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THOMAS F. MCFARLAND

July 14, 2003

ENTERED
Office of Proceedings

JUL 21 2003

Part of
Public Record



Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Finance Docket No. 34376, *City of Creede, Colorado - Petition for Declaratory Order*

Dear Mr. Williams:

The above proceeding has been brought in response to an order of United States District Court Judge Robert E. Blackburn of the District of Colorado, entered on May 9, 2003, in *City of Creede v. Denver & Rio Grande Railway Historical Foundation, et al.*, No. 01-RB-318 (CBS) ("Order"). Judge Blackburn's Order referred specified questions to the Board.

As here pertinent, Paragraph 5 of the Order requires the parties to provide the Board with copies of documents from the Court record which the parties consider relevant to the determinations to be made by the Board. Paragraph 6 of the Order requires that those documents be provided within 80 days of the date of the Order. The latter date corresponds to July 28, 2003.

Pursuant to those requirements, Respondent Denver & Rio Grande Railway Historical Foundation (the Foundation) hereby provides the Board with (1) a copy of the summons and complaint filed by the City of Creede in *City of Creede v. Denver & Rio Grande Railway Historical Foundation, et al.*, in the District Court, County of Mineral, State of Colorado.¹ No. 00-CV-4, on or about January 13, 2001, and (2) a copy of the Foundation's answer to that complaint, filed on or about February 13, 2001.

Consistently with its communication to the Board in this proceeding dated July 9, 2003, the Foundation would object were the City of Creede to provide the Board with documents that bear on the alleged invalidity of the Board's approval of the Foundation's acquisition of the involved rail line in 1999 pursuant to an offer of financial assistance ("OFA"). Any such

¹ The matter was removed from state court to federal court.

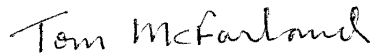
THOMAS F. MCFARLAND

Vernon A. Williams
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Page 2

document would have no relevance to the determinations to be made by the Board. Judge Blackburn specifically denied the City's request that the issue of the validity of the OFA be referred to the Board, and specifically denied the City's motion to amend its complaint to add an allegation concerning invalidity of the OFA.

Ten copies accompany the original of this filing. Counsel for the City is being served with a copy.

Very truly yours,



Thomas F. McFarland
*Attorney for Denver & Rio Grande
Railway Historical Foundation*

TMcF:kl:enc:wp8.0\957\lrstb2

cc: George M. Allen) w/encl.
Donald Shank) w/encl.

DISTRICT COURT, COUNTY OF MINERAL, STATE OF COLORADO
Case No. 00-CV- 4

SUMMONS AND RETURN OF SERVICE

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

-vs-

**DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation and
DONALD H. SHANK,**

Defendants.

THE PEOPLE OF THE STATE OF COLORADO,

GREETING

To: DONALD H. SHANK
DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION
1474 Main Avenue, Suite 223
Durango CO 81301
Telephone: 970-259-9498
Facsimile: 970-259-0202

You are summoned and required to file with the Clerk of this Court an Answer or other response to the attached Complaint within twenty (20) days after this Summons is served on you in the State of Colorado, or within thirty (30) days after this Summons is served on you outside the State of Colorado.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, judgment by default may be entered against you by the Court for the relief demanded in the Complaint, without any further notice to you.

A copy of any response you file should also be served on the attorney whose name appears below by mailing or transmitting a copy of same by facsimile to him at the address shown below.

Copies of the following document(s) are also served with this Summons:

Complaint
Notice of Change of Address of George M. Allen

Dated: January 13, 2001

A handwritten signature in dark ink, appearing to read "G. M. Allen", is written over a horizontal line.

George M. Allen 2080
206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

Counsel for Plaintiff

RETURN OF SERVICE

State of Colorado)
County of La Plata)

I declare under oath that I served the Summons, Complaint and Notice of Change of Address of George M. Allen, as allowed by law on DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION and DONALD H. SHANK at the following location:

in La Plata County, Colorado on _____, 2001, at _____ a.m./p.m.

- ☐ by handing it to a person identified to me as the defendant.
- ☐ by leaving it with _____, who refused service.
- ☐ by leaving it with _____ a person to receive service for the defendant.
- ☒ I am over the age of 18 years and am not interested in nor a party to this case.
- ☐ I attempted to serve the defendant on _____ occasions but have not been able to locate him/her.

Return of service is made on _____

By: _____

Process Server

Subscribed and sworn to before me this ____ day of _____, 2001, in La Plata County,
State of Colorado.

My Commission expires: _____

Notary Public

Date _____

Address: _____

[] Private process server
[] Sheriff, _____ County
Service \$ _____
Mileage \$ _____

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DISTRICT COURT, COUNTY OF MINERAL, STATE OF COLORADO

Case No. 00-CV- 4

*Filed in the Combined Court
Mineral County, Colorado*

CITY OF CREEDE, a Colorado Municipal Corporation,

NOV 7 2000

Plaintiff,

-vs-

*Margaret A. Wardell
Clerk of the Combined Court*

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation and
DONALD H. SHANK,

Defendants.

Plaintiff, by its attorneys, George M. Allen and W. Randolph Barnhart, states:

Summary of the Action

Since 1972, the City of Creede has had in force a residential zoning regime which relates to property as to which the Denver & Rio Grande Railway Historical Foundation (the "Foundation") and its President, Donald H. Shank, now claim to have a right to develop commercial and business activities. Mr. Shank, acting on behalf of the Foundation he heads and for which he solicits contributions, has carried out numerous overt acts, including the erection of signs and barricades, the publication of public notices and initiation of criminal prosecutions and the issuance of "Notices to Vacate," to launch commercial and business activities on residential property lying within the City of Creede. The Foundation's activities have had the disruptive effect of causing uncertainty and instability in Creede. Because the fundraising solicitations carried out by Mr. Shank and the Foundation contain representations regarding prospective future use of residential property in Creede for business and commercial purposes, they may implicate the City of Creede in potentially actionable misrepresentations and/or for unlawful takings for which the City may not have sovereign immunity, thus exposing the City of Creede to potential liability to third parties on account of misrepresentations with respect to land use in violation of Creede's zoning and land use controls.

In this action, the City of Creede seeks a declaratory judgment that its residential zoning is applicable to those lands purportedly subject to use by the Foundation but for which the Foundation

has no direct railroad or railroad freight use.¹ The City of Creede may also seek such temporary, preliminary or permanent injunctive relief as may be necessary to enforce its zoning and land use controls.

Parties, Venue and Jurisdiction

1. The parties to this action are:
 - A. The Plaintiff is the City of Creede, a Colorado Town, a Colorado Municipal corporation.
 - B. The Denver & Rio Grande Railway Historical Foundation (the "Foundation"), a Colorado Not-For-Profit Corporation, is a defendant.
 - C. Donald H. Shank, the President of the Foundation, is a defendant.
2. This Court has jurisdiction of this action pursuant to Article VI, Section 9(1) of the Constitution of the State of Colorado, vesting general jurisdiction of civil matters in the District Courts of the State. Jurisdiction of this Court is further invoked pursuant to C.R.S. §13-51-101, *et seq.*, the Uniform Declaratory Judgments Law and Rule 57 of the Colorado Rules of Civil Procedure.
3. Venue is proper in this County and District pursuant to Rule 98(a) of the Colorado Rules of Civil Procedure, as this is an action affecting application of Creede's zoning to property lying within this County.

General Averments

4. In 1972, Creede enacted a zoning regime by which certain real property lying within that part of Creede known as "South Creede" was zoned residential. South Creede continues to be zoned residential.

¹ *The City of Creede does not, in this action, seek any declaratory or injunctive relief with respect to the grant of rights to carry out railroad freight made to the Foundation by the United States Surface Transportation Board.*

5. The Surface Transportation Board of the United States ("STB") has authorized Defendant Foundation to provide freight rail service within Mineral County, pursuant to the Foundation's Offer of Financial Assistance filed with the STB.
6. In connection with the authorization for conduct of freight rail service, the Defendant Foundation and its principal officer, Defendant Shank, have carried out numerous overt acts to develop and take possession of certain land in South Creede for non-freight railroad related activities. Those acts have included but not been limited to the following:
 - A. Erection of signs and barricades limiting or purporting to limit ingress and egress to the non-railroad-related land in South Creede.
 - B. Instigation of criminal proceedings against persons claimed to have trespassed or interfered with Defendant's activities on non-railroad-related land in South Creede;
 - C. Issuance of news statements and releases declaring an intent to carry out commercial and business activities on non-railroad-related land in South Creede;
 - D. Issuance, on August 4, 2000, of "Notices to Vacate" to occupants of non-railroad-related land;
 - E. Solicitation of contributions to the Foundation, by means of the Internet, United States mails, interstate and intrastate wire communication, including telephone calls, facsimile transmissions and data transmissions and other means of communication, to obtain financing in relation to the Foundation's declared intent to carry out non-railroad-related activities on non-railroad-related land in South Creede, in which the Defendants have declared and published representations that they have a right to carry out commercial and business activities on non-railroad-related land in South Creede.
7. Creede has zoned the land at issue in this suit, lying in South Creede, as residential property. The prospective business and commercial use of non-railroad-related land, declared to be carried out by Defendants, does violate and will continue to violate Creede's zoning and land use laws and ordinances.

8. Defendants' widely publicized intent to use non-railroad-related land in South Creede for non-freight railroad related commercial and business purposes has created disruption and uncertainty within financial and real estate markets, tending to jeopardize the integrity and viability of Creede's land use and zoning regimes as applied to South Creede and tending to create circumstances in which third parties may reasonably draw the conclusion Creede's land use and zoning regimes are either not be enforced or have been waived or rescinded as to Defendants' activities in South Creede.
9. Creede has no adequate or effective means of protection of the integrity and viability of its land use and zoning regimes, as applied to non-railroad-related land use of land on which Defendants may have certain use rights (for railroad freight activities) in South Creede other than this action.
10. Creede has no effective, speedy or adequate remedy at law for the damages to Creede and its citizens and the irreparable harm which has been and is being caused by Defendants other than the declaratory judgment and possible injunctive relief sought in this action.

Cause of Action

11. Paragraphs 1 through 10 are incorporated herein by reference.
12. This Court should enter a declaratory judgment, pursuant to C.R.S. §13-15-101, *et seq.* and Rule 57 of the Colorado Rules of Civil Procedure, declaring the following:

That Creede's 1972 residential zoning is in full force and effect with respect to that land in South Creede as to which Defendant Foundation claims to have certain rights to carry out freight railroad activities, with regard to all land in South Creede as to which no freight railroad activities or activities directly related to freight railroad activities are being carried on. The Declaratory Judgment should specifically state that with respect to all lands in South Creede not directly used for freight railroad activity, Creede's residential zoning, enacted in 1972, is in full force and effect and that Defendants have no right to carry out any activity or make any third-party commercial speech representation that they have any right, claim or basis to carry out non-freight railroad related activities on such land.

Prayer for Relief

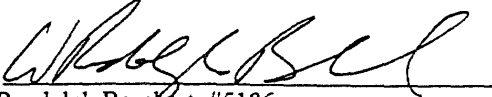
WHEREFORE, Plaintiff prays that this Court enter judgment as set forth in paragraph 12 above, together with such other and further relief as the Court deems appropriate, including Plaintiff's cost of this action.

Dated this 2nd day of November, 2000.

Respectfully submitted,

George M. Allen #2080
P.O. Box 66; 145 Payson Street
Naturita CO 81422
Telephone: 970-865-2800
Facsimile: 970-865-2808
E-Mail: alnoma@yahoo.com

HILLYARD & BARNHART, L.L.P.

By: 
W. Randolph Barnhart #5186
7887 East Belleview Ave., Ste. 1200
Englewood CO 80111
Telephone: 303-793-0700
Facsimile: 303-793-1950
E-Mail: rbarnhart@hblegal.com

COUNSEL FOR PLAINTIFF

DISTRICT COURT, COUNTY OF MINERAL, STATE OF COLORADO
Case No. 00-CV- 4

**NOTICE OF CHANGE OF ADDRESS
OF GEORGE M. ALLEN**

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

-vs-

**DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation and
DONALD H. SHANK,**

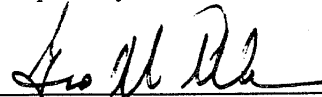
Defendants.

To the Court, all parties and counsel:

Please take notice of the change of address of Plaintiff's counsel George M. Allen. Effective January 1, 2000, the address of the undersigned is as follows:

George M. Allen 2080
206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

Respectfully submitted,



George M. Allen 2080
206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that I have at Telluride, Colorado this 13th day of January, 2001, served a true copy of the document denominated below on the parties and/or counsel listed below by the means of service shown below:

Document Served

NOTICE OF CHANGE OF ADDRESS OF GEORGE M. ALLEN

Means of Service

- ☒ facsimile
- ☐ U.S. Mail, Postage Prepaid
- ☐ Overnight Courier
- ☐ Hand Delivery

Counsel Served

W. Randolph Barnhart, Esq. (5186)
HILLYARD & BARNHART
7887 East Belleview Ave., Ste. 1200
Englewood CO 80111
Telephone: 303-793-0700
Facsimile: 303-793-1950



George M. Allen

DISTRICT COURT COUNTY OF MINERAL, COLORADO 201 No. Main Street Creede, CO 81130 CITY OF CREEDE, a Colorado Municipal Corporation, Plaintiff, vs. DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation and DONALD H. SHANK, Defendants. Raymond P. Micklewright Wolf & Slatkin, P.C. 44 Cook Street, Suite 1000 Denver, CO 80206-5827 Telephone: (303) 355-2999 Atty. Reg. #: 13009	▲ COURT USE ONLY ▲ Case No. 00-CV-4 Division /Courtroom:
ANSWER	

Comes now the defendants, Denver & Rio Grande Railway Historical Foundation and Donald H. Shank (the "Defendants"), by their undersigned attorneys, and for their Answer state:

1. Defendants admit the allegations of paragraph 1 of the Complaint.
2. Defendants deny that this Court has jurisdiction over this action pursuant to the provisions of law cited in paragraph 2 of the Complaint or any other provisions of Colorado law. This action presents a Federal question. Defendants will take steps to remove this matter to Federal Court.
3. Defendants deny the allegations of paragraph 3 of the Complaint inasmuch as venue cannot be proper in this Court when this Court lacks jurisdiction over this action.

11. No further answer is required as to paragraph 11 of the Complaint which seeks to incorporate paragraphs 1 through 10 by reference.

12. Defendants deny the allegations of paragraph 12 of the Complaint inasmuch as this Court lacks jurisdiction to enter the declaratory judgment requested, and entry of such a judgment would not be warranted even if the Court had the requisite jurisdiction.

AFFIRMATIVE DEFENSE

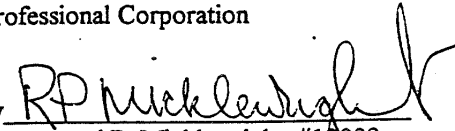
A. Local zoning and land use laws cannot be lawfully applied in a manner that would result in a diminution of the width of Defendants' railroad right-of-way inasmuch as the full width of railroad right-of-way is presumed to be necessary for the legitimate purposes of the railroad.

WHEREFORE, Defendants Denver & Rio Grande Railway Historical Foundation and Donald H. Shank request that the Complaint be dismissed. Defendants should be awarded their costs in this matter and all other relief to which they may be entitled.

Respectfully submitted,

WOLF & SLATKIN
Professional Corporation

By



Raymond P. Micklewright, #18009
Attorneys for Defendants
44 Cook Street, Suite 1000
Denver, CO 80206-5827
(303) 329-6826

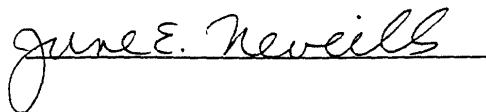
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer were served, this 13th day of February, 2001, by placing the same in the U.S. Mail, postage prepaid, and addressed to the following:

Thomas F. McFarland, Jr., Esq.
McFarland & Herman
20 North Wacker Drive, Suite 1330
Chicago, IL 60606-2902

George M. Allen 2080
206-A Society Drive
Telluride, CO 81435

W. Randolph Barnhart, Esq.
Hillyard & Barnhart
7887 E. Belleview Ave., Suite 1200
Englewood, CO 80111

A handwritten signature in cursive script, reading "June E. Newell", is written over a horizontal line.