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COLORADO, UTAH AND HAWAII

Telluride
August 9, 2004

Hon. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington DC 20423-0001

ENTERED
Office of Proceedings

AUG 11 2004

Part of
Public Record

Re: Finance Docket No. 34376

Dear Secretary Williams:

This transmits the City of Creede Opening Statement in the referenced matter.

Yours very truly,

A handwritten signature in black ink, appearing to read "G. M. Allen".

George M. Allen

Enclosure

cc: Thos. McFarland, Esq.
Robert T. Opal, Esq.
Raymond P. Micklewright, Esq.
Karl Morell, Esq.
Hon. B. J. Myers, City of Creede

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BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES



CITY OF CREEDE, CO
PETITION FOR
DECLARATORY ORDER

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FINANCE DOCKET NO.
34376

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OPENING STATEMENT OF CITY OF PETITIONER,
CITY OF CREEDE, CO

ENTERED
Office of Proceedings

AUG 11 2004

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Part of
Publication

Petitioner, City of Creede, by its attorney, George M. Allen, hereby submits its Opening Statement.

Facts

The facts relevant to this Petition are completely developed in the materials from the District Court record filed by the City of Creede on October 14, 2003. That record and subsequent submissions detailed the salient facts relevant to this proceeding. Those facts are summarized below:

1. Rail service on the Creede Branch of the former Denver & Rio Grande Western Railroad ceased in 1985.
2. Rail service within the City of Creede (where the land at issue in this matter is situated) last took place in 1972.
3. The Denver & Rio Grande Railway Historical Foundation – the owner of the Creede Branch through the Offer of Financial Assistance process – has neither capability nor plans for resumption of rail service by actual operation of trains within the City of

Creede.

Thus this proceeding, unlike other matters resolved in either the Board's proceedings or in judicial decisions, relates not to the zoning rights of a municipality with respect to an operating railroad, but rather to the zoning and police power rights of a defunct railroad which may, possibly, at some far future date, see restoration to service.

Discussion

In a November 12, 2002 submission to the Colorado District Court which referred this matter to the Board, the City of Creede made the following statement:

Last year's Eleventh Circuit decision in *Florida East Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), makes it abundantly clear that Creede can apply its residential zoning to non-rail activity on the right of way within the City of Creede. A fact issue exists, of course, as to what parts of a right of way, if any, have rail activities taking place. In this litigation Creede concedes that if there were legitimate interstate freight rail activity on any part of the right of way, that part (but only that part) would be immune from Creede's zoning regulation, although Creede might well have inherent police power authority under some circumstances. Since the materials we now seek to file in the record of this action establish that the Foundation has no ability to rehabilitate the Creede Branch and establish freight rail service, the area of application of Creede's residential zoning should embrace **all** of the right of way within the town limits of Creede.

Nothing has occurred since Creede made the above statement to the District Court nearly two years ago other than the passage of nearly two more years in which the Foundation has failed to rehabilitate the line and restore rail service.

The Board will recall from prior proceedings that the Foundation submitted – then withdrew – a grant request to the Colorado Department of Transportation (CDOT) for some \$11 million to rehabilitate the line pursuant to what the Foundation styled its “Master Plan.”

Thus we confront the issue which was before the Eleventh Circuit in the *West Palm Beach* case but in a critically different factual context. There both the District Court and the Court of Appeals were required, in determining whether the pre-emption doctrine precluded application of the zoning ordinances of West Palm Beach, to make a finding whether or not the regulation of non-rail activity on the right of way might impact operation of rail service and thus conflict with, and, perforce “regulate” that rail service.

Here, in the context of the long defunct railroad right of way in Creede, there is no rail service which could be affected or regulated by Creede’s zoning ordinances. Thus, as a matter of uncontroverted fact, there is no possibility of Creede’s zoning having any impact whatever on rail operations of the Foundation because the Foundation has no rail operations, has no prospect of rail operations and thus has no federally regulated activity on the right of way which might be affected by Creede’s zoning.

The final paragraph of the *West Palm Beach* case illustrates the point:

As the exercise of a traditionally local police power, West Palm Beach's zoning and occupational license ordinances are entitled to an assumption of

no pre-emption when evaluated pursuant to the Supremacy Clause. Against this presumption of validity, we conclude that the application of the ordinances against Rinker, based on the facts found by the district court, does not qualify as "regulation of rail transportation" and does not frustrate the objectives of federal railroad policy. The judgment of the district court is therefore affirmed.

If the application of West Palm Beach's ordinances to use of land by a railroad tenant adjacent to an operating railroad did not interfere with interstate rail commerce, it follows, *a fortiori*, that the application of Creede's residential zoning to a defunct right of way cannot have any impact, adverse or otherwise, on the interstate rail system. Again, we quote from the Eleventh Circuit's opinion in *West Palm Beach*, *supra* (footnote 12 is reproduced in its entirety):

FEC places great emphasis on the City's hostile motivation in its enforcement of the zoning ordinance against Rinker. Quoting testimony by the Mayor of West Palm Beach, FEC argues that the City intended to impose additional costs on FEC and thereby sought to discontinue FEC's railroad operations in the residential area where the 15th Street facilities are located. See FEC Initial Br. at 44-46. That the City hoped FEC would move its railroad operations elsewhere is not relevant to our analysis: in evaluating whether the local regulation is pre-empted by the federal law, we focus on the federal statute (including its mandates and purposes) and determine the extent to which the actual effects of the local regulation interfere with the

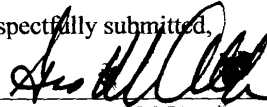
intended functioning of the federal law. See Egelhoff v. Egelhoff, No. 99-1529, 121 S. Ct. 1322, 1326-28 (Mar. 21, 2001). Cf. Teper v. Miller, 82 F.3d 989, 995 (11th Cir. 1996) ("[I]t is the effect of the state law that matters in determining preemption, not its intent or purpose.") (emphasis in original). Even if the City's intentions are as FEC suggests, we nevertheless conclude that there is no frustration of the federal objective, and so the application of the local regulation must be upheld. See Hayfield Northern, 467 U.S. 622 (where companies acting pursuant to state condemnation statute sought specifically to prevent railroad's abandonment of line, state condemnation statute was nevertheless not pre-empted because federal statute did not occupy field and federal objectives had not been frustrated).

Conclusion

The District Court has asked the Board to determine the extent of application, if any, of Creede's residential zoning to the defunct former D&RGW right of way within Creede. Since there are no rail operations and since the record demonstrates that there is no practical likelihood of rail operations in the future within the City of Creede, there is no potential adverse impact of Creede's zoning on any railroad activity. Therefore the Board should determine that Creede's zoning should remain in full force and effect. If and when there is ever any rail activity, Creede recognizes that its zoning will not apply to actual railroad activity. That may or may not involve a controversy, but at present the likelihood of there ever being rail service restored to the City of Creede is so remote that neither the Board nor the District Court has a case in controversy to warrant any attempt to fashion

a remedy with respect to some possible, highly speculative, future dispute which might arise if somehow the Foundation restores rail service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "George M. Allen", written over a horizontal line.

GEORGE M. ALLEN
Counsel for City of Creede

CERTIFICATE OF SERVICE

I hereby certify that I have, at Telluride, Colorado this 9th day of August, 2004, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

OPENING STATEMENT OF CITY OF CREEDE, CO

Means of Service

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

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