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September 10, 2004

By UPS overnight mail
(Monday delivery)

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

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ENTERED
Office of Proceedings
SEP 13 2004
Part of
Public Record

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

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply Statement, for filing with the Board in the above referenced matter.

Also enclosed is a diskette with the Reply Statement in Word Perfect 8.0 & .pdf formats.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Respondent

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF CREEDE, CO -- PETITION) FINANCE DOCKET
FOR DECLARATORY ORDER) NO. 34376



REPLY STATEMENT

ENTERED
Office of Proceedings

SEP 13 2004

Part of
Public Record

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
20 North Broadway
Monte Vista, CO 81144

Respondent

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Attorney for Respondent

DATE FILED: September 13, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF CREEDE, CO -- PETITION	)	FINANCE DOCKET
FOR DECLARATORY ORDER	)	NO. 34376

REPLY STATEMENT

Pursuant to the procedural decision served June 22, 2004, as amended by decision served August 19, 2004, DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION (the Foundation) hereby files this Statement in reply to a Statement filed by the City of Creede, Colorado (the City) on August 11, 2004.^{1/}

OVERVIEW

The City is attempting to draw a legal distinction between land in the center of a railroad right-of-way (ROW) on which trackage is located, and land at the outer edges of the ROW on which there may not be direct rail activity. The City acknowledges that direct rail use of land in the center precludes application of local zoning provisions. It argues, however, that land in the outer portions is not used for railroad purposes, and thus is susceptible to residential zoning under municipal law.

As shown in this Reply Statement, there is no such legal distinction. As a matter of law, a rail carrier subject to Board jurisdiction is entitled to exclusive use of the full width of its ROW

^{1/} The City's Statement was filed 20 days late, without explanation nor motion for acceptance. In a decision served August 19, 2004, the Board denied the Foundation's motion for rejection of the City's Statement for procedural noncompliance. The Board stated that while rejection could be justified, it would accept the City's Statement because the proceeding was instituted to address questions referred to the Board by a United States District Court.

land, regardless of its location in the center or on the edges, and irrespective of whether it currently is in active rail use. In addition, as a matter of fact, the full width of the South Creede ROW is shown to be used and required for rail operations, as the location of a railroad yard consisting of four tracks and a depot in the north part of South Creede, and as a necessary storage and staging area for maintenance materials and for future track expansion in the narrower usable ROW south of the yard.

Land at the edges of the Foundation's rail ROW in South Creede thus constitutes "property . . . related to the movement of passengers or property, or both, by rail" within the definition of rail "transportation" in 49 U.S.C. § 10102(9)(A). It follows that the City of Creede's attempted application of residential zoning to that land constitutes "regulation of rail transportation" under municipal law that is federally preempted by virtue of 49 U.S.C. § 10501(b). The Board should issue a report to the Court reflecting the foregoing findings.

BACKGROUND

On November 7, 2000, the City filed a complaint against the Foundation in the District Court of Mineral County, Colorado, seeking a declaratory judgment that the City's residential zoning ordinance applies to land in the Foundation's railroad ROW in South Creede "as to which no freight railroad activities or activities directly related to freight railroad activities are being carried on." *City of Creede v. Denver & Rio Grande Ry. Hist. Found.*, D.C., Mineral Cty., Colo., Case No. 00-CV-4, complaint at 4. More specifically, it is the City's position that except for a 25-width of land in the center of the Foundation's railroad ROW on which the main track is located, land in the outer portions of the ROW (totaling 75 feet in width) is not directly used for

freight railroad activity, and is thus legally susceptible to application of the City's residential zoning ordinance.

The Foundation removed the case to the United States District Court for the District of Colorado. *City of Creede v. Denver & Rio Grande Ry. Hist. Found.*, USDC, Colo., No. 01-RB-318 (CBS). In an order in that case entered on May 9, 2003, United States District Court Judge Robert E. Blackburn directed that the following questions be referred to the Board:

- A) Is the land in the outer portions of [D&RGHF's] 100 feet wide railroad right-of-way in South Creede, Colorado, each of which is 37.5 feet wide, necessary for the safe and convenient use of the central portion of the right-of-way, which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?
- B) If the answer to question A is negative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of [D&RGHF's] 100 feet wide railroad right-of-way, each of which is 37.5 feet wide, or are these ordinances: (i) federally preempted by 49 U.S.C. 10501(b); and/or (ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?
- C) If the answer to question A is affirmative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of [D&RGHF's] 100 feet wide railroad right-of-way, each of which is 37.5 feet wide, or are these ordinances: (i) federally preempted by 49 U.S.C. 10501(b); and/or (ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?

On July 2, 2003, the City filed a petition for declaratory order with the Board seeking responses to those questions.

Paragraph 5 of Judge Blackburn's order required 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. Pursuant to that requirement, the Foundation provided

the Board with copies of the complaint and answer as filed with the Court in Mineral County, Colorado. The City filed over 400 pages of the Court record and a pleading arguing that the Board should void the Foundation's acquisition of the Derrick-Creede line, of which the South Creede ROW is a part. Virtually all of the voluminous filing made by the City related to the issue raised in that pleading, rather than to the issues referred by the Court.

In a decision served November 3, 2003, the Board treated the City's filing as a petition to reopen the proceeding in Docket No. AB-33 (Sub-No. 132X), *Union Pacific R. Co. -- Aband. Exempt. -- in Mineral County, CO*, in which the Foundation was authorized to acquire the 21.6-mile rail line between Derrick and Creede, CO, pursuant to an offer of financial assistance. That decision also found that the instant declaratory order proceeding should be held in abeyance pending resolution of that petition to reopen.

In a decision served June 22, 2004 in Docket No. AB-33 (Sub-No. 132X), *supra*, the Board denied the City's petition to reopen that proceeding; reinstated the instant declaratory order proceeding; and provided a procedural schedule for filing evidence and argument in the declaratory order proceeding.

On August 11, 2004, the City filed its Statement in the declaratory order proceeding. That filing was 20 days late without explanation nor request for acceptance out-of-time. In a decision served August 19, 2004, the Board denied the Foundation's motion for rejection of the City's Statement, but extended the procedural schedule in view of the City's late filing (*see note 1, supra*).

The Foundation is hereby filing its Reply Statement in accordance with that extended procedural schedule.

FACTS ^{2/}

The City is attempting to apply its residential zoning ordinance to land in the outer portions of the Foundation's ROW in South Creede, Colorado. The City concedes that its ordinance cannot be lawfully applied to a 25-foot width of land in the center of that ROW on which trackage is located because such land is used directly for railroad purposes. The City contends that its ordinance can be lawfully applied to the remaining 75 feet of land in the 100-foot-wide ROW on the theory that such land is not used for railroad purposes.

The Foundation's ROW in South Creede is 100 feet wide and approximately 1,925 feet long. It is a part of the 21.6-mile Creede Branch that extends between Derrick and Creede, Colorado. In 2000, the Foundation acquired the Creede Branch for rail operation pursuant to an offer of financial assistance. The Branch had not been operated for a number of years, but it was never formally abandoned. The Foundation is in the process of rehabilitating the Branch. The Foundation intends to operate the entire Creede Branch for rail freight and passenger service.

A railroad yard consisting of four tracks and a depot occupies the northern 900 feet of the South Creede ROW. All four of those tracks and the depot are necessary for the safe and efficient operation of freight and passenger trains in the South Creede railroad yard. It is the Foundation's intent to rehabilitate and to use all four of those tracks for spotting empty freight cars; delivering loaded freight cars; loading and unloading of freight shipments; storage of freight and passenger railcars; switching and staging of freight and passenger train movements; and for general railroad purposes. The Foundation intends to use the depot for a freight office and for

^{2/} The facts set forth below are supported by the verified statement of Mr. Donald H. Shank, President and Executive Director of the Foundation, which is a part of this Reply Statement as Tab 1.

passenger operations. It is readily apparent from the map and photographs in the record that those tracks and the depot occupy virtually the full width of the 100-foot-wide ROW in the railroad yard in South Creede. It is also apparent that residential use of any portion of that ROW would be wholly inconsistent with, and disruptive of, the legitimate rail operating activities identified above.

South of the railroad yard in South Creede, the usable ROW is considerably narrower than 100 feet wide (i.e., averaging 30 to 40 feet) because of the presence on the ROW of Loma Street, a drainage ditch, and hilly terrain. The full width of that usable ROW is required for efficient access to the main track by maintenance vehicles, and by maintenance and operating personnel. The entire usable width is also required for storage and marshalling of materials used in maintenance, such as crossties, switch ties, rail, ballast and bridge parts. The entire usable width is also required for potential track expansion. In that regard, the Foundation currently is in discussions with a significant potential rail user who could require construction of sidetrack facilities for transloading commodities from truck to rail. Residential use of any part of this narrow ROW would be inconsistent with those legitimate railroad uses.

ARGUMENT

I. THE BOARD SHOULD ADVISE THE COURT THAT THE LAND IN THE OUTER PORTIONS OF THE FOUNDATION'S RAILROAD ROW IS NECESSARY FOR THE SAFE AND CONVENIENT USE OF THE LAND IN THE MIDDLE OF THAT ROW (ANSWER TO REFERRED QUESTION A)

A. That Finding Is Required As A Matter Of Law Because A Rail Carrier Is Entitled To Exclusive Use Of The Full Width Of Its Railroad ROW Land, Including Outer Portions Thereof That May Not Be In Active Rail Use

As a matter of law, a rail carrier is entitled to exclusive use of the full width of its railroad ROW land, including outer portions that may not be currently in active rail use. As shown below, it is conclusively presumed under the law that land in the outer portions of a rail carrier's ROW is necessary for the safe and convenient use of the land in the center of that ROW.

One of the leading cases is *Midland Valley R. Co. v. Sutter*, 28 F.2d 163 (8th Cir. 1928). In that case, the rail carrier had an easement for railroad ROW purposes over land that was 390 feet wide (195 feet on each side of its track). The fee owners entered that land more than 50 feet distant from the track for the purpose of drilling oil and gas wells. The rail carrier sought an injunction to prevent them from doing so. The lower court held that the fee owners were entitled to drill at points 50 feet or more from the track. The Court of Appeals reversed, holding that the issue is governed by federal law, and that the rail carrier was entitled to exclusive use of the full width of its ROW land. The Court said at 167-168:

. . . exclusive possession is necessary to enable the railroad company to safely conduct its business and meet the duty of exercising that high degree of care which the general law and administrative rules enjoin upon it . . .

That decision is significant because it was acknowledged by both parties that the rail carrier was legally entitled to exclusive use of its ROW land for 50 feet on each side of its track

(100-foot-width), which is the ROW width of land in the case at hand, and because it was held that the carrier was entitled to exclusive use of ROW land on the outer edges regardless of whether such land was in active rail use.

That principle had been established in early decisions of the United States Supreme Court. One such case is *Northern Pacific R. Co. v. Smith*, 171 U.S. 260 (1898). There the rail carrier had received ROW land of 400-foot width by federal land grant. The City of Bismarck, North Dakota conveyed lots for nonrail use at the outer edges of that land. The owners of those lots brought an action to establish their title and right to possession of that land. The lower court ruled in their favor, emphasizing that only a 25-foot width of land in the center of the ROW, on which the rail carrier's track was located, had ever been occupied for railroad purposes. The Supreme Court reversed, holding that the grant of a 400-foot-wide ROW was a conclusive determination by Congress that land of that width was necessary for a railroad, and that it was immaterial that only 25 feet of that width was actually occupied for railroad purposes. The Court said (at 275-276):

... the finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance ...

That decision is significant because it rejected the identical argument made by the City in the case at hand -- namely, that only 25 feet of land at the center of the railroad ROW on which trackage is located is used and required for railroad purposes. That decision is broader than the case at hand because it protected ROW land width of 400 feet from attempted nonrail use. Here, ROW land width of only 100 feet is at issue.

To the same effect is *New Mexico v. United States Trust Company*, 172 U.S. 171 (1898), where the United States Supreme Court quoted favorably from *Southern Pacific v. Burr*, 86 California 279, to the effect that the absence of active railroad use of the ROW land at issue is not material where the carrier had potential for use of the land in the future for side tracks or other purposes, viz. (at 184, emphasis added):

. . . It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, and other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so . . .

The decision in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903), is in accord. In that case, the Supreme Court held that a portion of railroad ROW land not currently in active use for train operations was not subject to a claim of adverse possession under state law. (*Id.* at 273). The Supreme Court cited its prior decisions on the issue, and said (at 272, emphasis added):

. . . Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

See, also, Iowa Terminal R. Co. v. ICC, 853 F.2d 965, 971 (D.C. Cir. 1988).

The Supreme Court cases involved land grants from government, but the principle is not limited to land grant ROW. The ROW easement in *Midland Valley R. Co. v. Sutter, supra*, was acquired by private grant.

The decisions of the Board and its predecessor, the Interstate Commerce Commission (ICC), are fully in accord with the foregoing principle. Thus, in *City of Lincoln - Petition for Declaratory Order*, 2004 STB LEXIS 508 (STB Finance Docket No. 34425, decision served Aug. 12, 2004), the City of Lincoln sought a Board declaration that a 20-foot width of land at the outer edge of a rail carrier's ROW was not used for railroad purposes, and thus was susceptible to condemnation for use as a recreational trail under State eminent domain law. In refusing to so declare, the Board found that the rail carrier had established that it uses all of its ROW land for rail transportation purposes, including land in the outer edges of the ROW, and that a narrowing of the ROW to construct a trail would hinder or halt those legitimate transportation operations and create safety hazards (*id.* at *12).

That decision is significant because it is a contemporary determination of the continued vitality of the legal principle that rail carriers are entitled to exclusive use of the full width of their ROW land, including land at the outer edges of their ROWs.

To the same effect are *Boston & M. Corp. -- Aband. & Discon. of Serv. in Hartford County, CT*, 1991 ICC LEXIS 178 at *13-16 (ICC Docket No. AB-32 [Sub-No. 43], decision served Aug. 7, 1991), and *Burlington N. R. Co. -- Aband. Exempt. -- in Snohomish County, WA*, 1996 STB LEXIS 73 at *10-12 (STB Docket No. AB-6 [Sub-No. 375X], decision served March 11, 1996), finding that the entire width of railroad ROW land is used and required for rail operations.^{3/}

^{3/} Decisions of State courts are to the same effect. See, e.g., *Allard Cattle Co. v. Colorado & S. Ry. Co.*, 187 Colo.1 (Sup. Ct., Colo., 1974).

The upshot of the foregoing is that as a matter of law, land in the outer parts of the Foundation's railroad ROW is necessary for the safe and convenient use of land in the central part of that ROW, without regard to whether such land is in active rail use. The Board should so advise the Court.

B. The Factual Record Also Dictates That Finding

The map, photographs and testimony in the verified statement of the Foundation's President and Executive Director (Tab 1) establish that the Foundation is a rail carrier subject to Board jurisdiction, who will make legitimate rail transportation use of the entire usable width of ROW in South Creede, and that the residential use of the outer portions of that ROW attempted to be imposed by the City would be wholly inconsistent with, and disruptive of, that rail transportation use.

The record establishes as a matter of fact that land in the outer portions of the Foundation's railroad ROW in South Creede, Colorado is necessary for the safe and convenient use of the 25-foot width of land in the center of that ROW. That is evident as to the portion of that ROW approximately 900 feet in length that constitutes the Creede railroad yard. There are four tracks and a depot on that 100-foot width of ROW. The Foundation will use all four of those tracks for legitimate railroad purposes -- namely, for spotting empty freight cars; delivering loaded freight cars; loading and unloading of freight shipments; storage of freight and passenger railcars; switching and staging of freight and passenger train movements; and for general railroad purposes. (Tab 1 at 3).

That is also the case for the South Creede ROW south of the yard. The usable width of land in that ROW south of railroad yard is limited to 30 feet to 40 feet as a result of the presence

on the ROW of Loma Street and a drainage ditch, and due to hilly terrain. The Foundation will make use of all of that limited width for efficient access to the main track by maintenance vehicles and personnel, for storage and marshalling of track materials used in maintenance, such as crossties, switch ties, rail, ballast and bridge materials, and for future track expansion. (Tab 1 at 3-4).

The evidence thus dictates a finding that it will be necessary for the Foundation to use the land at the outer portions of its railroad ROW to enable the safe and convenient use of the land in the center of that ROW. The Board should so advise the Court.

II. THE BOARD SHOULD ADVISE THE COURT THAT THE CITY OF CREEDE'S ATTEMPTED APPLICATION OF ITS RESIDENTIAL ZONING ORDINANCE TO LAND IN THE OUTER PORTIONS OF THE FOUNDATION'S RAILROAD ROW IS FEDERALLY PREEMPTED BY VIRTUE OF 49 U.S.C. § 10501(b) (ANSWER TO REFERRED QUESTION C)

Inasmuch as the Foundation has a right under federal law to exclusive use of the full width of its railroad ROW land, state or municipal regulation of any width of that land would be federally preempted, regardless of whether such width is located on the edge of the ROW or is not in active rail use.

The United States Court of Appeals for the Seventh Circuit recently so held in *Michigan Southern R. Co. v. City of Kendallville*, 251 F.3d 1152 (7th Cir. 2001). In that case, the City of Kendallville sought to enforce a municipal ordinance against Michigan Southern that required that weeds be cut on the full 100-foot width of railroad ROW. A regulation implementing the Federal Railroad Safety Act required that vegetation be controlled on railroad property "on or immediately adjacent to the roadbed." The parties stipulated that "immediately adjacent to the roadbed" means 15 feet in both directions from the center of the main track, i.e., a 30-foot width.

The lower court held that in light of the federal regulation, enforcement of the municipal ordinance was federally preempted as to the portion of the ROW within that 30 feet, but not as to the remaining 70 feet on the edges of the ROW. The Court of Appeals reversed, holding that federal preemption also applied to the land on the edges of the ROW. The Court stated that “we cannot find that local municipalities can enforce local weed control ordinances on railroad rights-of-way” (*id.* at 1154-1155). The Court treated the 100-foot-wide operating ROW as a whole, notwithstanding the more limited application of the federal regulation.

Where a federal statute contains a specific preemption clause, the language of that clause is the focus for determination of whether federal preemption applies. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 562 (6th Cir. 2002); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001). The statute providing for federal preemption of state regulation of rail transportation is 49 U.S.C. § 10501(b). That statute has a specific preemption clause, as follows:

... (T)he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under ... State law.

The statute was enacted as part of the ICC Termination Act of 1995, effective Jan. 1, 1996. A court has observed in reference to that statute that “it is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp. v. Georgia Public Serv. Comm.*, 944 F.Supp. 1573, 1581 (ND, Ga. 1996). All of the cases interpreting that statute find a broad reading of Congress’s preemption intent, not a narrow one. *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998).

Federal preemption does not apply where the rail transportation activity at issue is not performed by a rail carrier, nor where the rail transportation facility at issue is not owned and controlled by a rail carrier. See *Town of Milford - Petition for Declaratory Order*, 2004 STB LEXIS 507 at *6-8 (STB Finance Docket No. 34444, decision served Aug. 12, 2004), and *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1336-1337 (11th Cir. 2001).

The federal preemption issue in the case at hand can thus be framed as follows:

Does the City of Creede's attempted application of its residential zoning ordinance to land in the outer portions of the Foundation's railroad ROW constitute regulation of a transportation facility of a rail carrier within the meaning of 49 U.S.C. § 10501?

If so, such attempted application is federally preempted. As appears below, that issue has been resolved in the affirmative as to municipal zoning ordinances on a number of occasions.

In *Norfolk Southern Ry. Co. v. City of Austell*, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga., Atl. Div., No. 1:97-cv-1018-RLV), the Court held that a Georgia municipality's zoning ordinance and land-use requirement were federally preempted by § 10501(b) as attempted to be applied to prevent a rail carrier from constructing and operating a rail-truck transloading facility on a 110-acre tract of property located adjacent to its railroad ROW (at *24). The federal preemption principle has even stronger application when municipal zoning is attempted to be applied to property located within the rail carrier's railroad ROW, as is the case in the matter at hand.

Local zoning and/or land-use provisions were also determined to be federally preempted when attempted to be applied to rail transportation activities or facilities of rail carriers in

Borough of Riverdale - Petition for Declaratory Order, 1999 STB LEXIS 531 at *17-19 (STB Finance Docket No. 33466, decision served Sept. 10, 1999); *Village of Ridgefield Park v. New York, Susquehanna & W. Ry.*, 750 A.2d 57 (Sup. Ct., N.J., 2000); and *Friends of the Aquifer, et al., Railroad and Clearcuts Campaign*, 2001 STB LEXIS 670 at *9-10 (STB Finance Docket No. 33966, decision served Aug. 15, 2001).

As in the foregoing cases, the attempted application of municipal zoning to the railroad ROW land at issue here satisfies all elements of federal preemption. Without question, an attempted application of a zoning ordinance to land constitutes “regulation” of such land. Just as clearly, a rail carrier’s ROW land that is used and required for rail operations constitutes “rail transportation” under the statute. That is evident inasmuch as the term “transportation” is defined broadly in 49 U.S.C. § 10102(9)(A) to include “property . . . of any kind related to the movement of passengers or property, or both, by rail . . .”. The ROW land at issue is owned and controlled by the Foundation, which has been specifically found by the Board to be a rail carrier subject to Board jurisdiction.

It follows that the City of Creede’s attempted application of its residential zoning ordinance to land in the outer portions of the Foundation’s railroad ROW is federally preempted by virtue of 49 U.S.C. § 10501(b). The Board should so advise the Court.^{4/}

Inasmuch as federal preemption clearly applies here, it should not be necessary for the Court to address whether the municipal zoning ordinance is invalid as in conflict with the

^{4/} The City has not provided a coherent argument against federal preemption. The City has cited *Florida East Coast Ry. Co. v. City of West Palm Beach*, *supra* (266 F.3d 1324), but that decision is clearly distinguishable on the ground that the rail transportation activity there at issue was performed by a third-party noncarrier rather than by a rail carrier.

Commerce Clause of the United States Constitution. *See Soo Line R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (D., Minn., 1998). It is evident, however, that a municipal zoning ordinance which would impede a rail carrier's right to make legitimate rail use of its railroad ROW land constitutes an undue burden on interstate commerce in violation of the Commerce Clause. The Board should advise the Court that the City's residential zoning ordinance as attempted to be applied is also invalid on that additional ground.

Respectfully submitted,

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HISTORICAL FOUNDATION
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Respondent



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Attorney for Respondent

DATE FILED: September 13, 2004

denied petitions filed by the City to reopen and reverse that finding. The Foundation's capability to operate the Creede Branch is no longer open to question. The City is also wrong in alleging that the Foundation does not plan to resume rail service into Creede. As President of the Foundation, I know that the Foundation plans to restore rail service on the entire Creede Branch. The Foundation is in the process of rehabilitating the Branch to enable reinstitution of rail service.

In the matter under consideration, the City seeks a declaration that the City's residential zoning ordinance applies to all land in the Foundation's 100-foot-wide ROW in "South Creede" except a 25-foot-width in the center of the ROW. The map that is attached to my statement as Appendix DHS-1 shows that the 100-foot-wide ROW in South Creede has well-defined limits, i.e., between the boundary of Sections 25 and 36 a short distance north of First Street, on the one hand, and a point a short distance south of Seventh Street on the other. For convenience, that ROW will be referred to as the "South Creede ROW." The South Creede ROW is approximately 1,925 feet in length. Immediately to the north of the South Creede ROW, the ROW is 200 feet wide. Immediately to the south of the South Creede ROW, the ROW is 125 feet wide.

The Creede railroad yard is located in the northern part of the South Creede ROW. There are four railroad tracks and a depot in the Creede railroad yard. The main track and ICC Track Nos. 38 and 39 extend for virtually the full 900-foot length of the Creede railroad yard. ICC Track No. 40 is a crossover track that extends a shorter distance between the main track and Track No. 39 (see map, Appdx. DHS-1).

The photographs that are attached to my statement as Appendix DHS-2 show that all of those tracks and the depot are still in place. The photographs were taken at the end of August, 2004. The Foundation intends to rehabilitate those tracks and the depot in conjunction with reinstituting rail service over the entire Derrick-Creede rail line. The Foundation has already commenced rehabilitation of trackage starting from the east end of the line.

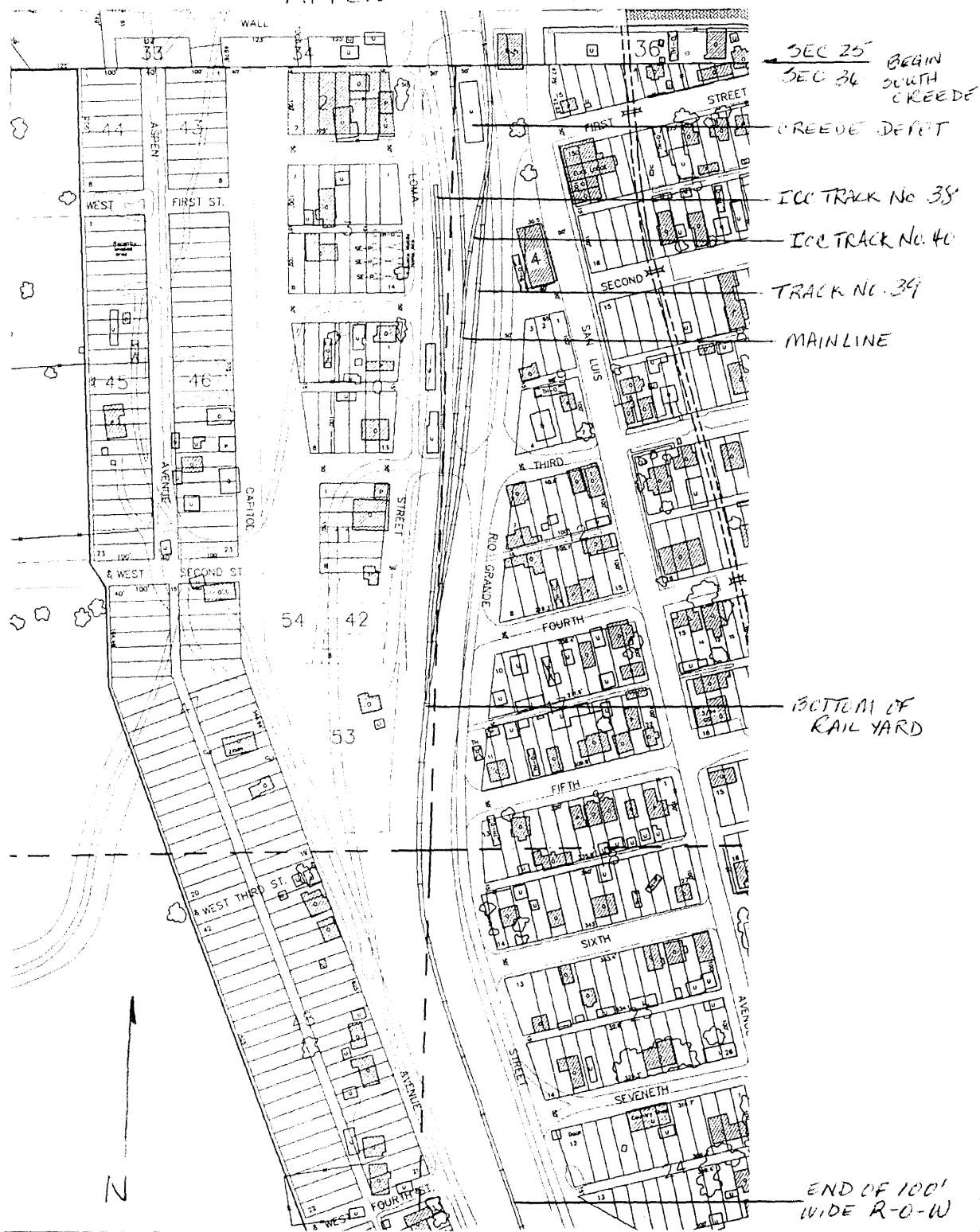
All four of the tracks and the depot in the Creede railroad yard are necessary for the safe and efficient operation of freight and passenger trains. The Foundation will make use of those tracks for spotting empty freight cars, delivering loaded freight cars, loading and unloading of freight shipments, storage of freight and passenger railcars, switching and staging of freight and passenger train movements and for general railroad purposes. The Foundation will use the depot for a freight office and for passenger operations. It is readily apparent that those tracks and the depot occupy virtually the full width of the 100-foot-wide ROW in the railroad yard in South Creede. It is also apparent that residential use of any portion of that ROW would be wholly inconsistent with, and disruptive of, the legitimate rail operations identified above.

Although only the main track is located on the South Creede ROW south of the railroad yard, it is apparent from the photographs (Appdx. DHS-2) that the usable ROW in that area is considerably narrower than 100 feet in width because of the presence on the ROW of Loma Street and a drainage ditch, and because of hilly terrain. Usable ROW width in this area averages only 30 to 40 feet. The full width of that usable ROW is required for efficient access to the main track by maintenance vehicles, and by maintenance and operating personnel. The maximum width is also required for storage and marshalling of materials used in maintenance such as

crossties, switch ties, rail, ballast and bridge materials. The entire ROW width is also required for potential track expansion. In that respect, the Foundation is currently in discussions with a significant potential rail user who could require construction of sidetrack facilities for transloading commodities from truck to rail. Residential use of any part of this narrow ROW would be inconsistent with those legitimate rail uses.

It should be noted that the City itself endorses uses of the ROW at issue that are inconsistent with the residential zoning that the City argues for. Each year for the past 15 years, the City has endorsed and promoted the "Days of '92" State Mining Championship and the Rocky Mountain Knife and Tomahawk Throwing Competition that are held squarely within the ROW in the railroad yard. Both events involve dozens of vendors who sell goods and services and who collect sales taxes that are shared by the City. Despite its claim that the land in that area is zoned residential, the City has never required the organizers of the multi-day events to obtain special use permits for activities in a residential area.

APPENDIX DHS-1



Photos:

APPENDIX DHS-2

- #1 looking south down mainline from beginning of 100' wide ROW at Creede depot
- #2 looking south down Trk 39 at beginning of 100' wide ROW on east side of depot
- #3 looking north at center of mainline. Note Loma Street to the left (west)
- #4 looking north at Trk 39 and beginning of Trk 40 from east side of depot
- #5 looking south thru mainline with Trk 39 to left. Trk 38 buried to right and drainage ditch evident
- #6 looking south thru Trk 38. Note drop off & street to west
- #7 looking south across 3rd Street. Note drainage & street on both sides of ROW
- #8 looking south from between mainline & Trk 39 towards the Loma Street crossing
- #9 looking south thru main & Trk 39 switch. Note concrete wall to right supporting drainage culvert
- #10 looking south at first switch into Creede yard. Loma Street crossing in just south. Track then next to hillside below
- #11 looking south towards end of 100' wide ROW. Note shadow on street marking apprx. end of 100' width
- #12 looking north from beginning of subject area. Note hillside to west, drainage & street to east
- #13 looking north towards yard from about 5th Street. Note road on both sides of ROW
- #14 looking north from between 4th & 5th Street as yard widens
- #15 looking east NE from hillside above. Red car is about 4th Street
- #16 from above looking down across mainline at south end of 100' wide ROW
- #17 looking south thru the weeds showing hillside to west & road to east
- #18 looking NE from above showing yard with street on both sides
- #19 looking south from the beginning of 100' wide subject area
- #20 looking north shows Trk 38 semi-buried. Note drainage ditch to left (west)
- #21 Creede rail yard looking north. The mainline is still there



#1 looking south down mainline from beginning of 100' wide ROW at Creede depot



#2 looking south down Trk 39 at beginning of 100' wide ROW on east side of depot



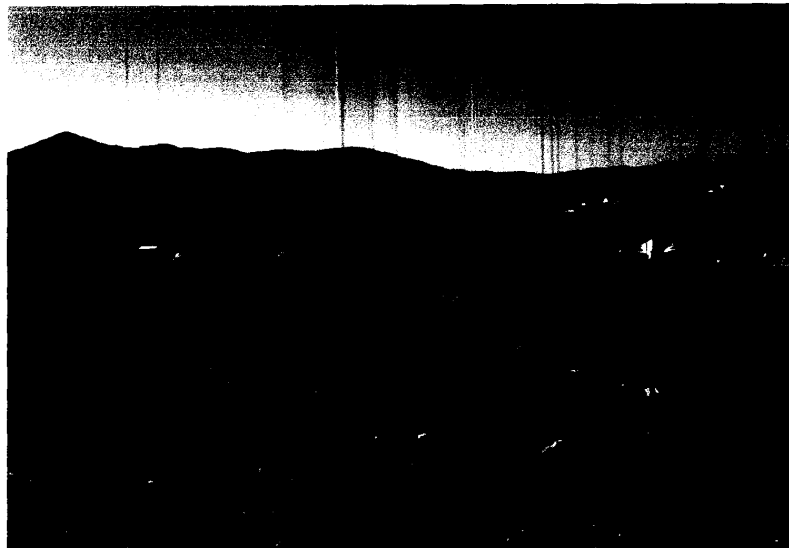
#3 looking north at center of mainline. Note Loma Street to the left (west)



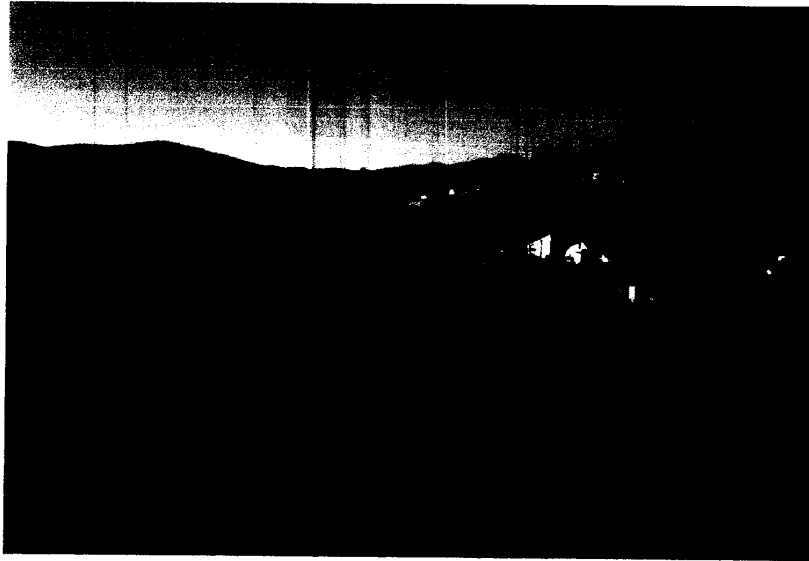
#4 looking north at Trk 39 and beginning of Trk 40 from east side of depot



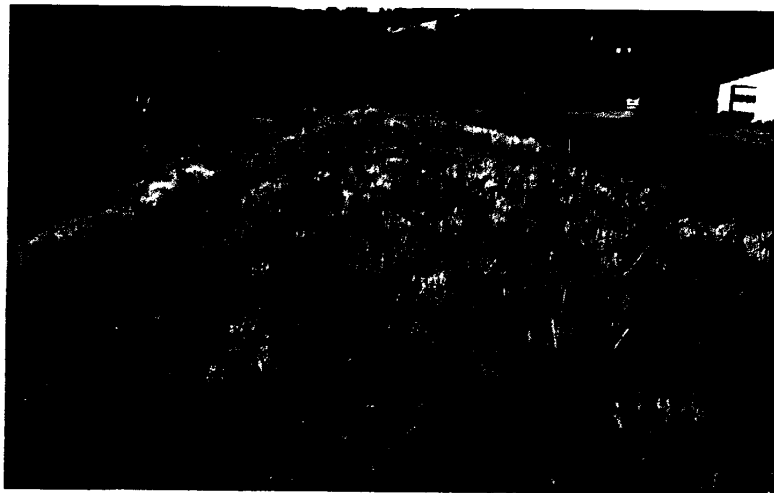
#5 looking south thru mainline with Trk 39 to left. Trk 38 buried to right and drainage ditch evident



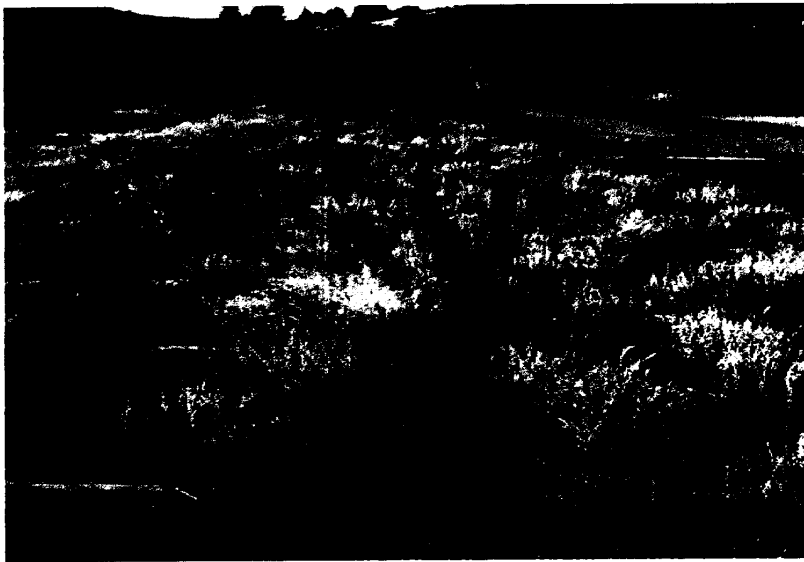
#6 looking south thru Trk 38. Note drop off & street to west



#7 looking south across 3rd Street. Note drainage & streets on both sides of ROW



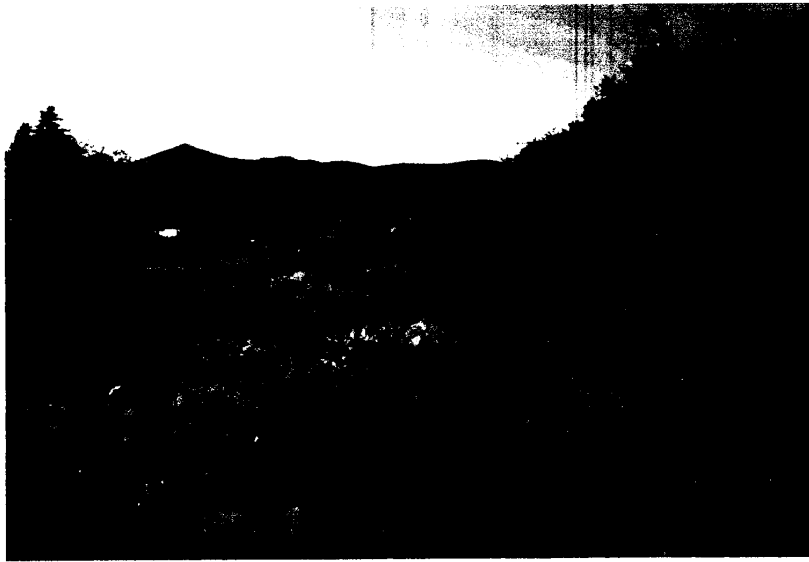
#8 looking south from between mainline & Trk 39 towards the Loma Street crossing



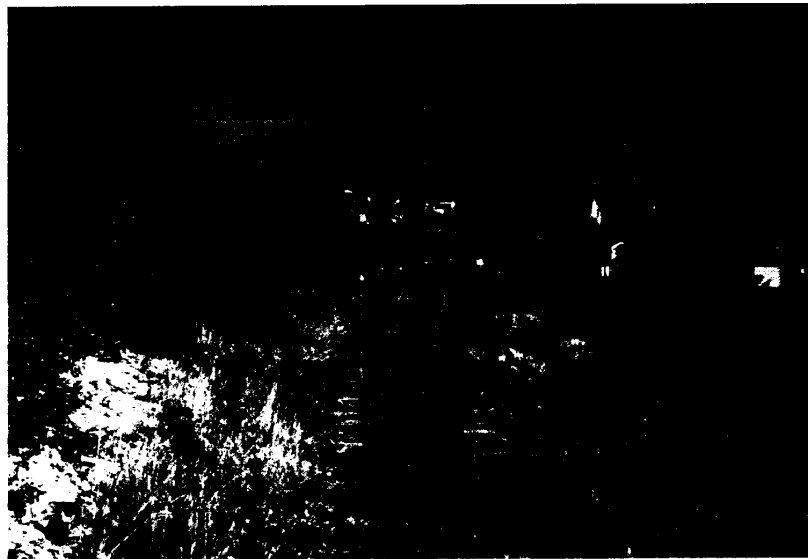
#9 looking south thru main & Trk 39 switch. Note concrete wall to right supporting drainage culvert



#10 looking south at first switch into Creede yard. Loma Street crossing is just south. Track then next to hillside below Loma St.



#11 looking south towards end of 100' wide ROW. Note shadow on street marking approx end of 100' width



#12 looking north from beginning of subject area. Note hillside to west, drainage & street to east



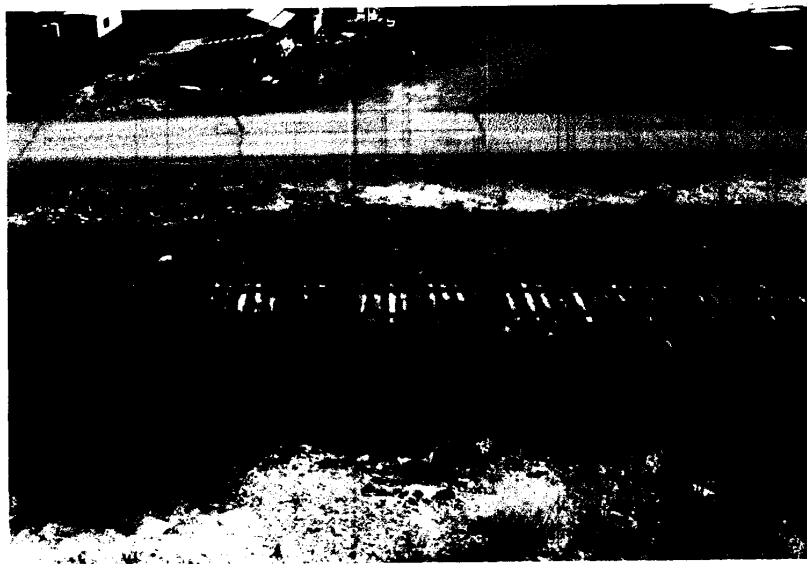
#13 looking north towards yard from about 5th Street. Note roads on both sides of ROW



#14 looking north from between 4th & 5th Streets as yard widens



#15 looking E-NE from hillside above. Red car is at about 4th Street



#16 from above looking down across mainline at south end of 100' wide ROW



#17 looking south thru the weeds showing hillside to west & road to east



#18 looking NE from above showing yard with streets on both sides



#19 looking south from the southern beginning of 100' wide subject area



#20 looking north shows Trk 38 sem-buried. Note drainage ditch to left (west)



#21 Creede rail yard looking north. The mainline is still there.

VERIFICATION

STATE OF COLORADO)
) SS:
COUNTY OF RIO GRANDE)

DONALD H. SHANK, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.

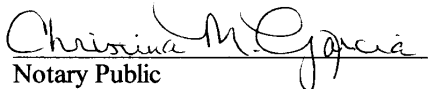


DONALD H. SHANK

SUBSCRIBED AND SWORN to

before me this 31 day

of August 2004.



Notary Public

My Commission Expires: April 17, 2006



CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2004, I served the foregoing document, Reply Statement, on George M. Allen, 206-A Society Drive, Telluride, CO 81435, by UPS overnight mail (Monday delivery).

Thomas F. McFarland

Thomas F. McFarland