

227147

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BY HAND

May 24, 2010

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW - Suite 1149
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
MAY 25 2010
Part of
Public Record

RE: STB Docket No. 35380, San Luis & Rio Grande Railroad -
Petition For A Declaratory Order

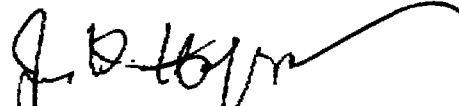
Dear Ms. Brown:

On behalf of San Luis & Rio Grande Railroad, I am
enclosing for filing in the above-captioned proceeding an
original and ten copies of its Petition For A Declaratory
Order.

You will also find a diskette containing the document
and a filing fee check in the amount of \$1400.00

Please date stamp and return one copy for my records.

Sincerely yours,


John D. Heffner

Enclosures:

cc: Mr. Ed Ellis
All Parties

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ORIGINAL



STB Finance Docket No. 35380

**SAN LUIS & RIO GRANDE RAILROAD
PETITION FOR A DECLARATORY ORDER**

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**SURFACE
TRANSPORTATION BOARD**

FILED

MAY 25 2010

**SURFACE
TRANSPORTATION BOARD**

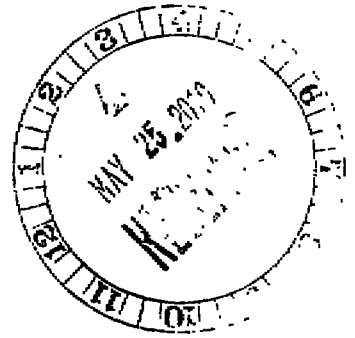
ORIGINAL

Submitted by
John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

Dated: May 25, 2010

Expedited Handling Requested

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Finance Docket No. 35380

**SAN LUIS & RIO GRANDE RAILROAD
PETITION FOR A DECLARATORY ORDER**

INTRODUCTION

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a), the San Luis & Rio Grande Railroad (“SLRG”) files this Petition for a Declaratory Order seeking a ruling from the Surface Transportation Board that section 10501(b) of the I.C.C. Termination Act (“the ICCTA”), 49 U.S.C. 10501(b), preempts the railroad from having to comply with the Land Use Code of Conejos County (“Conejos”) in connection with SLRG’s ownership and operation of a containerized truck-to-railroad solid waste transload facility at Antonito in Conejos County, CO (“the Facility”). Today the County filed a lawsuit in County Court, Conejos County, to enjoin SLRG from operating the Facility and moving this traffic by rail in interstate commerce.¹

¹ A copy of the County’s summons and complaint is attached to this Petition as Exhibit A. SLRG has learned that several private citizens have filed suit in Conejos County District Court *pro se*. A copy of their complaint is attached as Exhibit B. SLRG has given notice of removal of the County’s litigation to federal court in Denver.

Accordingly, a case or controversy now exists for the purpose of Board jurisdiction.

For the reasons stated herein SLRG requests that the Board adopt the schedule proposed here and grant expedited handling of its request with a decision rendered on or before 90 days from the date of this filing.

BACKGROUND

SLRG is a class III short line railroad subsidiary of railroad holding company Iowa Pacific Holdings, LLC (“IPH”), and its wholly owned operating subsidiary Permian Basin Railways. As relevant, SLRG was originally established in 2003 by short line holding company, RailAmerica, Inc., to acquire and operate two lines of railroad then owned and operated by the Union Pacific Railroad, (1) the Alamosa Subdivision from milepost 299.30 near Derrick, CO, to milepost 180.0 near Walsenburg, CO; and (2) the Antonito Subdivision from the point where the two subdivisions connect at milepost 251.7 in Alamosa, CO, to milepost 281.78 in Antonito, CO, a total distance of 149.38 miles. In 2006, IPH, through Permian Basin Railways, acquired control of SLRG by stock purchase from RailAmerica.

IPH and its subsidiary companies are well known and well respected members of the short line railroad community. IPH currently controls five other American short lines, several excursion passenger operations, and

several small railroads in England.² It has worked cooperatively with rail shippers in efforts to preserve vitally-needed branch line service threatened with service disruption.³ IPH is known to the Board, having participated actively in the STB rulemaking proceeding on common carrier service and railroad capacity.

THE FACTS

The controversy which is the subject of this Petition involves the efforts of SLRG to establish and operate a containerized solid waste transload facility at Antonito, in Conejos County, CO to handle contaminated dirt in the form of “class 7 and class 9 hazardous waste”⁴ from the US Department of Energy (“DOE”) Los Alamos National Laboratory.

² Arizona Eastern Railways, Chicago Terminal Railroad, Mt. Hood Railroad, Texas Mexico Railroad, West Texas & Lubbock Railway.

³ For example it has assisted railroad shippers faced with a loss of rail service by acting as the shippers’ alternative rail service provider. Roseburg Forest Products Co., Et al-Alternate Rail Service-Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35175, decision served March 4, 2009, identifies IPH subsidiary West Texas & Lubbock Railway Company, Inc., as the alternative rail service provider chosen by those shippers as well as by the principal shipper on the South Plains Lamesa Railroad in Lubbock, TX.

⁴ Materials transported to the Transload Facility and shipped by rail shall be limited to DOT criteria designation Class 7, 9, or Unregulated and which meets NRC classification as Low Level Class A waste. These materials consist of dirt, wood, metal from old conventional explosive tests as well as some very low levels of depleted uranium and PCB’s (polychlorinated Biphenyls). SLRG believes that contaminated dirt is exempt from the provisions of the Clean Railroads Act amendment to the ICCTA because this dirt is government-generated dirt as opposed to “industrial waste,” waste generated by manufacturing and industrial and research and development processes and operations. 49 U.S.C. 10908(e) (1) (D). Moreover, it will be transported in sealed bags which are “original shipping containers” under the law. Solid Waste Transfer Facilities, Ex Parte No. 684, decision served January 14, 2009.

Specifically, SLRG's rail customer, EnergySolutions, Inc. ("ES"), has a contract with DOE to process, transport, and dispose of contaminated dirt. ES has entered into a transportation agreement under 49 U.S.C. 10709 with the Union Pacific Railroad to move that freight from the Facility to its final destination at Clive, UT. Because UP no longer serves Antonito, having sold that line to SLRG in 2003, SLRG will handle the local movement between Antonito and the UP interchange at Walsenburg. ES has also entered into a transportation agreement under 49 U.S.C. 10907 with SLRG to provide such additional local services such as transloading that UP does not provide.

In order to fulfill its obligations to serve ES at the Facility, SLRG has entered into an agreement with Alcon Construction, Inc., to provide transload services on SLRG's property at the Facility. A copy of that agreement with the commercial terms deleted is attached hereto as Exhibit C. Briefly, Alcon will handle the movement and unloading of sealed containers from trucks onto rail cars. It will monitor and direct the movement of incoming trucks and handle any associated paper work for which SLRG will compensate Alcon. Alcon will have no right to market services to ES or any other customer that might eventually be served at the Facility and SLRG will have total responsibility for marketing. Alcon will

function as SLRG's agents, under its supervision and direction. SLRG will be totally and wholly responsible for all costs, liabilities, and expenses associated with the Facility including maintenance, repair, operation, and taxes as well as for any loss or damage claims related to the freight movement. SLRG will have complete control and responsibility over the Facility for any purpose including safety, security, and compliance with local and federal laws. While SLRG's agreement with Alcon has a two year term, SLRG retains the ability and sole discretion to terminate that agreement without cause and to provide those services directly or through a new subcontractor.

ES and SLRG began discussions with officials of Conejos County ("the County") in 2009 regarding the proposed transportation. SLRG agreed to postpone its use of the Facility after objections from County officials. SLRG then engaged County citizens and officials in discussions to persuade them that operation of the Facility does not pose any sort of safety or health hazard to local citizens. In response, County officials demanded that SLRG and Energy Solutions seek a permit prior to construction for a land use change under Article 5, Division 5.1, section 5.100 of the County's Land Use Code, a construction permit under that provision, and a Special Use Permit. Aside from the substantial time and administrative processes that

might be required for the railroad to obtain these permits, County officials informed SLRG that the County had a moratorium in effect until May 25, 2010, before SLRG could even apply for such permits. County officials further informed both SLRG and ES officials that obtaining such permits would require public hearings and could take an indefinite amount of time. SLRG took the position that its actions in owning and operating the Facility were exempt from the County's requirements under the preemption provisions of 49 U.S.C. 10501(b). The County responded by claiming that the Facility was not exempt from local law under federal preemption.

Eventually the parties, including ES, SLRG, and the County agreed to meet in an attempt to settle their differences. Towards that end, the parties met several times and arrived at what SLRG, ES, and several County officials thought was the basis for a mutually acceptable settlement agreement. In exchange for numerous concessions by SLRG, that agreement would have permitted SLRG to initiate transload operations at the Facility on or about May 25, 2010, without the need to comply with the Land Use Code or any County permitting requirements. The final draft of the settlement agreement was presented to the County Commissioners for approval in principle at an open meeting and hearing on Wednesday evening May 19, 2010. After considerable debate and intense citizen opposition,

the Commissioners declined to approve the proposed settlement and directed the County attorney to go to local court to seek an injunction against the railroad for conducting the proposed transload operation.

As noted in the introduction, the County initiated litigation against SLRG today Monday May 24, 2010, seeking both a preliminary and a permanent injunction. The County alleged, *inter alia*, that section 1, Division 1, Section 5.100 of the Land Use Code requires a Land Use Permit for any change in use of land, that no development or activity can occur prior to the issuance of same, and that SLRG has changed the use of the Facility without applying for a Special Use Review and obtaining a Land Use Permit. The County also alleged that the Land Use code requires a construction permit for all new construction and that SLRG has constructed a building or other structures on its property without obtaining a construction permit. The County further alleged that Article 4, Section 4.200 of the Land Use Code requires that all structures conform to the water and wastewater requirements of Article 13 of the Land Use Code, that SLRG's structures do not conform with those provisions, and that SLRG has been advised by the County that its must comply with those requirements prior to using the Facility. Finally, the County alleged that section 30-28-124 of the Colorado Revised Statutes forbids the construction of any building or structure in

violation of a zoning code and that it is unlawful to use any building, structure, or land in violation of a zoning code. County complaint, sections 8-14, 18, and 19, attached hereto.

ARGUMENT

5 U.S.C. 554(e) and 49 U.S.C. 721, give the Board discretion to issue a declaratory order to terminate a controversy or remove uncertainty. See, Norfolk Southern Railroad Company and the Alabama Great Southern Railroad Company-Petition for Declaratory Order, STB Finance Docket No. 35196, decision served March 1, 2010. The issue here is whether federal transportation law applicable to railroad operations including those of SLRG preempts Conejos County land use regulations pertaining to the licensing and operation of facilities handling the transfer of freight including containerized contaminated dirt from trucks to railroad cars for continuing movement in interstate commerce. SLRG believes it does. With the filing of the attached complaint in Conejos County court, SLRG has met the requirement of a case or controversy. This matter is now ripe for presentation to the Board for a decision.

Simply stated, section 10501(b) applicable to all common carrier railroad operations including those of SLRG at the Facility preempts the application of inconsistent state or local laws or regulations. Those

preempted here include Section 30-28-124, C.R.S., Article 16 of the Conejos County, Land Use Code, Article 5, Division 5.1, Section 5.100 of the Land Use Code, Article 4, Section 4.200 of the Land Use Code, and Article 13 of the Land Use Code. These provisions are preempted because they would forbid SLRG from conducting common carrier railroad operations in the form of transloading and hauling in interstate commerce containerized contaminated dirt from Antonito, CO, to Clive, UT. They act as a prior restraint on SLRG's operating authority granted by this Board in 2003 and SLRG's use of its Facility.

More specifically, section 10501(b) of the ICCTA provides "that the jurisdiction of the [Surface Transportation] Board over transportation by rail carriers and the remedies provided under [the ICCTA] are exclusive and preempt the remedies provided under Federal or State law." In fact, federal preemption of State or local attempts to interfere with a railroad's common carrier service and obligation is so well recognized and pervasive that one court has observed "it is difficult to image a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than Congress provided in 49 U.S.C. 10501(b). CSX Transp., Inc. v. Georgia Public Service Com'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

Case precedent holds that in order for the Board to find preemption over local laws two elements must be present. First, the service sought to be regulated or forbidden at the local level must entail transportation and, second, that transportation must be performed under the auspices of a rail carrier. New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway-Construction, Acquisition, and Operation Exemption-In Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op. served July 10, 2007 at 9-10. Unquestionably, both elements of this test are met here. The movement of containerized contaminated dirt in interstate commerce from its origin near Antonito to its destination at Clive, UT, is undoubtedly transportation. Moreover, the ownership, operation, and use of SLRG's "Facility" at Antonito qualifies for "transportation" under 49 U.S.C. 10102(9) which defines it as "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property." The ICCTA defines the term "transportation" broadly to encompass not only rail lines but ancillary facilities used for and services related to the movement of property by rail, expressly including "receipt,

delivery,” “transfer in transit,” “storage,” and “handling” of property. 49 U.S.C. 10102(9). Thus, as the Board has held “transportation” is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage. Accordingly, the courts and the rail industry have consistently understood that transloading operations are part of rail transportation. For us to attempt to suggest otherwise here could have far-reaching, disruptive implications for a host of other commodities (such as lumber, cement, brick, stone and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail component of the movement.” New England Transrail, supra, at 2.

The second part of the requirement is also met. There is no question that SLRG is a “rail carrier” which is defined as a “person providing transportation for compensation” as SLRG was authorized by the Board to acquire and operate about 149 miles of railroad track back in 2003.⁵

Moreover, there is ample precedent holding that section 10501(b) preempts state or local permit or preconstruction requirements including environmental and zoning requirements for railroad transloading facilities. See, Green Mountain Railroad Corporation v. Vermont, 404 F.3d 638 (2d

⁵ San Luis & Rio Grande Railroad Company–Acquisition and Operation Exemption–Union Pacific Railroad Company, STB Finance Docket No. 34352, decision served July 18, 2003.

Cir. 2005) and cases cited and discussed therein. SLRG submits that the Green Mountain case is directly on point and bars the County from enforcing its land use regulations against the railroad.

The fact that SLRG has chosen to have a subcontractor, Alcon, operate the facility does not change the result mandated by Green Mountain and similar precedent. See, The City of Alexandria, Virginia-Petition for Declaratory Order, STB Finance Docket No. 35157, slip op. served February 17, 2009 (holding that the railroad's use of a subcontractor to operate its transload facility is still entitled to preemption against the application of local permitting laws). SLRG deliberately modeled its arrangements for operating the Facility after those employed by Norfolk Southern Railroad ("NS") in operating its ethanol transload facility in Alexandria, VA.

Just like NS' arrangements with its contractor (RSI Leasing), SLRG's contractor will handle the movement and unloading of sealed containers from trucks onto rail cars, monitor and direct the movement of incoming trucks and handle any associated paper work, and function as SLRG's agents, under its supervision and direction. Like RSI, Alcon will have no right to market services to ES or any other customer that might eventually be served at the Facility and SLRG will have total responsibility for marketing. Like NS, SLRG will be totally and wholly

responsible for all costs, liabilities, and expenses associated with the Facility including maintenance, repair, operation, and taxes as well as for any loss or damage claims related to the freight movement, will have complete control and responsibility over the Facility for any purpose including safety, security, and compliance with local and federal laws, and will retain the ability and sole discretion to terminate that agreement without cause and to provide those services directly or through a new subcontractor. City of Alexandria, supra, at 3-5.

SLRG recognizes that this case presents some novel questions particularly insofar as the commodity involved, contaminated dirt, might appear to be subject to the provisions of the Clean Railroads Act amendments to the ICCTA. SLRG contends it is not subject to that law. However, SLRG will present evidence and argument on that issue as well as any other pertinent issues. Accordingly and consistent with other cases seeking declaratory relief, SLRG requests that the Board initiate a proceeding and adopt the following expedited schedule for presentation of evidence and legal argument:

Petitioner's Opening Statement	Due 15 days after filing or June 10
Respondent's Reply	Due 45 days after filing or July 10
Petitioner's Rebuttal	Due 60 days after filing or July 26

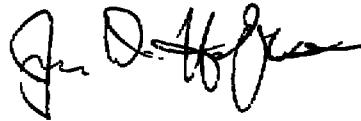
Decision

Due 90 days after filing

CONCLUSION

SLRG respectfully requests that the Board initiate a declaratory order proceeding under 5 U.S.C. 554(e) and 49 U.S.C. 721 and adopt an expedited schedule for soliciting evidence and legal argument and issuing a decision on the merits holding that Conejos County's land use and related requirements are preempted by 49 U.S.C. 10501(b).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", is written over a horizontal line.

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

Dated: May 25, 2010

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that a copy of the foregoing Petition for Declaratory Order, for San Luis & Rio Grande Railroad was served on May 24, 2010 to the following by first class United States mail and by electronic mail to those persons marked with an asterisk:

Stephane Walter Atencio, Esq. (*)
S.W. Atencio & Associates, P.C.
Attorney for Plaintiff
601 Third Street
Alamosa, CO 81101

Jeffery D. Bursell, Esq. (*)
Dewhirst & Dolven, LLC
650 S. Cherry Street
Suite 600
Denver, CO 80246

Maria Alice Tyrell
28 W 5th
Antonito, CO 81120

Michele Terese Tryille
502 W. 8th Avenue
Antonito, CO 81120

Jean & Robert Archuleta
19 Pine Court
Antonito, CO 81120

Marsha & Chris Banela
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Dominica Borela
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Manassas, CO 81141

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316 W. 11 Avenue
Antonito, CO 81120

Mario Barela
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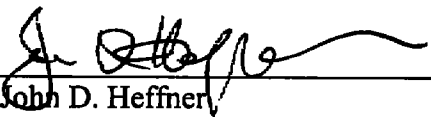

John D. Heffner

EXHIBIT A

COUNTY COURT,
COUNTY OF CONEJOS
STATE OF COLORADO

CONEJOS COUNTY COURTHOUSE
P.O. BOX 128
CONEJOS, COLORADO 81129
(719) 376-5465

**Plaintiff: The Board of County Commissioners
of Conejos County, Colorado,**

v.

Defendant: San Luis & Rio Grande Railroad, Inc.

S.W. ATENCIO & ASSOCIATES, P.C.
Stéphane Walter Atencio, #13129
Conejos County Attorney
601 Third Street
Alamosa, CO 81101
Phone Number: (719) 589-6005
Fax Number: (719) 589-5748
E-mail: atenciolaw@amigo.net

▲ COURT USE ONLY ▲

Case No.:

Div.:

Ctrm.:

COMPLAINT FOR INJUNCTIVE RELIEF

COMES NOW, the Board of County Commissioners of Conejos County, Colorado, by and through the Conejos County Attorney, S. W. Atencio & Associates, P.C., and for its Complaint against the Defendant, San Luis & Rio Grande Railroad, states and alleges as follows:

1. Plaintiff, the Board of County Commissioners of Conejos County, Colorado, brings this action against Defendant pursuant to Section 30-28-124, C.R.S., and Article 16 of the Conejos County Land Use Code (hereinafter referred to as "Land Use Code"), which is a zoning resolution lawfully adopted pursuant to Section 30-28-101, *et seq.*, C.R.S.
2. Defendant is the owner of certain real property located in Conejos County, Colorado (hereinafter referred to as "the Property"). The legal description of the Property is described in Defendant's vesting deed, which is attached hereto as Exhibit A.

3. Defendant is a Delaware corporation which is duly registered to conduct business in the State of Colorado. Defendant maintains a business office in Colorado which is located at 601 State Avenue, Alamosa, Colorado. Defendant regularly conducts business in Conejos County, Colorado.
4. This is an action affecting real property located in Conejos County, Colorado. Pursuant to C.R.C.P. Rule 398(a) and Section 30-28-124, C.R.S., venue is proper in the County Court of Conejos County.
5. All events or occurrences complained of herein took place in Conejos County, Colorado.
6. This Court has jurisdiction over the subject matter of and the parties to this action.
7. The Property is located within an "Industrial" Zoning District of Conejos County.
8. Article 5, Division 5.1, Section 5.100, of the Land Use Code provides that a Land Use Permit is required for any change in use of land (unless such use is expressly exempt from this requirement). Said Section 5.100 also provides that no development or activity associated with a land use change may occur prior to issuance of a Land Use Permit.
9. Defendant has engaged in activities which constitute a change in use of the Property without obtaining a Land Use Permit. More specifically, Defendant has changed the use of the Property to one which is properly characterized as a "Solid Waste Transfer Facility" pursuant to the Land Use Code.
10. Pursuant to the Land Use Code, use of land as a Solid Waste Transfer Facility is neither a permitted nor an "exempt" use in an Industrial Zone and such use may occur only after applying for a Special Use Review and obtaining a Land Use Permit.
11. Article 5, Division 5.1, Section 5.100, of the Land Use Code provides that a Construction Permit is required for all new construction (unless expressly exempted) and no construction activities may commence prior to the issuance of a Construction Permit.
12. Defendant installed, placed, or constructed a building and other structures on the Property prior to obtaining a Construction Permit. Defendant's building and other structures are neither permitted nor exempt pursuant to the Land Use Code.
13. Article 4, Section 4.200, of the Land Use Code states that all structures shall conform to the water and wastewater requirements of Article 13 of the Land Use Code.

14. The structures that Defendant has installed, placed, or constructed on the Property are not in conformance with the water and wastewater requirements of Article 13 of the Land Use Code.
15. Defendant has been advised by the Conejos County Land Use Administrator that Defendant must comply with the Land Use Code prior to using the Property as a Solid Waste Transfer Facility. Defendant advised Plaintiff that Defendant believes it is not subject to the jurisdiction of either the Conejos County Land Use Code or State law. Defendant further advised Plaintiff that the Land Use Code was preempted by federal law and Defendant will not file an application for a Land Use Permit.
16. Defendant further informed Plaintiff that Defendant has and will use the Property as a "Transload Facility" for the purpose of transferring solid hazardous waste from trucks onto rail cars. More specifically, Defendant has informed Plaintiff that Defendant has and will continue to use the Property for the purpose of receiving shipments of solid waste which contains radioactive material and polychlorinated biphenyls ("PCB's"), transferring the solid hazardous waste to rail cars located on the Property, and then transporting the solid hazardous waste by rail car through Conejos County.
17. Defendant has failed to provide Plaintiff with an order, judgment, determination, edict, or ruling from any Court, tribunal, administrative agency, or the Surface Transportation Board which supports Defendant's argument that it is not subject to the provisions of the Conejos County Land Use Code.
18. Section 30-28-124(1), C.R.S., provides, in pertinent part, that it is unlawful to erect or construct any building or structure in violation of a zoning code and that it is unlawful to use any building, structure, or land in violation of a zoning code. Section 30-28-124(1), C.R.S., further provides, in pertinent part, that a summons and complaint alleging violation of this law "shall require that the violator appear in county court"
19. Section 30-28-124(2), C.R.S., provides, in pertinent part, as follows:

In case any building or structure is or is proposed to be erected, constructed, . . . or used, or any land is or is proposed to be used, in violation of any regulation or provision of any zoning resolution . . . the county attorney of the county in which such building, structure, or land is situated, **in addition to the other remedies provided by law, may institute an injunction**, mandamus, abatement, or other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful erection, construction, reconstruction, alteration, or use. (*emphasis added*).

20. Last year, Defendant voluntarily abated its use of the Property as a Solid Waste Transfer Facility after objection was made by Plaintiff. However, Defendant recently informed Plaintiff that Defendant will recommence receipt of shipments of solid hazardous waste, and will recommence transloading of the solid hazardous waste on the Property, on May 24, 2010.

21. Plaintiff has no plain, speedy, and adequate remedy at law.

22. Entry of a preliminary injunction will both maintain the status quo and protect Plaintiff from real, immediate, and irreparable injury pending a trial on the merits of Plaintiff's request for a permanent injunction. The granting of a preliminary injunction will not disserve the public interest and the balance of the equities favors the injunction.

WHEREFORE, Plaintiff prays this Court enters an order preliminarily and, after a trial on the merits, permanently enjoining Defendant's use of the Property as a Solid Waste Transfer Facility until such time as Defendant applies for a Special Use Review and obtains a Land Use Permit, a Construction Permit, and conforms the structures located on the Property to the water and wastewater requirements of the Land Use Code, and for such other relief as the Court may deem just.

RESPECTFULLY SUBMITTED this ____ day of _____, 2010.

S. W. ATENCIO & ASSOCIATES, P.C.

/s/ Stéphane Walter Atencio, original signature on file at S. W. Atencio & Associates, P.C.

Stéphane Walter Atencio, #13129
S. W. Atencio & Associates, P.C.
Attorney for Plaintiff
601 Third Street
Alamosa, Colorado 81101
(719) 589-6005

Plaintiff's Address:

Board of County Commissioners
P.O. Box 157
Antonito, CO 81129

COUNTY COURT,
COUNTY OF CONEJOS
STATE OF COLORADO

CONEJOS COUNTY COURTHOUSE
P.O. BOX 128
CONEJOS, COLORADO 81129
(719) 376-5465

**Plaintiff: The Board of County Commisssioners
of Conejos County, Colorado,**

v.

Defendant: San Luis & Rio Grande Railroad, Inc.

S.W. ATENCIO & ASSOCIATES, P.C.
Stéphane Walter Atencio, #13129
Conejos County Attorney
601 Third Street
Alamosa, CO 81101
Phone Number: (719) 589-6005
Fax Number: (719) 589-5748
E-mail: atenciolaw@amigo.net

▲ COURT USE ONLY ▲

Case No.:

Div.:

Ctrm.:

MOTION FOR FORTHWITH HEARING

COMES NOW, the Board of County Commissioners of Conejos County, Colorado, by and through the Conejos County Attorney, S. W. Atencio & Associates, P.C., and hereby moves for entry of an Order for Forthwith Hearing, and as grounds therefor state and allege as follows:

1. Plaintiff has filed a Complaint against Defendant requesting entry of both a preliminary injunction and a permanent injunction.
2. Defendant's registered agent will be served a copy of the Complaint and an original Summons on May 24, 2010.
3. Defendant's attorney is aware of the filing of the Complaint and the subject Motion. The undersigned provided Defendant's attorney with a copy of the Complaint and the subject Motion, via email, on May 23, 2010.
4. As alleged in the Complaint, on May 24, 2010, Defendant will commence use of

certain Property as a Solid Waste Transfer Facility for the purpose of transferring solid hazardous waste from trucks onto rail cars. More specifically, Defendant will use the Property for the purpose of receiving shipments of solid waste which contains radioactive material and polychlorinated biphenyls ("PCB's"), transferring the solid hazardous waste to rail cars located on the Property, and then transporting the solid hazardous waste by rail car through Conejos County.

5. Defendant has failed to provide Plaintiff with an order, judgment, determination, edict, or ruling from any Court, tribunal, administrative agency, or the Surface Transportation Board which supports Defendant's argument that it is not subject to the provisions of the Conejos County Land Use Code.
6. Plaintiff has no plain, speedy, and adequate remedy at law. Entry of a preliminary injunction will both maintain the status quo and protect Plaintiff from real, immediate, and irreparable injury pending a trial on the merits. The granting of a preliminary injunction will not disserve the public interest and the balance of the equities favors the injunction.

WHEREFORE, Plaintiff prays this Court enters an Order for Forthwith Hearing and schedule a Hearing on Plaintiff's request for Preliminary Injunction as soon as possible.

RESPECTFULLY SUBMITTED this ____ day of _____, 2010.

S. W. ATENCIO & ASSOCIATES, P.C.

/s/ Stéphane Walter Atencio, original signature on file at S. W. Atencio & Associates, P.C.

Stéphane Walter Atencio, #13129
S. W. Atencio & Associates, P.C.
Attorney for Plaintiff
601 Third Street
Alamosa, Colorado 81101
(719) 589-6005

COUNTY COURT, COUNTY OF CONEJOS STATE OF COLORADO CONEJOS COUNTY COURTHOUSE P.O. BOX 128 CONEJOS, COLORADO 81129 (719) 376-5465 Plaintiff: The Board of County Commissioners of Conejos County, Colorado, v. Defendant: San Luis & Rio Grande Railroad, Inc.	▲ COURT USE ONLY ▲ Case No.: Div.: Ctrm.:
ORDER FOR FORTHWITH HEARING	

COMES NOW the Court, this _____ day of May, 2010, upon review of Plaintiff's Motion for Forthwith Hearing, and finding said Motion well taken,

IT IS HEREBY ORDERED that the subject motion is hereby granted and that a Hearing on Plaintiff's request for Preliminary Injunction shall be held on May _____, 2010, at the hour of _____; and,

IT IS FURTHER ORDERED Plaintiff's counsel shall immediately provide a copy of this Order to Defendant's counsel, via email.

DONE AND SIGNED this _____ day of _____, 2010.

BY THE COURT

Elizabeth Garcia
County Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of _____, 2010, service of the foregoing **ORDER FOR FORTHWITH HEARING** was made via U.S.

Postal Service, upon the following:

John D. Heffner John D. Heffner, PLLC 1750 K Street, N.W., Suite 200 Washington D.C. 20006	Stéphane Walter Atencio S. W. Atencio & Associates, P.C. 601 Third Street Alamosa, CO 81101
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EXHIBIT B

May 24, 2010

**District Court
Conejos County Courthouse
Conejos, Colorado**

**FILED Document
CO Conejos County District Court 12th JD
Filing Date: May 24 2010 4:00PM MDT
Filing ID: 31261398
Review Clerk: Shelly Quintana**

REQUEST FOR A TEMPORARY RESTRAINING ORDER

WHEREAS it has come to the attention of the local citizenry, that there is a plan underway to, receive, handle

(transload), and ship , toxic and even radioactive waste material from Los Alamos, New Mexico through or

near Antonito, Colorado, and

WHEREAS the County Commissioners of Conejos County, during a special open meeting, including a group

of citizens who were unanimously opposed to such an activity, did vote to direct the Attorney working for

Conejos County, Steven Atencio, to file an Injunction against the parties involved in this plan, and

WHEREAS said attorney has ignored this directive and although fully Four and One-half days have transpired,

and still, no such Injunction has been filed, and

WHEREAS it has been announced that toxic and potentially radioactive waste material has already been

shipped from Los Alamos and preparations have been made go ahead with transloading operations in or

near Antonito, today, irrespective of the public outcry and the unanimous resolution of the County Com-

missioners mandating an Injunction be filed,

NOW THEREFORE COME THE UNDERSIGNED CITIZENS OF CONEJOS COUNTY to implore the

Judge of the District Court, to enjoin and prevent the San Luis-Rio Grande Railroad together with Energy Solutions, Inc. from any activity involving toxic waste of any kind anywhere in Conejos

County

and to enforce a TEMPORARY RESTRAINING ORDER, Until an Injunction can be filed and the merits

of said Injunction can be discussed and ruled upon.

Submitted by,

NAME

ADDRESS

Maria Luis Trujillo	28 W 5 th	Antonito, Co	81120
Michelle Teresa Trujillo	502 W. 8 th Ave.	Antonito, Co.	81120
Jean Archuleta	19 Pine Court	Antonito, CO	81120
Robert Archuleta	19 PINECOURT	81120	
Marapa Barola	3282 CR. 12.5	Antonito, CO	81120
Shirley Barola	3282 CR. 12.5	Antonito, CO	81120
Joseline Barola	604 Main	Manitou, CO,	81141
Mike Barola	3282 CR. 12.5	Antonito, Co	81120
Jammy Barola	316 W 11 Ave	Antonito Colo	81120
Maria Barola	315 W 11 Ave	Antonito Colo	81120

Submitted by,

NAME

ADDRESS

Elva M. Quintana	413 ^W 10 th Ave	Antonito, CO 81120
Joseph L. Quintana	413 W 10 th Ave	Antonito, CO 81120
Louise L. Jones	217 W 9 th Ave	Antonito, CO 81120
Robert F. Parola	123 West 6 Ave	Antonito, CO 81120
Alfred G. Gheys	6925 CO. Rd. D5	Antonito, CO 81120
Martha G. Gheys	6925 G. Rd. D5	Antonito, CO 81120
Jose G. Gheys	6819 G Rd D5	Antonito, CO 81120
Jose G. Gheys	6819 CR D-5	Antonito, CO 81120
Yasmin R. Halligan	6958 Ct Rd-5	Antonito, CO 81120
RANCO M. Halligan	6958 Ct Rd-5	Antonito, CO 81120

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Case Number:

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[view]	2006CV5	SAN LUIS VALLEY FEDERAL BANK vs. VIGIL, ELI et al	Active
[view]	2009CV21	SAN LUIS VALLEY FEDERAL BANK vs. SKYLINE RANCH RESERVE LP et al	Active
[view]	2009CV38	SAN LUIS VALLEY FEDERAL BANK vs. CROPPER, KYLE J et al	Active
[view]	2010CV14	CONEJOS COUNTY CITIZENS vs. SAN LUIS-RIO GRANDE RAILROAD et al	Active
			1-4 of 4 Cases



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Case Information

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CONEJOS COUNTY CITIZENS vs. SAN LUIS-RIO GRANDE RAILROAD et al

Case Number	Court Name	Division	Case Class	Case Type
2010CV14	CO Conejos County District Court 12th JD	1 - Division 1	Civil	Restraining Order
File & Serve Live Date: 5/24/2010				

 Court Officials

<u>Participant Name</u>	<u>Participant Type</u>	<u>Organization</u>
Swift, Pattie P	Judge	CO Aramosa County District Court 12th JD

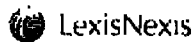
 Case Parties

Show Active Case Parties

<u>Party Name</u>	<u>Party Type</u>	<u>Attorney</u>	<u>Attorney Type</u>	<u>Firm</u>
CONEJOS COUNTY CITIZENS	Plaintiff	Pro Se	N/A	Pro Se-
ENERGY SOLUTIONS INC	Defendant	Pro Se	N/A	Pro Se-
SAN LUIS-RIO GRANDE RAILROAD	Defendant	Pro Se	N/A	Pro Se-

1-3 of 3 Case Parties

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EXHIBIT C

AGREEMENT FOR TRANSLOADING SERVICES

This Agreement dated _____ is made by and between the San Luis & Rio Grande Railroad ("SLRG" or "the Railroad"), a Colorado corporation, and Alcon Construction, Inc. ("Alcon"), a Colorado corporation.

WHERE AS, EnergySolutions has entered into a transportation agreement under the provisions of 49 U.S.C. Section 10709 dated November 1, 2009 and identified as #UPCQ 95614 with the Union Pacific Railroad Company ("UP") for the transportation of waste in sealed packages compliant and in accordance with U.S. Department of Transportation regulations;

WHERE AS, UP will provide rail transportation for this cargo from Antonito, CO, to its destination at EnergySolutions' facility at Clive, UT, pursuant to a bill of lading issued by UP;

WHERE AS, because UP does not serve the traffic origin directly, it has arranged for SLRG to move this cargo utilizing SLRG's rail lines and facilities between Antonito, CO and the UP/SLRG interchange at Walsenburg, CO;

WHERE AS, EnergySolutions will enter into a separate agreement under the provisions of 49 U.S.C. 10709 with SLRG for local transportation services that the Railroad will perform to the extent not covered in the EnergySolutions/UP agreement referenced above;

WHERE AS, pursuant to UP's bill of lading EnergySolutions will pay UP for all transportation charges incurred in this move except for those local services provided by SLRG;

WHERE AS, because the origin of waste generation near Antonito is not located on a rail line, the sealed packages will be transported by truck from the origin to a facility ("the Transload Facility") at Antonito that SLRG will construct on its land where SLRG will transload the sealed packages into rail cars for further movement in interstate commerce;

AND WHEREAS, SLRG shall provide and EnergySolutions shall compensate SLRG for those local transportation services including but, not limited to, switching, transferring of cargo between trucks and rail cars at the

Transload Facility, weighing, and demurrage as provided in the EnergySolutions/SLRG agreement;

The parties agree as follows:

1. SLRG will as part of its common carrier obligation provide all transportation services in connection with the transfer of cargo from truck to rail at SLRG's Transload Facility at Antonito including the direct unloading of sealed inbound packages from truck onto waiting rail cars or the unloading and temporary storage of inbound containers before placing them on rail cars for outbound movement, direct the movement of loaded inbound trucks into and the movement of outbound empty trucks out of the Transload Facility, the switching, servicing, weighing, and storage of empty or loaded rail cars, and such servicing of rail cars and equipment as may be required;
2. In its sole discretion, SLRG may subcontract to other parties including Alcon such functions as the movement and unloading of sealed containers from trucks onto rail cars or into temporary storage;
3. Alcon's role at the Transload Facility will be limited to the monitoring the arrival of loaded and the departure of empty trucks, directing the movement of trucks at that facility, and completing as SLRG's agent any paper work required by the truckers;
4. Except for payment of its services, Alcon will have no relationship, financial or otherwise, with EnergySolutions or any other customers to be served at the Transload Facility or SLRG;
5. Alcon will have no right to market to shippers or third parties the services it will provide at the Transload Facility;
6. Energy or other shippers, truckers handling cargo on their behalf, or SLRG, as the case may, will provide Alcon with bills of lading or other paper work necessary to advise it of the flow of inbound traffic;
7. In selecting Alcon as its subcontractor, SLRG will compensate Alcon for its services in accordance with the procedures and schedule attached to this agreement as Exhibit A;
8. In selecting Alcon as its subcontractor, SLRG engages Alcon to work as its agent and under its sole direction;

9. SLRG will be solely responsible for all costs, liabilities, and expenses associated with the Transload Facility including maintenance, repair, operation, and taxes related thereto;
10. SLRG will be solely responsible for any loss or damage to cargo during the movement through and during the loading and unloading process at the Transload Facility and during the portion of the rail movement over SLRG's line;
11. SLRG will be solely responsible for the marketing of services provided by or at the Transload Facility;
12. SLRG shall have total control over the Transload Facility including access to the facility for any purpose and responsibility for safety and security and compliance with local laws, to the extent applicable;
13. The term of this Agreement shall be two years but SLRG may at its sole discretion and without cause terminate the transload services provided at the Transload Facility by Alcon as its agent upon 30 days' written notice and may provide those services directly or through another agent or subcontractor at its sole discretion;
14. SLRG shall defend, indemnify, and hold Alcon harmless for all costs, liabilities, and expenses it incurs in providing transload services at the Transload Facility regardless of cause or fault.

Agreed to:

San Luis & Rio Grande Railroad

Alcon Construction, Inc.

By: _____
Title

By: _____
Title