

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34376

CITY OF CREEDE, CO-PETITION FOR DECLARATORY ORDER

Decided: June 22, 2004

In a decision served in STB Docket No. AB-33 (Sub-No. 132X) on May 11, 1999, the Board approved the sale of a 21.6-mile rail line known as the Creede Branch from Union Pacific Railroad Company (UP) to the Denver & Rio Grande Railway Historical Foundation (D&RGHF) pursuant to the offer of financial assistance (OFA) procedures under 49 U.S.C. 10904 and 49 CFR 1152.27. On May 24, 2000, the Board denied the City's petition to reopen, finding that the City had not satisfied the criteria necessary for reopening administratively final proceedings. The sale of the line was also consummated on May 24, 2000.

On July 2, 2003, the City filed a petition for declaratory order (STB Finance Docket No. 34376) pursuant to an order of the U.S. District Court for the District of Colorado (District Court)¹ referring to the Board three questions involving federal preemption of the City's zoning laws as applied to the D&RGHF and ordering the parties to submit to the Board, within 80 days of the District Court's order, all portions of the court record relevant to the preemption issue. D&RGHF made its submission to the Board on July 21, 2003. After requesting two extensions from the District Court, the City submitted portions of the court record, totaling over 400 pages, on October 14, 2003. In addition to the documents themselves, the City tendered a pleading arguing that the Board should void the authorization in the abandonment exemption proceeding for sale of the line to D&RGHF under the OFA provisions.

As reflected by a decision served on November 3, 2003, the Board treated the City's filing as a petition to reopen the proceeding in STB Docket No. AB-33 (Sub-No. 132X). The Board also held in abeyance the proceeding in STB Finance Docket No. 34376 pending resolution of the petition to reopen in STB Docket No. AB-33 (Sub-No. 132X). By a decision served on June 22, 2004, in STB Docket No. 33 (Sub-No. 132X), the Board denied the City's petition to reopen. Accordingly, the Board will now consider the petition for a declaratory order proceeding filed by the City in STB Finance Docket No. 34376.

¹ City of Creede v. Denver & Rio Grande Ry. Historical Found., No. 01-RB-318 (CBS) (D. Colo. May 9, 2003).

The City filed this petition pursuant to an order of the District Court referring to the Board three questions involving federal preemption of the City's zoning laws as applied to the D&RGHF. Specifically, the District Court asks the Board to address the following questions:

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?

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests, considering a number of factors, including the significance to the industry and the ripeness of the controversy. See Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). There, the ICC noted that petitions for issuance of a declaratory order premised on referral from a federal court are routinely accepted and treated procedurally in the same manner as a complaint.

Under the Board's authority in 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding is instituted to resolve this controversy. The matter is within the Board's jurisdiction and has been referred by a federal court. The Board will resolve this matter pursuant to the modified procedure rules at 49 CFR 1112.1, et seq. A procedural schedule is set forth below.

This action will not significantly affect the quality of the human environment or conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure rules, on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice at 49 CFR subchapter B, including parts 1112 and 1114.

2. The procedural schedule for this proceeding is as follows:

July 22, 2004	The City's opening statement is due.
August 23, 2004	D&RGHF's reply statement is due.
September 13, 2004	The City's rebuttal is due.

3. This decision is effective on the date of service.

4. A copy of this decision will be served on:

The Hon. Robert E. Blackburn
United States District Judge
United States Courthouse A741
909 19th Street
Denver, CO 80294

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary