

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB FD 35496

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION'S
PETITION FOR DECLARATORY ORDER**

231074

Office of

September 9, 2011

Part of
Public Record

**RESPONSE TO
SAN LUIS & RIO GRANDE'S
REPLY IN OPPOSITION**

Submitted by
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Denver & Rio Grande Railway
Historical Foundation
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Dated: September 9, 2011

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REPLY IN OPPOSITION**

INTRODUCTION

The Denver & Rio Grande Railway Historical Foundation, (“DRGHF” or “Petitioner”) hereby submits the following RESPONSE to the Reply in Opposition filed August 1, 2011 by John D. Heffner, PLLC, (“Heffner Reply”) as counsel for and in behalf of San Luis & Rio Grande Railroad (“SLRG”) and its President Ed Ellis (“Ellis”).

Certain statements, accusations and exhibits found within the Heffner Reply are incorrect, false, or misleading and therefore do not represent an accurate portrayal of the facts. Accordingly, in this Response, Petitioner will do its best to reflect a far more accurate representation of the facts surrounding its Petition for Declaratory Order.

STATEMENT OF FACTS

PREFACE

This Reply, or a Response to a Reply is being prepared by Donald H. Shank, the Founder and Incorporator of the Denver & Rio Grande Railway Historical Foundation, (DRGHF) a Colorado not-for-profit corporation. I am not an attorney, nor do I profess to be one. I will not site case law. What I will do is present the facts as they truly exist in laymen's terms, not as an accomplished barrister such as Mr. Heffner nor as he interprets or twists to fit the needs of his client, Ed Ellis.

I know the difference between fact and fiction as well as right from wrong. Accordingly, I will do my best to (1), rebut Mr. Heffner's inaccuracies and (2) set the record straight.

REBUTTAL

DRGHF is a Colorado not-for-profit corporation in good standing. It is a 501(C)(3) tax-exempt foundation as recognized by the Internal Revenue Service. As such, it is a publicly supported charitable organization, under the direction, but not owned, by Donald H. Shank.

DRGHF operates approximately twenty miles of railroad under a d.b.a. by the name of Denver & Rio Grande Railroad, AAR symbol (DRGR). The line was acquired in May 2000 from the Union Pacific

Railroad through an o.f.a. referenced by Docket No. AB-33 (Sub-No. 132X).

DRGR is a tourist-based passenger business operating a self-propelled rail-bus fondly referred to as the “Silver Streak”. *See*, photo as Petitioner’s Exhibit A. It was placed into operation in June 2009, with the approval of the Federal Railroad Administration (FRA). To date we have carried in excess of 4,500 very satisfied and supportive passengers. Additionally, DRGR carries less-than-carload (l.c.l.) intra-line freight for three local shippers, all with a 100% perfect safety record, including *not* a single derailment.

DRGHF continues to upgrade the physical plant in terms of track maintenance and improvements. Over two thousand wooden cross-ties have been replaced, dozens of sticks of rail and the roadbed improved in numerous locations. This work continues as of this date and the foreseeable future.

Within the text of Mr. Heffner’s “Statement of Facts”, he would lead you to believe that DRGHF/DRGR is simply storing “derelict or inoperative” railcars and/or equipment within the twenty miles comprising our rail line. At the South Fork Depot we have on display one (1) Pullman Palace Car built in 1901 in nearly its original condition, which was previously owned and displayed at the Henry Ford Museum in Dearborn,

Michigan. We give tours routinely and the public is wonderfully amazed at the historic cars condition. Additionally, we have on display one (1) original former D&RGW Caboose and one (1) 44 ton G.E. center-cab locomotive, both of which are under restoration for future use on the DRGR. Certainly nothing of a “derelict” nature as suggested.

If one travels west from the South Fork Depot, you won’t encounter a single stored “derelict” or “inoperable” rail car anywhere. We have a handful of fully-operable MOW push-carts and a hydraulic side-dump car regularly used in track work.

Next, on Page 4 of his Reply in Opposition, Mr. Heffner alleges that a spur track is the basis for my Petition. The track ***of which only a portion*** is contained within property purchased from RailAmerica/SLRG was identified within the text of my Petition for Declaratory Order as a contributing factor justifying the Board’s pending ruling as that spur contains railroad cars that have been restored within the boundaries of the subject property and utilized in regular passenger revenue service. Rio Grande Southern Railroad (RGS) and DRGHF do not dispute the fact that the ***portion*** of said spur located on the within the 1.84 acre subject parcel was retained by RailAmerica/SLRG, but it must be expressly understood that the remaining contiguous portion of said spur resides on additional

property abutting the subject parcel and said additional property is owned by me. The remaining portion of the spur that I own is leased to DRGHF and contains a steam locomotive under restoration, a boxcar containing numerous parts and assemblies, two former D&RGW flangers and a 1942 D&RGW caboose. RGS and DRGHF do not dispute Exhibits B and C. I knew what I bought and what was retained.

In addition to Mr. Heffner's inaccurate assertion that the spur is the basis of my Petition, he states that said spur is "*physically disconnected*" from our line in South Fork operating as the Denver & Rio Grande Railroad (DRGR). The FRA has classified DRGR as a "non-insular, tourist railroad". Non-insular means we are connected to the North American Rail System, which last time I checked also includes the SLRG. There is nothing "disconnecting" DRGR from SLRG and only a locked "derail" installed on the rail at our interchange point in South Fork exists at the request of the FRA interrupts free movement between railroads. That derail can be unlocked in a moments notice.

At the very bottom of Page 4 and the top of Page 5, Mr. Heffner refers you to a letter from SLRG VP Todd Cecil that he attached to his Reply as Exhibit D. Please refer to my letter responding to Mr. Cecil attached as Petitioner's Exhibit A. Then he initiates dialog claiming "to the best of

SLRG's knowledge and belief, etc” He then refers you to photographs attached as Exhibit E. The copies of five (5) photos that I received from Mr. Heffner behind the title page marked as Exhibit E are individually marked as Exhibit 8-A, 8-F, 8-E, 8-M and 8-N. These photos are all dated from January 2011?? Ironically, photos 8-A, M and N are of equipment not even located on the subject property! Photos 8-F and E are on the subject. Why isn't there an Exhibit (photos) reflecting equipment residing on the spur? Could this be because the car facing east (in the direction of the SLRG's Alamosa base of operation) happens to be my former Union Pacific Railway Post Office car, modified on that very spur for, and used by SLRG in their passenger operation during 2006 and 2007 as a concession car. Please refer to photos of “SLRG 5904” attached as Petitioner's Exhibit B. The other two cars located on SLRG's retained easement portion of the spur were brought there by SLRG at Ed Ellis's request. All three were to have been returned to South Fork and the DRGR. We have been denied use or the ability to work on those cars. Ellis ordered the placement of the cars on the spur in Monte Vista. He then attempted to extort \$250,000 as “a switch fee (\$100,000 per switch) and switch maintenance fee (\$25,000/year, per switch)”, claiming that if I didn't pay it by a specific date (now a few years ago), he would remove the switches. He

in fact ordered his Section crew to remove the switch entirely and relocate it to Fir, which is located on the top of La Veta Pass. The Section crew removed one (1) switch-point, thus disabling the switch into the Monte Vista spur track. Please refer to the Daily Operating Bulletin (DOB) No. 5244 attached as Petitioner's Exhibit C. Refer to Item No. 12. MP 269.19 – Switch Out Of Service – and the date 10/16/08 @ 16:23 hrs. "Aragon" is John Aragon, the Section Foreman. The switch is still disabled to this day, nearly three years later. Please refer to the photo of said switch and the missing point attached as Petitioner's Exhibit D.

Apparently Mr. Heffner hasn't made the connection between historic railroad equipment and the "HF" in DRGHF, that being "Historical Foundation". In addition to operating a tourist railroad on a very historic rail line under a name dating back to 1870 and rehabilitating equipment used for that purpose, we also do our best to save historic equipment from extinction. In doing so, some have a rather dilapidated appearance. We could have chosen not to acquire them, let them continue to deteriorate or be destroyed and allow history to be lost, but since we are an historical foundation an integral part of our mission is to save history, not promote its demise.

With respect to Mr. Heffner's statement and Footnote [6] regarding "criminal" proceedings against the Petitioner, I have included a copy of the

Decision and Order from the Monte Vista Municipal Court. Please review the courts ruling attached as Petitioner's Exhibit E. Please read the second, third and fourth paragraphs on Page 4 under the heading "Analysis and Conclusions of Law". In the second paragraph Judge Wilder admits that the "North Parcel" (the subject parcel in my Petition) has always been part of the railroad right-of-way. Then when you read on and discover that there was an oversight or "error" by the town in not even recognizing the existence of the railroad that predates the town. This "error" would lead one to question the position of SLRG (Ed Ellis) in failing to support its neighboring railroad. When you take into account that Ellis savors every opportunity to create problems for DRGHF and has even tried several times to "backdoor" our Foundation in hopes of taking our railroad from us in his typical underhanded, unethical manner, nothing surprises us. I suspect that at this point Mr. Heffner has his panties in an uproar as I may have insulted Ellis's character (or lack thereof). Probably just about as much as this Petitioner appreciated being branded a "criminal" @ Footnote 6.

I found Mr. Heffner's final sentence in the "Statement of Facts" section on Page 5 of his "Reply in Opposition" most interesting. "SLRG supports the City in its efforts to require compliance by Petitioner with its laws." Perhaps Mr. Heffner is unaware of his clients standing order (now

rescinded) to open the dump valve on the holding tank on one of SLRG's passenger cars, the "Lookout Mountain", and dump raw sewage directly on the track at speed. Given the fact that photographs exist depicting human waste and "paper" stuck to the underbody of the passenger train and given the fact that the City of Alamosa ordered Ellis to stop dumping raw sewage on the track within the City Limits of Alamosa, I suspect Ellis will attempt to weasel his way out of this. In fact, the several members of the operating crew onboard the SLRG passenger train to La Veta witnessed Mr. Edwin E. Ellis personally opening the valve. The Petitioner understands just how angry SLRG's track maintenance crew was and how they really "appreciated" having to work in raw sewage. Last time this Petitioner checked, OSHA and the EPA weren't too keen on dumping raw human waste on the environment. Lest we forget, "SLRG supports compliance with law." Oh yes, when asked by angry SLRG employees about this practice, apparently Ellis responded with "it's my railroad, I'll do what I want."

In Mr. Heffner's "Argument" portion of his Reply, he sights the necessity for two key elements of our activities in Monte Vista. For the record, Mr. Heffner attempts to minimize the "subject" of the Petition to the spur track of which only a portion is owned by SLRG. The Petition deals with the 1.84 acre parcel of land that was always in integral portion of the

railroad's right-of-way since before the existence of the town. Even within the court's April 1st ruling, Judge Wilder states that the North Parcel (the "Subject") has always been part of the railroad.

Again, Petitioner is responding *pro se* and therefore will not be sighting numerous excerpts from case law, but it doesn't require a law degree to recognize Mr. Heffner's intent. He simply belittles the Denver & Rio Grande Railroad's passenger operation that utilizes a piece of FRA approved former maintenance-of-way equipment (the "Silver Streak"), which has served the DRGR well. Perhaps the Board would appreciate the FACT that SLRG utilized a converted Ford van that came off the Canadian National Railway and was fondly call the "Meandering Moose". The "Moose" regularly carried passengers between Alamosa and Antonito. It was butt ugly, used a set of locomotive horns that nearly deafened its passengers and was nowhere near as efficient as the "Streak". Perhaps Mr. Heffner was unaware of the Moose. Heffner even states near the bottom of Page 7 in his Reply that SLRG also understands that at times Petitioner has allowed "speeders" to run on DRGR. Imagine that. Well organized excursions operating certified motorcars, licensed operators under a \$10MM insurance policy that book months in advance. Well Mr. Heffner might again be surprised to learn that SLRG does the exact same thing. In fact,

nearly every NARCOA (North American Rail Car Operators Association) sponsored event that runs “speeders” our railroad has run the SLRG either

the day before or the day after. Was there some point he was trying to make?

On Page 8 Mr. Heffner make an assertion regarding Exhibit E and the cars depicted in the photos. Again, none of those are the cars located on the spur and only two of the five photos are even addressing cars located on the subject property. The reference that DRGHF is using the subject property without SLRG’s permission is false and misleading. Once again, SLRG’s portion of the spur within the 1.8 acre subject parcel is not the subject in the Petition, but a contributing factor that supports the fact that the subject is served by a spur. Lest we forget that a major portion of the spur is owned by Donald H. Shank and leased to DRGHF (the Petitioner). Again, the SLRG retained portion of the spur contains cars placed there against Petitioner’s wishes by employees of SLRG and at the direction of SLRG management. The cars all should have been taken/returned to South Fork (Derrick) and spotted on DRGHF/DRGR track, where they came from.

Mr. Heffner’s assertion that this case is “right on point” with the *James Riffin-Petition for Declaratory Order*, FD 34997, is again false and misleading. The Creede Branch is contiguous with SLRG and interchanges

PETITIONER'S EXHIBIT "A"

Donald H. Shank

20 North Broadway Street, Monte Vista, CO 81144-1166

July 31, 2011

Mr. Todd N. Cecil
Vice President – Real Estate Development
San Luis & Rio Grande Railroad
118 S. Clinton St., Suite 400
Chicago, IL 60661

SENT VIA CERTIFIED U.S. MAIL – RETURN RECEIPT REQUESTED
SENT VIA Email to: cecilt@iowapacific.com

Re: Railroad Track at Monte Vista, CO

Dear Mr. Cecil:

I am in receipt of your letter dated July 22, 2011, advising me of SLRG's position regarding the storage and removal of railcars and/or railroad related equipment on a portion of a spur track identified as ICC Track # 15 located in Monte Vista, CO.

Your letter also reflected request("s") for this removal having taken place "over recent months". Considering you called me just two to three weeks ago to discuss this very issue, I believe the inference to a multi-month situation is unfair and misleading.

Further, you stated that I have "refused" to remove the railroad equipment from this track. That is simply untrue. For the record, I have never refused. Should you care to accurately recollect, I simply stated to you in our only phone conversation regarding this issue, that when you called on my cell phone that I was quite busy with Denver & Rio Grande Railroad passengers and their safe boarding and did not have time to discuss anything with you at that time. I don't believe this can be construed as a refusal of anything, other than having the time to talk.

That said, your letter has asked for my acceptance of SLRG's final request that I immediately remove all railroad cars and other equipment from this track and further warns of further action being taken should I fail to do so.

Again, for the record, the railcars in question were placed on that spur by SLRG crew members at the direction of your railroad's President, Edwin Ellis, years prior to your employment with his company(s). These cars were to have been taken ***back*** to South Fork, CO, and placed on Denver & Rio Grande Railroad tracks, ***where they came from!*** At the request of Edwin Ellis, these cars were brought from South Fork to be used on the SLRG, one of which was rebuilt on this very spur and placed into revenue service during 2006 and 2007 as the passenger train's concession car. Edwin Ellis failed to live up to

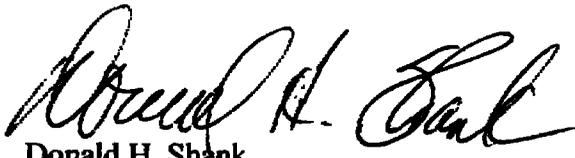
his end of the agreement and failed to return the equipment to South Fork. Now you are demanding their removal.

This gets real simple here Mr. Cecil. Bring all my equipment back to South Fork that SLRG employees brought to Monte Vista, shove it up the Denver & Rio Grande Railroad's mainline just enough to clear our connection point and we'll all be happy. SLRG will be living up to their end of the agreement and SLRG will have their portion of the spur track in Monte Vista clear of equipment.

Whatever would make you or anyone else at SLRG think that I wanted any rail equipment that SLRG brought from South Fork to be left in Monte Vista? That denies me and the D&RG RR its use.

I trust you now fully understand that I didn't place those cars on SLRG's portion of the spur. SLRG did. Bring them back to South Fork and stop threatening me with "further action".

Sincerely



Donald H. Shank

PETITIONER'S EXHIBIT "B"



SILRO

COTTON

REELS

AL-111

7/29/08

PETITIONER'S EXHIBIT "C"

**DAILY OPERATING BULLETIN
NO. S244****SAN LUIS & RIO GRANDE RAILROAD
EFFECTIVE 00:01 SEPTEMBER 01, 2011****TO: TRAINS STARTING AND YARD ENGINES****AT: ALAMOSA, COLORADO****ALAMOSA SUBDIVISION**

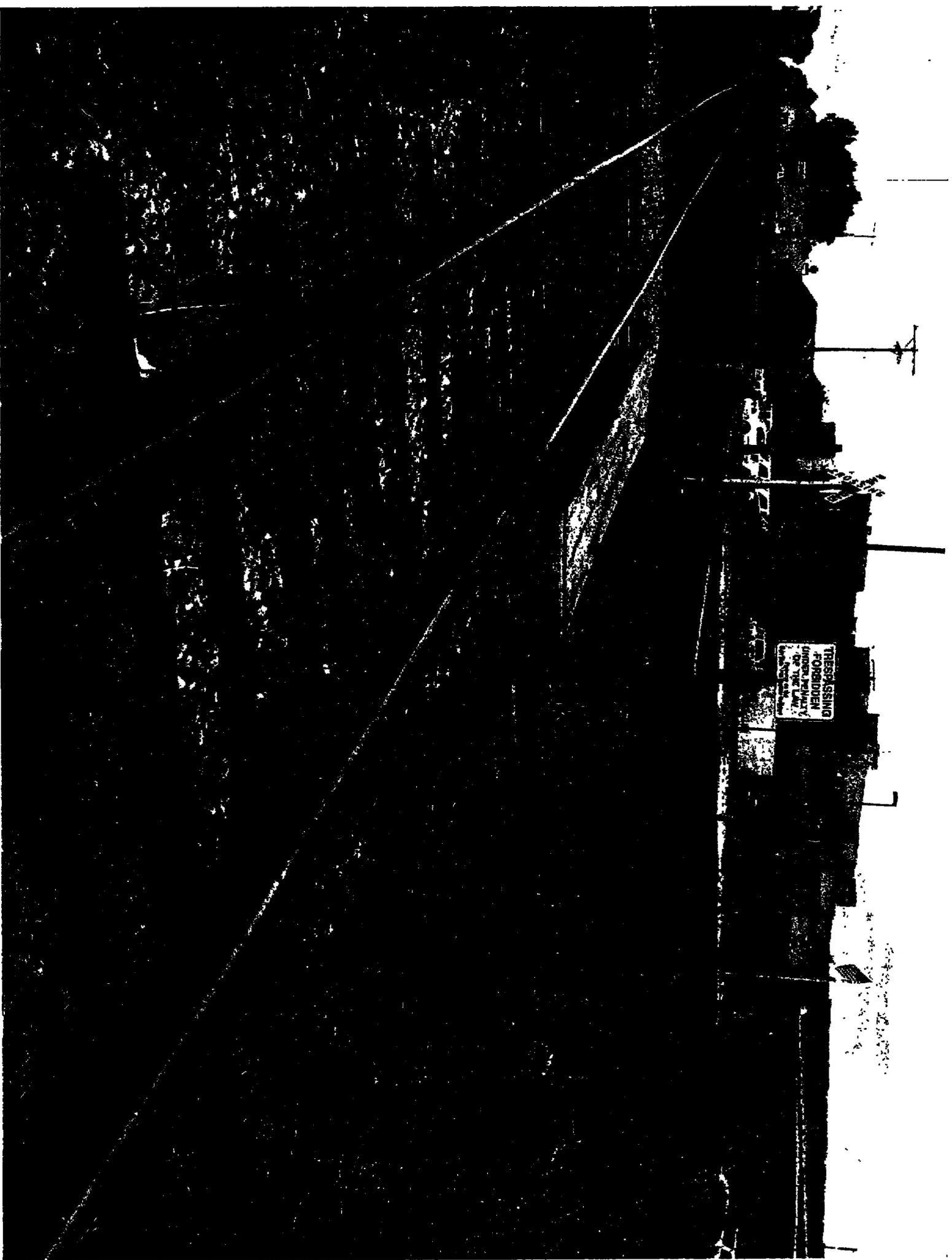
1. MP 175.00 TO MP 180.00 – DO NOT EXCEED 10MPH. ALL TRAINS. NO FLAGS DISPLAYED – ARAGON 5/25/11
2. MP 176.6 LOOK OUT UNEVEN FOOTING ORDER, MP 176.64 BRIDGE DECK FOOT PATH HAS A MISSING PLANK ON NORTH SIDE OF TRACK- GILLILAND
3. MP 215.2 TO MP 222.00. – DO NOT EXCEED 20 MPH ALL FREIGHT TRAINS, 25 MPH PASSENGER TRAINS - NOFLAGS DISPLAYED. – ARAGON 01/06/10
4. MP 214.37 EAST SIDING SWITCH IN SIERRA 400 FEET IN USE DERAIL SET, REST OF SIDING OOS – ARAGON 12/29/10
5. MP 214.8 SIERRA. DO NOT USE CATWALK, IN NEED OF REPAIR – ARAGON 08/25/11
6. MP 227.55 – 701 SWITCH (EAST CONTINENTAL SPUR SWITCH) OUT OF SERVICE. – J ARAGON 3/23/11
7. MP 227.6 (FORT GARLAND CROSSING) – DO NOT EXCEED 10 MPH ALL TRAINS. NO FLAGS DISPLAYED. – ARAGON 10/27/09
8. MP 251.00 LOOKOUT FOR UNEVEN FOOTING. BRIDGE DECK MISSING PLANKS ON SOUTH SIDE OF TRACK. ARAGON 07/06/10
9. MP 251.00 TO MP 252.00 – DO NOT EXCEED 10 MPH. ALL TRAINS. NO FLAGS DISPLAYED – CYRUS 5/18/11
10. MP 262.80 TO MP 269.00 DO NOT EXCEED 10 MPH, NO FLAGS DISPLAYED. DUE TO TIE CONDITION – J ARAGON 3/15/11
11. MP 268.80 LOOKOUT FOR MEN AND EQUIPMENT NEAR TRACK, APPROACH WITH CAUTION. – K LINDSEY 10/06/10
12. MP 269.19 SWITCH OUT OF SERVICE. NO FLAGS DISPLAYED. – ARAGON 10/16/08 @1623
13. MP 269.30 TO MP 299.30 - MAIN TRACK OUT OF SERVICE – CYRUS 3/28/2011

AT: ALAMOSA, COLORADO**CUMBRESSUBDIVISION****AT: ALL SUBDIVISIONS**

1. IN CASE OF CONFLICTING RESTRICTIONS, THE LOWEST SPEED WILL GOVERN. - MCCORMICK 10/06/09

OK: DATE: 9/01/11 TIME: 0001 DISPATCHER: DRG

PETITIONER'S EXHIBIT "D"



PETITIONER'S EXHIBIT "E"

IN THE MUNICIPAL COURT
CITY OF MONTE VISTA, CO
CASE NO. 2010-0936
CASE NO. 2010-0937

The People of the City of Monte Vista,)
Plaintiff)

) DECISION AND ORDER

v.)

Donald H. Shank,)
Defendant)

FACTS AND HISTORY

The Defendant in both of these cases is Donald Shank, one and the same person as Donald H. Shank. The word "Defendant" refers to him as an individual. Two related parties, the Rio Grande Southern Railroad company, LLC, a Colorado limited liability company and the Denver & Rio Grande Railway Historical Foundation, a Colorado not-for-profit corporation, are not named defendants.

There are two parcels involved in these two cases, described as follows:

The North Parcel – This parcel, a portion of the original railroad right-of-way, was purchased by the Defendant in early 2005 and it is the Parcel involved in Case No. 2010-0936. The Parcel is approximately described as follows: Bounded on the north by a line parallel to and 20' south of the centerline of the main line of the railroad, on the west by U.S. Hwy. 285, on the south by the south boundary of the original railroad right-of-way and on the east by a point approximately 60 feet west of the switch that serves Spur Track ICC No. 15.

The South Parcel – This is the Parcel involved in Case No. 2010-0937 and was evidently never a portion of the original railroad right-of-way. It was also purchased by the Defendant in 2005. It is approximately described as follows: Lots 1, 2, 3 and 20, the west half of Lot 19, 18 and 17, all in Block 1, and a tract north of these Lots, in the Town (now City) of Monte Vista.

As of 2005 and thereafter, both of these Parcels were zoned CB (Commercial Business).

The Defendant individually placed 11 railcars on the North Parcel in 2005, two on blocks and 9 on panel track (track that is not connected to a main line). He placed another 17 railcars on this Parcel in 2010, either on blocks or panel track.

The Defendant individually placed 4 railcars on the South Parcel in 2005, either on blocks or panel track. No additional railcars have been placed on the South Parcel.

In 2008 or 2009, the City of Monte Vista (the "City" herein) adopted amendments to its zoning Ordinances (the Amendments" herein). Both Parcels remained in the Commercial Business district but the City added provisions directed specifically at railcars. No complaints were filed against the Defendant (or any entities) until November 19, 2010. On that date, the Defendant was served with 2 Complaints directing his individual appearance. The Defendant appeared, was advised of his rights and was granted a continuance. The Defendant retained Ronald E. Howard, Attorney at Law, on both cases (hereafter, "Defendant's Attorney") and the Defendant's Attorney filed an Entry of Appearance and Plea of Not Guilty in both Cases.

Complaint No. 2010-0936 charges that the Defendant, on November 19, 2010, violated the amended Section 12-17-110 (3) and (5) of the City Code. Specifically, he was charged with the unlawful storage of 28 railcars on the North Parcel in a Commercial Business district other than on a railroad spur connected to the mainline of the railroad. Complaint No. 2010-0937 is almost identical except that it involves the 4 railcars located on the South Parcel.

Thereafter, the Defendant's Attorney filed a Motion to Dismiss both Complaints based entirely on Federal pre-emption. The Motion included a Supporting Brief. The City Attorney filed a Response shortly thereafter. The Court denied dismissal and the alternative request that the Court stay these proceedings and refer the matter to the U.S. Surface Transportation Board for a possible declaratory judgment.

The Defendant waived his Right to a Speedy Trial and filed a Witness and Exhibit list. The City Attorney immediately filed a Motion in Limine requesting that the Court disallow the testimony of one defense witness. The Court substantially granted this Motion. The City Attorney then filed an Amended Motion in Limine on March 15, 2011 to exclude testimony by telephone. The Court never had an opportunity to rule on this Motion but at trial (the next day), no ruling proved necessary.

The trial began and ended on Wednesday, March 16, 2011. The trial consisted of a substantial number of verbal stipulations including all essential factual elements of the charges. The only oral testimony relied upon by the Court was the testimony of the Defendant regarding how many railcars were placed on which Parcels and on what approximate dates. All of the City's Exhibits were admitted into evidence. The Court appreciates the professionalism shown by both counsel in entering into the stipulations.

DISCUSSION

The Court reviewed all of Chapter 12 of the City Code (Zoning) with the exception of the Sections dealing with signs. Article 1 is entitled "General Provisions" and Section 12-1-10 is entitled "Definitions". The following definitions were considered significant.

The definition of "Permitted Use" reads as follows: "Permitted use means a use specifically allowed in one (1) or more of the various zone districts without the necessity of obtaining a use permit." A permitted use is a vested property right.

Table 12-3 in Section 12-5-20 is a "Use Chart" that contains 58 "Use Groups". Use Groups define all of the possible uses of land in the City. The Chart shows all of the various zone districts, all permitted uses, special review uses and, by omission of either of those uses, all prohibited uses, in every district. To this Court, the word "specifically" compels a narrow interpretation of the various uses.

The definition of "Nonconforming use" (not including irrelevant language) reads as follows: "Nonconforming . . . use means a lawful existing . . . use at the time this Chapter or any amendments thereto become effective which does not conform to the requirements and provisions of this Chapter." The Court considers a nonconforming use to be a significant vested property right. As a result, this Court must give far more than lip service to that right.

The definition of "Special review use" reads as follows: "Special review use means any use which, although not permitted outright in a particular district, may be permitted by the City Council upon recommendation by the Planning and Zoning Commission in accordance with the standards and procedures of this Chapter". The Court believes that a Special Review Use does not create a vested property right.

The following Sections of the City Code were considered pertinent. Some of these may only be identified by number and title.

Sections 1-4-20 and 12-1-90: Noted only to show the seriousness of the possible penalties.

Section 12-4-50: Zoning Map Amendment. Paragraph (6)(a), Grounds for Request, reads as follows: "Evidence that the property was not properly zoned when existing zoning was imposed".

Sections 12-3-230, 250, 260, 290 and 300: All of these Sections deal with nonconforming uses. Several of these Sections are significant factors in this decision.

Section 12 -2 -30: Article 2 deals with the Board of Adjustment. That Section reads in part as follows: (b) The Board of Adjustment shall have the following duties: (2) To hear and decide whether a specific use is expressly permitted in a use group as specified in Article 5 of this Chapter." The underlined words very clearly require a very narrow interpretation of the definition of "permitted use".

Section 12-3-200: Time Limitation of Use Permit: This Section is cited because it further illustrates that the concept of "Special Use Review" does not establish a vested right.

Sections 12-13-10, 20 and 30. These Sections and those immediately following create the Commercial Business (CB) District and provide some of the limitations that apply in that District. However, the vast majority of the limitations, as with all of the districts, appear in

Table 12-3, the Use Chart. The Court also notes that while Sections 12-13-10 and 50 and Table 12-11 are perfectly compatible with Monte Vista's central business district, their applicability to the North Parcel is a bit of a challenge.

Section 12-17-110: Both of the Complaints are based entirely on this Section. Because of the Amendments, the Court had to analyze both the pre and post Amendment versions.

ANALYSIS AND CONCLUSIONS OF LAW

These cases represent the latest collision between the police powers of the City and the private property rights of its citizens. The Court is tasked with legally resolving the conflict. To a degree, part of the process involves trying to determine the intent of the City with respect to the zoning Ordinances.

The Court cannot treat the North Parcel and the South Parcel in the same way. The North Parcel has always been a part of the railroad right of way and most of the South Parcel has not. The Court will address the North Parcel first.

The railroad existed before the City and has always occupied a significant amount of acreage within the City. So, the railroad represents a substantial business in this City. By law, some property rights must exist with respect to the railroad. Prior to the Amendments, what were those property rights?

The answer appears to be - none. Only permitted uses and nonconforming uses can constitute vested property rights. Special review uses are not vested. Very surprisingly, the City zoning Ordinances, both before and after the Amendments, do not even acknowledge the existence of the railroad. There are no Permitted uses and no districts that allow a railroad. As a result, there are no vested property rights associated with the railroad except any "after the fact" nonconforming uses. Table 12-3, with all of its detailed uses, does not list or imply a railroad use. This omission denies the existence of any vested property rights associated with that use.

Nonetheless, it would be unfair for the Court to conclude that it was the intent of the City to deprive such a substantial business of any vested property rights. It is legally more appropriate for the Court to conclude that the omission was an oversight or an "error".

The Court cannot speculate on the intent of the City in the face of an error. So, to give any meaning to the whole subject, the Court concludes that the City's intent was to treat the conduct of the railroad business as a Permitted Use and that any activities engaged in by the railroad that would normally be associated with the operation of a railroad are permitted uses. For purposes of these cases (but not necessarily the subject of pre-emption), the Court concludes that the storage and rehabilitation of railcars is not an abnormal use of railroad property.

The failure of current or prior owners of the railroad to request an amendment to the error in Table 12-3 is no more fatal to the Defendant's rights than the City's failure to correct the error is fatal to its police powers. Consequently, the Defendant did not violate the City Zoning Ordinances on the North Parcel during the period preceding the Amendments.

Subsequent to the Amendments, the fundamental question is the power of the City to regulate and prohibit certain current uses of the North Parcel. The only answer to that question is hidden somewhere in the subjects of property rights, police powers and Federal pre-emption. The Court therefore finds that the Amendments do not violate established property rights and that the Amendments represent a valid exercise of the City's police power. Federal pre-emption will be left to some other tribunal.

The end result with respect to the North Parcel is that, of the 28 railcars placed on that Parcel, 11 of them were placed there lawfully, before the Amendments, and their continuing presence on that Parcel is now protected as a valid nonconforming use. The other 17 railcars were placed on that Parcel after the adoption of the Amendments and are therefore not protected as a nonconforming use. The Court finds the Defendant Not Guilty with respect to the 11 railcars placed on the North Parcel before the Amendments. The Court finds the Defendant Guilty in Case No. 2010-0936, with respect to the 17 railcars placed on the North Parcel after the Amendments.

As noted earlier, the South Parcel is legally different. The difference is that this Parcel has been historically used for commercial and not railroad purposes. The fact that it was zoned Commercial Business does not represent an error. The fact that it was not zoned in error provides the owner with at least some vested property rights. So, where the South Parcel is concerned, the only important question is whether are not the placement of the 4 railcars prior to the Amendments was a violation of the City zoning Ordinances. If the placement of the railcars was a violation and unlawful before the Amendments, their continuing presence could not now be a nonconforming use. If the placement was not a violation and was lawful before the Amendments were adopted, their continuing presence constitutes a valid non-conforming use.

The Court's review of the zoning Ordinances as they existed prior to the Amendments did not identify a specific prohibition against placement of the railcars on the South Parcel. The permitted uses in the Commercial Business District prior to the Amendments could be construed to validate the placement of the railcars, particularly 18-302(9) and (14). The Amendments deal specifically with railcars, endeavor to avoid Federal pre-emption and create the prohibitions that gave rise to these Cases. Finally, while the nearly 6 year delay in prosecuting these alleged violations does not necessarily constitute a defense, that delay leads the Court to believe that before the Amendments, even the City did not believe that it could convict the Defendant for the placement of the original 11 railcars on the North Parcel and the 4 railcars on the South Parcel.

As a result of all of the above, the Court cannot conclude beyond a reasonable doubt that the original placement of the 4 railcars on the South Parcel was unlawful. Therefore, the Court must find that, after the Amendments, the four railcars on the South Parcel remained lawful as a nonconforming use. Accordingly, the Court finds the Defendant Not Guilty in Case No. 2010-0937.

To dispel any suspicion that this decision represents some sort of compromise verdict, the parties are advised that, no matter how many railcars were placed before and after the Amendments, it would not change the Court's legal conclusions in the slightest.

The Clerk of the Court is instructed to consult with the attorneys and schedule a date and time for sentencing in Case No. 2010-0936. That date should be at least 31 days from the date of this Order. In the interim, the Defendant may perfect an appeal in the state courts, in the Federal courts or with the U.S. Surface Transportation Board.

Done and signed this 1st day of April, 2011.

By the Court:

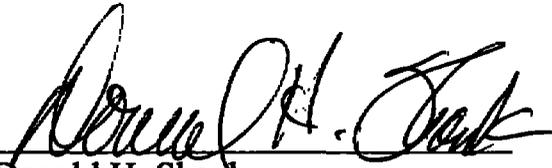
Municipal Judge of Monte Vista, Colorado

CERTIFICATE OF SERVICE

I, Donald H. Shank, hereby certify that I have mailed a copy of this
Response to a Reply in Opposition to Denver & Rio Grande Railway
Historical Foundation's Petition for Declaratory Order (FD 35496) to the
following parties by first class U.S. Mail this ^{7th D.H.S.} day of October 2011:

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