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KARL MORELL

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December 19, 2003

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BY HAND DELIVERY

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

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Re: STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company -- Abandonment Exemption -- In Rio Grande and Mineral Counties, CO

Dear Secretary Williams:

Attached for filing are the original and ten copies of the Comments of Adjacent Land Owners in Support of the Petition to Reopen.

Please time and date stamp the extra copy of the Comments and return it with our messenger.

If you have any questions, please contact me.

Sincerely,

Karl Morell

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-33 (SUB-NO. 132X)



UNION PACIFIC RAILROAD COMPANY
-- ABANDONMENT EXEMPTION --
IN RIO GRANDE AND MINERAL COUNTIES, CO

COMMENTS OF ADJACENT LAND OWNERS
IN SUPPORT OF PETITION TO REOPEN

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Attorney for:
The Adjacent Land Owners

Dated: December 19, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-33 (SUB-NO. 132X)

UNION PACIFIC RAILROAD COMPANY
-- ABANDONMENT EXEMPTION --
IN RIO GRANDE AND MINERAL COUNTIES, CO

COMMENTS OF ADJACENT LAND OWNERS
IN SUPPORT OF PETITION TO REOPEN

Elk Creek Ranch, Inc. and Wason Ranch Corporation (the "Coalition")¹ submit these comments in support of the petition to reopen this proceeding ("Petition") filed by the City of Creede ("Creede") on October 14, 2003.² As is demonstrated in the Petition and the attached documents, the offer of financial assistance ("OFA") filed by the Denver & Rio Grande Railway Historical Foundation ("D&RG") contained false and fraudulent information as to the financial condition of D&RG and its president, Donald H. Shank ("Mr. Shank"). The evidence submitted by Creede also demonstrates that D&RG fraudulently misled the Board into finding that the OFA was for continued rail freight service.

¹ Nearly a third of the right-of-way involved in this proceeding traverses through Elk Creek Ranch and Wason Ranch. Elk Creek Ranch is located approximately between Mileposts 300.85 and 302.15, and Wason Ranch, about four miles in length, is located immediately adjacent to the City of Creede.

² By decision served November 3, 2003, in this proceeding, the Surface Transportation Board ("Board") accepted the pleading filed by Creede as a petition to reopen and extended the date for parties to respond to December 3, 2003. By decision served November 26, 2003, the Board further extended the response date until December 19, 2003. The Coalition believes that it is entitled to file these Comments in support of Creede's Petition by the December 19th response date. In the event the Board reads its November 3rd and 26th decisions or its Rules of Practice otherwise, the Coalition respectfully requests that these Comments be treated as a separate petition to reopen this proceeding. Under the Board's Rules, such a petition may be filed by a person at any time. 49 C.F.R. 1115.4.

SUMMARY OF ARGUMENTS

More than four and a half years have passed since the Board granted the OFA and not a single train has traversed the Creede Branch (the "OFA Line"), the OFA Line remains un-rehabilitated, and Union Pacific Railroad Company ("UP"), the seller of the OFA Line, remains largely unpaid. The inability of D&RG to pay UP, rehabilitate the OFA Line and initiate rail service is hardly surprising given the newly discovered evidence submitted by Creede. Creede's evidence lays bare the pervasive fraud committed by D&RG and Mr. Shank in their OFA filings before this Board. The newly discovered evidence demonstrates that D&RG and Mr. Shank did not have the financial resources to acquire, rehabilitate and operate the OFA line at the time the OFA was filed, nor do they have the necessary resources today.

Moreover, the lack of freight operations on the OFA Line is not simply a consequence of D&RG's and Mr. Shank's financial shortcomings, but rather is attributable to the utter lack of need for freight rail service in the areas surrounding the OFA Line. As Creede's evidence demonstrates, D&RG and Mr. Shank fraudulently mislead the Board into finding that there was a need for freight rail service along the OFA Line and that D&RG was able to meet that need. Creede's new evidence establishes that there was no need for rail freight service on the Line at the time of the OFA, there is no need for such service today and there will be no need in the foreseeable future.

Rather than restoring rail service as he had promised the Board, Mr. Shank has utilized the Federal preemption accorded to D&RG by virtue of the OFA award to engage in the practice of leasing real estate along the OFA Line and otherwise harassing the citizens of Creede and other adjacent land owners. Because of the disruptive and deleterious effect the OFA award is

having on the local community, the Coalition joins Creede in respectfully urging the Board to reopen this proceeding and to revoke the OFA.

**CREEDE HAS SATISFIED THE CRITERIA
NECESSARY FOR REOPENING THIS PROCEEDING**

Pursuant to the provisions of 49 U.S.C. § 722(c) and the corresponding regulations in 49 C.F.R. §§ 1115 and 1152.25(e)(4), the Board may, on its own initiative, or on a person's request, reopen a proceeding because of material error, new evidence, or substantially changed circumstances. *Tongue River RR Co. – Constr. & Oper. – Ashland-Decker, MT*, 2 S.T.B. 735, 737 (1997); STB Docket No. AB-441 (Sub-No. 2X), *SWKR Operating Co. – Abandonment Exemption – In Cochise County, AZ* (not printed), served September 29, 1998. The newly discovered evidence submitted by Creede demonstrates that the Board's decision granting the OFA in this proceeding was induced by false and misleading information.

The OFA provisions set forth at 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27, require that an offeror, such as D&RG, demonstrate that it is financially responsible, that the OFA is *bona fide* and that the offer is for continued rail freight service. See *Hayfield Northern v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 629-31 (1984); *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 712 (D.C. Cir. 1994). These statutory requirements were specifically adopted by Congress to prevent parties, such as D&RG, with other agenda, from acquiring rail lines through forced sales under Section 10904. As the evidence submitted by Creede demonstrates, D&RG and Mr. Shank knowingly submitted false financial information and intentionally mislead the Board into finding that there is a need for continued rail freight service on the OFA Line.

**D&RG AND MR. SHANK SUBMITTED FALSE AND
FRAUDULENT FINANCIAL INFORMATION**

Pursuant to the provisions of Section 10904(d)(1), the Board must find that an offeror is a "financially responsible" person. In order for the Board to make that finding, the offeror must

demonstrate that it has the financial resources necessary to pay the net liquidation value (“NLV”) of the line, perform any necessary repair or rehabilitation and operate the line for at least two years. See Docket No. AB-167 (Sub-No. 1094), *Chelsea Property Owners – Abandonment – Portion of the Consolidated Rail Corporation’s West 30th Street Secondary Track In New York, NY* (not printed), served December 9, 1992.

In an attempt to demonstrate that it was financially responsible, D&RG submitted to the Board an unaudited Statement of Financial Condition, dated as of November 30, 1998, and a Statement of Financial Condition for Mr. Shank, as of March 15, 1999.³ As Creede’s Petition reveals, however, virtually none of the assets listed in D&RG’s Financial Statement were owned by D&RG or in its possession at the time of the filing of its OFA.

The D&RG Financial Statement listed seven pieces of rolling stock with a purported collective value of \$48,500. At his August 3, 2001, deposition, Mr. Shank admitted that the 1881 RGS Narrow Gauge Passenger Coach was never acquired by D&RG and that the 1880 Passenger Coach and 1883 Pullman Car were pledged but not in the possession of D&RG at the time the OFA was filed.⁴ Implicit in Mr. Shank’s deposition testimony is the assertion that as of August 3, 2001, D&RG continued to have in its possession the other four pieces of rolling stock with a purported collective value of \$21,000.

D&RG’s 1999 Federal tax return (“Tax Return”) and 2001 Statement of Property Declaration to the State of Colorado (“Property Declaration”), however, paint a vastly different picture and directly contradict the representations made to this Board in the OFA filing and Mr. Shank’s sworn deposition testimony. The Tax Return lists only two pieces of rail equipment as

³ Copies of the Statements are set forth at pages 47 through 53 of Creede’s Submission of Materials Compiled During U.S. District Court Proceedings, attached to the Petition. Further references to the documents submitted by Creede in these Comments will be Creede Documents at ____.

⁴ Creede Documents at 253.

being owned by D&RG during 1999: the 1880 caboose and the 1890 dining car.⁵ Moreover, in the OFA filing, D&RG represented to the Board that the value of those two pieces of equipment was \$15,000, as of November 30, 1998, whereas the Tax Return lists the combined book value as \$3,200. Furthermore, in the OFA filing, the 1880 caboose was identified as being owned by D&RG at least as of November 30, 1998, whereas according to the Tax Return that caboose was acquired on August 9, 1999, or four months after the OFA was filed.⁶ The Property Declaration, signed by Mr. Shank on May 14, 2001, under penalty of perjury, confirms that the only railroad equipment owned by D&RG was the 1889 caboose and the 1890 dining car, and that these two pieces of equipment had a collective value of \$3,200.⁷

In summary, D&RG fraudulently represented to the Board that, at the time of its OFA filing, it owned \$48,500 worth of rolling stock. In actuality, D&RG owned only the 1890 dining car with a book value of \$2,500, at the time of the OFA filing, and that by 2001, the only rolling stock owned by D&RG were a caboose and a dining car, each well over a century in age, with a combined value of \$3,200.

In the OFA filing, D&RG also claimed that it owned railroad memorabilia and artifacts with a value of \$66,000 and model railroad collections with a combined value of \$152,000.⁸ At his deposition, Mr. Shank continued to assert that the memorabilia and artifacts were legally owned by the D&RG even though he acknowledged that D&RG had not taken possession of any of these items nor did D&RG have these items insured.⁹ Mr. Shank further acknowledged that the model railroads were owned by his father, brother and himself and that, as of August 3, 2001,

⁵ Creede Documents at 35.

⁶ Compare Creede Documents at 35 with 48. In addition, the Tax Return and Property Declaration state that the Creede Branch was acquired by D&RG on August 10, 1999 whereas UP notified the Board by letter dated May 26, 2000 that the sale was consummated on May 24, 2000.

⁷ Creede Documents at 171.

⁸ Creede Documents at 48.

D&RG had not taken physical possession of the model railroads. Once again, D&RG's Tax Return and Property Declaration paint a vastly different picture. According to the Tax Return, the only tangible property owned by D&RG on the date of its OFA filing, other than the 1890 dining car, was a "Link & Pin" acquired for \$400 on February 2, 1999, or two months after the date of the Financial Statement. The only other personal property acquired by D&RG from the date of the OFA filing through May 14, 2001 – the date of the Property Declaration – was \$3,200 in miscellaneous railroad fixtures.

In addition, D&RG represented to the Board that, as of November 30, 1998, it held cash and cash equivalents of \$23,194.07 and possessed 7.375 acres of land in Silverton, CO valued at \$35,000. There appears to be no documents uncovered by Creede which would verify or dispute the amount of cash possessed by D&RG at the time of the OFA.¹⁰ According to the Tax Return, D&RG acquired the land on January 3, 1999 with a value of \$34,000.¹¹ The land no longer appears on the Property Declaration, which is dated May 14, 2001.¹² Nevertheless, at his August 3, 2001 deposition, Mr. Shank testified under oath that D&RG continued to own the land.¹³

In summary, D&RG fraudulently represented to the Board that it had assets of \$323,694.07, liabilities of \$3,900, and a net worth of \$319,794.07. The documents uncovered by Creede, however, reveal that, at best, D&RG's net worth was \$21,794.07, as of the date of its Financial Statement, and \$56,194.07, as of the date of its OFA filing.

⁹ Creede Documents at 253-54.

¹⁰ In its Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, dated March 20, 1998, D&RG informed the IRS that, prior to paying the \$465 application fee, it had \$468.66 in its bank account. Creede Documents at 20.

¹¹ Creede Documents at 35. While D&RG apparently owned the land at the time of the OFA filing, the Financial Statement is nevertheless false in that the land was not acquired until after the date of the Statement.

¹² Creede Documents at 171.

¹³ Creede Documents at 254.

Because D&RG's net worth, even at the fraudulently inflated level, fell well short of the NLV of the OFA Line, Mr. Shank pledged to donate \$400,000 to D&RG to be utilized for the acquisition of the OFA Line. In support of that pledge, Mr. Shank submitted to the Board an unaudited Statement of Financial Condition, showing that Mr. Shank had a net worth of \$1,591,169.¹⁴ Not surprisingly, Mr. Shank's Statement is as fictitious as the Statement filed by D&RG.

At his August 3, 2001 deposition, Mr. Shank admitted that he had not made the contribution to D&RG and that he was not in a financial position to do so.¹⁵ When asked for an explanation, Mr. Shank categorically refused to answer virtually all questions as to his inability to make the contribution and the nature or status of the purported \$1,957,600 in assets identified in the Financial Statement he submitted to the Board.¹⁶

Mr. Shank's sworn testimony concerning the California "Personal Residence" is telling as to the veracity of the remainder of his Financial Statement. In the Statement submitted to the Board, Mr. Shank listed the Personal Residence as being jointly owned with a value of \$495,000. The OFA filing, in turn, expressly states that "[t]here is currently equity of \$433,000 in Mr. Shank's residence, which is available for equity financing."¹⁷ At his August 3, 2001 deposition, Mr. Shank testified under oath that the California Personal Residence had been jointly owned by himself and his former wife at the time of the OFA filing.¹⁸ Ten months earlier, however, Mr. Shank had signed a California divorce judgment in which he acknowledged that the residence

¹⁴ Creede Documents at 50-53.

¹⁵ Creede Documents at 241-42.

¹⁶ Creede Documents at 242-46.

¹⁷ Creede Documents at 45.

¹⁸ Creede Documents at 245.

had all along been the separate property of his former wife and “that at no time was title ever transferred to the parties jointly or as community property.”¹⁹

Furthermore, the only assets listed in the OFA filing as being owned by Mr. Shank which appear in the California divorce judgment are: (1) an interest in the Air Park Village, with a stated value of \$250,000 in the OFA but no specified value in the judgment; (2) the Highway 160 acreage, with a stated value of \$450,000 in the OFA but no specified value in the judgment; (3) a Ford Explorer, with a stated value of \$18,000 in the OFA but which was leased from G.E. Capital according to the judgment; (4) ancient coins, with a stated value of \$213,000 in the OFA but which were identified as being worth \$6,500 in the judgment.²⁰ Assuming that the Air Park Village and Highway 160 acreage values in the OFA are accurate, which is highly dubious given the vastly inflated valuations for the other assets, Mr. Shank owned or had an interest in assets valued at about \$706,500 and not \$1,957,600 as represented in the OFA. In addition, Mr. Shank had liabilities in excess of \$390,275 according to the judgment.²¹ In the OFA filing, Mr. Shank listed liabilities of \$366,431.²²

Taking the information contained in the various documents in a light most favorable to Mr. Shank, Mr. Shank had a net worth at the time of the OFA of about \$316,225 and not \$1,591,169 as represented to the Board. If one deflates the claimed \$700,000 value for the Air Park and Highway 160 properties in a manner consistent with the other flagrant exaggerations uncovered by the Creede Documents, Mr. Shank more than likely had a marginal net worth at best at the time of the OFA.

¹⁹ Creede Documents at 361.

²⁰ Creede Documents at 353-56.

²¹ Creede Documents at 356-58.

²² In the OFA filing, Mr. Shank claimed to have a net worth of \$1,591,169, as of March 15, 1999. One year earlier, however, Mr. Shank was forced to enter into a Stipulation In Lieu of Judgment because Mr. Shank was unable to pay a credit card bill totaling \$10,580.38. See Exhibit 1.

The deceit by D&RG and Mr. Shank does not stop with the fraudulent financial information. In the OFA, D&RG represented to the Board that D&RG had a verbal commitment from the Colorado Department of Transportation (“CDOT”) to provide a grant of \$1 million for the rehabilitation of the OFA Line.²³ No such verbal commitment was ever made and the funds were never granted to D&RG.

Aside from the explicit misrepresentation that CDOT had made a commitment to grant D&RG \$1 million for rehabilitation work on the OFA Line, implicit in that statement is a representation to the Board that the OFA Line only needed \$1 million in rehabilitation.²⁴ The Creede Documents, however, disclose that the level of rehabilitation necessary on the OFA Line was grossly misrepresented to the Board.

As just noted, in 1999, Mr. Shank represented to the Board that the OFA Line needed \$1 million in rehabilitation work. In his June 21, 2001 deposition, Mr. Shank stated that the cost of rehabilitating the OFA Line would be in the vicinity of \$700,000.²⁵ One year later, Mr. Shank had filed three applications with the CDOT for funding the rehabilitation costs of the OFA Line. In the three applications, Mr. Shank represented to CDOT that the cost of rehabilitating the OFA Line was \$10,295,390.²⁶ Notwithstanding the precarious financial condition of D&RG at the

²³ Creede Documents at 46.

²⁴ As previously noted, an offeror must demonstrate that it is financially capable of acquiring, rehabilitating, and operating the line for at least two years. Since the fraudulent financial information submitted by D&RG and Mr. Shank barely covered the NLV of the OFA Line, the CDOT grant presumably was intended to cover the full cost of the rehabilitation work D&RG had estimated as necessary to reopen the OFA Line.

²⁵ Creede Documents at 237.

²⁶ Creede Documents at 404-09. A brake down of the rehabilitation costs are \$8,094,240 for the restoration of track and ties on the OFA Line, \$2,075,500 for the restoration of the bridges on the Line, and \$125,650 for the construction of a maintenance facility. Mr. Shank submitted a fourth application to fund the acquisition of the adjacent rail line that was out of service. The significant rehabilitation costs contained in the CDOT filing are likely much more accurate than the \$1 million claimed in the OFA filing given the facts that there has been no rail traffic anywhere on the OFA Line since the mid-1980’s, no service into Creede since 1972, and there are six bridges on the Line that are over 100 years old. Creede Documents at 392.

time, Mr. Shank further represented to CDOT that, as of November 2001, D&RG had \$2,059,078 available for the rehabilitation work and, therefore, needed only \$8,236,312 from CDOT. In a subsequent e-mail to CDOT, Mr. Shank explained that he was withdrawing the funding request because of the CDOT requirement that he arrange for a letter of credit to cover the cost of rehabilitation, equipment, maintenance and operation. As Mr. Shank ironically stated: “[i]f we had that we wouldn’t need enhancement funds, would we?”²⁷ Three years earlier, however, Mr. Shank expressly represented to this Board that he and D&RG had readily available all of the funds necessary to acquire, rehabilitate and operate the OFA Line.

According to the Tax Return and Property Declaration, D&RG agreed to acquire the Creede Branch from UP for \$624,616.²⁸ In its filing with the Board, UP stated that the sale was consummated on May 24, 2000. According to the Property Declaration, as of May 14, 2001, D&RG still owed UP \$274,616, with the first installment of \$137,308 due on September 2, 2001 and the remainder due by May 2, 2002.²⁹ At his August 3, 2001 deposition, Mr. Shank conceded that neither he nor D&RG was in a position to make the September 2001 installment payment to UP.³⁰ To date, UP is still owed the principal sum of \$274,616.³¹

²⁷ Creede Documents at 410.

²⁸ Creede Documents at 35 and 166.

²⁹ Creede Documents at 167. According to Mr. Shank, D&RG made a \$100,000 earnest deposit to UP some time in late 1999. The source of that deposit apparently was a loan from Mr. Shank to D&RG. Subsequently, D&RG made an installment payment to UP of \$250,000. The sources of those funds were donations to D&RG. Creede Documents at 255. D&RG’s lack of funds presumably was the reason UP and D&RG notified the Board on four separate occasions that the closing had been postponed. See Decision served May 24, 2000, in this proceeding, slip op. at 2.

³⁰ Creede Documents at 253. In an earlier Affidavit to the Colorado Federal District Court, Mr. Shank admitted that D&RG still owed UP nearly 50 percent of the purchase price. Creede Documents at 154. That admission is in stark contrast to Mr. Shank’s statement to a reporter in December 2000: “The Note payment issue to the Union Pacific for the year 2000 is resolved and we look forward to next year’s final installment and total debt retirement.” A week later, it was reported that the payment had not been made but that UP had granted an extension. See Exhibit No. 2.

³¹ See City of Creede’s Supplemental Update, filed December 1, 2003 (“Update”). Attached to the Update is a letter from UP to Creede’s attorney acknowledging that the Note by D&RG to UP

D&RG relied on fictitious financial statements to induce the Board into finding D&RG a financially responsible entity within the meaning of Section 10904. Two years after the Board found D&RG financially responsible and authorized the sale of the OFA Line to D&RG on the basis of the fraudulent financial information, Mr. Shank switched stories. He no longer claimed that he or D&RG had the financial resources to fund the acquisition and rehabilitation of the OFA Line. Instead, Mr. Shank stated that “[t]he financial strength and financial availability to the [D&RG] comes from the donations, pledges, grants from private individuals, businesses, other organizations or foundations.”³²

The problem with Mr. Shank’s new story is two-fold. First, it is totally inconsistent with the representations made to the Board. It is inconceivable that the Board would have authorized the sale of the OFA Line to D&RG on the basis of potential future donations. Under Section 10904, the Board is only permitted to authorize a sale to a “financially responsible person”. Allowing entities to establish their financial responsibility through claims of potential future donations would be tantamount to reading the financial responsibility provision out of the statute. Any unsavory character would be able to meet this statutory requirement by simply stating that he or she will be able to obtain a loan or donation at some future date. This is clearly not what Congress had intended in enacting the OFA statute.

Second, Mr. Shank’s new-found theory of financial fitness has also not withstood the test of time. It appears that in 1999, after the sale of the OFA Line was authorized by the Board, D&RG received \$452,464 in donations.³³ About half of those funds (\$250,000) were used for

in the amount of \$274,616 remains unpaid and that UP had extended the due dates to March 2, 2005 and September 2, 2005, or six years after the OFA filing in which D&RG and Mr. Shank represented to the Board that they were financially responsible and capable of paying UP.

³² Creede Documents at 246.

³³ Creede Documents at 28.

the partial payment of the Line to UP.³⁴ The donations, however, appear to have totally dried up. Mr. Shank has claimed that Creede's lawsuit was the direct cause of the draught in donations. Creede, however, did not file its lawsuit until November 7, 2000.³⁵ It appears that the donations stopped by the end of 1999.³⁶

The Board need not quibble over the precise net worth of D&RG or Mr. Shank at the time of the OFA or today. The Creede Documents demonstrate that the financial statements submitted to this Board by D&RG and Mr. Shank were knowingly and willfully falsified. The test of time confirms what the Creede Documents so plainly show: neither D&RG nor Mr. Shank was financially responsible in 1999 and they remain financially challenged to this day.

D&RG'S OFA WAS NOT FOR CONTINUED RAIL SERVICE

Section 10904 requires that an offeror demonstrate that its offer is for continued rail freight service. See Docket No. AB-33 (Sub-No. 71X), *Union Pacific Railroad Company – Abandonment Exemption – In Lancaster County, NE* (not printed), served September 28, 1992; Docket No. AB-167 (Sub-No. 493N), *Conrail Abandonment West 30th Street, NY* (not printed), served January 13, 1987 (“Section 1090[4] also requires that the offeror demonstrate that the offer is one for continued rail service [The offeror] must demonstrate that it can, and will provide continued rail service for two years.”); Docket No. AB-52 (Sub-No. 79X), *The Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Atchison County, KS* (not printed), served April 13, 1995.

³⁴ The initial \$100,000 deposit to UP came from Mr. Shank's loan to D&RG. The next \$250,000 installment to UP came from the 1999 donations. It is unclear from the documents D&RG produced to Creede what happened to the remaining \$202,464 in donations and why, given those donations, D&RG was unable to meet, at a minimum, its next installment payments of \$137,308 to UP.

³⁵ Creede Documents at 60.

³⁶ Creede Documents at 165. D&RG's Annual Statement of Property reports non-operating income of \$452,543 for 1999 and zero non-operating income for 2000.

Particularly where, as here, there has been no demand for rail service for nearly two decades, the offeror must demonstrate that shippers are likely to make use of the line and that there is sufficient traffic available to enable the offeror to operate the line for at least two years. See STB Docket No. AB-547X, *Roaring Fork Railroad Holding Authority – Abandonment Exemption – In Garfield, Eagle, and Pitkin Counties, CO* (not printed), served May 21, 1999. [“The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely.”]

In its OFA filing dated April 2, 1999, D&RG addressed the issue of whether there was a need for continued rail service as follows: “The Foundation is ready, willing and able to handle rail freight traffic. The Foundation would actively seek to develop rail freight traffic to and from the line.”³⁷ With these artfully crafted words, D&RG, without ever expressly stating that there was a present or reasonably foreseeable need for rail freight service on the OFA Line, mislead the Board into believing that such a need existed. In a subsequent Reply to an appeal of the Board’s April 6, 1999 decision, D&RG took its deception a step further by asserting that it had “every intention of acquiring and operating the rail line for the provision of interstate common carrier rail freight service.” In its December 1, 1999, Reply in Opposition to Protest of the City of Creede (“1999 Reply”), D&RG takes its deception full circle. In lieu of asserting, much less demonstrating, that a need for freight rail service exists, D&RG simply cited to the Board’s finding in the April 22, 1999 decision that the OFA was for continued rail freight service, which finding, of course, was induced by D&RG’s very own misleading information.³⁸

³⁷ Creede Documents at 46.

³⁸ 1999 Reply at 3. Attached to the Reply is a letter dated November 24, 1999 from Mr. Shank. In the letter, at page 2, Mr. Shank exposes D&RG’s true motives:

“The closure of the last mine in 1985 ended the need for rail service and the railroad became all but extinct, as did the Town of Creede. *** Creede

At his June 21, 2001 deposition, Mr. Shank continually evaded questions as to the need for freight service on the OFA Line and the identity of any potential shippers. More than two years after the OFA was filed, Mr. Shank asserted that their “interface with shippers at this time has been minimal.”³⁹ After claiming that “different individuals ... have expressed a desire, at some point in time, to be able to ship product on the railroad,” Mr. Shank was unable to name or identify a single shipper that required service.⁴⁰ In fact, Mr. Shank conceded that he could not identify or quantify a need for rail service from any business located along the OFA Line.⁴¹ Mr. Shank was similarly clueless as to the nature of any freight traffic that may ever be shipped over the OFA Line.⁴²

Mr. Shank’s inability to identify any actual or potential rail traffic that has even a remote possibility of moving over the OFA Line is hardly surprising. The undisputable facts are that the only rail shipper along the OFA Line in recent memory was a mine near Creede and that mine shut down in 1985, terminating all rail operations on the Line. Since the closing of the mine, Creede and the area surrounding the OFA Line have been converted into a tourist economy.

survived the 1980’s and has now become dependent upon the tourist trade for its livelihood. *** [O]ur proposed rebirth of the Denver & Rio Grande Railway is a continuation of the overall plan to increase tourism....”

Nowhere in his letter does Mr. Shank refer to the community’s need for freight service or his intention to provide such service.

³⁹ Creede Documents at 211.

⁴⁰ Creede Documents at 212-13.

⁴¹ Creede Documents at 213-14.

⁴² Creede Documents at 214. “Q. That means as of this moment...you don’t have any specific knowledge as to what freight may be shipped over [the OFA Line]...? A. Correct, that’s fair to say.” Mr. Shank subsequently noted that he had been approached by an individual with a herd of sheep that might be interested in shipping the sheep to the summer range. When pressed further, Mr. Shank was forced to concede that such a movement would require him to find stock cars, which are all but nonexistent, and involved trucking the sheep to a point along the OFA Line, loading the sheep onto the stock cars, transporting the sheep a few miles by rail to Creede, where the sheep would need to be off-loaded from the stock cars back onto the same trucks for a 30-mile delivery to the summer range. Creede Documents at 216-17. Simply to state what is involved in such a movement illustrates its absurdity.

In her Affidavit attached to the Petition, Betty Jean Myers, the Mayor of Creede, explains in great detail why there is no current or future need for rail freight service on the OFA Line. Mineral County had an estimated population of 810 as of mid-2001 and the economy of the county seat, Creede, is almost entirely based on seasonal tourism.⁴³ Mayor Myers lists every business entity in Creede and along the OFA Line in Mineral County, including churches and government operations.⁴⁴ It is readily apparent from that list that none of these entities need or want rail service and that their limited transportation needs are more appropriately met by United Parcel Service, Federal Express and other trucking operations. The only possible exception is the True Value hardware store located in Creede. The manager of the hardware store, however, informed Mayor Myers that they have no need for rail service.⁴⁵

**D&RG'S CLOAK OF FEDERAL PREEMPTION IS BEING MISUSED
TO HARASS ADJACENT LAND OWNERS**

Under different circumstances, the Coalition would likely not care whether D&RG's OFA rights were revoked. No freight traffic will traverse the OFA Line in the foreseeable future, if ever. Tourist operations on the Line are also likely never to materialize or, if they do, to fail. D&RG and Mr. Shank are woefully short of attracting the funds that are necessary to pay UP the balance owed and to rehabilitate the OFA Line to accommodate passenger operations. Even if these funds were to become available, the operating losses would soon overwhelm D&RG like so many other rail passenger ventures around the country.

The Coalition's concern is not the potential revival of rail service on the OFA Line, but the harassment Mr. Shank has inflicted on the community under the guise of being a Board-licensed railroad. Unless the Board revokes the OFA award to D&RG, the OFA Line, at best,

⁴³ Creede Documents at 2.

⁴⁴ Creede Documents at 2, 8-10.

⁴⁵ Creede Documents at 3.

will remain a playground for rail buffs or, at worst, become a nightmare for the community as Mr. Shank continues in his efforts to extort money from adjacent property owners and otherwise to harass the community at large.

Since taking possession of the Creede Branch from UP, Mr. Shank, among other unbecoming conduct, has: (1) erected signs and barricades along the streets of Creede in an attempt to keep the citizens of Creede off the portions of their streets that traverse along the right-of-way; (2) instigated criminal proceedings against individuals that allegedly trespassed on the parts of the right-of-way that also constitute streets within Creede;⁴⁶ (3) aggressively sought to extort lease payments from adjacent land owners who either have to traverse the right-of-way to access their homes or businesses or whose structures are partially located on the right-of-way;⁴⁷ (4) threatened to evict anyone who did not comply with his extortion demands;⁴⁸ (5) threatened to close the only highway running into Creede from the south;⁴⁹ (6) dug trenches and erected "No Trespassing" signs along a dirt road which crosses the right-of-way and provides the only access to a popular camping area;⁵⁰ (7) fenced off Creede's downtown parking lot and children's playground;⁵¹ (8) demanded the removal of a drainage ditch in downtown Creede which had been

⁴⁶ Creede Documents at 62.

⁴⁷ Creede Documents at 86, 73-85, 270 and 272. Attached to the 1999 Reply is a Right Of Way Indenture dated October 24, 1969, which granted the former railroad an easement over certain property owned by the State of Colorado within the City limits of Creede. Paragraph 14 of the Indenture expressly limits the railroad's ability to sub-let portions of this right-of-way solely for "uses compatible with railroad business or operations." Notwithstanding this express limitation, Mr. Shank is demanding lease payments from anyone encroaching on this portion of the right-of-way even though there is no nexus between the encroachment and railroad business.

⁴⁸ Creede Documents at 208, 274-75.

⁴⁹ Creede Documents at 413.

⁵⁰ See Exhibit 3.

⁵¹ See Exhibit 4.

located on a part of the right-of-way for over 100 years;⁵² and (9) disrupted a “caped” area that qualifies as a Superfund Site along the right-of-way.⁵³

Because of Mr. Shank’s property claims along the right-of-way and within Creede derived solely from the OFA award: (1) Creede’s financial standing and ability to raise money are threatened;⁵⁴ (2) citizens and business owners are being threatened with the loss of their homes and businesses;⁵⁵ and the sales of at least two local businesses have failed.⁵⁶

The depths to which Mr. Shank will go are best illustrated by the story of Ms. Louise Gray, a citizen of Creede. Ms. Gray is an elderly, retired woman that lives on her social security income. In recent years, Ms. Gray collected aluminum cans in order to raise enough money to purchase a used car. After she was successful in acquiring a car, Mr. Shank forced her into paying \$300 a year for the privilege of crossing the right-of-way with her car in order to access her garage.⁵⁷ The right-of-way adjacent to Ms. Gray’s home has not been visited by a freight or passenger train in well over 30 years. That same right-of-way will not see a train in the foreseeable future, if ever. Nevertheless, because of the Federal preemption granted to D&RG through the OFA award, Mr. Shank is able to extort monies from individuals like Ms. Gray that reside along the right-of-way.

The right-of-way encumbers or affects about 40 percent of Creede’s downtown area.⁵⁸ All of the right-of-way located within the City of Creede is reversionary: some parts are owned by private landowners, others by the State of Colorado and the remainder by Creede.⁵⁹ Consequently, were it not for the fraudulent OFA filed by D&RG, the right-of-way within Creede

⁵² See Exhibit 5.

⁵³ See Exhibit 6.

⁵⁴ Creede Documents at 103.

⁵⁵ Creede Documents at 104.

⁵⁶ Creede Documents at 106.

⁵⁷ Creede Documents at 69-85, 104.

⁵⁸ Creede Documents at 416-22

would have reverted to the rightful owners upon the consummation of the abandonment by UP.

CONCLUSION

The Creede Documents leave little doubt that much of the information contained in D&RG's OFA filing is false, fictitious or fraudulent.⁶⁰ Solely on that basis, the Board should reopen this proceeding and revoke the OFA award in order to protect the integrity of the Board's good offices and administrative procedures. In so doing, the Board will send a strong message that it will not countenance ethical lapses from individuals appearing in proceedings before the Board.

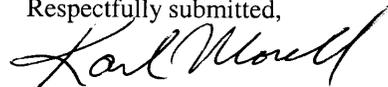
In any event, Creede's Petition more than adequately satisfies the criteria for reopening this proceeding and revoking the OFA. The newly discovered evidence contained in Creede's Petition clearly and unassailably demonstrates that the Board's decision was induced by fraudulent and misleading information. Moreover, the fraudulently procured OFA award is neither harmless nor inconsequential to Creede and the surrounding areas. D&RG's president is using the cloak of Federal preemption to harass the community and extort lease payments from adjacent landowners.

⁵⁹ Creede Documents at 105.

⁶⁰ The OFA filing appears to contain statements that constitute criminal violations punishable under 18 U.S.C. 1001. At this time, the Coalition is not pursuing or suggesting any sanctions under that statute. Rather, the Coalition is simply seeking the revocation of the OFA and the departure of Mr. Shank from the Creede community.

By revoking the OFA, no harm will befall any rail shipper because there are none along the OFA Line. UP will benefit by being able to salvage the OFA Line and finally recoup its investment in the Line. Creede will gain its rightful ownership to the city streets, the parking area and the children's playground. And Ms. Gray will no longer have to pay to gain access to her garage.

Respectfully submitted,



Karl Morell
Of Counsel
Ball Janik LLP
1455 F St., N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorney for:
The Adjacent Land Owners

Dated: December 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing Comments on the following parties of record in this proceeding, by first-class mail, postage prepaid:

Thomas F. McFarland, Esq.
208 South LaSalle Street, Suite 1890
Chicago, Illinois 60604-1112

Robert T. Opal, Esq.
Law Department
Union Pacific Railroad
1416 Dodge Street, Room 830
Omaha NE 68179-0001

George M. Allen
206 Society Drive, Suite A
Telluride, CO 81435



Karl Morell
December 19, 2003

EXHIBIT 1

DISTRICT COURT, COUNTY OF LA PLATA, STATE OF COLORADO
Case No. 98 CV 36, Div./Ct.Rm. _____

IN DISTRICT COURT
LA PLATA COUNTY, COLORADO

FEB 05 1998

DEPUTY CLERK

STIPULATION IN LIEU OF JUDGMENT

Providian National Bank, f/k/a
First Deposit National Bank,

Plaintiff,

vs.

Donald H. Shank,

Defendant.

The parties, for their Stipulation in Lieu of Judgment, as follows:

1. The Defendant verifies certain information to be true and correct, as follows:
 - a. Full-legal name: DONALD H. SHANK
 - b. Residence address: 357 VALLE VISTA WAY
DURANGO, CO 81301
 - c. Home phone: 970-385-1012 Work phone: 970-259-9440
 - d. Employer's name and address: DONALD SHANK ENTERPRISES
1474 MAIN AVE, STE 121, DURANGO, CO 81301
 - e. Bank accounts at (name, address and account #'s): BANK OF DURANGO
407119 P.O. BOX 67487 G. DURANGO, CO 81302

The Defendant agrees to notify the Law Offices of Frank J. Bell, in writing to the address specified below, within ten (10) day if any information contained in this paragraph changes.

2. The Defendant acknowledges that the Defendant is indebted to Providian National Bank, f/k/a First Deposit National Bank ("Providian") in the amount of \$10,580.38, as of February 10, 1998. In addition to repayment of this amount, the Defendant shall pay interest at the reduced rate of 8.0% per annum on the declining balance. In the event the Defendant defaults on the terms of this stipulation, interest shall resume at the rate of 21.9% per annum as previously agreed by the parties in their contract and agreement and all previously forgiven interest shall be reinstated. The Defendant shall make monthly payments on 26th day of each month commencing February 26, 1998, and continuing until principal, interest, costs, and fees are paid in full. Same equals, \$10,176.58 principal, \$18.00 late & overlimit fees; \$64.80 unpaid interest accrued from 12/05/97 through 02/10/98, \$121.00 costs and \$200.00 attorney's fees, totalling \$10,580.38. This balance includes a payment of \$410.00 posted to the Defendant's account on 01/12/98. The monthly payments shall be \$205.00.

3. The payments referred to above shall be made payable to Providian c/o the Law Offices of Frank J. Bell, 216 16th Street, Suite #800, Denver, Colorado 80202. In return for Defendant's agreement to make same payment, and perform as stipulated herein, First Deposit agrees to stay or suspend any legal action so long as same monthly payments are made in

¹ Interest rate reduced effective 01/12/98.

A

full, or until the Defendant abrogates the terms of this Stipulation, in which event the terms set forth in paragraph 4 below become effective.

4. If the Defendant defaults or fails to make payments pursuant to paragraph 2, First Deposit shall, through its counsel, communicate with the Defendant in writing by first class mail to the Defendant's last known address, allowing the Defendant ten (10) days to cure the default. A \$25.00 late fee will be charged on every occurrence that same default letter is mailed to the Defendant. Cure of the default can only be made by payment of the monthly amount then due and owing. If the default is not cured within ten (10) days of the date the letter is mailed to the Defendant, the Defendant further specifically agrees to waive any right to hearing and to confess judgment at that time for the remaining unpaid balance and agrees to pay attorney fees and costs which will be incurred upon execution of the judgment including, but not limited to, \$100.00 each for Motions for Judgment, \$100.00 each for Motions for Interrogatories, \$100.00 each for Motions for Contempt Citations, \$100.00 each for wage garnishments, \$100.00 each for bank garnishments, \$100.00 each for judgment liens, and reasonable attorney's fees for property attachments and hearings regarding the above mentioned actions. The Defendant acknowledges and agrees the aforesaid attorney's fees are reasonable.

5. This stipulation may be executed in two or more counterparts, and signatures by facsimile shall be sufficient on any counterpart. This stipulation shall be effective when the signatures of all parties have been affixed to counterparts of this stipulation.

LAW OFFICES OF FRANK J. BALL

Frank J. Ball 1/26/98
Frank J. Ball - 76477
Attorneys for Plaintiff
216 16th Street, #800
Denver, Colorado 80202
(303) 629-7000

Donald H. Shank 1-22-98
Donald H. Shank
Defendant - pro se
357 Valle Vista Way
Durango, Colorado 81301
(970) 385-1010

ORDER

THE COURT, having reviewed the Parties' Stipulation in Lieu of Judgment and the file, and thereby becoming fully advised in the premises, does hereby approve and make same an Order of the Court.

DONE this 5th day of February, 1998.

BY THE COURT:

Margaret M. Lynn
County Court Judge
District

xc: F. Ball

EXHIBIT 2

Shank pays UP-RR

Union Pacific says
payments made in
timely manner

By DENISE UHLEMAN
ARMSTRONG

CREEDE — The note payment issue between the Denver and Rio Grande Historical Foundation and Union Pacific has been resolved.

When asked Friday if the Dec. 2 note for \$137,308 due to the Union Pacific Railroad Company for the 21-mile rail line between South Fork and Creede had been paid, Don Shank, director of the Denver and Rio Grande Historical Foundation replied, "The Note payment issue to the Union Pacific for the year 2000 is resolved and we look forward to next year's final installment and total debt retirement."

About his current plans, Shank stated, "We anxiously anticipate the commencement of our rehabilitation program for

■ Please see Shank page 3

Shank

■ Continued from page 1

the Creede Branch as soon as weather permits next spring."

Continuing Shank said, "The DRGHF has entered into discussions with the Colorado Attorney General's Office for an invitation to be extended to one member of the Creede City Council to sit down with myself, and a mediator to hopefully reach some resolution to the divisive and detrimental opposition regarding the reintroduction of rail service to Creede."

The Union Pacific Railroad Company spokesperson, John Bromley, confirmed Monday, "All payments due the Union Pacific by the DRGHF have been made on schedule and in a timely manner."

Valley Courier

THURSDAY,
DECEMBER 7, 2000

Have you heard?

Full payment not made to UP-RR

By DENISE UHLEMAN-
ARMSTRONG

CREEDE — The story of the D&RG Historical Foundation's right of way has taken another track.

Earlier this week, John Bromley of The Union Pacific Railroad Company said, "All payments due the Union Pacific by the Denver and Rio Grande Historical Foundation have been made on schedule and in a timely manner."

Asked if an extension had been granted he said, "I have talked to the accountants and they said all payments have been made, that nothing is showing as past due."

Bromley called in route during his travels on Wednesday to say, "I have found out that yes, an extension has been granted on the remaining amount owed to the Union Pacific by the DRGHF. Regular payments have been made against the amount owed on time and on schedule though. I do not know the current balance, but I will get those figures when I get back in town to my office, but the full of amount of \$137,308 due Dec. 2 has not been paid."

EXHIBIT 3



United States
Department of
Agriculture

Forest
Service

Rio Grande
National Forest
Divide Ranger District

13308 West Highway 160
Del Norte, CO 81132
(719) 657-3321

File Code: 5400

Date: August 30, 2000

Mr. Don Shank, President
Denver & Rio Grande Railway Historical Foundation
1474 Main Avenue, Suite 223
Durango, CO 81301

Dear Mr. Shank,

It has come to my attention that you have been working on the rail line between South Fork and Creede. The Forest Service (FS) formally expressed concerns regarding how work, associated with the rail line, should be done on National Forest System (NFS) lands. These concerns were related to protection of watershed and wildlife resources, as well as the safety of Forest visitors. Our recommendations were included in the Surface Transportation Board order, which Union Pacific (UP) and any successors must comply (see attachment).

FS recommendations included provisions for protecting stream channels, dealing with hazardous materials, and protecting the Palisade Campground. UP and any successors must notify the FS at least one or two days prior to salvage work in the campground, so that campers can be notified.

The recent, unannounced work in the campground involved large vehicles that blocked a loop road. Had a large recreational vehicle pulled in behind your vehicles, it would have been required to back out, creating a dangerous condition for our users. Trenches were also dug in the roadway to expose the tracks. These trenches created a hazardous situation for campground users, with no forewarning. It was because of such hazards that we recommended the roadbed be filled with road base to the original level after tracks are removed.

Since Forest Service recommendations have been included as requirements in the STB order, I expect that you will comply with them. We cannot take necessary precautions to protect Forest users and resources, when we hear of your work second-hand and after the fact.

When contacted in advance, we can notify appropriate individuals to make necessary preparations. I would also request that you avoid constructing deep trenches in the roadway that could damage vehicles and camp-trailers. Perhaps you could have exposed the rails with a sloping trench that would allow vehicles to ease through, rather than drop abruptly.

It has also come to my attention that several "No Trespassing" signs and a small barrier have been placed on the Forest along a dirt road, which crosses the rail line and leads to a popular dispersed camping area near the Rio Grande River. We are working with the STB to determine the appropriateness of the signs and barrier. Until then, we are requesting that you remove these structures, preferably prior to the busy Labor Day Weekend, to allow for public access to campsites and the river.

If you would like to review requirements for work on NFS land with me, feel free to give me a call or request a meeting. I look forward to working more directly with you in the future.

Sincerely,

Dale Burgess

for RANDALL BURGESS
District Ranger

Cc: Surface Transportation Board, Washington DC
Cc: Union Pacific
Cc: Colorado Department of Transportation

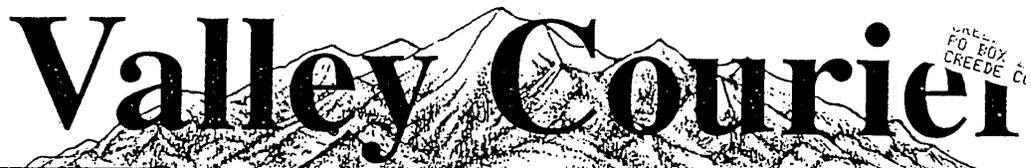


Caring for the Land and Serving People

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Valley Courier



CREEDE
PO BOX
CREEDE CT

DAY,
SEPTEMBER 5, 2000 VOLUME 73, NO. 173

Serving the San Luis Valley with Local News

Alamosa 81101; Ft. Garland 81133; La Jara 81140; Monte Vista 81144

Forest Service vetos Shank signs, barriers

CREEDE— The U.S. Forest Service has written railroad developer Don Shank asking him to remove “no trespassing” signs and barriers from Palisade Campground along the Rio Grande between here and South Fork.

After looking into “two separate situations” at the campground, the Forest Service reportedly wrote to Shank telling him the installations had to go.

The USFS also has contacted the Surface Transportation Board, which oversees the rail lines, including the almost 22 miles of line Shank reportedly purchased from the Union Pacific Railroad earlier this year. The South Fork to Creede lines, unused for more than 20 years, run through the National Forest.

Shank, who operates the Denver & Rio Grande Railway Historical Foundation based in Durango, is reportedly in Missouri.

Region report

Feds challenge landowner in campground dispute

By ERIN SMITH
The Pueblo Chieftain

CREEDE — The U.S. Forest Service is investigating the placement of barriers to public access to the Rio Grande at the Palisade Campground between South Fork and Creede.

Dale Gomez, acting district ranger for the Divide District of the Rio Grande National Forest, said officials are looking into "two separate situations" at the "dispersed campground." (A dispersed campground is one where camp sites aren't in one location but scattered throughout an area.)

Recently, railroad developer Don Shank acquired 21 miles of an unused railroad line from South Fork to Creede from the Union Pacific. He plans to use the line, which snakes along the Rio Grande looking down at reaches of prime fishing in the river, for a tourist train.

As part of his claim of ownership, Shank recently used twine to rope off an area in Creede that had become a parking lot, a children's playground and an arena for public

events, including the Colorado Mining Championships.

On Aug. 19, several people drove through the twine. As of Tuesday, Sheriff Phil Leggitt had issued six summonses alleging criminal mischief of less than \$500. To appear in county court at 1 p.m. Sept. 22 on the charges are Ian R. Romo, 22, Midlothian, Texas; Cheryl J. Streams, 47, South Fork; and Paul E. Stone, 49; Lindsay E. Fox, 31; Fox's mother, Barbara M. Elliott, 65, the leader of the Aug. 21 demonstration; and Jessie A. Gilmer, 59, all of Creede.

Leggitt said the problems in the Palisade Campground are a civil matter, between Shank and the Forest Service.

Gomez said the Forest Service wants to know whether Shank has a right to put up "no trespassing" signs preventing citizens from crossing over land they've traditionally used to get to the river to fish.

Gomez said the railroad tracks "go right through the campground" and Forest Service property, that is, public land.

In one instance, "some of

Shank's employees apparently were clearing rail lines and dug some large trenches a couple of weeks ago. People in the campground did not like it because the trenches created a major speed bump. They put in some dirt. Since then, it's rained so it's not much of a problem now," Gomez said.

A quarter-mile downstream toward South Fork, there is a small dirt road to the highway. Shank has put up a "no trespassing" sign. Beyond that, the "user-made road," also on the Forest, crosses the tracks. Where the road crosses the tracks there is another "no trespassing" sign, plus two strands of orange twine like the twine Shank used in Creede to cordon off property, Gomez said.

"People can go around," Gomez said.

"We're not too sure what his rights are. We're trying to find if he has the right to put up the signs," Gomez said.

"We hope to work with Shank to remedy the situation," the ranger added.

EXHIBIT 4



Saying goodbye
to David Brower
page 2

Periodical

High Country News

November 20, 2000

Vol. 32 No. 22

A Paper for People who Care about the West

One dollar and fifty cents

WESTERN ROUNDUP

Hear that whistle blowin'

CREEDE, Colo. — The depot from which the last Denver and Rio Grande train left here nearly 30

years ago stands old and weathered, all but buried in earth and brush. The train carried

silver ore from the mines above town until it made more economic sense for trucks to do the job.

The mines closed in 1985, and in the years since, this town of 390 in Southern Colorado's San Juan Mountains has relied on tourists enjoying art galleries and the Creede Repertory Theatre on the main street.

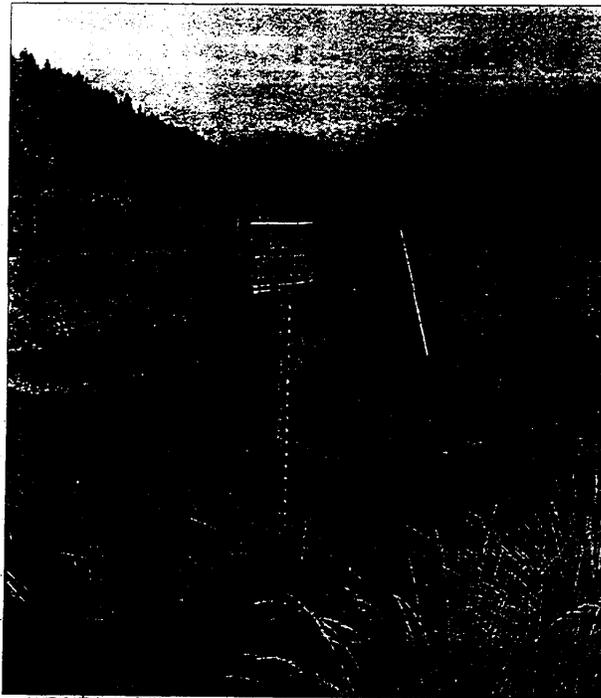
Now the train may be chugging back. Durango, Colo., businessman Don Shank wants to shuttle 600 tourists per day from South Fork, a town of 1,200, up through the Rio Grande River Valley to Creede for lunch. So this May, Shank bought Union Pacific's right to run a train on 21.5 miles of track.

The promise — some say threat — of a train has divided Creede. Mayor B.J. Myers and a local citizens' group say a train would disrupt the relationships local businesses have created with second-home owners and with visitors who have been welcomed for decades by the area's guest ranches. Some residents, however, fondly recall the days when a steam engine puffed up the valley. A train, they say, is part of Creede's history.

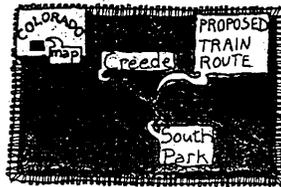
A shot of adrenaline

Shank was able to make his purchase, called a right-of-way, when the federal agency that regulates railroad property, the Surface Transportation Board, accepted his offer to buy Union Pacific's abandoned line.

"It's an interesting line," he says, and it has an important history in Creede." The critics' arguments are "nonsense," he adds, since the railroad



TRACKS FROM THE PAST: The right of way today (Tim Sullivan photo)



Shank has been to Creede repeatedly to participate in town meetings and to stake out his claim, and on Aug. 19, he began to dig up the old tracks. Much to the outrage of some locals, he also tried to fence off the downtown parking and children's playground which the city had put on the right-of-way after the railroad's departure. Shank contends that the right-of-way, a federal easement, takes precedence over the city-leased state property through which it runs. If Shank has his way, the parking lot and playground will have to make way for the train by May 2002.

Shank points out that in nearby South Fork, most locals support his

35 seasons, as well as buying thousands of dollars' worth of art from galleries. Meanwhile, restaurant, shop and hotel owners in town have established relationships with their customers.

"It's almost like an extended family," says Jenny Inge, a gallery owner.

But when the Fourth of July rolls around, the town experiences exponential increases in visitors for its "Days '92" mining competition. Then the rapport evaporates, says Lindsay Fox, who owned a coffee shop on Main Street for several years.

"It's such a hectic day, with people just coming in for water and soda," she says, "that the people that buy coffee from you every day don't come."

Critics like Gilmer and Fox claim that, not only is the train a bad idea, it's also illegal. They say Union Pacific had no right even to sell Shank the right-of-way, because a 1969 state railroad regulation terminates right-of-way contracts not used for 12 consecutive months.

Colorado Attorney General Ken Salazar agrees with the local critics. Since the rail line had not been used for some 27 years, Salazar wrote in a Sept. 19 letter to Shank and the town, "the railroad's right to use this land would have terminated a long time ago." Shank and his lawyer, however, say federal law supporting the railroad's claims takes precedence over the state's 1969 regulation.

The town's leaders say they'd be willing to work with Shank once he gives them a business plan. "Do we believe Mr. Shank has even looked into the economics of what the train would do to Creede?" asks Mayor Myers. She says she has: Ten years ago, the city looked into building a tourist train and concluded that it wouldn't work. The town was simply too small to accommodate all the people a train would bring. More recently, she says, the chamber of commerce conducted a survey of all town businesses; the owners voted five-to-one against the train.

Smashing pennies

Shank is not without some local support. "I don't think the people on the train would be any different than what we run into in Creede every day," says Chuck Fairchild, a native of Creede and former miner who now runs an underground mining museum. Fairchild finds it ironic that those who are fighting Shank's train were once tourists themselves.

"If you want to get back to when they invaded my privacy, it was 1952"

and fell, but now a tourist train from Durango serves as the town's economic lifeline.

Gerald Swanson, a third-generation Silverton resident, says he watched the train change from hauling ore to hauling people. After World War II, says Swanson, the train began to add more and more passenger cars. "It began to snowball," he says, until the four trains full of tourists per day became the town's primary source of income.

"The train is like a shot of adrenaline to this town," says Swanson.

Lynn Hutson, Silverton train stationmaster, says the town depends on the train so much that its businesses open and close according to whether the train has come or gone. More than 200,000 people each spend two hours in town in the summer, she says. "By this time of year, everyone's exhausted."

Different kinds of tourism?

It is this kind of dependence that many residents of Creede fear. While Silverton grew into its tourist train slowly, Creede faces the sudden

Creede fence falls to safety concerns

By ERIN SMITH
The Pueblo Chieftain

CREEDE — The city council, at a special meeting Monday night, voted to remove a controversial fence of pickets and twine "for public safety and welfare reasons."

Mayor B.J. Myers said the council was afraid that the fence, erected Saturday by railroad developer Don Shank and some of his



Creede Mayor
B.J. Myers

employees, might create a public hazard.

Shank, who has acquired the Union Pacific right-of-way to 21 miles of line which ends up in downtown Creede, claims the city has

encroached upon his right-of-way with a public parking lot, children's playground and events area.

Although the town has used the property unfettered since the 1970s, Shank has announced he intends to remove the park and events area and close the parking lot to the public.

His actions resulted in a demonstration Monday.

"We're afraid that because ...

it is not well lighted and people are used to going through there, someone on a bike could be 'clothes-lined' with wire or run into a fencepost," Myers said Tuesday.

She said the town is "waiting for our lawyer to do the official thing, give it to the sheriff, notify Shank, and so forth. Then the city maintenance crew will take it down and pile it up neatly so Shank can pick it all up in a neat pile."

Valley Courier

THURSDAY,
AUGUST 24, 2000

VOLUME 73, NO. 165

As the Railroad Turns: **Shank's fencing removed** **—again—by city crews**

By GARY TAYLOR

CREEDE — The temporary fencing has come down for a second time. It was disclosed the State Land Board has rebuked tourist train developer Don Shank over control of leases. And opponents waited for the next shoe to drop.

Just—what has become—another day in paradise.

"The city council voted unanimously to remove the fencing," City Manager Sandra Wright said on Wednesday.

Six council members supported a motion to remove 30 metal stakes and twine for the safety of walkers at night in the area of a city parking lot, children's playground and civic-events area.

Shank and workers had installed the temporary fencing Saturday for the reason of liability protection only to have about 20 residents run it down. After he initiated criminal complaints and reinstalled the fencing on Monday, the city, after the vote, removed it again on Tuesday afternoon.

Council went into executive session on Monday night while Shank, a Durango developer, sat in council chambers. Wright said the discussion by elected city leaders behind closed doors was done because it involved talk about legal issues. The city is considering a lawsuit to stop Shank's Denver & Rio Grande Railway Historical Foundation from starting a tourist train to Creede.

Residents, polled previously, voted against the train.

The council motion voted on was to "remove the wrongful fencing installed by the Denver & Rio Grande Railway Historical Foundation, and keep it clear, for the health and safety of the public."

"That area," said Wright, "didn't have fencing during the first 100 years due to a liability concern, so why does it need one now?"

The small playground and parking area in question, and another nearby area in town where there is a ballfield and where Shank wants a drainage ditch moved, are owned by the State Land Board. Shank's foundation purchased the railroad right of way from Union Pacific Railroad in May for \$675,000.

Since the 1970s the city had a \$50-a-year lease with railroad owners for the parking and playground area. When Shank purchased the right of way, he

■ Please see Shank page 3

EXHIBIT 5

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NOT-FOR-PROFIT/TAX-EXEMPT CORPORATION

August 4, 2000

SENT VIA FACSIMILE and CERTIFIED U.S. MAIL
719-658-2017

To: City of Creede - City Council - All Council Members

From: Donald Shank, President
Denver & Rio Grande Railway Historical Foundation, (DRGHF)

Re: Termination of Right-of-Way Sub-Lease #16851 - Notice to Vacate and Access Revocation

This letter contains important information regarding railroad right-of-way formerly sub-leased by the City of Creede. The information contained herein is time critical thereby inclusion into the minutes of the Creede City Council meeting scheduled for Monday evening, August 7, 2000, is requested. The following information should be read during your meeting:

1. The City of Creede received a Notice of Lease Termination received and signed for by Sandra Wright, City Manager, DRGHF return receipt dated July 5, 2000.
2. This letter now serves as NOTICE TO VACATE.
3. Termination became effective thirty (30) days from receipt, which coincides with the date of this document.
4. The right of ingress/egress upon railroad right-of-way is hereby formally terminated, subject to the following:
 - A. The lawful entry of Creede city employees for the sole purpose of restoration of the railroad right-of-way to its pre-leased condition, which was, in fact, fully operational and intact.
 - B. The removal of all city personal property placed or added to the railroad right-of-way, including, but not limited to:
 - i. Fill dirt and decomposed material utilized as fill surrounding and placed upon the track structure.
 - ii. Bleachers and "press-box", equipment, rock, and associated material comprising the "events center".
 - iii. Playground equipment and sub-structure
 - iv. Any additional items placed upon railroad right-of-way at the request of others with the consent of the City of Creede.
5. The city's usage of railroad right-of-way for any purpose including, but not limited to parking is no longer allowed. Persons entering upon DRGHF right-of-way will now be considered trespassers and upon the forthcoming installation of appropriate "No Trespassing" signage and possible fencing, may be subject to arrest, fines and/or incarceration, which is not inconsistent with today's railroads.

FOUNDATION OFFICE: 1474 MAIN AVENUE, SUITE 223, DURANGO, CO 81301-5195
TEL: 970-259-9498 FAX: 259-0202 Email: drghf@frontier.net

6. Per the terms and conditions defined within the lease document, the City of Creede AGREED to the thirty (30) day proviso regarding Termination, please see Sections 18 of the lease document, as well as the thirty (30) day time constraint for restoration of the right-of-way as defined within Sections 21 and 4, Vacation of Premises and Improvements.
7. In the event that the City of Creede does not comply with the terms and conditions of the lease referenced above, upon the expiration of thirty (30) days, commencing tomorrow, August 5, 2000, or by September 5, 2000, if the City has not removed all "improvements" and/or personal property as partially described above in Section 3, B, i through iv, AND the restoration of the right-of-way and track structure, the DRGHF will remove it for you, and the costs incurred during such removal and right-of-way/track restoration will be a debit against the City of Creede, once again as defined and agreed to in the lease document.

FURTHERMORE:

The City of Creede, per information obtained from Sandra Wright, City Manager, willfully and knowingly entered upon railroad right-of-way at a point just South of the Colo Hwy 149 grade crossing within the city limits of Creede, and illegally installed a drainage ditch in such immediate proximity to the railroad track structure as to seriously undermine the structural integrity and stability of the right-of-way and compromised the mainline of the railroad by placing it at extreme risk of a train turning over as well as the risk of potential washout.

THEREFORE, DRGHF hereby places a DEMAND upon the City of Creede to restore the right-of-way the entire length of the ditch. The City must understand the gravity this act carries. The roadbed dating back to 1891 will not support a train. It has lost its structural integrity. The following non-negotiable demands are hereby placed upon the City of Creede:

1. The removal of the concrete "jersey-barrier" placed within the drainage ditch.
2. Appropriate fill material reinstalled in lifts of no more than eight (8) inches.
3. Compaction of fill material to a rate of not less than 95 proctor at a maximum 15% moisture content.
4. An onsite licensed engineer will oversee the restoration.
5. The City of Creede assumes all liability for future potential problems within this compromised right-of-way area.
6. All costs for engineering, construction, legal and professional fees, insurance and existing and subsequent damage to the railroad track during restoration are the sole responsibility of the City of Creede.
7. An approved set of plans for the restoration of railroad right-of-way will be forwarded to DRGHF no later than sixty (60) days from the date this letter is received.
8. In the event the City of Creede does not choose to comply, legal action will commence upon the sixty-first (61st) day via the Federal Government and DRGHF

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retained counsel. Several Federal agencies take serious offense to the wilful destruction of railroad right-of-way.

DRGHF has investigated the lack of permission to trespass and damage railroad property. Creede neither sought nor received permission of any kind to install this drainage ditch. Its removal from the railroad right-of-way is non-negotiable. Obviously the City of Creede felt it easier to ask forgiveness rather than obtain permission. The fact that DRGHF was under contract with the Union Pacific Railroad at the time was certainly a factor in the bold, yet foolish actions taken. Neither UPRR nor DRGHF would have granted permission to place the mainline at such risk. FYI, the right-of-way through this area is 125' wide. The right-of-way on the eastern side of the track that contains the ditch measures 75' from the centerline of the track.

In conclusion, several additional encroachments exist within Section 36 as well as Section 25. Each and every encroachment issue will be addressed and remedied through individual meetings, not public hearings. DRGHF will make every effort to accommodate those issues that have the greatest effect on the City of Creede, first. But rest assured, each and every one will be addressed.

FYI, the right-of-way as measured from the centerline of the mainline track within Section 25 measures 200' wide and proceeds 919' north-westerly from the section line to a point just below Windy Gulch.

Regrettably, the City of Creede has now lost the use of a portion of railroad right-of-way through the termination of Lease #16851. Ironically, it's certain members of the Creede City Council that initiated the action that ultimately resulted in this lease termination.

The continual negative activities as levied against the railroad by certain political figures, are counter-productive and far from the harmonious relationship sought by DRGHF over eighteen months ago. Consideration may be given towards a better working relationship between the City of Creede and the DRGHF.

Please accept my apology for not attending this Mondays City Council meeting. A prior commitment out-of-state rendered me unavailable.

Sincerely,



Donald H. Shank
President, DRGHF

Changes for tourist train are beginning here

By DENISE UHLEMAN-ARMSTRONG

CREEDE - Changes have begun here to accommodate a tourist railroad and depot, and the Durango developer behind the changes says he will deal with each property owner's issue individually.

Don Shank told *The Mineral County Miner* that in the past some building was done knowingly in rights of way and easements of the Denver & Rio Grande Western Railroad, and that he will not be deterred from completing the project.

In a letter to the City of Creede, Shank requested, among several changes, a parking area west of Kentucky Belle Market and the playground, where community events such as The Days of '92 are held, be returned to its "original condition."

He spoke by phone with the *Miner*. "Each situation is unique in regards to property rights issues and will be dealt with that way," Shank said.

He added: "It has taken me 18 months to purchase the rail line, and it will take two years from the date of purchase to have a working train line. I hope the people of Creede will use this time wisely to profit and benefit from this venture, and use the train to

enhance the town. I will exercise my legal rights and complete this project."

Shank may be contacted through the Denver & Rio Grande Railway Historical Foundation (DRGHF) at 1474 Main Ave., Suite 121, Durango, CO 81301, 970-259-9498 or email him at drghf@frontier.net.

"I welcome anyone with concerns about the rail line to contact me in a professional manner, and I will be happy to speak with them. In some areas, buildings and such have been built, knowingly in many cases, on rights of way and easements, and I would like to point out that these problems existed long before the purchase by the Historical Foundation, and would be the same with any owner."

Shank's foundation purchased unusable 21.6 miles of formerly operating line between South Fork and Creede on May 26 with the intention of running a tourist railroad such as the Durango & Silverton Narrow Gauge Railroad and the Cumbres & Toltec Scenic Railway.

The Creede Branch will use a standard-gauge engine at first, but would like to lay a third line so that a narrow-gauge train could also be used in the future. A narrow-gauge train was Shank's original plan.

A majority of Creede residents are against the tourist train coming to their town, Shank is proceeding with laying the groundwork despite objections from some townspeople.

Some leases have been canceled below Wall Street, and above Wall Street some business owners have renegotiated leases. The Creede Historical Society is moving the miners cabin and outhouse, which are located next to the museum depot. Funds for this project are currently being raised.

Also, the Historical Society has been asked for space in the depot for a ticket

office to be used by tourist train.

Said Shank: "I recognize that there are many issues to be dealt with in regards to the Creede Branch to make it a working rail line, and one such item will deal with property owners along the line, and I will deal with each property on an individual basis."

Shank said he would like to see everyone in South Fork and Creede grow and prosper, with the rebirth of the tourist railroad.

"Railroad enthusiasts are very excited about this prospect," he said. "The train is historically correct with

the area and could enhance the town and give it great benefits."

In the letter to the City of Creede, Shank also requested the city move a drainage ditch near the new ball field.

City Manager Sandra Wright said, "Only the Jersey Barriers have been recently added." She said the drainage ditch has bene ther for 100 year of more.

Officials of the Willow Creek Reclamation Committee have showed concern over the flood plain being interrupted. See related story on Page 11A.

Your input would be appreciated, and The Mineral County Miner would like your opinion on this matter. How do you see the train, as an enhancement or detriment to the town of Creede? You may call or fax the staff reporter at 658-2706, or email her at deniseu@vanion.com, or you may write the editor at 229 Adams St., Monte Vista, CO 81144.

EXHIBIT 6

Thursday, August 10, 2000

The Mineral County Miner

WCRC concerned with work on railroad tracks through contaminated flood plain area

By Denise Uhleman-Armstrong

CREEDE - At the meeting Wednesday of the Willow Creek Reclamation Committee, members were concerned because work has been observed on the two mile area that is contaminated, of the 21.6 mile railroad line, known as the Creede Branch. Purchased on May 26, 2000 by the Denver and Rio Grande Historical Foundation.

It was said by members at the meeting that interruption of the 'caped' surface without receiving the proper permits, is in direct violation of restrictions imposed by the Surface Transportation Board, Environmental Protection Agency, Forest Service and other such organizations.

The Willow Creek Reclamation Committee was formed to determine the contamination levels of the area and to recommend clean up procedures. They work closely with many land and water use agencies; including the local government, so that work can be coordinated in a pleasant and efficient manner for all.

The EPA did a preliminary hazard ranking on the area and it qualifies for placement on the National Priorities list as a Superfund Site. The WCRC offers an alternative to that process; and one of the concerns by the committee is that they are presently forming a base line in their reclamation procedures and any disruption can alter these readings.

Many state and federal land and water use organizations have requested certain conditions be met in the clean up procedures for contaminated areas, and are closely working with the WCRC.

Members and representatives of these agencies present at the meeting showed surprise that no representative of the Denver and Rio Grande Historical Foundation has approached any of them yet, and that no representative of the Denver and Rio Grande Historical Foundation was attending the WCRC meetings.

Concern was expressed as to whom would end up with liability, should this site be interrupted, as two balloon notes are still due to the seller/lender, Union Pacific Railroad. It was determined by the committee to send letters of concern to both the Denver and Rio Grande Historical Foundation, and the Union Pacific Railroad representatives.