

AKIN GUMP
STRAUSS HAUER & FELD LLP

Attorneys at Law

222078

RONALD M. JOHNSON
202 887 4144 / 202 887 4288
rmjohnson@akingump.com

April 14, 2008



Anne K. Quinlan, Esq
Acting Secretary
Surface Transportation Board
395 E Street, SW, Suite 1149
Washington, DC 20024

Re *Denver & Rio Grande Railway Historical Foundation -- Adverse Abandonment --
In Mineral County, CO, Docket No AB-1014*

Dear Acting Secretary Quinlan

Enclosed for filing please find the original and 10 copies of the Reply of the City of
Creede to Fourth Supplemental Letter of the Denver & Rio Grande Railway Historical
Foundation

Please time and date stamp the additional copy for our records

Sincerely,

Ronald M Johnson

ENTERED
Office of Proceedings
APR 14 2008
Pcrt of
Public Record

Enclosures

222078

ENTERED
Office of Proceedings

APR 14 2008

Part of
Public Record



BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No AB-1014

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, ADVERSE
ABANDONMENT—IN MINERAL COUNTY, CO

REPLY OF THE CITY OF CREEDE TO FOURTH SUPPLEMENTAL LETTER OF
THE DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

The Denver & Rio Grande Railway Historical Foundation (“Foundation”) has submitted yet another letter, its fourth, again purportedly pursuant to 49 CFR part 1114, Subpart A, in the Foundation’s effort to avoid adverse abandonment of the track in the city limits of Creede. By letter dated March 24, 2008, the Foundation asked that the Board take official notice of another newspaper article, this time from the March 20, 2008 on-line edition of the Pueblo Chieftain. According to the Foundation, this article reported that the Environmental Protection Agency (“EPA”) has proposed “two sites in the Creede historic mining district for Superfund cleanup.” From this bit of news, the Foundation makes a leap to its statement that “[r]ail is the preferred means for transportation of clean earth and rock from those sites” and therefore the cleanup represents a “potential for rail freight over the Creede Branch.” The Foundation goes on to state that “[t]ransportation of earth, rock and the products of mines should originate in Creede rather than Wason, now that the rail line has been reopened to Creede.” This newspaper article does not meet the criteria of section 1114.6 of the Board’s rules; the article has no bearing whatsoever on the potential of freight for the Creede Branch or the

need for the track that is the subject of the City's Application for Adverse Abandonment
The only probative value of the Foundation's latest letter is to show that the Foundation
does not know what it is talking about, is shameless in its abuse of the Board's
procedures, and continues to misinform the Board

It appears that, if Donald Shank, the President of the Foundation, reads something
in the newspaper and finds something he thinks can be spun to support the Foundation's
position, then he has it sent it in to the Board, purportedly under section 1114.6 of the
Board's rules. The Foundation does so without any due diligence as to whether the
reported event really supports the Foundation's position. This news article about the
proposed listing of the Nelson Tunnel/Commodore Waste Rock Pile as a Superfund
cleanup site does not show any potential for freight or any basis for denying the City's
Application for Adverse Abandonment

The City of Creede and Mineral County formed the Willow Creek Reclamation
Committee several years ago to identify and address environmental issues in the Willow
Creek Watershed. Willow Creek originates in the mountains above Creede. East and
West Willow Creeks merge north of Creede to become Willow Creek. Willow Creek is
channeled through town through a stone flume constructed by the Army Corps of
Engineers. After passing through town, Willow Creek flows into the Rio Grande River,
all in Mineral County.

The Nelson Tunnel has been identified as a major source of metal contaminants in
Willow Creek. Nelson Tunnel drains several old mines (all long closed), including the
old Commodore Mine, north of Creede. The water flowing out of the Nelson Tunnel is

contaminated with metal contaminants left over from the former mining activity. These contaminants are not a human health risk, but pose a danger to birds and fish.

The Commodore Waste Rock Pile sits at the mouth of the Nelson Tunnel and is comprised of waste rock left over from mining activity in the old Commodore Mine. There were actually two parts to the pile, an upper one and a lower part. West Willow Creek is channeled through the Commodore Waste Rock Pile by means of a wooden flume. In 2005, because of flooding, the lower part of the pile broke away and moved towards town. The debris, including pieces of rock cribbing and old pipes, had to be moved out of or away to avoid its being swept into the flume that channels Willow Creek through town. Otherwise, this debris could have resulted in flooding if the debris backed up water in this flume. To avoid future problems, the upper pile needs to be stabilized.

The City and County asked the EPA to place these two projects, which are considered to be a single proposed Superfund site, rather than two, as the Foundation erroneously states, on the National Priority List for Superfund projects in order to obtain federal funds to remediate these two problems. A copy of the City's October 10, 2007 letter to the EPA, which describes the proposed Superfund listing, is attached to this Reply as Exhibit No. 43.

Contrary to the Foundation's letter, neither project will result in the "transportation of clean earth and rock." Nothing in the newspaper article mentions or says anything about the transport of contaminated rock or clean earth and rock. This is because these projects will not involve such transportation.

The Commodore Waste Rock Pile project will involve stabilizing the remaining pile, probably by building new cribbing and/or a retaining wall. There is no proposal to truck the waste rock pile out of the mountains.

The Nelson Tunnel project will involve the assessment of the sources of the metal contaminants that get into the water. This is difficult to determine with any certainty, because there are many different sources of the water that flow into West Willow Creek, including rain, snow pack runoff, and water that flows into West Willow, but which may pick up contaminants from sources other than the Nelson Tunnel. If the source of the contaminants can be identified, then remediation options typically are to redirect the water around the contaminants or, if that is not feasible, cap the contaminated rock with concrete, rocks, asphalt, grass, or other materials. Another possibility is to isolate the contaminated waste rock by depositing it in a lined repository at the site. The lining prevents the contaminants from leaching into the water. The repository may or may not be capped. If, as is more likely, the source of the contaminants cannot be identified with any certainty, then a waste water treatment plant may be constructed to remove the contaminants from the water that flows into West Willow.

In any event, there will not be the transporting out of contaminated rock and inbound transport of clean dirt and rock. This is unnecessary and would be prohibitively expensive. There is also the question of to where the contaminated rock would be transported.

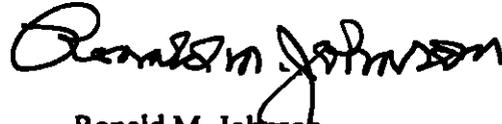
Besides the Foundation's failure to show that there will be any transportation of clean or contaminated earth or rocks, the Foundation provides no support for its assertion that rail would be the preferred mode for such transportation, even if such transportation were to occur.

The Foundation's statement that "the rail line has been reopened to Creede" is either deliberately false or at best misleading. The record in this proceeding shows that the line to Creede is not open for purposes of moving freight, or passengers, by rail. The record shows that the track has not been rehabilitated to FRA class I standards, which are required for passenger operations, and that engineering studies have yet to be done to ascertain whether trains can safely traverse the bridges on the Branch. The Foundation admitted as much in the Verified Statement filed by Mr. Shank in this docket. See, e.g., Verified Statement of Donald H. Shank at 8 (a "detailed report [on bridges] is due in the very near future;" engineers believe "some needed repairs" on bridges), 10 ("All that is left to achieve compliance with FRA Class I safety standards for freight and passenger operations is to restore another crossing (which the State will do this coming Spring) and to install additional crossties"), and 17 ("We have taken the position that until we can definitively establish a date whereby we can offer freight service, and the heavy tonnage associated with it, we will not beat the bushes seeking shippers until we know we can reliably and safely deliver") (filed January 30, 2008). The Foundation in more than eight years has never demonstrated that it is capable of moving a train, and by train, the City means locomotives and cars, not speeders or putt-putts, over the Branch.

Conclusion

For the reasons stated in the Reply, the March 24 letter and attachment submitted by the Foundation do not meet the criteria of section 1114 6, do not provide any new basis to deny the City's Application, and should be disregarded

Respectfully submitted,



Ronald M Johnson
Heidi Gunst
Akin, Gump, Strauss, Hauer & Feld, LLP
1333 New Hampshire Avenue, N W
Washington, DC 20036
202-887-4114

Counsel for City of Creede, Colorado

Dated: April 14, 2008

CERTIFICATE OF SERVICE

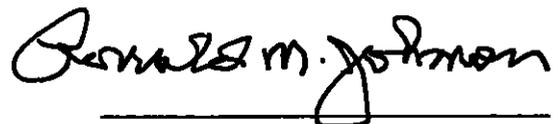
I hereby certify that I have caused a true and correct copy of this Reply of the City of Creede to Fourth Supplemental Letter of the Denver & Rio Grande Railway Historical Foundation in Docket No AB-1014 to be served upon the following individuals by first class mail, this 14th Day of April, 2008

Thomas McFarland
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112
Attorney For the Denver & Rio Grande Railway
Historical Foundation

Donald H Shank
Denver & Rio Grande Railway
Historical Foundation
20 North Broadway
Monte Vista, CO 81144

John D Heffner, PLLC
John D Heffner
1750 K Street, N.W.
Suite 350
Washington, D C 20006
Counsel for San Luis & Rio Grande Railroad

John L Richardson, Esq
John L Richardson, P L L C
555 13th Street, N W
Suite 420 West
Washington, D.C 20004
Counsel for Wason Ranch Corporation



Ronald M Johnson

Exhibit No. 43

The City's October 10, 2007 letter to the EPA

ORIGINAL
MAILED 11/14/07

City of Creede

A Colorado Town

P O Box 457
Creede, CO 81130
(719) 658-2276
Fax 658-2017



October 10, 2007

The Honorable Governor Bill Ritter
136 State Capitol
Denver, CO 80203

Dear Governor Ritter,

With this letter, the City of Creede, a Colorado Town supports and endorses the listing of the "Nelson Tunnel/Commodore Wasterock" site on the National Priorities List for Superfund projects. This site is located on the Commodore Mining property on Bachelor Mountain on West Willow Creek. West and East Willow Creek merge approximately one-quarter mile below and is then called Willow Creek. Willow Creek then flows through the City of Creede for approximately one mile and then meanders about another mile and a half before it flows into the Rio Grande River.

Analytical data gathered and recorded for the last 8 years have concluded that elevated levels of several heavy metals are present in Nelson Tunnel and West Willow Creek. The numerous analyses indicate that Nelson Tunnel is a major contributor of these heavy metals. Although the Nelson Tunnel is not considered a Human health Risk, it is considered an Ecological/Environmental Risk.

The Commodore Wasterock Pile is comprised of wasterock from the mining activity within the Commodore mine that accumulated over the years. West Willow Creek runs through this wasterock pile and is channeled through a wooden flume that was breached by high run off in the spring of 2005. Because of potential future breaches, the Commodore Wasterock Pile is considered a Human Health Risk. Due to the risk of catastrophic failure, the EPA Emergency Response program will work to stabilize the pile within the next year. The City of Creede requests that the stabilization be done in such a manner as to incorporate long-term remediation goals.

The U. S Environmental Protection Agency has met with our community several times to discuss the phases to the Superfund Process. The Nelson Tunnel is a significant portion of Creede's water rights and we would like those water rights to be preserved. The only other concern we ask is for the selected remedy to complement the community's interest in the historical mining site and structures in the area.

