RFTA Staff Responses to Comments Received
on the
Proposed Rio Grande Railroad Corridor Access Control Plan (ACP) Update

City of Glenwood Springs Comments:

1. **ACP Comment:** Please inventory the segments of right-of-way obtained through the Federal Railroad Act in the 1800s and identify the adjoining property owners. This information would be valuable in evaluating alternatives to the rail banking approach to preserving the corridor.

   Response: RFTA is in the process of identifying all of the adjoining property owners and evaluating whether there are any viable alternatives to "railbanking." More information on this process will most likely be provided to the RFTA Board of Directors at the August 13th meeting

2. **ACP Comment:** Many culverts were placed by the Denver Rio Grande Railroad when the rail line was built. The City does not want to take jurisdiction or maintenance responsibility for any culvert constructed to benefit the railroad.

   Response: RFTA would appreciate clarification of this comment. If the City is referencing specific culverts, it would be helpful if the City could provide a list of them to RFTA. If any of the culverts were installed as a part of an existing agreement, there should be a maintenance clause associated with the installation. For any new projects that require the installation of culverts for drainage, maintenance will be addressed and agreed upon as part of a maintenance agreement.

3. **ACP Comment:** The City does not believe that RFTA owns all of the land shown in the Ownership Atlas. In fact, the City holds the deed to the wye parcel in the downtown area. Other deeds grant the right of way for 7th Street. Other errors exist also.

   Response: The survey of the railroad right of way performed by Farnsworth Group (FGI) depicts the boundaries of the Railroad Corridor conveyed to RFRHA. Limited ownership research was performed in a small number of select areas in an attempt to confirm the railroad's right of way boundaries. In the area of 7th Street, as well as other areas, there very well may be conflicting title interests that need further research and investigation; however, generally, the FGI survey established the boundaries of the Railroad Corridor that were included in the acquisition by RFRHA. In the 33 1/2 miles of railroad corridor right of way, FGI is only aware of one incorrect boundary portion of the survey, i.e. the portion of the boundary that mistakenly included the Garfield County Court House. RFTA requests that the City provide any information it has regarding the existence of other potential survey errors or ownership conflicts.

4. **ACP Comment:** As the ACP impacts local land use (just like the State's ACP), it would seem the policy should be approved by IGA by each member entity. This is the way CDOT's access control plan works.

Response: The proposed update of the ACP can only be adopted by a unanimous vote of the RFTA Board members that represent the original constituent governments of RFRHA: Glenwood Springs, Carbondale, Eagle County, Basalt, Snowmass Village, Pitkin County and Aspen. This very high threshold for adoption of the proposed update of the ACP will require total consensus and should generate considerable discussion, compromise, and collaboration, by and among all of the RFTA member governments. RFTA believes the current process for adoption of the proposed ACP, as well as the impending update of the Corridor Comprehensive Plan should suffice and that a separate and duplicative IGA process is unnecessary

5. **ACP Comment:** Some of these policies dictate the ability of public agencies to approve and manage land development and zoning master plans that have been in place before this policy was developed. It also interferes with growth and future potential tax revenue that public agencies and property owners are entitled to under zoning regulations and property rights. This document is draconian in nature and does not create a proactive environment to promote the best interests of RFTA or the agencies that ultimately make up the RFTA Board. It could create lawsuits and years of litigation for which RFTA claims it is not obligated to and will eventually be passed onto the public agencies that make up the RFTA Board. In my opinion, this document is a litigation nightmare that does not consider obligations, historical documents, and prior obligations that need to be honored. It does not consider property rights of homeowners or private citizens, or the privileges afforded to those property owners under zoning laws and policies. It does not acknowledge prescribed rights, or pre-exiting conditions that may reside within the easement and fee titles to land that may have existed before the railroad. It seems this document opens liability issues to RFTA and the public agencies that may have a detrimental effect to all the hard work that has gone into creating this transit agency.

   Response: The Railroad Corridor is regulated by the federal Surface Transportation Board (STB) pursuant to 16 U.S.C. 1247(d) (interim trail use and preservation of corridor for possible future rail reactivation) and a series of STB decisions. STB jurisdiction preempts state and local law that is in conflict. See 16 U.S.C. 1247(d) and 49 U.S.C. 10501(b). STB in general requires that interim trail managers preserve railroad Corridors for future rail reactivation. The agency also takes the position that "railbanking" under 16 U.S.C. 1247(d) requires that Corridors not be "severed" for rail purposes. RFTA accordingly must manage the Railroad Corridor in order to preserve it not only for its current recreational uses but also for possible future public transportation uses. RFTA believes that the best way to ensure the protection of the contiguous railbanked Corridor is to manage it as though it is an active freight rail corridor, or as a corridor on which service has been discontinued, but which is being kept intact with a bona fide intent to preserve it for future rail reactivation. RFTA's management approach is based on long standing recommendations from legal and engineering advisors. Therefore, RFTA does not agree that the ACP represents a litigation nightmare but, instead, views the ACP as simply restating commonly used principles in the railroad industry designed to protect the integrity of railroad corridors for railroad uses. RFTA justifiably wouldn't want to lose the contiguous Corridor because it underestimated the importance of protecting the Corridor for future freight rail reactivation. However, RFTA understands that opinions differ as to the level of management controls necessary (particularly as it pertains to public crossings) to adequately protect the Corridor's railbanked status. For that reason, RFTA is supportive of engaging in a collaborative effort with the City and Town of Carbondale to obtain guidance from the STB as to the level of management controls necessary to ensure preservation of the Corridor's railbanked status. With respect to prescribed rights or pre-existing conditions, Federal case law appears clear

that a railroad that acquires property under the 1875 Grant is entitled to exclusive possession of the entire width of the Corridor and that no prescriptive rights can be acquired against such property.

6. **ACP Comment:** In a review of the Design Standards, it appears that RFTA is asking jurisdictions and private parties that cross the Rail corridor to improve the Rail Classification from a Class III short line rail road to a Class I major carrier standard and Track Standard from a Class 2 standard (30 mph) to a Class 3 standard (60mph). This seems to conflict with RFTA's stated goals of Corridor protection. It also would require RFTA or any new carrier that wanted to reestablish service on the line to re-grade and reconfigure the horizontal curvature of the existing corridor and perhaps replace existing structures to meet the new standards.

   Response: In RFTA's view, the Design Guidelines don't conflict with RFTA's goal of corridor preservation. Instead, they are intended to help assure that reactivation of freight rail service is feasible. In addition to the standards governing the horizontal geometry and vertical clearances of the track alignment of freight railroad lines, the vertical geometry consists of two components, i.e. its profile and its vertical curves. This seems to be the cause of most of the confusion about various standards. The profile and vertical curve standards that the railroad industry uses for freight railroads, to this day, are the same as laid out by A.M Wellington in 1887, and remain largely unchanged. Depending on the various railroad standards being used currently by the UPRR, BNSF, and other major railroad companies, you will see modifications to the allowable rate of grade change separated into either main (heavy haul) line or branch line criteria (occasionally railroads added a relaxed low speed yard or backtrack standard for switching, industrial or hump yard applications). The RFTA Railroad Corridor was always considered as a branch line of the D&RGW Railroad, and that is what RFTA is maintaining as the standard. There is nothing in the profile standard that UPRR, BNSF or RFTA uses that specifies either FRA Track Class or Railroad size class. RFTA holds the rate of change to be the branch line rate of change (RFTA Section 8, Part 4.0 for Branch line or speed under 40mph) to the same standard as UPRR or BNSF for branch line use. There is a vertical curve standard in the AREMA Manual (first printed 2012) that is less restrictive, but it is intended for transit (uniform lightweight cars of a similar size and similar center of gravity). That standard has yet to be adopted by any Class 1, 2 or 3 (sized) railroad in the United States or Canada, to the best of our knowledge. There has yet to be any rigorous dynamic testing or modelling for freight railroads using freight railroad dynamic forces with the 2012 AREMA vertical curve standard. Until that happens, and if the results are accepted by the major railroad companies, it is unlikely that that standard will be adopted for freight railroad use. Until such time, RFTA also has refrained from adopting that 2012 transit standard. RFTA Standards hold to the freight railroad standard as opposed to light rail or the higher speed passenger rail standards because of RFTA's NITU status for the Corridor. This standard is a Branch Line freight standard, which is the same as was used by the D&RGW RR.

7. **ACP Comment: Page 4, paragraph 1** – RFTA states that parties seeking to cross RFTA's corridor are admonished to consider whether the crossing is compatible with freight rail reactivation and commuter rail uses.

   Response: As previously noted, STB, a federal agency, preemptively regulates the Railroad Corridor, with a concern that it be kept intact compatible with rail reactivation, pursuant to 16 U.S.C. 1247(d). RFTA will consider changing "admonish" to a term such as "advise" but all parties should recognize that RFTA must discharge its responsibility under the statute to preserve the Corridor for potential freight rail service reactivation. In addition, the Railroad Corridor was originally acquired in part for

a future public transportation system. RFTA is committed to working cooperatively with crossing sponsors to enable them to design and construct their crossings as economically as possible, while minimizing the potential for successful claims of severance, which could jeopardize the Corridor's railbanked status and thus its availability for trail, open space, and future public transportation needs.

8. **ACP Comment: Page 4** - "unencumbered by future financial burdens" In the event a rail carrier or shipper requests to have freight rail reactivated what is the criteria for reactivation by the STB and who pays for reactivation? Has there ever been a case decided by the STB where the corridor has been determined to be severed because of the expense associated with reactivation? A December 2014 STB Decision regarding a rail banked trail in Kirkland and King County Washington indicates that the railroad seeking to reestablish rail service on the trail must bear financial responsibility for reinstituting rail service, replacing track, etc., not the trail manager or trail sponsor. This STB Decision is attached. If the STB has ever ruled that the trail manager or trail sponsor was responsible for upgrading the trail to a rail ready platform, RFTA should provide these STB decisions to demonstrate the risk.

   Response: In response to the first question, i.e. (criteria for reactivation and who pays): If RFTA (which holds the reactivation rights) sought to reactivate, STB case law indicates that the reactivation would be allowed as a matter of course. If a hostile third party sought reactivation, then, the King County case indicates that the third party must have financial responsibility to pay for the cost of restoring track, ties, and acquiring the property interests of RFTA necessary to operate a railroad. Please note, however, that STB precedent in Offers of Financial Assistance (49 USC 10904) and Feeder Line (49 USC 10907) forced sale scenarios tends to value rail easements at zero, and portions of this right of way appear to be based on the 1875 Act, which the Supreme Court recently held conveyed only an easement type interest.

   In response to the second question, i.e. (STB decisions on severance due to the cost of removal of obstructions placed by third parties with railbanker consent):

   > In <u>Roaring Fork Railroad Holding Authority – Abandonment Exemption – in Garfield, Eagle and Pitkin Counties</u>, AB 547X, served May 21, 1999, Garfield County argued that CDOT had severed the Aspen Branch at Wingo Junction and Offer of Financial Assistance applicants Kulmer and Schumacher argued on the same basis that STB should grant emergency relief against RFRHA over the alleged severance. STB stated that "RFRHA "has acted appropriately to protect its interests and responsibilities by negotiating with CDOT a commitment to restore the track and to indemnify RFRHA at the conclusion of the project." Slip at 3-4. At p. 4 footnote 9, STB said that "[t]he project contemplates a grade-separated crossing, in conjunction with projected light rail service or, upon reasonable request, freight service."

   This decision indicates a means to defeat a claim of severance, i.e. a means to create a kind of "safe harbor" from a claim of severance. In particular, it suggests that if the railbanker requires the party proposing a highway project or other use to restore the rail line in the event rail use is properly requested, and to indemnify the railbanker, then there is no severance. The indemnifying entity here was CDOT, presumably not a judgment proof agency.

   If the owner of a railroad allows an obstruction that bars or impedes supplying rail service to a bona fide shipper, and the shipper demands service, the railroad (a) must embargo the line or it is liable

to pay the shipper's lost profits if it fails to provide the service, and (b) if it embargoes the line to avoid liability for lost profits, it is obligated to restore service or abandon the line (if STB is willing to authorize abandonment).

When RFRHA originally acquired the Aspen Branch, it was an operating line of a railroad. In order to avoid liability for lost profits, RFRHA arranged to deliver a carload of beer for Orrison Distributing at Glenwood Springs. The significant expense of doing so precipitated RFRHA's effort to railbank the Aspen Branch. 16 USC 1247(d) treats railbanked corridors as equivalent to unabandoned corridors. It would follow that the rules applicable to inactive but unabandoned rail corridors apply to railbanked lines. Accordingly, if a shipper sought reactivation and was prepared to pay for track restoration and required property interests (assuming the King County case applies), RFTA could face the choice of removing a very expensive obstruction, or abandoning the Corridor. This problem would appear to be alleviated if the proponent of the costly obstruction agreed to assume all liability to remove it in the event of reactivation for rail purposes and had adequate resources to do so (consistent with the 1999 Garfield County case).

9. **ACP Comment: Page 5** - Conservation Covenant- What happens when there are conflicts between the corridor preservation and conservation requirements?

   Response: RFTA doesn't believe there is a conflict between corridor preservation and the GOCO Agreement conservation requirements. The Amended GOCO agreement in section 2.2 reads: "The parties agree and acknowledge that the Corridor was originally purchased and is held by RFRHA (now RFTA) in perpetuity not only for its Conservation Values and the construction and maintenance of a trail, but for the re-establishment of a mass transit system in the future." it continues later in the section to read "Accordingly, RFRHA (now RFTA) shall be permitted to take all actions necessary with the STB and the State of Colorado, Department of Transportation (CDOT) and the Public Utilities Commission (PUC), to ensure the continuing ability of RFRHA (now RFTA) to operate and manage the Corridor as a railroad. It is not the intent of the parties to interfere with the legal rights and obligations of RFRHA (now RFTA) attendant to the operation of a mass transit corridor or the legal rights and obligations of tenants or grantees of easements upon the corridor, including the trail easement owned by the Board of County Commissioners of Pitkin County, Colorado, on the corridor within Pitkin County, provided however, to the extent reasonable and practicable the design criteria and operation of mass transit improvements and rail alignments shall consider and respect the Conservation Values of the Property and trail uses of the corridor."

10. **ACP Comment: Page 6** – "unfunded and/or unaccounted for financial obligations." As stated above, in the event a rail carrier or shipper requests to have freight rail reactivated what is the criteria for reactivation by the STB and who pays for reactivation? Has there ever been a case decided by the STB where the corridor has been determined to be severed because of the expense associated with reactivation?

    Response: Please see answer to number 8. In all events, the absence of a case does not mean absence of a problem. For example, it may mean that no one has yet created such a condition, much less brought such a condition to the agency's attention.

11. **ACP Comment: Pages 6 and 7**, purpose of the policy – RFTA states three things: "The policy seeks to ensure compliance with 16 U.S.C. 1247(d)." A copy is attached of what I believe is the most recent interpretation of this code by the STB (May 30, 2012). In reading the decision I believe RFTA takes a

very conservative, "no risk to RFTA" stance to the preservation of the corridor. RFTA should be asked to provide evidence (STB decisions) to support their claim of the risk of "financial severance". In research done on other rail banked corridors in the United States, no other corridors had such an extreme policy for crossings. This research is attached. The policy seeks to minimize new at grade crossings and consolidate existing at grade road crossings. The policy seeks to avoid any future financial liability and cost to RFTA arising from third party use, including the expense of upgrading any existing or approved crossings of the rail corridor.

Response: As to the bona fide concern of RFTA about "financial severance," see response to 8. As noted there, Garfield County and OFA applicants argued exactly that as to Wingo Junction. STB did not say there was no legitimate concern. STB indicated that RFRHA had obligated Colorado DOT to restore the Corridor at CDOT expense in the event of rail reactivation. It is appropriate for RFTA to act within the scope of existing decisions, for if STB determined the Corridor to have been severed by an action in which RFTA was complicit, the public would lose the contiguous Corridor for all the purposes for which it was acquired, including transportation, recreation, conservation and open space. The public investment would be lost, and RFTA might incur additional financial liabilities. As to the practices of other interim trail managers, it may be that due to local geography and population density, other railbanked corridors researched by the commenter simply do not have crossings or obstructions that raise potential severance issues. In other instances, the trail managers may be acting in ignorance or may be misadvised. In addition, RFTA notes that a number of the interim trail managers researched by the commenter indicated that they granted licenses (as opposed to easements) for crossings, and made them subject to the reactivation of freight rail service. In the event of freight rail reactivation, these licenses contained language requiring the crossing sponsors to either remove or reconstruct the crossings if necessary. Permanent easements could be problematic if the proposed crossings are incompatible with freight rail reactivation. So far, the City has not indicated an ability to accept financial responsibility for rendering the crossing compatible with rail in the event of reactivation. RFTA has been advised by its legal counsel that the construction of crossings that are incompatible with freight rail reactivation, which result in the accumulation of deferred costs to restore the Corridor to proper working order for a freight rail service, might lead to claims of severance which, if successful, could result in the loss of large segments of the contiguous Corridor consisting of federal land grant areas.

In addition, the Corridor was purchased in order to preserve it for a future public transportation system. It is important, therefore, for RFTA to keep the Corridor as free as possible from obstacles that might impair the efficient and safe operation of a future public transportation system.

RFTA is committed to doing all it can to work with crossing sponsors to minimize their crossing costs to the maximum extent feasible, while ensuring that their crossings won't jeopardize the Corridor's railbanked status. RFTA urges all crossing sponsors to consider other means in which RFTA may work with it to equitably defray costs for all concerned.

12. **ACP Comment: Page 6,** "Purpose and Intent": It is my understanding that the freight rail corridor may already be severed at Wingo Junction due to a bridge that cannot support freight rail activity. Isn't RFTA tasked with maintaining all infrastructures required to support rail operations in the event that an entity wants to utilize this corridor for freight rail? This document should also discuss the existing condition of the freight rail corridor and what steps are in place now to maintain the current rail status.

Response: RFRHA (now RFTA) has an agreement in place with CDOT that obligates CDOT to reconstruct the Wingo Junction Railroad Crossing at the time that rail service is restored. CDOT, as an investor in the acquisition of the Railroad Corridor ($3 million), has a financial interest in ensuring that the contiguous Railroad Corridor isn't lost due to a claim of severance. In AB 547X, served May 21, 1999, STB rejected Garfield County's claim that CDOT severed the Corridor at Wingo Junction, and also rejected Kulmer/Shoemaker's request for emergency relief against CDOT, stating that RFRHA acted appropriately in requiring grade separation and indemnity by CDOT if rail service is restored. Without a written agreement with CDOT assuring that the rail Corridor would be restored at Wingo Junction in the future, the STB might have ruled in favor of the County's claim. This example is instructive, because it indicates that claims of severance can arise when alterations to the Railroad Corridor are allowed that appear to be incompatible with freight rail reactivation.

13. **ACP Comment: Page 8, paragraph 4** - The statement "The Surface Transportation Board (STB) has exclusive jurisdiction over transportation by rail, including rail-banked right of ways such as the railroad corridor." In STB decision 49 CFR Part 1152, it says, " The STB's role under the Trails Act is largely ministerial….The STB plays no part in the negotiations between trail sponsors and railroads, nor does it analyze, approve or set the terms or rail banking/interim trail use agreements… The Board does not "regulate activities over the actual trail, and has no involvement in the type, level or condition of the trail…"

    Response: RFTA agrees that to date, STB has not attempted to regulate trails on a railbanked rail corridor. Instead, STB focusses on rail reactivation. The STB tends to view railbanking as simply a means to keep railroad corridors intact for future rail reactivation. The agency's regulations provide that interim trail use is subject to being cut off at any time for the reinstitution of rail service. 49 C.F.R. §§1152.29(a)(3), (c)(2) & (d)(2). A railbanked line is not abandoned, but rather remains part of the national rail system, albeit temporarily unused for railroad operations. Consequently, if and when a railroad wishes to restore rail service on all or part of the property, it may request that the CITU/NITU be vacated to permit reactivation of the line for continued rail service. E.g., Georgia Great Southern Division – Abandonment – between Albany and Dawson, AB 389 (Sub-no. 1X), served Feb. 2, 2004 (reactivation over the objections of interim trail manager). Thus, although the STB does not regulate the trail, it does have power to require rail reactivation. As to rail reactivation, STB case law indicates that although there is always a holder of the right to reactivate (the original abandoning railroad or its lawful transferee, in this case RFTA), an agency or a shipper request may result in a STB order of reactivation. The STB in effect says it will monitor the discretion of those holding the right to reactivate and/or may order involuntary transfer of that right. In this case RFTA is not only the NITU holder but it also holds the certificate for reactivation of the rail line. This is unique to RFTA and (with approval of voters in the region to assure an appropriate level of funding) it would allow RFTA to reinstitute a freight rail and/or a commuter rail system in the Roaring Fork Valley in an expeditious fashion.

14. **ACP Comment: Page 8** - The ACP applies to the entirety of the corridor owned by RFTA. The City of Glenwood Springs owns a portion of the corridor as deeded to the City by RFTA. Does RFTA intend that the ACP apply to the portion the City owns?

    Response: As long as the UPRR's exclusive freight rail easement exists in the Wye, RFTA believes this issue is moot. RFTA will otherwise administer the ACP on its right of way in the Corridor.

15. **ACP Comment: Page 8** - Authority- Does approval of this policy by RFTA affect member jurisdiction's ability to appear before the CPUC? Should this policy be approved by every member jurisdiction to be effective?

    Response: This policy does not affect a member jurisdiction's ability to appear before the CPUC. RFTA, as the Railroad, would be notified by the CPUC of any applications affecting the Railroad Corridor and it would have an opportunity to support or oppose such applications. Regarding the need for the policy to be approved by every member jurisdiction, see RFTA's response to Comment #4, above.

16. **ACP Comment: Page 9, paragraph 2** – In this paragraph RFTA states that there is no intent to abrogate any easement, license, covenant or any other private agreement or restriction. This is contradicted by the following: Page 14, paragraph 1 – Failure to obtain approval from RFTA for a private crossing, failure to pay the license fee, or failure to comply with RFTA guidelines (requiring grade separation) may result in refusal to grant the license or termination of an existing license and removal of the crossing. Page 14, paragraph 4 – Licenses shall be specific to private individual landowners and entities and shall not run with the land, nor shall they be subject to assignment or transfer to another private party In other words, landowners cannot sell their properties without risk of losing their access. Landowners will be forced to negotiate with RFTA for a new license (and be required to meet their grade separation standards), or negotiate with adjoining property owners to consolidate an access point. This policy could result in a taking of the private landowner's home or property rights, if they could not afford to construct a grade separation of their access, or if the adjoining landowner refused to cooperate in consolidating the access point. Page 17, paragraph 5 – "A change in use of an existing crossing may also result in the requirement to upgrade the crossing, or revocation/removal of the crossing and improvements." "A change in use" is not defined, and could be anything RFTA chooses. Closing of any crossing public or private should not be a decision made by RFTA staff.

    Response: To the extent consistent with 49 USC 10501(b) and 16 USC 1247(d), this ACP is not intended to abrogate any existing easement. The licenses that RFTA has issued to adjacent property owners are the same agreements that the D&RGW, SPRR and the UPRR have used to license uses since the 1800's. Maintenance and Improvements are addressed in the licenses and the language is consistent throughout all of the license documents. If a rail service is restored in the Corridor, crossings along the entire Corridor may need to be evaluated to determine whether there might be alternatives for consolidation in order to enhance the safety and efficiency of the system. RFTA would not have the ability to make needed modifications to crossings if it granted adjacent property owners easements instead of licenses and the easements did not contain language that allowed the modifications. It is with a view to a future public transportation system that RFTA intends to continue offering adjacent property owners revocable licenses, which are the standard in the railroad industry. RFTA will work cooperatively with adjacent property owners to ensure that they have access to their land, while maintaining the flexibility for RFTA to modify their crossings in the future, if necessary. Issuing licenses for crossings of the Corridor is not considered a taking. If a property owner refuses to sign a license agreement; however, RFTA would then be forced to exercise its rights under Colorado law to compel them to do so consistent with its obligation to maintain the railbanked status of the Corridor and comply with GOCO requirements**.** Although it would be challenging to define or foresee every potential change of use that might trigger the requirement to upgrade a crossing, RFTA can attempt to provide some guidance in the proposed update of the ACP. For example, a change from ingress/egress for a single family home or owner

occupied ranch to ingress/egress for a new housing development or a change from serving a residential use to a commercial use, may result in the requirement to upgrade the crossing. If a jurisdiction approved additional commercial activity on an adjacent property that would increase vehicular traffic over an existing licensed crossing, RFTA might require the license holder to provide additional safety measures for trail users.

17. **ACP Comment: Page 9, paragraph 4** – RFTA reserves the right to adopt amendments to this policy at any time. This policy has broad effect on land use throughout the valley. We suggest that this policy and all amendments have extensive public process and be adopted by the RFTA Board, as well as all member jurisdictions.

    Response: RFTA will ensure that proposed amendments of the ACP are disseminated to the public, member jurisdictions, and CDOT, with sufficient time for review and comment. Similar to the adoption of updates to the ACP and Comprehensive Plan, all amendments to the ACP must be adopted by a unanimous vote of the seven RFTA member jurisdictions that were the constituent members of RFTA. Most likely, except in the event of an emergency, RFTA will provide for two readings of the proposed amendments prior to adoption.

18. **ACP Comment: Page 10**, Great Outdoor Colorado Requirements and locations defined. This section speaks of a spread sheet of violations or encroachments to the Rail Corridor. How have these encroachments been handled in the past? Have these encroachments been researched against case law involving prescribed rights? How does this affect encroachments that have been long standing without dispute? How are the encroachments written in areas where RFTA only has an easement? This seems like a very dangerous policy that may institute unnecessary litigation. Areas where RFTA only owns an easement, which does not adequately define the use of the land for a prescribed right such as rail, may not give RFTA the right to dictate encroachment. It does not reduce the right of the fee title holder to utilize that land for other uses that are not in conflict with the right of a single rail line.

    Response: In 2001, RFTA assumed ownership of the Railroad Corridor from RFRHA, as well as the responsibility for managing the Conservation Covenant Areas included in the 2001 GOCO Agreement. To assist with this requirement, RFTA created a Covenant Enforcement Commission (CEC) consisting of representatives from each RFTA member government, a Pitkin County Open Space and Trails' representative, and two at-large representatives living within the boundaries of the two counties that make up the nine Conservation Covenant Areas. The CEC meets annually to assess RFTA's compliance with GOCO requirements and to make recommendations to the RFTA Board regarding corrective action needed to adhere to the conservation values set forth in the GOCO Agreement. RFTA retains a consultant to conduct a thorough annual inspection of the nine Conservation Covenant Areas to determine whether any potential violations exist. The nine Conservation Covenant Areas consist of approximately 50% of the 34-mile long Railroad Corridor owned by RFTA. RFTA also completes its own assessment of encroachments in the Conservation Covenant Areas and holds an annual meeting with the CEC to discuss the status of the previous year's violations, any new violations that have been identified, and any other concerns associated with the Railroad Corridor. The CEC makes recommendations to the RFTA Board of Directors regarding any remedial action that is needed and the Board directs staff to eliminate and/or license the violations. Each year, RFTA provides GOCO with a letter outlining all violations and describing the plan for eliminating them. The GOCO covenants are very restrictive and, over the years, RFTA

has eliminated or licensed multiple encroachment violations within the Railroad Corridor, both within and outside of the GOCO Conservation Covenant Areas.

Federal case law appears clear that a railroad that acquires property under the 1875 Grant is entitled to exclusive possession of the entire width of the Corridor and that no prescriptive rights can be acquired against such property.

19. **ACP Comment: Page 14**, Private Encroachment: How will this be applicable if RFTA does not own the underlying fee of the property, and the easement is not specifically defined?

    Response: To the extent the 1875 Grant Land is being referred to in this comment, the width of the railroad right of way is defined by the 1875 Act and the center line of the right of way is the track as originally constructed. Please see the response to Comment #5, above.

20. **ACP Comment: Page 14**, Private Crossing Maintenance Responsibility: How can the access not run with the land? If the owner dies or sells the land, then the access becomes null and void? If the access is denied, RFTA has just devalued the land and basically landlocked the land based on the sale. Is this legal in the State of Colorado? This could be looked at as a condemnation from a public agency and may not be a wise policy choice.

    Response: Licenses by definition do not run with the land. RFTA intends to issue, terminate, and reissue licenses to adjacent property owners in accordance with Colorado law, while maintaining the railbanked status of the Railroad Corridor and complying with the GOCO requirements**.** RFTA possesses the ability, and sometimes has the need, to specify the location for accesses and to consolidate access points when feasible and reasonable. RFTA does not allow a license to automatically transfer to a new owner, but it will provide a new license for a new property owner as part of the closing documents for acquisition of a parcel. During the ACP comment period, a private property owner asked RFTA to add language to the ACP (regarding the issuance of crossing licenses to subsequent property owners) that reads "which approval will not be unreasonably withheld." RFTA will revise the proposed update of the ACP to include this language. Many properties adjacent to the Railroad Corridor have changed ownership since rail was introduced into the valley and RFTA does not believe they have been devalued due to the need to obtain licenses from the railroad for their accesses.

21. **ACP Comment: Page 15, paragraph 3** – Public Encroachment – An "encroachment" is any use of any portion of the railroad corridor without the permission of RFTA. It is RFTA's policy to treat any encroachment in a similar manner as a crossing and require a license for any encroachment. An unlicensed encroachment is a trespass and may be removed by the user, or it will be removed or blocked by RFTA at the user's expense." While RFTA has yet to publish lists of the approved crossings, we believe there are a number of unlicensed utility crossings and potentially a road crossing (23rd, 8th Street, South Bridge). With this language, RFTA has the ability through their license process to require the City to grade separate any crossing (licensed or not) or block the access point at the City's expense.

    Response: When RFRHA acquired the Corridor in 1997, it developed lists of existing approved uses of the Corridor (List A), tentatively approved new uses of the Corridor (List B), and proposed new uses of the Corridor that were subject to approval in the future (List C). These lists will be incorporated as attachments to the updated ACP. An update to this list, which identifies all of the

current uses in the Corridor, i.e. crossings, encroachments, utilities, etc. will be developed in the future as time and resources allow. Subsequently, RFTA will address removal of the encroachments that no longer serve a purpose, licensing of allowed encroachments, and requests for new uses of the Railroad Corridor. Until RFTA is able to compile a complete inventory of the Railroad Corridor, updating the list of approved uses may be challenging. However, if there are concerns about any potential current unlicensed City uses, RFTA can work with the City to inventory all of the existing uses and develop licenses for any uses that currently might not have licenses.

22. **ACP Comment: Page 15** - Does approval of this agreement preclude a member from going to hearing at the PUC? Should RFTA be requiring fully built rail crossings for a rail banked line when there is no plan for re-activation of any type or any funding in place? This seems to be a waste of public money and/or private money.

    Response: RFTA's responsibility, as delegated by the jurisdictions that were the members of RFRHA, and that are now members of RFTA, is to preserve and protect the Railroad Corridor for a future public transportation system. Railbanking is the mechanism that is currently preserving and protecting the contiguous Corridor, which is an asset of inestimable value. Railbanking requires RFTA to maintain the Corridor's viability for future freight rail reactivation; therefore, RFTA must exercise caution in approving crossings or uses of the Corridor that could significantly impair, if not preclude, the Corridor's suitability for reactivation of freight rail service. RFTA has no intention of preventing CDOT or local jurisdictions from obtaining access over the Corridor, so long as such crossings don't jeopardize RFTA's ability to maintain the Corridor's railbanked status, inasmuch as railbanking is the mechanism that keeps the contiguous Railroad Corridor intact. The ACP does not preclude a jurisdiction from applying to the CPUC for a crossing; however, it would be best if these jurisdictions worked cooperatively with RFTA to design their crossings in a way that would be compatible with freight rail reactivation, so that RFTA can support their CPUC applications.

23. **ACP Comment: Page 15** - Public Encroachment- What enforcement authority does RFTA have? This policy will be very expensive to enforce.

    Response: As a landowner, RFTA has the same rights to remove encroachments or sue for trespass as any other landowner and that is what it has done when it has faced this situation in the past. As to the expense for enforcement, like any other business decision – a cost-benefit analysis of bringing a lawsuit must be carefully evaluated before engaging in litigation.

24. **ACP Page 16, paragraph 1** – RFTA has not included in the document their lists of permitted crossings, List A and List B. These lists were not provided so the lists cannot be reconciled with the City's crossings. This should be done before any further consideration of the policy.

    Response: The existing lists will be attached to the ACP and provided to the City and other interested parties.

25. **ACP Comment: Page 16, paragraph 2** – **Improvements**. RFTA states here that "Owners shall be responsible to improve and maintain existing crossings in conformity to applicable standards so as to allow and not impede freight rail reactivation. (Improvements or maintenance can be triggered by the following): General transit system improvements initiated by RFTA, RFTA determines that increased traffic over an existing crossing warrants improvements, Where improvements have been agreed to through RFTA's License Agreement process. This statement requires that RFTA be a part

of the City's land use process. RFTA would need to review all new land use proposals to decide whether traffic had increased enough in their opinion to warrant imposing their grade separation standards on the City or the developer. In addition, any changes to a public crossing would require an updated application to the CPUC for review.

RFTA offers no standard at which that determination might be made. (CDOT requires the City to submit land use applications to them to determine an adverse effect on the State Highway system. CDOT's threshold is a 20% increase in volume at the intersection. CDOT can require new acceleration and deceleration lanes, a new signal or signal retiming. RFTA has stated that they would like to eliminate 50% of all existing at grade crossings (Design Standards – Section 5, paragraph 2). Grade separation of a roadway is a huge cost, roughly $5-$10 million in today's dollars. In addition, RFTA through this section would have the ability to require an existing crossing (licensed or not) to meet their design standards with a "general transit system improvement." It is unclear what this means, and could be a simple as adding a bus stop.

Response: Crossings in existence when active rail service existed on the Corridor are presumably compatible with rail reactivation. RFTA's goal is to ensure that the condition of the Corridor at the time of the purchase is not allowed to deteriorate so that in the event freight or passenger service reactivation, significant modifications to existing crossings will be necessary. In the interim, conflicts between vehicles and trail users could prompt RFTA and jurisdictions to jointly modify crossings to improve safety. A change in use from a private crossing with minimal traffic, to a public crossing or a private crossing involving commercial uses and/or significantly higher volumes of traffic, might also prompt RFTA to seek safety improvements from crossing sponsors. However, changes to existing crossings or proposed new crossings that adversely impact RFTA's ability to maintain the Corridor's railbanked status would engender significantly greater concern and reduce the likelihood that RFTA would be supportive of them. Particularly in the case of proposed new public crossings, project sponsors would need to also obtain permission from the CPUC, whether or not rail is active in the Corridor. Generally, RFTA plans to continue to allow at-grade crossings of the Corridor as long as there in no active rail service. The implementation of active rail service in the Corridor could prompt RFTA to reevaluate the need for grade-separation of public crossings at certain locations. As far as establishing specific thresholds similar to CDOT's that would potentially trigger the need to upgrade an at-grade crossing to a grade-separated crossing, RFTA will attempt to develop such guidelines and incorporate them into the proposed update of the ACP Design Guidelines and Standards. Most likely these standards would be applied when rail is imminent or active. As it relates to proposed new public crossings, the CPUC will determine whether the crossing should be at-grade or grade-separated and it could allocate the costs of any proposed crossing between the sponsor and RFTA. There may be limits, though, on the amount, if any that could be properly be allocated to RFTA at this time under 16 U.S.C. 1247(d).

26. **ACP Comment: Page 16**, **Existing Public Crossing:** If a private crossing already exists, and does not have adequate safe crossing apparatus meeting current standards, and the replacement is not discussed in the current language of the crossing, it would stand to reason that RFTA may have a future financial obligation that it cannot write away in policy. What is RFTA considering regarding public roadways that already cross the Corridor, but are not on the A, B, or C list? There does not seem to be a crossing listed for 23rd Street although the City has built and paid for a rail crossing at this location for South Grand Avenue. How will RFTA handle this type of situation? Some parcels of land may have been platted or homesteaded and may predate the rights of the railroad. Has a list been compiled of such properties?

Response: It is possible that with the reintroduction of rail service in the Corridor that the rail project might need to bear a substantial portion of the cost to upgrade public or private crossings. The 23rd Street crossing at MP 361.73 is DOT #253718R, D&RGW Contract #27326 and, therefore, is licensed. There is also a PUC Decision on this crossing; PUC Application #18466 (1961) plus Appl. 23872/71005 (1966). Because this is an at-grade crossing, and rail is not active, RFTA does not foresee this crossing being a problem as far as preserving the Corridor's railbanked status.

Over time, as resources allow, RFTA will attempt to develop an inventory of adjacent property owners and, where uncertainty about ownership is identified, attempt to resolve these issues in a fair and equitable manner.

27. **ACP Comment: Page 16, paragraph 12** - **Crossing improvements and Maintenance of Existing Crossings:** Has each agreement been researched to verify this policy? Is this a sound policy if existing crossing documents are not concise? If the language already exists for the crossing and predates this document, how will RFTA handle these issues?

    Response: RFTA's crossing licenses contain language that was derived from licenses issued by the D&RGW and the Southern Pacific Transportation Company. Maintenance of and improvements to private crossings are addressed consistently in RFTA's licenses. It has been RFTA's experience that public crossings are typically maintained by the jurisdictions in which they are located. In some instances, when tracks have not already been removed and/or paved over, RFTA might be asked to share the expense of maintaining the tracks. Private crossings are a different matter. Currently, there is a recreational trail located within the Corridor. Where private crossings intersect and cross the trail, owners of the crossings are required to maintain their crossings to ensure that they are safe and not causing unwanted damage to the Corridor or the trail itself. RFTA has been managing the trail for nearly 15 years and has not found this requirement to be a problem for licensees. If rail is reactivated, changes to crossings may be required. Where tracks have been removed or paved over, RFTA might need to bear the cost of repairing the crossings. However, the cost of maintaining approaches to the crossings would typically be borne by jurisdictions if the crossings are public or by adjacent property owners if the crossings are private.

28. **ACP Comment: Page 17, paragraph 4** – "All crossings shall meet the current minimum Design Guidelines and Standards adopted by RFTA… An owner may be required to upgrade an existing crossing that does not comply with the design standards, at no cost to RFTA, when freight or commuter rail activation takes place, a subdivision or site development is proposed, or when the crossing itself is proposed to be improved, realigned or reconstructed." As stated above, this statement requires RFTA to be included in the City's land use decisions. It also allows RFTA to impose very costly improvements to both private and public landowners. The policy will require the City to involve RFTA in every new project, public or private on the west side of the City.

    Response: Staff will be revisiting this language as it pertains to impacts on private property owners. The proposed ACP language, as written, provides RFTA with flexibility to make or to require improvements to existing crossings when rail service is restored, or when crossing sponsors propose new uses or changes to existing license agreements. Regarding the Land Use comments, the Corridor Comprehensive Plans have envisioned that the City and other jurisdictions wishing to utilize the Railroad Corridor would include RFTA in their land use processes. As it relates to the Corridor, RFTA should be considered a referral agency and impacts to the Railroad Corridor should be

mitigated to the greatest extent possible to ensure its ongoing preservation as a trail and/or a future public transportation Corridor. RFTA has no intention of usurping the sovereignty of local governments through which the Corridor passes, but as a landowner, RFTA should be consulted when it is anticipated that the Corridor will be impacted by projects proposed by others. In addition, the Corridor holds a unique status, in that it is regulated under 16 USC 1247(d), which preempts state and local law to the contrary, just as federal rail regulation preempts state and local law to the contrary.

29. **ACP Comment: Page 17** - Design Guidelines and Standards "at no cost to RFTA." This may not be consistent with State policy as ruled on by the CPUC where cost allocations can be determined.

    Response: RFTA agrees with this comment and the language will be revised in the next version of the proposed ACP update to acknowledge the CPUC's role in allocating the cost of public crossings between the crossing sponsors and RFTA, within the limits of 16 U.S.C. 1247(d).

30. **ACP Comment Page 19** - This policy will likely cause lawsuits against RFTA at some point in the future. Has RFTA considered the costs and negative impact on entity?

    Response: The Aspen Branch Corridor was subject to considerable litigation before and after RFRHA acquired it. RFTA believes that the way to avoid more litigation is to comply with 16 U.S.C. 1247(d) as interpreted by STB, and to comply with other applicable law. If RFTA complies with 16 U.S.C. 1247(d), then many claims against the Corridor might be preempted. In addition, this approach preserves the contiguous Corridor intact for its current recreational uses and its future use as a public transportation Corridor. The creation of unfunded obligations that might pose a significant impediment to freight rail reactivation could jeopardize RFTA's ability to maintain the Corridor's railbanked status. Claims of severance could arise, which if upheld by the STB, could result in the potential loss of federal land grant areas that keep the contiguous Corridor intact. The safest policy for RFTA, absent specific guidance about the types of actions that the STB would consider a severance of the Corridor, is to not allow crossings that would pose a physical barrier to freight rail reactivation or which result in the accumulation of unfunded obligations to repair or restore the Corridor in the future. RFTA believes that it is instructive that In AB 547X, served May 21, 1999, the STB rejected Garfield County's claim that CDOT severed the Corridor at Wingo Junction, and also rejected Kulmer/Schumacher's request for emergency relief against CDOT, stating:

    > "In a third instance, it appears that a highway reconstruction project by CDOT has obstructed the rail line beyond Carbondale, CO, an obstruction that apparently will continue for some period of time. That portion of the railroad, however, has been under embargo for at least a decade, since before RFRHA acquired the line. RFRHA has no control over the highway project, ***but has acted appropriately to protect its interests and responsibilities by negotiating with CDOT a commitment to restore the track and to indemnify RFRHA at the conclusion of the project***. We find that offerors have failed to allege any facts upon which emergency relief may be granted, and, therefore, deny such relief."

31. **ACP Comment: Page 19** - Does the STB look at the number of crossings to determine if a Corridor has been severed, or is financial cost to reestablish rail service considered when assessing the possibility of severance? RFTA should demonstrate the threat of severance through current STB decisions regarding number of crossings or financial cost.

Response: As indicated in the response to #30, above, the STB intervenes when claims of severance are made. In the Wingo Junction example, the STB noted that the Railroad Corridor had been obstructed but it ruled against the claim of severance noting that "RFRHA had acted appropriately to protect its interests and responsibilities by negotiating with CDOT a commitment a commitment to restore the track and to indemnify RFRHA at the conclusion of the project." It can be inferred from the STB ruling that RFRHA's "responsibilities" were to not to allow an obstruction for which there was no provision for removal and restoration of the Corridor so as to be compatible with freight rail reactivation.

32. **ACP Comment: Page 19, paragraph 4** – "No new at grade crossings will be considered or permitted to serve any new parcels or lots, without consolidation or eliminating existing crossings elsewhere so that there are NO NET NEW CROSSINGS" If this policy passes the RFTA Board, this statement would have a huge effect on future public projects. All crossings would need to be grade separated, at considerable cost. At this time the City is being required to grade separate South Bridge, at an additional cost of $4.5 million dollars. 14th Street Bridge would also need to be proposed as a grade separation.

    Response: The redesign of South Bridge project allows the roadway to cross the Railroad Corridor at-grade by raising Highway 82 in order to create an interchange system. RFTA will consider revising this language to make it clear that new at-grade crossings may be allowed depending on the circumstances. RFTA will, however, continue to have a goal of minimizing new at-grade crossings and reducing existing at-grade crossings (most likely through consolidation). Although RFTA may allow new public at-grade crossings, they must be safe for trail users, not jeopardize the Corridor's railbanked status, and also be approved by the CPUC.

33. **ACP Comment: Page 19, paragraph 5** – Denial of Private Crossing. RFTA retains the right to deny a private crossing request. This provision does not affect the City as greatly as it does other jurisdictions. However, it does raise the same concerns mentioned above, in that this policy could be construed to be a taking of private property, and could subject RFTA and all of the member jurisdictions to lawsuit.

    Response: RFTA has no intention of denying private crossings for frivolous reasons. Because the Corridor has been in existence for over 100 years, the vast majority of properties adjacent to the Corridor already have approved accesses. In the case of requests for new private crossings, RFTA should be able to establish the conditions surrounding such crossings, to ensure that they are safe and constructed to certain standards. If an existing property owner that already has a crossing requests a new crossing, RFTA may make the approval of the new crossing contingent upon the abandonment of the old crossing. If a property is subdivided and the owner requests a crossing for a new parcel, RFTA may require that the crossing be consolidated with an existing crossing in order to minimize the proliferation of crossings, which could impair the safe and efficient operation of a future rail system. RFTA has been involved in only one Corridor-related lawsuit during the past 15 years that it has managed the Corridor. This lawsuit was brought by RFTA against an adjacent property owner concerning an encroachment on the Corridor. Ultimately, this lawsuit was favorably settled and the encroachment was removed.

34. **ACP Comment: Page 20**, "No new crossing will be permitted that could …, trail and other uses for which RFTA has obligated itself." Reading this statement, it appears that RFTA is absolving itself from prior agreements. These agreements may not afford RFTA the freedom of breaking without the

agreement of both parties. Does this policy invite lawsuits for breeches in contracts for which RFTA and the public agencies that make up RFTA may be liable?

Response: RFTA does not intend to absolve itself from any prior agreements or commitments. To the contrary, it is because of agreements entered into by RFRHA and its member jurisdictions (that were assigned to and assumed by RFTA) that RFTA is doing its best to maintain the Corridor's railbanked status and to preserve the Corridor for a future public transportation system. If there are specific prior agreements to which the City refers, please specify and/or provide copies of such agreements.

35. **ACP Comment: Page 21**, Approval Criteria, "1. Improvements shall not create a future financial obligation or physical obstruction to freight rail, commuter rail reactivation, trail use or other uses that RFTA has obligated itself;" This language appears that RFTA is using this document to dissolve contractual obligations in previous agreements. If this is the case, this seems fiscally and managerially irresponsible to use this document to try and dissolve binding agreements.

    Response: See response to comment #34, above.

36. **ACP Comment: Page 22, paragraph 5** – Appeal process. Angela Kincade and Mike Hermes will determine whether the crossing will be approved. If the applicant disagrees, they have 10 days to file an appeal with the Board. RFTA staff will then send the appeal to the Board with their recommendation for denial. The Board will then determine whether or not the appeal will be heard. If the board chooses to hear the appeal, the applicant then only has 10 minutes to make the case for a different decision. This appeal process seems to be very limited for making large land use decisions.

    Response: RFTA initially wished to ensure that there was an expeditious appeal process in order to avoid delay. However, RFTA will revise the ACP appeals' process to provide more time for appeals to be submitted and adjudicated.

37. **ACP Comment: Page 24, Paragraph 2** – "RFTA reserves the right to deny or condition any and all licenses, permits or contracts for use of RFTA property not withstanding participation in a prior planning process." Here the RFTA policy asserts that RFTA has a higher land use authority than the local jurisdictions.

    Response: The agreements for management of the Railroad Corridor were put in place by all participating jurisdictions. RFTA has been delegated the responsibility for complying with agreements that it inherited from RFRHA and for managing the Railroad Corridor according to the terms and conditions of those agreements. The ACP asserts no land use authority over local jurisdictions. However, local jurisdictions should not assume that they can cause or allow impacts to the Railroad Corridor that might jeopardize its railbanked status. RFTA will work cooperatively with local jurisdictions to assist them in obtaining authorization for Corridor crossings. The language in this paragraph is intended to inform others that merely because RFTA participates in planning meetings and processes involving other jurisdictions, it should not be assumed that RFTA has given its assent to proposed crossings and other uses of the Corridor.

38. **ACP Comment: Page 24** - Financial responsibility. The CPUC allocations for crossings suggest the railroad may or should have partial responsibility for the cost of crossings.

Response: The allocation of crossing costs will be decided on a case-by-case basis by the CPUC; however, if a proposed crossing could affect the railbanked status of the Corridor, the CPUC may not have jurisdiction either to grant the crossing or to allocate the costs of the crossing to the railroad.

39. **ACP Comment: Page 24,** Coordination and Development Review with Local Jurisdictions: In order for RFTA to be involved with the development review process, it would require adoption or an IGA with a local agency. The problem is that this policy prohibits development and in some cases may create reverse condemnation of properties based on the nature and wording of the document. If adopted, developers would spend a tremendous amount of money to get a project approved, and in the end, may not be able to develop because of the restrictive nature of the document.

    Response: Nothing in this policy is intended to prohibit development or create inverse condemnation of properties. RFTA has a responsibility to adhere to the agreements it inherited from RFRHA; to maintain the Corridor's railbanked status and to preserve the Railroad Corridor for its primary use as a future public transportation Corridor and its secondary recreational and other public uses. RFTA has an obligation to manage the rail Corridor in a responsible fashion and agrees that it needs to work cooperatively with the jurisdictions to develop a joint land use review process for projects that impact the Railroad Corridor. Currently, RFTA is a referral agency for projects that impact the Railroad Corridor; however, RFTA doesn't always receive referrals in a timely manner and then it is forced to react after the fact instead of during the review process, which is not ideal. RFTA wants to work in harmony with its jurisdictional partners to ensure that crossing sponsors develop the best and most affordable projects for all concerned, including RFTA. Although the proposed update of the ACP may undergo additional revisions before it is adopted, RFTA believes that the updated ACP, when adopted, should help jurisdictions better understand RFTA's crossing guidelines and constraints and ultimately assist them in getting their crossings approved more rapidly.

40. **Design Guidelines and Standards Comment: Section 1.1, paragraph 8** – "There may be current third party uses of the RFTA property that do not conform to these guidelines and standards…On a case by case basis, RFTA will endeavor to remove or ameliorate the non-conforming uses to the extent consistent with applicable contracts and legal requirements." The City has a number of crossings that do not meet the proposed RFTA standards. The City would be subject to removal or improvement of the crossings to meet RFTA standards, at the City's cost.

    Response: The statement in this Section and paragraph is generally accurate, but it should be clarified that it is referring to the time when rail returns to the Valley. At that time, all of the existing crossings will need to be reviewed and some will undoubtedly need to be reconstructed, consolidated, or relocated, in order for rail to operate safely and efficiently. RFTA recognizes that most of the costs associated with the reintroduction of rail will likely need to be included as a part of a future rail system. In addition, the voters in the Valley will need to vote to support funding for a rail system. In order to have the greatest potential for success at the polls, it would seem wise to limit the accumulation of unfunded costs that would be required to repair damage created by crossings that aren't designed to be compatible with freight or commuter rail activation. Building and then having to remove a public crossing, instead of building it to accommodate a future rail system from the outset, could be considered wasteful and lead to an erosion of public support for the future commuter rail system.

41. **Design Guidelines and Standards Comment: Section 1.2, paragraph 2** – "Railroads do not recognize private crossings unless permitted under a written agreement between the land owner and RFTA. In this regard, to protect the Corridor, RFTA intends to act as if it were a railroad. No private crossings are permitted except pursuant to a written license agreement with RFTA, or a predecessor of RFTA." As discussed above, this is another statement that will require private landowners to negotiate with RFTA for a 30 day revocable license agreement, and subject the property owner to the expense of a grade separated crossing. RFTA has also stated that no new private crossings will be allowed without consolidation.

    Response: Because of its unique NITU/CITU status, and because the Corridor was purchased for a future public transportation corridor, RFTA manages the Corridor as a Railroad Corridor. The ACP promotes a standardized approach to the management of existing private crossings and to the development of new private crossings of the Railroad Corridor. If rail returned to the valley, RFTA would need to ensure that all crossings of the Corridor, whether public or private, were safe. In some cases, RFTA would need to work with private property owners to consolidate or realign their crossings. As part of that process, RFTA anticipates that the majority of costs would be borne by the rail project; although the private property owner could incur some costs associated with approaches to the crossings. They might also need to agree to the relocation or consolidation of their crossings. The need to manage private crossings in this way is not new, nor was it created by RFTA but, rather, it was created by RFTA's predecessor RFRHA. RFTA is a public agency and it will require public support in order to develop a future rail system; therefore, RFTA plans to continue working cooperatively with private property owners.

    Having a 30-day revocable license, the standard that railroads use, has not been a problem in the past. This potential problem appears to be theoretical and contrary to history. While RFTA is amenable to extending the revocation time frame for legitimate cause, RFTA, as the owner of the Corridor, has the responsibility for preserving the potential for future rail operations, as well as protecting current and future trail users from safety issues created by others. The licensing process and Design Guidelines and Standards are tools that RFTA uses to help protect the public, the Corridor, and RFTA. This system is similar to the ones railroads historically have employed as a means of managing safety and risk. Finally, it is RFTA understanding that the rail industry uses 30-day terminable licenses in order to ensure that federal regulatory authorities do not view some non-rail use an illegal de facto abandonment or unreasonable burden on rail service.

42. **Design Guidelines and Standards Comment: Section 1.2, paragraph 3** – "Railroads traditionally allowed private crossings with a 30 day terminable license. In order to protect the corridor in a fashion compatible with rail reactivation, RFTA intends to continue that practice." Continued…"Adjoining landowners are admonished that sales of real property adjacent to the RFTA's right of way corridor do not imply that the successor in interest to the adjoining landowner shall have a right to cross the railroad corridor. Failure to acquire a license agreement/contract/permit with RFTA may result in denial/revocation or removal of the private crossing. Change in use of the crossing may also result in the requirement to upgrade the crossing improvements, or revocation/removal of the crossing and improvements." This provision is so onerous that it may be construed to be a taking of private property rights. As stated above, at a minimum, landowners seeking to establish or reestablish access to their homes and land would first be forced to negotiate with their neighbor for consolidation, and then second be forced to grade separate a crossing to freight rail standards.

Response: This language is standard language used by railroads to protect their ability to safely operate within their railroad Corridors. This language already exists in the license agreements that RFTA has, for many years, had with the Corridor's adjacent property owners. For more information on this topic, please see RFTA responses to comments 16, 20, 28, 33, 37, and 41, above.

43. **Design Guidelines and Standards Comment: Section 1.3, general comment –** RFTA's policy implements a large and likely expensive application process. In it they reserve the right to act in the capacity of a NEPA reviewing agency. RFTA can request information on environmental issues, drainage issues, hazardous materials operations, health and safety, noise and or light pollution, traffic impact analysis and emergency and fire services mitigation. In the end, all private crossings (residential, commercial and utility), if granted, would be granted with a 30 day revocable contract or license. In Section 2.1, in the fourth paragraph, the policy states that RFTA will only permit crossings for a public agency in the form of a license agreement or contract, but not in the form of a permanent easement. This will likely to cause problems with Federal funding of projects. It seems unlikely that Federal funds would be allocated to a project that could be blocked or removed by RFTA. In addition, RFTA will need to hire additional staff for review of all of the land use applications and enforcement of this policy. Some or all of the cost could be funded through application fees, but costs to the developer would be very high. Finally, CDOT has made the City aware that in their negotiations with the Union Pacific Railroad for crossings, the UP grants CDOT permanent easements. In this document RFTA asks for a higher standard than an operating Class I railroad.

    Response: Railroads use an application process for parties seeking to use their Rail Corridors for access or other purposes. Customarily, any uses permitted by railroads are permitted by a license. It is not "new" for developers to apply to owners of railroad corridors for various uses. It is not RFTA's intent to create an additional layer of process for developers but, rather, it hopes that it can work with its member jurisdictions to ensure that the public's assets and interests are protected. RFTA feels obligated to issue revocable licenses because they help to protect the Corridor's railbanked status and preserve the Corridor for a future public transportation system. Nonetheless, RFTA will consider easements for public crossings, assuming that the crossings are approved by the CPUC and designed and constructed in a manner that won't jeopardize the Corridor's railbanked status. Given the complexity of managing a railbanked corridor, RFTA must accept the legal, engineering, and management costs associated with ensuring that the Corridor is adequately protected.

44. **Design Guidelines and Standards Comment: Section 2.1, paragraph 1** – "To this end RFTA seeks to avoid any obstructions to the Corridor which might amount to an arguable "severance" precluding rail reactivation. This requires RFTA to be vigilant not only to avoid granting property interests that disrupt the continuity of the Corridor, but also to avoid allowing changes in the elevation of the rail bed, or the installation of aerial, surface or subsurface structures that are incompatible with freight rail reactivation or commuter rail construction and operation." Here RFTA states that they would rather not allow crossings of the corridor. However, they may let a public entity or private individual cross if you do not disturb the rail bed. RFTA stated this position during the negotiations around the South Bridge crossing. The City initially proposed lowering the trial/ rail line to Federal AERMA standards. RFTA said that the grades were too steep. RFTA preferred that we keep a rail/ trail grade of less than 1.5% (AERMA standards allow 2%). This required very long transitions and excessive cost, roughly $10 million to meet RFTA's preferences. In the end RFTA said that they would prefer South Bridge to cross their trail/rail corridor at grade in this location. This decision conflicts with this proposed policy, and may not be allowed if this policy passes. The decision to allow the South Bridge

project to cross the rail corridor at grade still requires that the City and County raise State Highway 82 by 8 feet at the intersection and install a grade separated interchange and a series of retaining walls. The cost for this solution is $4.5 million.

Response: RFTA believes that the City's South Bridge project, as originally described in the Environmental Assessment, did not account for the cost of restoring the rail bed if freight or commuter rail were to be activated in the future. The estimated cost of repairing the Corridor so that rail vehicles could pass under the City's road was approximately $10 million. This is the type of unfunded obligation that RFTA is attempting to avoid in order to maintain the Corridor's railbanked status and to preserve it as a viable future public transportation Corridor. The additional $5 million cost of the redesigned South Bridge project will avoid damage to the Corridor and could possibly work better for traffic flows on Highway 82. Would RFTA prefer to have a grade-separated crossing of the Corridor rather than an at-grade crossing at this location? Yes, but RFTA recognizes that the cost of grade- separating the roadway in a manner that wouldn't harm the rail bed would be considerably more expensive than the City's current at-grade crossing design. RFTA was clear from the inception of the South Bridge EA process, that the project should not negatively impact the Railroad Corridor and, potentially, jeopardize the Corridor's railbanked status. In 2010, the City Engineer and the EA consultants represented to the RFTA Board that the project sponsors would put in escrow funds necessary to repair and restore the Corridor in the future if freight rail became active. However, in the EA, no mention of this commitment was made and RFTA objected to this omission. Considerable additional time and expense have been incurred by the City and RFTA to find a compromise crossing design that is workable from RFTA's perspective. Perhaps this additional time and costs might have been avoided if the current proposed ACP and Design Guidelines and Standards had been adopted and available for reference at the outset of the South Bridge design and environmental process. While it is in the best interest of RFTA, trail users, and a future public transportation system, to limit the number of new at-grade crossings of the Railroad Corridor and to consolidate existing crossings where feasible and reasonable, RFTA will make allowances when necessary.

45. **Design Guidelines and Standards Comment: Section 2.1, paragraph 2** - "Consistent with general railroad policies, RFTA seeks to consolidate or to remove as many at grade motor vehicle crossings as possible. New motor vehicle crossings, especially at grade crossings, should be avoided, if at all possible. Such crossings should be grade separated to minimize risk of impairing future rail restoration." As stated above, grade separation for public and private entities requires a bridge or a tunnel, both of which are hugely expensive, in the range of $5-$10 million per crossing in today's dollars. Not many new developments are able to absorb this kind of cost. If passed, RFTA's policy may significantly slow or stop development on the west side of the Roaring Fork Valley.

    Response: The cost of a grade separation may be overstated in this comment. The cost of a grade separation can vary widely and is very dependent on local site conditions, local geometry and safety needs. Often, costs of $1.5 to $2.5 million are more common for small local public road overpasses and underpasses. Full highway interchange costs are obviously much higher and also include many other improvements not directly associated with the road crossing of a railroad itself. Many public road crossings have alternatives that involve different cost and other considerations. Ideally, the costs of proposed crossing projects shouldn't be minimized to the detriment of the Railroad Corridor. RFTA will look at each crossing proposal on a case-by-case basis and work with crossing sponsors to develop crossings that are as affordable as possible for the sponsors while also avoiding

negative impacts on the Railroad Corridor. RFTA has no intention of hindering future developments or the transfer of real property.

46. **Design Guidelines and Standards Comment: Section 2.1, paragraph 4** – "Public crossings require a written license or other contract agreement with RFTA prior to construction, operation or alteration…..Failure to comply with the terms of the license or other agreement with RFTA will constitute a breach of contract and risk closure of the crossing." In this statement RFTA claims the ability to close public crossings. Glenwood Springs only has two crossings of the Roaring Fork River, both of which cross the RFTA Corridor. Closure of either one of these crossings would result in considerable traffic congestion and delay very similar to the closure of the Grand Avenue Bridge in 2017.

    Response: Whether RFTA would ever force closure of a public crossing for breach of contract depends on the circumstances presented. Although unlikely, RFTA needs to maintain that right, even as a last resort, in the event of an inability or unwillingness of a jurisdiction to execute a license agreement with RFTA, possibly jeopardizing the Corridor's railbanked status. In the case of public crossings in the Railroad Corridor, the CPUC still has the final word on any potential closure and the PUC would determine how costs for improvements to existing or new crossings would be allocated between RFTA and the jurisdictions making the changes within whatever limits are imposed by regulation under 16 U.S.C. 1247(d). RFTA envisions this issue would generally pertain more to utility crossings than roadway crossings, since most public crossings have previously received decisions from the CPUC.

47. **Design Guidelines and Standards Comment: Section 2.1, paragraph 5** – "Private crossings require a prior written agreement in the form of a 30 day terminable license between a private individual or entity and RFTA consistent with RFTA's ACP. New private at grade motor vehicle crossings shall be avoided." As discussed previously with other statements, this policy statement could be construed to be a taking of private property rights. A 30 day terminable crossing license will not be viewed very favorably by many banks and financial institutions. In addition, the cost to construct the bridge or tunnel crossing will be too much for most private projects to bear.

    Response: 30 day terminable licenses have been the standard since the Railroads began operating in the Roaring Fork Valley in the late 1800's. To RFTA's knowledge, this process hasn't negatively impacted the property values or the transfer of real property adjacent to the Railroad Corridor. RFTA is routinely contacted by the title companies in the Valley when parcels are changing hands. In such instances, RFTA supplies a new license as a part of the closing documents. RFTA has no intention of hindering future developments or the transfer of real property where there is no negative impact to the Corridor. As has been stated elsewhere, most private landowners already have licenses for accesses to their properties. In a number of cases, the crossings have already been consolidated. RFTA must preserve the ability to work with property owners to consolidate crossings, if possible and practical, when "new" crossings are requested.

48. **Design Guidelines and Standards Comment: Section 2.1, paragraph 6** – "Private crossing licenses may not be sold, subdivided or otherwise assigned. All private crossing rights are personal to the individual private licensee and do not run with the land." Again, this statement could be construed to be a taking of private property rights. With the sale of private land, the owner is forced through this policy to consolidate the private access and bear the cost of grade separating the access point.

Response: In general, licenses are personal to the licensee and do not run with the land. This is not a taking. The process of terminating the licenses of previous property owners and reissuing them to new property owners happens with regularity. When property sales happen, RFTA is notified and issues a new license to the new owner for the existing crossing of the Railroad Corridor. Licenses are not transferrable. This is a management tool that RFTA uses to ensure notification of changes in ownership of the parcels requiring access across the RFTA Railroad Corridor. This policy provides RFTA with the flexibility to work with property owners to realign and consolidate private crossings when necessary, desirable, and practical. Normally, the transfer of a crossing license from one owner to the next occurs without any changes to the crossing itself. There is no mandatory requirement for a private owner to grade-separate a crossing.

49. **Design Guidelines and Standards Comment: Section 2.1, paragraph 7** – " Private parties contemplating subdivision and redevelopment are hereby on notice that RFTA's policy prohibits additional new private motor vehicle crossings of the RFTA's Corridor without consolidation, or otherwise eliminating existing crossings elsewhere." See statement above.

    Response: RFTA must have the ability to work with private property owners to consolidate crossings when it is possible and practical. During the period that it has been managing the Railroad Corridor, RFTA has been asked to approve very few new private crossings of the Corridor. RFTA does not anticipate a tremendous number of new private crossing requests in the future. Consolidation may be considered when private property owners that have multiple licensed crossing already in existence agree to eliminate one or more crossings in order to be approved for a new crossing. Since RFTA acquired the Corridor, it has been working cooperatively with private property owners and has experienced minimal disputes. ACP provisions about which the City expresses concern have, to a large degree, been included in previous versions of the ACP. RFTA believes that the biggest ACP issue that needs to be addressed is how to facilitate affordable public crossings of the Corridor without jeopardizing the railbanked status of the Corridor.

50. **Design Guidelines and Standards Comment: Section 2.1, paragraph 8** – "For all private crossings licensed after the date of adoption of this ACP, the minimum insurance requirement for RFTA's protection from personal liability or property damage arising from the crossing shall be the greater of (a) $2,000,000 per incident /$6,000,000 aggregate or (b) the coverage limits of the relevant liability policy of the private individual or company owning the adjacent land served by the crossing." This provision adds an additional cost to the already outrageous cost to grade separate a crossing of the RFTA corridor for a private individual.

    Response: Current licenses, which RFTA patterned after the railroad, require the licensee to assume all liability arising from their crossings and indemnify RFTA. As a result of the ACP comment and review process, it is likely that the proposed insurance provision will be modified in the final draft of the proposed update of the ACP. RFTA has no desire to add unnecessary financial burdens on license holders; however, RFTA must ensure that it is protected from potential liabilities that could result from accidents involving trail users or others that are caused by the licensees. An insurance requirement will likely be added to the ACP for situations in which private property owners are performing work in the Corridor. There is no mandatory requirement for a private owner to grade-separate a crossing.

51. **Design Guidelines and Standards Comment: Section 2.1, paragraph 10** – " To the extent possible, it is RFTA's policy that all crossings must have an assigned FRA/DOT number and must be entered into

the Federal Database (administered locally by CDOT). Any crossing without a valid DOT number is subject to closure and may be removed." This is yet another mechanism for RFTA to close an existing crossing, with huge consequences to the local jurisdiction or private property owner.

Response: This is a federal requirement. Crossing numbers are issued by any one of the following: RFTA, CDOT (Intermodal), or FRA. In most cases RFTA and CDOT would jointly issue the number. The DOT number is for Safety recordkeeping & inventory purposes. This is not a system put in place to eliminate crossings, its purpose is to manage and monitor existing crossings and provide for management of new crossings. Closure of a crossing would be a last resort measure. RFTA believes it is unlikely that a property owner or a local government would refuse to take the relatively minimal steps necessary to obtain a valid DOT number for their crossings in order to comply with this policy. RFTA will assist everyone with getting their crossings the required FRA/DOT numbers if they don't have them already.

52. **Design Guidelines and Standards Comment: Section 2.1, paragraph 11** – "RFTA shall treat the Rio Grande Trail corridor as if it were an operating freight rail corridor. Bridges (overpasses and underpasses) constructed on the corridor shall be designed and constructed in accordance with applicable railroad clearances…..Any crossing of the RFTA corridor must be designed to meet current freight rail standards when constructed. Pledges to conform to rail standards at some future date are not an acceptable substitute because of future financial uncertainties as well as uncertainties in estimating construction and compliance costs." It seems unfair and well beyond the original purpose of RFTA to treat this corridor as an operating rail corridor. It adds huge costs to all crossings, and may well significantly slow or eliminate development on the west side of the Roaring Fork River from Glenwood Springs to Woody Creek. In addition, the UPRR does allow at grade crossings of their rail corridor. Why should RFTA's standards for a rail banked line be more stringent that the UPRR's requirements for an active line?

Response: The Railroad Corridor was acquired by RFRHA and its constituent governments. The City of Glenwood Springs was a signatory to a 1997 Intergovernmental Agreement that approved the purchase of the Corridor. The IGA states as follows:

> **If any one Government wishes to utilize all or a portion of the Property for a new or different use not enumerated in the Comprehensive Plan and within the jurisdiction of that Government, it may do so provided that such a use is approved by the Board of Directors of the Roaring Fork Railroad Holding Authority, does not preclude the desired future uses as determined by the Board of Directors**, as is consistent with the obligations imposed by the funding sources referenced at Section 5, above. **It is the responsibility of the Government proposing this new or different use to prove and otherwise insure that the use will not preclude any desired future use from occurring to the satisfaction of the Board of Directors.**
>
> The Governments recognize the potential issues surrounding certain existing physical conditions of the Property, in particular existing and proposed at-grade crossings by public rights-of-way and accesses. **Placement, modification, improvement and/or relocation of at-grade crossings will be allowed provided that those improvements follow generally accepted standards and do not result in negatively impacting the primary use of the Property, and**

are consistent with the grant conditions from the various funding sources described above. Attached as Exhibit "H" is an inventory of the Property identifying certain crossings, accesses, and uses along the Property (the "Access Plan"). This Access Plan shall assist the Roaring Fork Railroad Holding Authority in identifying current uses of the corridor, and in the adoption of the Comprehensive Plan. Notwithstanding any language to the contrary herein, nothing in this Agreement shall be construed or interpreted to mean that any illegal crossings, trespass, uses, unauthorized encroachments or homesteads upon the Property are being legalized or approved by the adoption of this Agreement."

In addition, the IGA states:

Development of a Comprehensive Plan. A Comprehensive Plan for the property (hereinafter the "Plan") shall be developed and approved by the RFRHA Board of Directors prior to improvement of the Property for public transportation uses. The parties hereto acknowledge that the Property is currently being used for certain purposes (rail transportation, utility easement, crossings for access to adjacent properties and related purposes.) Consistent with the Purpose section of this Agreement, it is **not the intent of the parties hereto to interfere with the legal obligations attendant to the operation of a rail transportation corridor** or the legal rights of tenants or grantees of easements upon the Property. The Plan shall include the following:

i. A **listing and description of possible uses for the property, including but not limited to such improvements necessary to place and operate a public transportation system**, public trail and/or access to public lands;

ii. A detailed improvements and operations plan for the ultimate preferred use(s) on the property, including a recommended management and funding strategy; and

iii. An interim plan which incorporates the interim use of the rail corridor for a temporary trail following approval from the Surface Transportation Board of a certificate of interim trail use pending the re-establishment of rail service.

A review of the founding RFRHA IGA's and the 2000 Comprehensive Plan, as well as the provisions of the GOCO agreement, indicates that RFRHA intended to allow public at-grade crossings so long as the project sponsors demonstrated to the satisfaction of the Board of RFRHA that such crossings would not preclude or negatively impact the primary use of the Corridor for a public transportation system. The members of RFRHA also agreed not "to interfere with the legal obligations of RFRHA attendant to the operation of a rail transportation corridor." RFTA is doing its best to comply with the responsibility for protecting and preserving the Railroad Corridor that was conferred upon RFRHA by its constituent governments, including Glenwood Springs, and assigned to RFTA in 2001.

53. **Design Guidelines and Standards Comment: Section 2.1, paragraph 14** – "RFTA will treat any opening or gate in a right of way fence on the corridor as a crossing. Unless the crossing has a license, RFTA will treat it as undocumented. Undocumented crossings are prohibited. RFTA shall

reserve the right to fence, lock or otherwise permanently obstruct the crossing, without liability to RFTA, and will require that all costs, including attorney's fees, be borne by the user of the undocumented crossing." This statement seems over the top and very unreasonable. Why pedestrian gates are a danger to the rail banked status of the line?

Response: Pedestrian gates are a safety issue for a Railroad Corridor. If the gates are public and involve a crossing, they require CPUC approval. If they are private, they must be licensed so that, if a rail system begins operating in the Corridor in the future, the gate can be removed, if necessary, to protect the public from accidents involving pedestrians and trains. Licensing gates is merely a management tool that enables RFTA to identify all uses of the Corridor and potential current and future safety and liability concerns.

54. **Design Guidelines and Standards Comment: Section 4.1, paragraph 2** – "If an underpass structure is required, the project must temporarily reroute train traffic around the construction site by utilizing a shoofly track subject to local operating review and approval. Shoofly tracks will be designed per Section 4.1.1." The City examined a shoofly track for the 8th Street project. It was deemed infeasible there. This expense is inappropriate for a corridor where there is no active service.

    Response: Shoofly tracks are a safety measure used for construction on an active Railroad Corridor. RFTA is managing this Corridor as a Railroad Corridor and as such has created a policy to account for all potential future uses of the Railroad Corridor. This policy will be applied when rail returns to the Railroad Corridor and if shoofly tracks are deemed necessary and appropriate for the situation at that time.

55. **Design Guidelines and Standards Comment: Section 5, paragraph 2** – "As stated in Parts 1 and 2 of this document, Federal guidance laid out in the 2008 Railway Safety Improvement Act and 23 -USC - 130 to reduce the total number of at grade crossings by 50% by elimination or consolidation of at grade crossings in order to preserve RFTA's corridor for future rail reactivation and for commuter rail use, RFTA believes it is prudent to apply the Federal guidance to management of the rail-banked corridor." Again, this policy is too extreme for a corridor which was purchased and rail-banked by the local jurisdictions with the intent of managing a recreational trail through the Valley. The existing crossings and any proposed new crossings enable better access to our cities and provide economic development in our valley. The idea of eliminating crossings and making new crossings so expensive as to be cost prohibitive will slow, and perhaps eliminate economic development in the Valley, and will also provide ample fodder for law suits against RFTA and all of the supporting member jurisdictions.

    Response: Please note that RFRHA originally purchased the Railroad Corridor as an operating line of railroad. It was railbanked only when actual provision of low volume freight rail service seemed prohibitively expensive. In any event, the Corridor was purchased for its primary use as a public transportation corridor and its secondary recreational and other public uses. Railroad Corridors are difficult to assemble and easy to lose but, with proper management, the Railroad Corridor should support good land use planning and help to preserve many of the Valley's long range transportation goals. To date, RFTA has not found the process to be litigious. If the Corridor is going to be preserved, it must be protected. If the growth and development that the City envisions occur, a viable, unencumbered, public transportation Corridor will be even more necessary and valuable than it is today.

Garfield County Comments:

1. **ACP Comment:** Foremost, the Board believes this document to be draconian in nature and does not create a proactive environment to promote the best interests of RFTA and the citizens of Garfield County

   Response: The proposed 2014 ACP is an update to the 2000 and 2005 versions of the Access Control Plan (ACP) that have been previously adopted either by RFTA or all of the constituent jurisdictions of the Roaring Fork Railroad Holding Authority (RFRHA) that currently comprise RFTA. The proposed 2014 update was written to include design Guidelines & Standards for all requested uses of the Corridor. Except for the inclusion of the proposed Guidelines & Standards, the proposed 2014 update is very similar in substance to the previous 2000 and 2005 versions. For informational purposes going forward, the 2014 update also includes non-substantive but important information regarding the history of the Corridor, the fundamental elements and concepts inherent in railbanking and a definitive explanation of the Great Outdoors Colorado (GOCO) Conservation Covenant areas and RFTA's management requirements associated with them.

   While the proposed ACP emphasizes the need to protect the Corridor's railbanked status by disallowing barriers to the reactivation of freight rail service (a Surface Transportation Board railbanking requirement) to a greater extent than its predecessors, many of the provisions of the previous ACP's have been incorporated verbatim. To address concerns that have been expressed about the overly restrictive nature of the proposed ACP, RFTA has formed a collaborative ACP Work Group, consisting of staff members of jurisdictions throughout the region. The goal of the Work Group is to improve the ACP in a way that doesn't' jeopardize the Corridor's railbanked status, so as to keep the contiguous Corridor intact.

2. **ACP Comment:** The County also believes that some of these policies dictate the ability of public agencies to approve and manage land development and zoning master plans that have been in place before this policy was developed.

   Response: The inclusion of Design Standards and historical information in the proposed 2014 update ACP was not intended for the purpose of dictating land use policies. Rather, the focus has been to comply with the updating process that is required by the GOCO agreement and assure that the railbanked status of the Corridor is maintained. RFTA's fiduciary responsibility to preserve and protect the valuable Corridor asset requires it to manage it in a way that doesn't jeopardize its railbanked status. When land use issues arise, local governments and RFTA will need to work closely together to find workable solutions that enable all of the parties to achieve their respective goals to the greatest extent feasible.

3. **ACP Comment:** The County believes this ACP is an excessive means to protecting the "rail banked" status of said corridor. Alternatives for protecting the corridor such as converting the corridor to a right of way for trail use instead of preserving it for future rail under the railbanking legislation may be more appropriate.

   Response: The Corridor's railbanked status provides strong and unique Federal protections for many citizens and guests of the Roaring Fork Valley who enjoy and use of the Corridor today, while also preserving it for its intended use as a future public transportation Corridor. Although it is in

process of researching other ways to manage the Corridor, RFTA isn't optimistic that it will be able to find suitable and/or affordable options that provide the same level of protection that railbanking affords. Conversion of the Corridor from a Rail Corridor to a trail Corridor will require the acquisition of the federally granted lands comprising the Corridor. In light of the holding of the recent United States Supreme Court case of MARVIN M. BRANDT REVOCABLE TRUST ET AL. v. UNITED STATES -01-2014), whereby landowners prevailed in their argument as adjacent owners that they were entitled to ownership of abandoned Federal easements, railbanking both protects the Corridor from intrusion by private interests and preserves it for use in the future as a public transportation Corridor for the entire region.

4. **ACP Comment:** In reviewing this plan, the County would like to ensure that private landowners are protected and that, if necessary, adjustments are made to impacted property boundaries and areas of encroachment Garfield County has received correspondence from concerned constituents in regard to fee titles to land that may have existed before the railroad. The County encourages RFTA to resolve these issues proactively with respective property owners.

   Response: RFTA is in the process of identifying all potentially impacted adjacent property owners and developing a strategy for cleaning up any and all boundary issues related to the Railroad Corridor. Meetings have already been held with potentially impacted adjacent property owners for the purpose of resolving legal boundary issues.

5. **ACP Comment:** The specific provisions for the proposed appeal process are extremely limited, are inappropriate for the complexity of the issues at hand and may not allow for an appellant to be heard. The County believes the appeal process should be reconsidered to allow for more than 10 days to appeal, and not limit the time of argument to be made within a short 10 minutes. The County is also concerned that the plan provides for inappropriate duties assigned to the Assistant Director of Project Management, such as the unilateral ability to approve new accesses.

   Response: Revisions that will hopefully address these concerns will be explored and discussed with the ACP Working Group and the RFTA Board.

6. **ACP Comment:** As both RFTA and the County are aware, as stated in the original Intergovernmental Agreement entered into on December 31, 1994 concerned with the purchase and public ownership of the Aspen Branch of the Denver and Rio Grande Western Railroad Right-of-way ("1994 IGA"), the primary use for the property was to be as a public transportation corridor and the secondary use could include recreation. RFRHA (now RFTA) was to continue to evaluate all aspects of a freight operating agreement for reactivation of freight services on the Rail corridor.

   Response: RFTA has been delegated the responsibility for preserving and protecting the Corridor for a future public transportation system. In addition, the Corridor has been railbanked through the Surface Transportation Board; therefore, RFTA is required to manage the Corridor in the same fashion as an operational freight and compatible passenger or commuter rail service.

7. **ACP Comment:** The 1994 IGA was restated in a new Intergovernmental Agreement made on June 26, 1997 ("1997 IGA"). It is the failure of the draft ACP to recognize critical pieces of this IGA. The Governments recognize the potential issues surrounding certain existing physical conditions of the property, in particular an existing proposed at-grade crossings agreement that causes concern for the County. Of utmost relevance is Section 6.d.iii.paragraph 2 of the 1997 IGA [being] public right-

of-way and access. Placement, modification, improvement and /or relocation of at grade crossings will be allowed provided that those improvements follow generally accepted standards, do not result in negatively impacting the primary use of the Property, and are consistent with the grant conditions from various funding sources."

Response: References to all agreements related to the acquisition and management of the Railroad Corridor should be included in the ACP and copies made readily available.

8. **ACP Comment:** The County is concerned that the draft ACP does not recognize the allowance for modifications, improvements and/or relocations to existing public roadways. In 1997, RFRHA also provided a list of Identified Accesses and Uses for the Roaring Fork Trail corridor. It is in this document, as list A, List B and List C, that provides assurance to the County that existing public right-of-ways can continue in use (and future modification) unhampered by the proposed draft ACP. As a solution to this omission, the County requests that this section of the IGA as well as Lists A, B and C be both referenced in the ACP as clear exceptions to the application of the plan as well as provided as an exhibit to the draft document. In addition, all prior agreements in regard to use and rights need to be acknowledged and preserved.

   Response: Generally**,** RFTA agrees with this statement and will be including the original list of 1997 identified existing, future proposed and approved, and future proposed but not yet approved accesses, as well as an updated list of new uses as a part of the final accepted version of the updated ACP. Future modifications to existed uses will require a review.

Colorado Department of Transportation Comments:

1. **ACP Comment:** CDOT is extremely concerned that interpretation of requirement imposed by 16 USC 1247(d) by the Roaring Fork Transportation Authority (RFTA) and their implementation through this ACP will place unnecessary requirements on entities seeking to modify or install new crossings of the Rio Grande Trail. The Colorado State Highway Access Code provides authority to and authorizes the CDOT to regulate vehicular access to or from any public highway under its jurisdiction from or to property adjoining a public highway for the health, welfare and safety of the traveling public.

   Response: Please take note of STB's 1999 Garfield County decision involving Garfield County's claim that the Corridor was severed due to a CDOT project at Wingo Junction. STB disallowed Garfield County's claim on the ground that RFRHA appropriately required CDOT to restore the Corridor in the event of rail reactivation. That decision suggests that public projects on the Corridor should be consistent with rail reactivation, or the proponent of the project should agree to bear the costs of restoration in the event of reactivation. RFTA is simply following the precedent set by CDOT's prior actions. In any event, RFTA's responsibility, as delegated by the jurisdictions that were the members of RFRHA, and that are now members of RFTA, is to preserve and protect the Railroad Corridor for a future public transportation system. Railbanking is the mechanism that is currently preserving and protecting the Corridor, which is an asset of inestimable value. Railbanking requires RFTA to maintain the Corridor's viability for future freight rail reactivation, therefore, RFTA must exercise caution in approving crossings or uses of the Corridor that could significantly impair, if not preclude, its ability to reactivate freight rail service. RFTA has no intention of preventing CDOT or local jurisdictions from obtaining access over the Corridor so long as such crossings don't jeopardize RFTA's ability to maintain the Corridor's railbanked status. Failure to maintain the Corridor's

railbanked status would result in the loss of significant segments of Federal land grant areas that keep the contiguous Corridor intact.

2. **ACP Comment:** The draft ACP does not balance the interests of the traveling public and has the potential to impede CDOTs administration of the Colorado State Highway Access Code. In recent coordination for a proposed new connection between SH 82 and the new South Bridge in Glenwood Springs we learned that RFTA defines avoiding "obstruction to freight rail reactivation" to mean that any new crossing must be designed as if freight rail were in existing operation on the corridor or financial assurances provided such as sufficient escrowed funds to make future changes. Freight rail operation in the corridor seems highly unlikely; however, such requirements were imposed and will lead to a substantial cost increase for the project.

   Response: Regulatory authorities and industry groups have devised standards and principles for management of railroads in a fashion compatible with the interests of the traveling public, and insofar as possible, RFTA is simply seeking to apply those same standards and principles to the Rail Corridor. The Rail Corridor was purchased to preserve it as a future public transportation corridor. The original South Bridge design, which may be precipitating this CDOT comment, would have adversely impacted the ability to use the Corridor not only for freight rail but, also, passenger rail. Also, as proposed in the Environmental Assessment, the original South Bridge project did not address how, in the event of freight rail or commuter rail reactivation, the estimated $10 million in cost to restore the Corridor to would be paid. The subsequent redesign of the South Bridge project may cost more to construct initially, but it may work better for motorists on Highway 82 than the original design, it will save tax payers money if rail service is ever reestablished, and it will not jeopardize the Corridor's railbanked status. In addition, the CPUC could allocate a portion of this crossing cost to RFTA.

3. **ACP Comment:** This is evidence the draft Access Control Plan could easily place costly restrictions on governments and private landowners seeking access between their local streets and the State Highway System. We understand the need to protect the RFTA interests; however, it is our opinion this is overly restrictive and does not anticipate inevitable economic growth or related changes in land use.

   Response: RFTA's interests are also the interests of its constituent governments, the citizens living in the region, tourists, Great Outdoors Colorado, and CDOT. The Corridor is an asset of inestimable value, not only for its current use as a recreational trail but, also, for its potential future use as corridor for a public transportation system. If the economic and population growth to which CDOT refers materializes, corridor preservation should be one of CDOT's highest priorities. CDOT, itself, of necessity, limits and consolidates access onto the State highway system in order to make it operate more efficiently and to preserve its capacity. The limited availability and high cost of a contiguous corridor right of way in developing areas is one of the greatest hurdles that must be overcome in order to increase transportation system capacity. RFTA, quite frankly, is surprised that CDOT is not more supportive of its efforts to preserve and protect the Corridor so that a future public transportation system can efficiently serve the growth in density that CDOT envisions. While the amount of growth and development that will occur in the future, and the pace at which it will happen, are highly speculative, RFTA has been delegated the responsibility for preserving and protecting the Corridor in case it is needed to make traveling in the Roaring Fork Valley more convenient in the years ahead. Regrettably, corridor preservation is not a mission that is universally embraced; however, CDOT, too, is often required to make hard decisions that are in the best long-

term interest of the public, even when they conflict with the wishes of the local communities with whom they are partners.

ACP Comment: The current transportation infrastructure cannot accommodate increases in local access without crossing the RFTA right of way and eliminating existing access points or constructing crossings to freight rail design standards places a substantial and unexpected burden on your neighbors.

Response: RFRHA originally purchased the Aspen Branch as an operating line of railroad, and all members of the organization presumably were aware that crossings would need to meet freight rail standards when the Corridor was originally purchased. The decision to railbank the Corridor under 16 U.S.C. 1247(d) was not precipitated by any intention to facilitate crossings, but instead was to avoid the costs of sporadic common carrier requests. CDOT was a party to the purchase of the Corridor and, on June 3, 1998, provided a letter of support to RFRHA supporting the railbanking of the Corridor (see Attachment A). In this letter, CDOT indicated that it had been working closely with RFRHA to develop a Corridor Investment Study, Environmental Impact Statement, and Comprehensive Plan which would identify transit and trail uses in the Roaring Fork Valley. The 2000 Corridor Comprehensive Plan and the Access Control Plan included in it stated the following with respect to new crossings of the Railroad Corridor:[1]

Policy for New Crossings: New crossings of the railroad corridor shall be generally prohibited. There are exceptions to this policy, including:

- A new public street or road crossing, which is administered through the CPUC;
- A need for a new crossing to provide access to a private property that otherwise cannot be reasonably provided by an existing permitted crossing or another route (i.e. connection to an existing public road).

Parties interested in pursuing a new crossing under the exceptions stated above must apply for such a crossing through either the CPUC procedures or through the permitting procedure administered by RFRHA. It is the burden of the party proposing a new crossing is necessary under the hardships described above.

If a new crossing of the corridor is pursued, the following standards shall be followed:

- A grade-separated crossing will be preferred;
- The new crossing must be shown to have no adverse impact to rail operations or to the trails and open space values of the corridor.
- Consolidation of existing crossings may be required as a part of any approval of a new crossing;
- Coordination with local agencies will be a part of the review/approval process.

[1] 2000 RFRHA Comprehensive Plan, Summary of Key Findings of the Access Control Plan, page 12

The Corridor Comprehensive Plan required concurrence by CDOT, Great Outdoors Colorado, and it had to be unanimously approved by each of the seven constituent governments of RFRHA. Admittedly, there has been considerable turnover at CDOT, on local Boards and Commissions, and among jurisdiction staffs since 2000, when the original Corridor Comprehensive Plan was jointly developed and approved. This may explain why CDOT and RFTA's local partners believe that designing crossings to freight rail standards imposes a substantial and unexpected burden on them, but this burden was assumed by their predecessors who assigned the responsibility for preserving the Corridor and adhering to their polices to RFTA. Currently, RFTA is in the unenviable position of reminding its partners that the Corridor was railbanked by them and that there are requirements that should be met in order to ensure continued public ownership of the contiguous Corridor. In any event, the ACP for the Railroad Corridor does not prevent a jurisdiction or CDOT from increasing local access points. It does define the standards that must be met so that crossings will not undermine RFTA's ability to protect the Corridor's railbanked status and, by extension, its ability to preserve the contiguous Corridor for the primary purpose for which it was acquired; namely, a future public transportation system. Stewardship of the Corridor was conferred upon RFTA by means of Intergovernmental Agreements, a vote of the citizens that created RFTA, and as a result of Agreements that its predecessor, RFRHA, entered into with GOCO. While RFTA will do everything it can to work with crossing sponsors, so as to minimize their crossing costs to the maximum extent feasible, it cannot allow crossings that could jeopardize the Corridor's railbanked status. RFTA may, however, help to mitigate increases in crossing costs caused by adherence to the ACP's Design Guidelines and Standards by considering and from time to time participating in innovative funding arrangements, consistent with its obligations and fiscal means.

4. **ACP Comment:** CDOT considers stakeholder input to be vital and requests that implementation of the RFTA Railroad Right of Way Corridor Access Control Plan be put on hold until meaningful collaboration occurs that balances the interests of all affected stakeholders.

   Response: At the direction of the RFTA Board of Director's, RFTA undertook a 120 day public comment period for the proposed update of the ACP, RFTA held 8 open houses to explain the proposed ACP update, and made numerous presentations to elected officials throughout the region. In preparation for the open houses RFTA mailed out approximately 3000 postcards to property owners within 500' of each side of the centerline of the Railroad Corridor notifying them of the upcoming open houses. In addition RFTA formed a collaborative ACP Work Group consisting of staff members from jurisdictions throughout the region that are assisting RFTA with the finalization of the proposed update of the ACP. A unanimous vote of the seven RFTA member jurisdictions that were the original members of RFRHA will be required in order to adopt the proposed update of the ACP. Consequently, RFTA believes that meaningful collaboration that balances the interested of all affected stakeholders must occur before adoption of the proposed ACP update. In the meantime, the 2005 ACP, which is similar in many respects, remains in effect.

ATTACHMENT A

STATE OF COLORADO

DEPARTMENT OF TRANSPORTATION

4201 East Arkansas Avenue
Denver, Colorado 80222
(303) 757-9011

DOT

June 3, 1998

Executive Director
RFRHA
P.O. Box 1270
Carbondale, CO 81623

Dear Mr. Ray Lloyd:

The Colorado Department of Transportation (CDOT) would like to support RFRHA's request to railbank the Aspen Branch Line from Glenwood Springs to Woody Creek, a distance of approximately 33 miles. CDOT has been working very closely with RFRHA to prepare a Corridor Investment Study/Environmental Impact Statement/Comprehensive Plan which will identify transit and trail improvements in the Roaring Fork Valley. Railbanking the Aspen Branch Line gives us the greatest degree of flexibility to utilize the railroad right-of-way in a manner that improves mobility in the Valley to the greatest extent.

If you have any questions with regard to our endorsement of railbanking the Aspen Branch Line, please call me at 757-9819.

Sincerely,

Dave Ruble
Intermodal Branch Manager