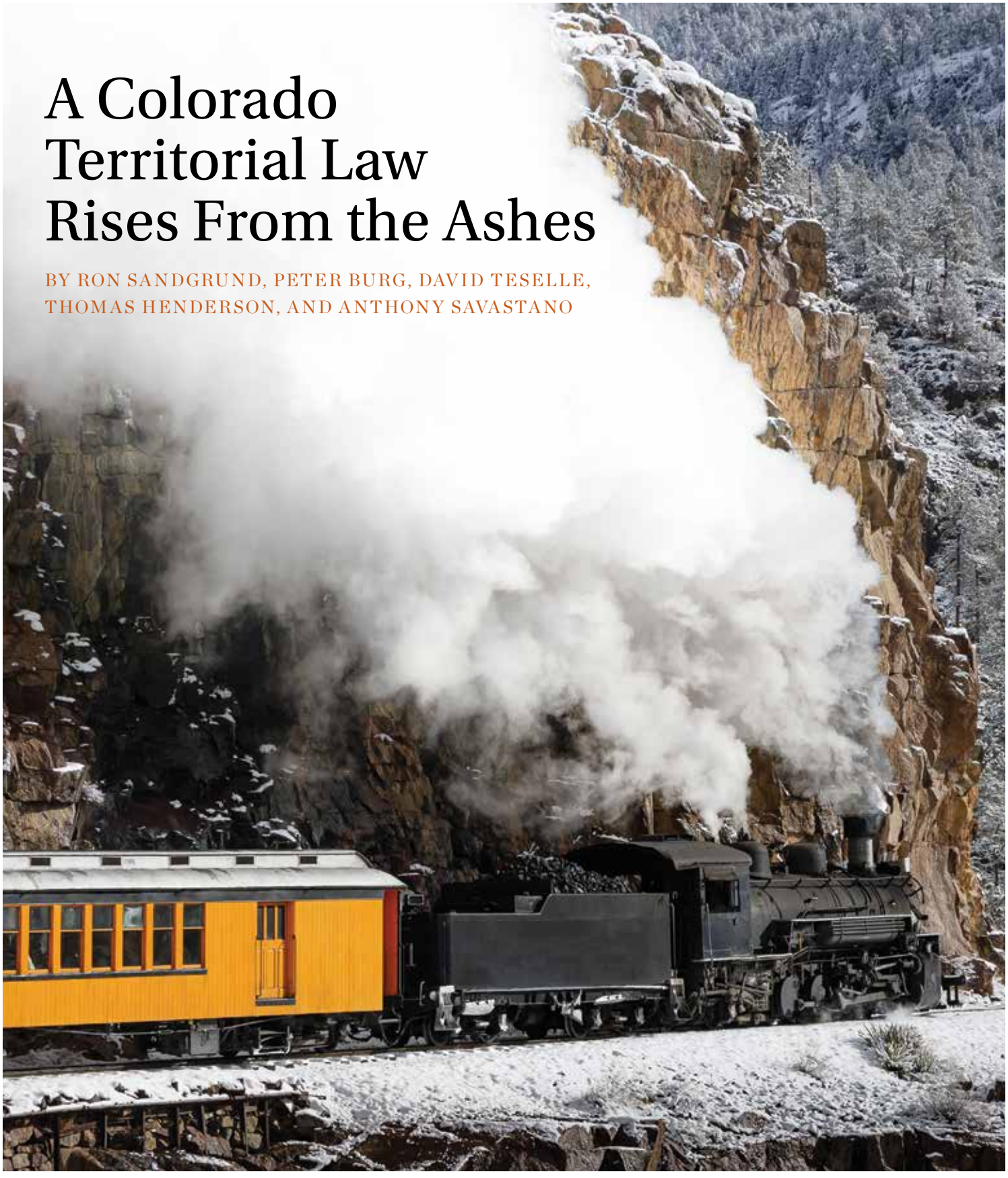
A Colorado Territorial Law Rises From the Ashes

BY RON SANDGRUND, PETER BURG, DAVID TESELLE, THOMAS HENDERSON, AND ANTHONY SAVASTANO



"A Sweep of Flame Through Colorado Springs," rang the headline in *The Pueblo Chieftain* the morning of October 2, 1898, announcing the destruction of the stately Antlers Hotel and much of downtown Colorado Springs.[1] "416 Fire on Track to Become One of Colorado's Largest Wildfires," warned *The Durango Herald* the morning of July 2, 2018.[2] What did these two fires—separated by 120 years—have in common? Both were claimed to have been started by nearby railroad operations. Also linking these two fires: Colorado's Railroad Fire Law—a legislative relic left over from the days of railway barons and Butch Cassidy. The law had lain mostly dormant for over a century until, per a Forest Service report, a coal-powered steam locomotive running the Durango & Silverton Narrow Gauge Railroad allegedly started the now-historic "416 Fire."[3] The 1898 Antlers Fire and the 2018 Durango 416 Fire became connected through time by law.

The History of Railroad Fire Laws

Steam engines helped lead the Industrial Revolution. Powered by burning coal, they turned water into pressurized steam, which energized a locomotive's pistons and turned its wheels. One risk they posed, however, was that hot ash and fiery embers from the coal were exhausted through the trains' smokestacks into the air and onto the surrounding land, including forests, prairies, farms, and sometimes towns. For their part in building America, railroads and their owners were largely forgiven for their cinders. But soon lawsuits followed the railroads west.

Railroad fire laws tracked the expansion of coal-fired railroads east from Massachusetts to California. As the US Supreme Court explained in 1897:

> [T]he liability of the railroad company was not restricted to a building by the side of its road, which the very particles of fire emanating from the engines fell upon and kindled a flame in, but extended to a building across a street, set on fire by sparks wafted by the wind from the first building while it was burning . . . .[4]

The Court continued:

> Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this [Massachusetts] statute, we think and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it.[5]

For their part in building America, railroads and their owners were largely forgiven for their cinders. But soon lawsuits followed the railroads west.

The Colorado Supreme Court observed that these railroad fire laws sprang from the English common law: "By the ancient common law it was held that a person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, was forced to make good the loss . . . . *Sic utere tuo, ut alienum non loedas* [sic]."[6] The Latin phrase used here by the Court expresses the common law maxim that "one must so use his own rights as not to infringe upon the rights of another."

Railroad Expansion Comes to Colorado

As railroads expanded west to the Colorado Territory in the late 1800s, so too did the inherent dangers of their operation—fires. Despite these dangers, however, railroads were critical to developing Colorado's economy, society, and infrastructure. From the late 1800s to the present, railroads have contributed significantly to Colorado's economy by transporting coal, oil, timber, and other natural resources; wheat, hay, livestock, and other farm and ranch produce; and miners, loggers, farm laborers, tourists, and other travelers. Over 2,600 miles of tracks crisscross Colorado, and the railroad industry and the businesses and residents it serves have a vital and significant economic impact on the state and its citizens.

Colorado recognized that a balance must be struck between the economic importance of railroads and the need to hold them accountable for the dangers they posed to surrounding communities due to the inevitable fires caused by their operation. That balance was struck through a quid pro quo between the railroads and Colorado's citizens. Railroads would be entitled to establish train lines and operate in Colorado, but they would be held strictly and absolutely liable for any and all damages caused by fires from their trains' operation.

Colorado's Railroad Fire Law

Before Colorado joined the Union in 1876, its territorial legislature adopted a Railroad Fire Law in its 1874 Session Laws. The law was reenacted in 1876 and slightly amended in 1887. All versions of the law effectively render railroads strictly liable for fires caused by their operations. The heart of the law states: "Every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fires that are set out or caused

by operating any such line of road, or any part thereof, in this state, whether negligently or otherwise."[7]

The Antlers Fire and Its Aftermath

In the early morning of October 1, 1898, the "devastating 'Antlers Fire,' . . . burned a substantial portion of downtown Colorado Springs."[8] The fire started in a pile of trash underneath the Denver and Rio Grande platform at its freight depot and, carried by high winds, quickly burned out of control, destroying much of the central business district, including the historic Antlers Hotel. The fire "begat a significant number of lawsuits, in which insurance companies appeared as subrogees of their insureds."[9] The litigation dragged on for five years before being resolved.

The 1903 "Anti-Subrogation" Amendment

The Railroad Fire Law was amended in 1903 to preclude property owners from contractually or by subrogation assigning their right to recover under the statute to any insurer who may hold a policy on "the property so damaged or destroyed by fire."[10] Little legislative history exists today concerning the 1903 "anti-subrogation" amendment to the Railroad Fire Law, Senate Bill 234. The amendment's new language referring to "property so damaged or destroyed by fire" lay at the heart of litigation that ensued more than 120 years after its enactment, litigation prompted by the 416 Fire.

Quiescence

Between 1910 and 1930, railroads, spurred on by acts like Colorado's Railroad Fire Law, began to transition from coal-fired engines to diesel fuel.[11] Not unexpectedly, the number and frequency of fires attributed to railroad operations dropped dramatically. Although sparks from steel wheels scraping steel tracks and other railroad operation sources still ignited the occasional fire, they were frequently limited to the immediate area of the tracks (where combustible material was better managed) and depots (where fire-fighting operations were faster to respond).

Over time, a few retired narrow gauge coal-fired locomotives, as well as standard gauge and cog railways, were restarted to attract tourists and their money. These included the Durango & Silverton,[12] Cumbres & Toltec, and Cripple Creek & Victor narrow gauge railways; the Royal Gorge Route Railroad; the Leadville Railroad; the Manitou and Pikes Peak Cog Railway; and the Georgetown to Silver Plume Loop.[13]

The Durango 416 Fire and Its Aftermath

On June 1, 2018, dozens of tourists lined up in Durango to begin the fabled Durango to Silverton narrow gauge railway train ride, climbing nearly 3,000 feet through the beautiful San Juan National Forest. As usual, the coal-fired steam locomotive and its passenger cars were followed by two small cars on the tracks, the first manned by a single railroad worker with a water-containing backpack and fire-fighting hand tools, and the second with three workers pulling a water tank with a spray nozzle. A helicopter also trailed the tourist train overhead carrying a large sack capable of being quickly filled on the fly at a nearby pond. Unfortunately, the locomotive departed during the midst of an "Exceptional Drought,"[14] the highest-level rating available on the National Integrated Drought Information System's scale. The drought had left the forest and vegetation surrounding the tracks dry as kindling, with red flag winds predicted.[15] A fiery recipe indeed. The ensuing 416 Fire burned about 54,000 acres in and around the San Juan National Forest and the hamlet of Hermosa, Colorado.[16]

The 416 Fire Litigation

The 416 Fire led to parallel state and federal court lawsuits. A key issue in both lawsuits was the meaning and effect of the Railroad Fire Law that had sat dormant in Colorado's appellate courts for over 120 years.

Two significant legal questions under this law framed these lawsuits:

- First, in the state court suit, whether damages could be recovered using the Railroad Fire Law to impose liability where the plaintiff's property had not been burned, but where the plaintiff-landowners suffered resulting injury causally related to the fire, such as landslide damage caused by annual monsoonal rains falling onto a once tree-covered slope that had been denuded by the fire and turned into a burn scar with destabilized soils. Or where the plaintiff-businesses lost profits due to marked decline in tourism or being altogether shut down due to smoke from the fire, fire-related road closures, fire-fighting activities, and evacuation zones.
- Second, in the federal court suit, whether multi-million-dollar fire-suppression expenses funded by taxpayer dollars and incurred by the US Forest Service could be recouped by the US government using the Railroad Fire Law to impose liability on the train's owners.

The answer to these legal questions turned, in part, on the 1903 amendment. In contrast to the original portion of the law that rendered railroads "liable for *all damages by fires*" caused by their operations, the 1903 amendment added a reference to "*property so damaged* or destroyed *by fire.*"[17] Therefore, both the state and federal courts needed to wrestle with the difference in meaning between the words "damages" and "damage" as used in the 1903 amendment. The railroad claimed recovery under the law was limited to compensation for burned ("damaged") property. The US government and local resident-plaintiffs maintained that the law encompassed all losses ("damages") caused by the fire.

The State and Federal Court 2019 and 2020 Rulings

The Colorado District Court for La Plata County held that recovery under the Railroad Fire Law could be obtained only for property actually damaged by fire.[18] In contrast, the US District Court for the District of Colorado held that the Railroad Fire Law's use of the word "damages" rather than "damage" implicated a much greater statutory reach given the law's broad compensatory purpose, and covered damages causally related to such a fire, including the government's fire suppression costs.[19] The federal court based its conclusion in part on the newspaper reports surrounding the 1903

amendment.[20] Unlike modern legislation, where there is a concrete record of the various iterative drafts of and amendments to bills, as well as detailed recordings of the debate surrounding proposed laws as to their meaning and intent, no similar record existed for the Railroad Fire Law or its 1903 amendment. As a result, the US district court turned its attention to the history, intent, and purpose of the 1903 amendment—even though no official legislative record existed of the proceedings.

It is a rare case where a US district court judge's ruling acknowledges the research efforts of court librarians—here, the librarians were thanked for helping uncover the circumstances concerning the 1903 amendment of the Railroad Fire Law.

Revisiting the 1903 Railroad Fire Law Amendment

Some exceptional historical sleuthing by the Tenth Circuit Court of Appeals' librarians, combined with various legal inferences, led the US District Court for the District of Colorado to conclude in 2019 that "it is no great stretch to surmise" that the 1903 amendment was responsive to *Crissey & Fowler Lumber Co. v. Denver & Rio Grande Railroad Co.*,[21] a leading case that arose from the Antlers Fire.[22] In that 1902 case, the court of appeals rejected and reversed the trial court's conclusion that various fire insurers' claims against the Denver & Rio Grande Railroad were barred on the theory the insurers could not assert subrogation under the Railroad Fire Law because they had been paid insurance premiums to assume the risk of a loss by fire.

During the amendment's debate, *The Denver Post* described its purpose as a "snake bill," "so adroitly drawn as to appear at first sight" that it "would greatly benefit the public and hurt corporations if they were enacted into laws."[23] The *Post* opined it was "an attempt on the part of the railroad companies to relieve themselves of the just liability which exists under the statutes of the state, and to prevent enforcement, through subrogation, of claims for losses by fire cause[d] in the operating of their roads."[24] The paper went on to characterize the bill as a "Scheme to Beat [the] Farmer" by "exclud[ing] the insurance companies from the fight and giv[ing] the railroad the advantage of fighting the individual . . . with its millions of backing against his poverty."[25] Thus, it appeared that SB 234 was pushed by the powerful railroad lobby to negate the effect of the *Crissey Fowler* decision and prevent insurers from using the Railroad Fire Law to support their subrogation claims. The railroads succeeded in this effort, although the amendment left open two questions: (1) what was the effect of the Railroad Fire Law's separate references to "damages by fire" and "property damaged by fire"; and (2) whether persons who suffer losses outside the scope of the Railroad Fire Law could still sue under the common law for their losses, such as under negligence and trespass theories.

It is a rare case where a US district court judge's ruling acknowledges the research efforts of court librarians—here, the librarians were thanked for helping uncover the circumstances concerning the 1903 amendment of the Railroad Fire Law.[26] Although newspapers are typically considered history's "first rough draft,"[27] the lack of any contemporaneous record of the 1903 Colorado General Assembly proceedings left the 1903 newspaper accounts of this amendment with the last word of what happened in 1903,

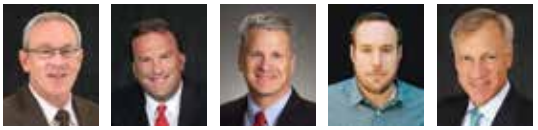
and those accounts helped inform the federal court's opinion.[28]

The same historical record was presented to the Colorado district court on a motion for reconsideration of its ruling that recovery under the Railroad Fire Law could be obtained only for property actually damaged by fire, but that motion was denied.[29] However, in two separate rulings, the Colorado district court denied summary judgment against common law negligence and trespass claims asserted by Colorado residents and businesses whose claims did not fall within the scope of the Railroad Fire Law.[30]

Eventually, the federal court case settled for about $20 million.[31] The state court case also settled, as reported by a local newspaper.[32]

The Future of the Colorado Railroad Fire Law

Because railroads continue to provide significant passenger, commercial, and tourist operations in Colorado today and likely into the foreseeable future, the 1876 Railroad Fire Law remains relevant to potential liability issues.[33] Even if railroads were to transition to magnetic-levitating propulsion[34] or Elon Musk's fanciful Hyperloop[35]—where the railroad's wheels do not touch the track during high-speed travel—it is doubtful we will ever be free of claims that a railroad's operation started a fire somewhere, sometime, somehow. Like a finely aged wine, the Railroad Fire Law will remain in the cellar until it is time to uncork once again.



Peter Burg, **David TeSelle**, and **Ron Sandgrund** of Burg Simpson Eldredge Hersh & Jardine, P.C., and **Anthony Savastano** of Duthie Savastano Brungard, PLLC, represented various Colorado citizens and businesses in the Colorado District Court lawsuit arising from the Durango 416 Fire. **Thomas Henderson**, formerly a part of the Burg Simpson team involved in that lawsuit, has since become a district court judge in Colorado's 18th Judicial District. The authors thank regular columnist Frank Gibbard for allowing them a shortline to idle on while offering their own "historical perspective" for this month's issue, and for his suggested edits and improvements.

Coordinating Editor: Frank Gibbard, frank_gibbard@ca10.uscourts.gov

NOTES

1. "A Sweep of Flame Through Colorado Springs," *Colo. Daily Chieftain* (Oct. 2, 1898), https://www.coloradohistoricnewspapers.org/?a=d&d=CFT18981002-01.2.2&e=-------en-20--1--img-txIN%7ctxCO%7ctxTA--------0------.

2. https://www.durangoherald.com/articles/416-fire-on-track-to-become-one-of-colorados-largest-wildfires.

3. Colorado Encyclopedia, "416 Fire," https://coloradoencyclopedia.org/article/416-fire (Forest Service investigation identified source of the fire).

4. *St. Louis & S.F.R. Co. v. Mathews*, 165 U.S. 1, 10 (1897) (emphasis added) (quoting *Hart v. W. R.R. Corp.*, 54 Mass. 99, 104–05 (Mass. 1847)).

5. *Id.* at 11.

6. *Union Pac. Ry. Co. v. De Busk*, 20 P. 752, 754 (Colo. 1889).

7. CRS § 40-30-103.

8. *United States v. Durango & Silverton Narrow Gauge R.R. Co.*, No. 19-cv-01913, 2020 WL 2832381, at *4 (D.Colo. June 1, 2020).

9. *Id.*

10. Laws 1903, SB 234, § 1 (now codified at CRS § 40-30-103).

11. Diesel Technology Forum, https://dieselforum.org/rail#:~:text=Since%20the%201930%27s%20Freight%20trains,efficiency%2C%20reliability%2C%20and%20durability.

12. https://www.durangotrain.com/history.

13. https://www.coloradoinfo.com/blog/history-narrow-gauge-rail-colorado.

14. National Integrated Drought Information System, "Summary of Drought for Colorado," https://www.drought.gov/drought/states/colorado.

15. "416 Fire," *supra* note 3.

16. *Id.*

17. *See generally United States v. Durango & Silverton Narrow Gauge R.R. Co.*, 2020 WL 2832381, at *3-7 (discussing Railroad Fire Law's history) (emphasis added in both).

18. *See* Order on the Scope and Applicability of CRS § 40-30-103, *Cohen Fam. Tr. v. Am. Heritage Rys., Inc.*, No. 2018CV30155, Div. 5 (La Plata Cnty. Dist. Ct. Oct. 8, 2019).

19. *Durango & Silverton Narrow Gauge R.R. Co.*, 2020 WL 2832381, at *1, *6 (approving and adopting magistrate judge's recommendation, No. 19-cv-01913, 2019 WL 9598175 (D.Colo. Dec. 27, 2019)).

20. *Id.* at *3.

21. *Crissey & Fowler Lumber Co. v. Denver & Rio Grande R.R. Co.*, 68 P. 670 (Colo.App. 1902).

22. *Durango & Silverton Narrow Gauge R.R. Co.*, 2020 WL 2832381, at *3.

23. *Id.* at *4.

24. *Id.*

25. *Id.*

26. *Id.* at *4 n.8.

27. Who coined this oft-repeated quote is disputed, although the earliest mention appears to be in an article titled "The Educational Value of 'News,'" published on December 5, 1905, in the South Carolina paper *The State*. *See* Popik, "The Big Apple" (Nov. 23, 2009), https://www.barrypopik.com/index.php/new_york_city/entry/first_draft_of_history_journalism.

28. *Durango & Silverton Narrow Gauge R.R. Co.*, 2020 WL 2832381, at *4–5.

29. *See* Order Re: Plaintiffs' Motion for Reconsideration of October 8, 2019 Order on the Scope and Applicability of C.R.S. § 40-30-103 (La Plata Cnty. Dist. Ct. August 27, 2020).

30. *See* Order Denying Defendants' Motion for Partial Summary Judgment Regarding Negligence Claims, *Cohen Fam. Tr. v. Am. Heritage Rys., Inc.*, No. 2018CV30155, Div. 5 (La Plata Cnty. Dist. Ct. June 9, 2021); Order Denying Defendants' Motion for Partial Summary Judgment Regarding Trespass Claims, *Cohen Fam. Tr. v. Am. Heritage Rys., Inc.*, No. 2018CV30155, Div. 5 (La Plata Cnty. Dist. Ct. June 18, 2021).

31. Hannon, "Durango Railroad Agrees to Pay $20 Million for 416 Fire Damages, *Durango Herald* (Mar. 21, 2022), https://www.durangoherald.com/articles/durango-railroad-agrees-to-pay-20-million-for-416-fire-damages.

32. *Id.*

33. In 2010, the Royal Gorge Route Railroad's diesel-powered train allegedly ignited a fire along its route in Cañon City. *See* Pankratz, "Witness Saw Beginning of Fire Near Royal Gorge," *Denv. Post* (Jun. 22, 2010), https://www.denverpost.com/2010/06/22/witness-sawbeginning-of-fire-near-royal-gorge. And in 2014, a lawsuit was filed against BNSF and Union Pacific for allegedly starting multiple fires near Sterling. *See* Complaint, *Mergs Unlimited, LLC v. BNSF Ry. Co.*, No. 2014-CV-30073 (Logan Cnty. Dist. Ct. Oct. 3, 2014).

34. *See generally* Wikipedia, "Maglev," https://en.wikipedia.org/wiki/Maglev#:~:text=Maglev%20(derived%20from%20magnetic%20levitation,of%20the%20lack%20of%20friction.

35. McGraw, "Elon Musk's Hyperloop Fantasy Ignores the Laws of Science—and Politics," *Bulwark* (June 16, 2022), https://www.thebulwark.com/elon-musks-hyperloop-fantasy-ignores-the-laws-of-science-and-politics.