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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-B-2114

JASON NAPOLITANO, a Colorado registered voter,
Plaintiff,

vs.

DONETTA DAVIDSON, in her official capacity as Secretary of the
Colorado Department of State,
Defendant.

REPORTER'S TRANSCRIPT
RULING

Proceedings before the HONORABLE LEWIS T. BABCOCK,
Chief Judge, United States District Court for the District of
Colorado, commencing at 10:34 a.m., on the 26th day of October,
2004, in Courtroom 1, Alfred A. Arraj United States Courthouse,
Denver, Colorado.

APPEARANCES

FOR THE PLAINTIFF:	JASON NAPOLITANO 1136 Wabash Street - Unit 20 Fort Collins, CO 80526-3022
FOR THE INTERVENORS:	RICHARD A. WESTFALL, ESQ. SCOTT E. GESSLER, ESQ. JASON R. DUNN, ESQ. Hale Friesen, LLP 1430 Wynkoop Street, #300 Denver, CO 80202

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Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

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8 P-R-O-C-E-E-D-I-N-G-S

9 THE COURT: Please be seated.

10 I will begin by surveying the legal landscape insofar
 11 as this may bear upon the jurisdictional issues presented.

12 Of course there is Article II, Section 1, clauses 2
 13 and 3 of the United States Constitution that are implicated
 14 here. There is centrally, I think, the First and Fourteenth
 15 Amendments to the United States Constitution, the First
 16 Amendment dealing with associational right in election contexts
 17 and the due protection right encompassed within the Fourteenth
 18 Amendment.

19 There is also implicated federal statutory law
 20 3, United States Code, Sections 1, *et seq.*, Section 1 dealing
 21 with the time of appointing electors being the first Monday in
 22 November and every fourth year succeeding every election. In
 23 this case that would be I think next Tuesday, November the 2nd.

24 Section 2 deals with the failure to make a choice on a
 25 prescribed day, and that provides that whenever any state has

1 held an election for the purpose of choosing electors and has
2 failed to make a choice on the day prescribed by law, the
3 electors may be appointed on a subsequent day in such manner as
4 the legislature of the state may direct.

5 Section 5 is the safe harbor provision, and it
6 provides, in part, "If any state shall have provided, by laws
7 enacted prior to the day fixed for appointment of electors, for
8 its final determination of any controversy or contest, then
9 there may be effect given to the state's determination of the
10 identity of the electors to vote in the Electoral College."

11 Article VI, Section 3 of the Colorado Constitution
12 provides for original jurisdiction to determine contests for
13 the appointment of electors, as does Colorado Revised Statute
14 Section 1-4-204 and Rules 21 and 100 of the Colorado Rules of
15 Civil Procedure.

16 Colorado Constitution Article V, Section 2, reserves
17 to the people of the State of Colorado the right of initiative.
18 And Section 7 of Article V provides that, "The secretary,"
19 meaning the Secretary of State, "shall submit all measures
20 initiated by the people for adoption or rejection at the polls,
21 in compliance with this section. In submitting the same and
22 all matters pertaining to the form of all petitions . . ."
23 guided by the general election laws of the state.

24 Article VI, Section 3, and as I, say Colorado Revised
25 Statute 1-11-204, provides for original jurisdiction in the

1 Colorado Supreme Court to resolve issues of constitutionality
2 of an initiative such as is before the Court and before the
3 voters of the State of Colorado.

4 I note that the initiative itself, Section 8 of it,
5 provides as well for original jurisdiction in the Colorado
6 Supreme Court to determine the constitutionality of Initiative
7 36, should it pass.

8 Section 1-4-301 of the Colorado Revised Statutes
9 provides for the time of holding presidential elections.
10 Nominations set forth in C.R.S. 1-4-302, Section 1-4-304,
11 subparagraph (5) provides that each presidential elector shall
12 vote for the presidential candidate and by separate ballot
13 vice-presidential candidate who will receive the highest number
14 of votes at the preceding general election of this state.

15 As we know, Initiative 36, if passed, would change the
16 selection of electors from one of "winner take all" in the
17 presidential vote to a proportional selection of electors. Its
18 principal mischief, if you will, identified by the plaintiff
19 and by the intervenor plaintiffs is its application to the 2004
20 election.

21 The law of standing is well established. In order to
22 have standing to assert a claim in this Court under Article III
23 of the United States Constitution there must be shown an injury
24 in fact, that is, an invasion of a legally protected interest
25 that is, first, concrete and particularized; and, second,

1 actual or imminent, not conjectural or hypothetical causation,
2 that is, a showing that the injury is fairly traceable to the
3 challenged action of the defendant; and, third, redressability,
4 that is, a showing that it is likely a favorable court decision
5 will redress plaintiff's injury.

6 The law of ripeness is also well settled, and that is
7 a justiciability doctrine that is designed to prevent courts
8 through the avoidance of premature adjudication from entangling
9 themselves in abstract disagreements. A claim is not ripe if
10 it rests upon contingent future events that may not occur as
11 anticipated or may not occur at all.

12 In looking at and applying the ripeness doctrine a
13 court must consider the relationship of the federal judiciary
14 with state institutions, the need to conserve judicial
15 resources, and a risk that a premature decision may have. The
16 evil, if you will, to be avoided through application of the
17 ripeness doctrine is that a court not render an advisory
18 opinion on a hypothetical question.

19 In looking at the law of standing and the question of
20 whether an injury in fact attends, that is, an invasion of a
21 legally protected interest that is concrete and particularized
22 and actual or imminent, not conjectural or hypothetical, one is
23 necessarily in this case driven to the determination of the
24 issue of whether there is a judicially recognized First
25 Amendment right of association asserted. And, necessarily, the

1 Court must analyze the Supreme Court decision of **Anderson vs.**
2 **Celebrezze** and other Supreme Court authority as it may bear
3 upon that question.

4 **Anderson** provides that in resolving constitutional
5 challenges to a state election law a court must first consider
6 the character and magnitude of the asserted injury to the
7 rights protected by the First and Fourteenth Amendments that
8 the plaintiff seeks to vindicate. It must then identify and
9 evaluate the interests asserted by the state to justify the
10 burden imposed by its rule.

11 In passing judgment the court must not only determine
12 the legitimacy and strength of each of these interests, it must
13 also consider the extent to which those interests make it
14 necessary to burden the plaintiff's rights.

15 So the first question, necessarily, is whether there
16 is an identifiable First Amendment right burdened by the action
17 of the state; if so, then the balancing analysis follows.

18 Now in this case the plaintiff has asserted one claim,
19 and that is that his First and Fourteenth Amendment right of
20 political association is burdened by the application of
21 Initiative 36 to the 2004 election.

22 Specifically he claims a constitutional right to know
23 when he votes whether the electoral selection will be a "winner
24 take all" or proportion.

25 The plaintiff intervenors have asserted the same claim

1 under the First and Fourteenth Amendments, and in addition a
2 Fourteenth Amendment due process claim. The plaintiff
3 intervenors assert that when a state legislature vests a right
4 to vote for president, and its people, the right to vote as the
5 legislature has prescribed is fundamental, citing **Bush vs.**
6 **Gore**, 531 United States at 529, and that C.R.S. 1-4-304(5)
7 creates a right that cannot be changed retroactively.

8 So the plaintiff's first claim and only remaining
9 claim and plaintiff intervenors' first and second claims really
10 focused upon the application of Initiative 36, if it passes, to
11 the 2004 election.

12 And, as I say, Mr. Napolitano contends that there is a
13 constitutionally recognized right not to burden his choice of
14 vote dependent upon the uncertainty of whether the electors
15 will be selected on a "winner take all" basis or
16 proportionately.

17 I think the analysis should proceed first with regard
18 to the plaintiff electors' Claims 2, 3 and 4.

19 In essence what these parties claim is that Initiative
20 36 is patently unconstitutional, in violation of the due
21 process provision of the Fourteenth Amendment, Article II,
22 Section 1, Clause 2, and Article II, Section 1, Clause 3
23 dealing with choosing the time for selection of electors, and
24 3, United States Code, Section 1.

25 As to each of these three claims I conclude that what

1 the elector intervenors seek is an advisory opinion on a
2 hypothetical question, a "hypothetical question" meaning will
3 36 pass or will it not pass, that is a fundamental contingent
4 future event which may not occur at all and would cause this
5 Court to render premature adjudication and entangle itself in
6 this abstract disagreement.

7 As the defendant points out, and it is basic, the
8 measure may not pass. Even if it does pass, under Section 11
9 of the initiative the General Assembly could call a special
10 session and enact legislation changing the manner of selection
11 of electors for presidency from a proportional basis to a
12 "winner take all" basis. Not only may the General Assembly
13 call the special session, but the governor could call that
14 session.

15 And there exists under present Colorado state law, and
16 would exist if 36 passes, original jurisdiction in the Colorado
17 Supreme Court to resolve the unripe claims asserted in Claims 2
18 through 4 of the elector intervenors' Complaint.

19 It is not of course lost on me that interest is
20 heightened in a presidential election because of national
21 interests. There is also countervailing interests reserved to
22 the people of the State of Colorado in its Constitution, in
23 their Constitution, of initiative. Frankly, we don't know
24 whether this initiative will pass or not. If it doesn't, all
25 of the fears and arguments advanced by the elector plaintiffs

1 in Claims 2 through 4 will be resolved. Those claims simply
2 are not ripe.

3 In looking at the standing issues it is necessary to
4 analyze the standing issues with regard to Mr. Napolitano
5 separately from the standing asserted by the plaintiff
6 intervenors.

7 First and foremost plaintiff intervenors do not and
8 cannot allege that they are minority party voters or are
9 situated as is Mr. Napolitano. The gist of the argument
10 presented by Mr. Westfall today is that, Well, if
11 Mr. Napolitano has a First Amendment associational right
12 burdened, ergo the plaintiff electors' rights under the First
13 and Fourteenth Amendment are also burdened. It's too far of a
14 stretch.

15 As I've said, in order to demonstrate injury in fact
16 there must be an invasion of a legally protected interest. The
17 legally protected interest asserted by the plaintiff electors
18 is purely to the extent, if any exist at all, derivative of
19 that asserted by Mr. Napolitano in his individual capacity. It
20 must be concrete and particularized and actual or imminent, not
21 conjectural or hypothetical.

22 There are a number of dates of course that are
23 important. On November the 2nd, 2004, Colorado voters will
24 cast their ballots. On November 2, 2004, nine Colorado
25 presidential electors are chosen to serve in the Electoral

1 College. On November 3rd Initiative 36, if it passes, becomes
2 law. On December 13, 2004, presidential electors cast their
3 votes in the Electoral College.

4 Now the presidential electors, it seems to me, focus
5 their claim on the rights of voters, specifically minority
6 party voters, to strategically align their votes in order to
7 maximize their voting power. They contend I think that a voter
8 does not know the effect of his or her vote on November the 2nd
9 because Initiative 36 has not yet either passed or not passed.

10 Now the presidential electors have attempted to
11 include themselves among the class of voters who will
12 experience the uncertainty that they describe. They say that
13 voters and presidential electors do not know how their votes
14 will be counted for presidential candidates during the
15 election.

16 Now while the presidential electors are members of the
17 general voting public and may vote in the general election,
18 presidential electors do not vote in the Electoral College on
19 November the 2nd. They themselves are elected on November the
20 2nd or otherwise chosen under 3 U.S.C. Section 3, and then they
21 cast their votes in the Electoral College on December 13.

22 Again, the overriding issue concerning standing is
23 that they never allege that they are minority party voters who
24 might be confused as to how to maximize their vote. They
25 experience no confusion whether their vote will count and,

1 therefore, suffer no injury.

2 To the extent that the presidential electors as
3 presidential electors who are not yet identified as the
4 electors who will vote in the Electoral College may be affected
5 by confusion -- and I say "may" because it is hypothetical and
6 conjectural, the only confusion they might experience is
7 wondering whether the nine of them who have been picked on
8 November the 2nd will eventually vote December 13 or whether
9 the presidential electors as a whole will have to go through
10 another selection process before December the 13 if Initiative
11 36 becomes law on November the 3rd.

12 Even if Initiative 36 passes and the individual
13 presidential electors who are chosen to cast their votes at the
14 Electoral College changes, their right to vote on December 13
15 is not affected.

16 I conclude that the presidential electors do not
17 suffer an injury to their legally protected interests, their
18 right to vote, that is concrete and particularized and actual,
19 nor is it imminent. Rather, any confusion they might endure is
20 either (1) purely hypothetical to them as general public
21 voters, because they do not allege that they are minority party
22 voters; (2) purely hypothetical to them as Electoral College
23 voters, because Initiative 36 has not passed; or (3) completely
24 unrelated to their eventual right to vote in the Electoral
25 College on December 13, almost six weeks after Initiative 36

1 would become law, if in the uncertain event that it is passed.

2 So I conclude that the presidential electors do not
3 have standing with regard to their first claim for relief. The
4 same analysis applies with regard to the second, third and
5 fourth claims for relief.

6 With regard to the Fourteenth Amendment due process
7 clause claim, I would note also the fundamental proposition
8 that this is a republic, it is not a pure democracy. This is
9 to say that we do not vote democratically directly for the
10 president or vice-president of the United States.

11 As to their second claim of facial invalidity, they
12 ignore the presumption of constitutionality that applies. They
13 say that it is facially unconstitutional under Article II,
14 Section 1, Clause 2. But that is an open question because the
15 cases construing the term "legislature" in various places
16 within the United States Constitution construe it differently
17 depending upon the context.

18 So under Article I it is construed as a law-making
19 process, and construed broadly. Under Article V dealing with
20 ratifications it is construed more strictly. It has not yet
21 been construed as to Article II, Section 1, Clause 2, their
22 protestations to the contrary notwithstanding based upon the
23 **McPherson** decision, which I believe was a decision rendered
24 before we had direct election of senators and the Constitution
25 was amended.

1 I agree with the defendant that **McPherson**, found at
2 146 U.S. 1, the 1892 decision, stands merely for an
3 unremarkable proposition that Article II, Section 1 authorizes
4 a state legislature to pass a law apportioning the state
5 electors rather than a "winner take all" method.

6 The fact that the legislature may decide to appoint
7 electors in a proportional fashion casts no doubt upon the
8 people's authority to do the same through the initiative
9 process.

10 Now I merely touch peripherally on the merits of that
11 claim. I reference this analysis only to point out that it is
12 not patently facially unconstitutional, that is, Initiative 36.
13 And I don't want my view in that context taken as any judicial
14 imprimatur approving or not approving the Article II, Section
15 1, Clause 2 argument asserted as to the fourth claim. Article
16 II, Section 1, Clause 3 doesn't really come to mind. It
17 provides - and don't you love the way drafters of the
18 Constitution spell - that "Congress may determine the time of
19 chusing," C-H-U-S-I-N-G, "the electors and the day on which
20 they shall give their votes, which day shall be the same
21 throughout the United States."

22 Well, it does say that, but if Initiative 36 were to
23 pass, there is, as I described at the outset of my ruling, a
24 wholly effective means of resolving the question through the
25 original jurisdiction of the Colorado Supreme Court with direct

1 review to the United States Supreme Court, the "chusing,"
2 C-H-U-S-I-N-G, of Colorado's presidential electors, all within
3 the framework set forth in 3, United States Code, Section 1,
4 *et seq.*

5 In short, the elector plaintiffs or the intervenor
6 plaintiffs have neither standing nor have shown ripeness with
7 regard to the claims set forth in the Complaint in
8 intervention.

9 Now Mr. Napolitano, I don't save you for last for any
10 particular reason. You were here first. The analysis of your
11 claim is in many respects more complex and necessarily requires
12 some analysis of the merits of your claim.

13 As I say, under **Anderson** the first question is to
14 determine whether there is a cognizable and recognized First
15 and Fourteenth Amendment right of association. That bears
16 directly on the question of whether you suffer an injury in
17 fact.

18 Certainly in your Amended Complaint you have alleged
19 that you are a minor party voter and you would vote for a major
20 party in a "winner take all" system, but a minor party in a
21 proportional system. And you allege that this affects you now
22 and will affect you in the voting booth.

23 Your claim I think has to be analyzed as presented in
24 an **Anderson** and subsequent Supreme Court context. It is
25 frankly a claim, as most of these cases reflect, that is

1 unique. Every one of the Supreme Court opinions dealing with a
2 First Amendment associational right contention comes up in a
3 little different context and is unique in that respect.

4 In thinking about the plaintiff's argument here I see
5 a couple of problems. Now, first of all, at least in theory
6 the asserted inability of a minor party candidate to win a
7 plurality of votes is equally as speculative as the passage of
8 Initiative 36. Plaintiff's assumption seems to be that a minor
9 party candidate cannot marshal a plurality of votes in
10 Colorado, and is premised upon the same type of predictive
11 intuitive, if you will, conclusion that all others suffer from
12 the same confusion, that they fear that proposition 36 might
13 not pass.

14 Plaintiff seems to be attempting to reduce the risk
15 inherent in the former speculation by eradicating the latter.
16 If looking at it in this light, the realities of polls,
17 probabilities are to govern, then minor party voters should be
18 left to make their own judgments about the likelihood of
19 Initiative 36 passing, just as they would normally judge the
20 likelihood of their candidate marshaling sufficient votes to
21 win the election.

22 Now the association right identified in **Anderson**
23 prohibits states from impermissibly burdening those who support
24 a third-party candidate. As **Anderson** determined it is the
25 right to vote that is heavily burdened if that vote may be cast

1 only for a major party candidate at a time when other parties
2 or other candidates are clamoring for a place on the ballot.
3 Or that the exclusion of candidates also burdens voters'
4 freedom of association because an election campaign is an
5 effective platform for the expression of views on the issues of
6 the day, and a candidate serves as a rallying point for
7 like-minded citizens.

8 As a result the Court ruled that Ohio could not
9 establish a different registration deadline for Anderson, a
10 minor party candidate, than the deadline for democrat and
11 republican candidates.

12 Here Colorado has subjected all candidates for
13 president to the same rules and variables, including the
14 existence of an Initiative 36 on the ballot. Minor party
15 supporters are burdened, if at all, by Initiative 36 only if
16 one first assumes that minor party candidates can't win a
17 plurality of votes, and that is wholly speculative.

18 So a ruling that Initiative 36's existence on the
19 ballot violates minor party voters' First Amendment
20 associational rights must necessarily rest upon speculation.
21 There is no -- and I stress, there is no empirical evidence
22 before the Court nor proffer. That is wholly speculative, at
23 best.

24 Looked at another way, if Mr. Napolitano's assumption,
25 that being that minor party candidates cannot win in Colorado,

1 is to be taken as true, then Initiative 36 can be said to
2 actually aid association by minor party voters because it gives
3 them a means of organizing to acquire an electoral vote for
4 their candidate that is otherwise unavailable to them. And no
5 minor party candidate has secured an elector for president in
6 the past, and given Mr. Napolitano's line of thinking, none
7 could be expected to do so this year without the passage of
8 Initiative 36. So minor party voters' ability to participate
9 through their vote in the presidential Electoral College can
10 reasonably be said to be enhanced by Initiative 36.

11 Now Mr. Napolitano's complaint is that he can't decide
12 with 36 on the ballot whether to be a major or minor party
13 voter. If a true minor party voter, I wouldn't have expected
14 this lawsuit to have been filed; rather, I would expect that
15 Mr. Napolitano would push for passage of 36 and election of his
16 favorite candidate.

17 This is an associational second-guessing that goes
18 beyond the right expounded in **Anderson**, that is, **Anderson**
19 protects the right of minor party voters to associate for the
20 purpose of expressing their political opinions through the
21 campaign platforms of minor party candidates. It does not
22 guarantee a backup plan for those minor party voters who might
23 be disappointed with the result of the election.

24 I want to keep in mind that the issue in **Anderson** was
25 equal access to the ballot for third-party candidates. What

1 this means with respect to Mr. Napolitano's claim is this:

2 The right to associate in **Anderson** is concerned with
3 the right of a third-party voter to associate himself with
4 other third-party voters to forward the views of the
5 third-party candidate, and more importantly, the third-party
6 platform. A candidate's rallying point serves to coalesce
7 voters who are disassociated from the two major party
8 candidates by reason of their differences of viewpoint.

9 So **Anderson** stands for the proposition that those who
10 are disassociated from the two mainstream major party
11 candidates can push a new agenda that will by reason of a
12 third-party candidate receiving at least a small percentage of
13 the votes positively and progressively affect the policy
14 decisions of major parties in the future. It has nothing at
15 all to do with the right to associate with other third-party
16 voters, to opportunistically vote for a major party candidate
17 when the third-party voter will not win. It stands for the
18 opposite, the right of a third-party voter to have his
19 candidate on the ballot and vote for that third-party candidate
20 even though he will not win.

21 Now **Burdick** is not on point, but **Burdick** serves to
22 circumscribe the associational right recognized by the United
23 States Supreme Court.

24 In short, I conclude that neither **Anderson** nor any
25 other judicial authority exists to provide a constitutionally

1 recognized First Amendment right of political association as
2 asserted by Mr. Napolitano. As such it is not burdened. And
3 there being no such recognized legally protected interest that
4 is not conjectural or hypothetical he can suffer no injury in
5 fact and, therefore, he has no standing to assert his claim.

6 Even assuming that there is a slight burden on a First
7 and Fourteenth political associational right that would be
8 recognized in the event that **Anderson** would be extended to
9 encompass it, that burden is slight at best.

10 Initiative 36 denies no one, including plaintiff, the
11 right to vote. Every voter in this state can vote for the
12 candidate of choice. There is no dilution of plaintiff's right
13 to vote because the vote will be weighed as is everyone else's.
14 Votes on the same questions are weighed equally. There is no
15 restriction on the plaintiff or anyone else's right to
16 associate with other voters.

17 The concern about the possible effect of the
18 plaintiff's vote does not find constitutional proportion, or
19 under the Supreme Court authority, as I understand it, every
20 voter is subject to the same circumstances.

21 Given these considerations I cannot see the burden,
22 but even if there is a slight burden, the standard of review is
23 not compelling state interest. And in an abundance of caution
24 I look to under the **Anderson** rubric the state's asserted
25 interest in submitting Initiative 36 to the Colorado voters,

1 and that interest is found principally in Article V, Section 2
2 of the Colorado Constitution, in the reservation of the right
3 of initiative in the people of the State of Colorado.

4 I have not taken judicial notice of anything, although
5 it cannot be disputed that early voting has already commenced
6 and has been ongoing. Election disruption and preelection
7 predictability counsel as specific interests in the state in
8 continuing the vote on Initiative 36. And that meets the
9 **Anderson** balancing test.

10 The analysis of the standing question with regard to
11 the plaintiff is somewhat clouded, I think you might say, in
12 the context of ripeness. I've found that as I analyzed the
13 standing issue and attempted to analyze the ripeness issue
14 concerning Mr. Napolitano's claim, there was a certain
15 conflation of the analysis that attended to it, but I would
16 further conclude that his claim is not ripe. The overriding
17 basis for my determination of a lack of jurisdiction with
18 regard to his claim, however, remains a lack of standing.

19 On the basis of standing, lack of standing, and the
20 claims not being ripe, this Court lacks jurisdiction.

21 In the alternative, there being inextricably
22 intertwined issues of state and federal law, I would exercise
23 discretion to abstain in deciding the merits of this case.

24 One of the things that I want to make exceedingly
25 clear is this: I express no view whatsoever on the merits of

1 Initiative 36. My ruling is that this Court lacks jurisdiction
2 to grant the relief sought and that it should go to the vote of
3 the people of the State of Colorado.

4 I will, therefore, grant the motions to dismiss and
5 this action is dismissed.

6 By the way, I do have to say that Mr. Napolitano
7 exhibits the best in citizen interest and has been exceedingly
8 thoughtful in his approach to this case. There's a law school
9 right up the road up 36 and there's one just off I-25 and
10 University Boulevard, but I think you're doing all right
11 without following that path.

12 Anything further, Mr. Napolitano?

13 MR. NAPOLITANO: No. Thank you, your Honor.

14 THE COURT: Mr. Westfall?

15 MR. WESTFALL: No, your Honor.

16 MR. KNAIZER: No, your Honor.

17 THE COURT: Mr. Grueskin?

18 Court will be in recess. Thank you.

19 (Proceedings concluded at 11:53 a.m.)
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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 18th day of December, 2004.

Gwen Daniel, CM, CFRR