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February 23, 2010

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D. C. 20423

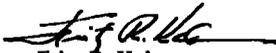
ENTERED  
Office of Proceedings  
FEB 23 2010  
Part of  
Public Record

Dear Ms. Brown:

Attached for filing in STB Docket No. AB-1052X, Almanor Railroad Company—  
Abandonment Exemption—in Plumas and Lassen Counties, CA, are the Comments of  
Almanor Railroad Company responding to the Environmental Assessment, served  
February 12, 2010.

If you have any question concerning this filing or if I otherwise can be of  
assistance, please let me know.

Sincerely yours,

  
Fritz R. Kahn

cc: Mr. Paul Hardy

**SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Docket No. AB-1052X**

**ALMANOR RAILROAD COMPANY  
--ABANDONMENT EXEMPTION--  
IN PLUMAS AND LASSEN COUNTIES, CA**

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**COMMENTS  
OF  
ALMANOR RAILROAD COMPANY**

**Fritz R. Kahn  
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**Attorney for**

**ALMANOR RAILROAD COMPANY**

**Dated: February 23, 2010**

**SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Docket No. AB-1052X**

**ALMANOR RAILROAD COMPANY  
--ABANDONMENT EXEMPTION--  
IN PLUMAS AND LASSEN COUNTIES, CA**

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**COMMENTS  
OF  
ALMANOR RAILROAD COMPANY**

**Almanor Railroad Company ("AL") offers the following comments pertaining to the Environmental Assessment, served February 12, 2009:**

**The Environmental Assessment, among other things, would condition the authorization to abandon AL's Chester-to-Clear Creek line by requiring:**

**Almanor Railroad Company shall report to the Board's Section of Environmental Analysis (SEA) regarding any consultation with California Office of Historic Preservation (the State Historic Preservation Office or SHPO) and the public. Almanor Railroad Company may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.**

**The obligation of complying with Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, is not that of AL or its representative; it is that of the Board. The statute unambiguously states:**

**[T]he head of any Federal department or independent agency having authority to license any undertaking shall, prior to . . . the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places].**

See, Mid States Coalition for Progress, et seq. v. Surface Transportation Board, 345 F.3d 520, 552-53 (8<sup>th</sup> Cir. 2003); Berkshire Scenic Railway Museum v. Interstate Commerce Commission, 52 F.3d 378, 382 (1<sup>st</sup> Cir. 1995).

The Board's predecessor, the Interstate Commerce Commission, understood full well what was expected of it under Section 106. In its bellwether Decision in Implementation of Environmental Laws, 7 I.C.C.2d 807, 826 (1991), the agency, in referring to Section 106, declared, "It requires the Commission to consult with the appropriate state historic preservation officer(s) ("SHPOs") (and other interested parties) to identify historic properties, determine if they will be adversely affected, and, if so, consider appropriate mitigation." In implementation of its Decision, the ICC adopted a regulation, at 49 C.F.R. 1105.8, requiring a railroad seeking certain relief, including the agency's abandonment authorization, to prepare a historic report that would include prescribed information relating to the properties that were 50 years old or older. "The purpose of the Historic Report," said subsection (a) of the regulation, "is to provide the Commission with sufficient information to conduct the consultation process required by the National Historic Preservation Act." Except for updating the reference to the agency, namely, the Board, the regulation remains in effect.

Section 101(b)(3)(E) of the National Historic Preservation Act, 16 U.S.C. 470a(b)(3)(E), directs the State Historic Preservation Officer ("SHPO") "to advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities." The Advisory Council on Historic Preservation regulation, 36 C.F.R. 800.3(c)(3), addressing the role of the SHPO in the Section 106 process, states, "The agency should consult with the SHPO/THPO in a

manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.”

The SHPO is expected to respond promptly to the agency’s request that he or she review the agency’s Section 106 submission. 36 C.F.R. 800.3 (c)(4), in part, provides, “If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the findings or determination or consult with the Council in lieu of the SHPO/THPO.” The ICC in its Decision in Implementation of Environmental Laws, supra, 7 I.C.C.2d at 827, underscored the need for a timely response by the SHPO, stating:

To expedite the historic review process, we will continue to set reasonable time limits for our consultation with SHPOs and the Advisory Council in individual cases. We also will terminate (or move to the next stage of) the process where a SHPO or the Advisory Council declines to participate in a timely manner or “sleeps on its rights.”

Somewhere along the line, the Board determined that it was the SHPO who was to initiate the Section 106 process. AL, pursuant to 49 C.F.R. 1105.7, had sought to consult with the California SHPO in the preparation of its Environmental and Historic Report, by letters dated November 2 and 24 and December 9, 2009, copies of which were sent to the Section of Environmental Analysis (“SEA”), and, pursuant to 49 C.F.R. 1105.8, AL served a copy of its Environmental and Historic Report on the California SHPO, by letter dated December 29, 2009, a copy of which was sent to SEA, twenty days before AL filed its Notice of Exempt Abandonment on January 20, 2010. No response was received from the California SHPO.

The California SHPO, however, just last year did respond to the consultation letter requests of the representative of another railroad located in California, Tulare Valley Railroad Company ("TVR"). Among other things, the California SHPO said:

In the case of the TVR abandonment in Tulare Valley, it does not appear that the Section 106 process has been initiated. Unfortunately, the letters from your offices do not qualify as initiating the Section 106 review process because neither your firm nor TVR are federal agencies. The Section 106 initiation request should come from the STB.

The historic condition which the Environmental Assessment proposes be attached to Board's authorization of the abandonment of the AL's Chester-to-Clear Creek line is completely out of order. The Board as yet has not taken the first step to initiate the Section 106 process, and its failure to do so contravenes the provisions of the National Historic Preservation Act, the regulations of the Advisory Council on Historic Preservation, the precedent Decision of the Interstate Commerce Commission and the wording of the Board's regulation.

WHEREFORE, Almanor Railroad Company asks that the historic condition proposed by the Environmental Assessment not be attached to the Board's authorization of the abandonment of the railroad's Chester-to-Clear Creek line.

Respectfully submitted,

ALMANOR RAILROAD COMPANY

By its attorney,



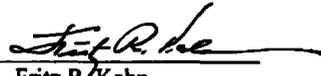
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Dated: February 23, 2010

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Comments of Almanor Railroad Company on the Feather River Land Trust by e-mailing a copy to its representative, Mr. Paul Hardy.

Dated at Washington, DC, this 23<sup>rd</sup> day of February 2010.

  
Fritz R. Kahn