

LAW OFFICES  
FRITZ R. KAHN, P.C.  
EIGHTH FLOOR  
1920 N STREET, N.W.  
WASHINGTON, D.C. 20036-1601

(202) 263-4152  
FAX (202) 331-8330  
e-mail: xicgc@worldnet.att.net

September 10, 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

227856

AB-1069X

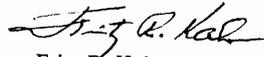
Dear Ms. Brown:

Transmitted herewith is the Petition for Exemption of Kern Valley Railroad Company to be filed in ~~Finance Docket No. 35409, Kern Valley Railroad Company—~~  
Termination of Trackage Rights—in Las Animas County, CO.

The \$6,300.00 filing fee was paid by check sent directly to the Board.

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

Sincerely yours,

  
Fritz R. Kahn

cc: Richard A. Weicher, Esq.  
Michael J. Van Wagenen, Esq.

ENTERED  
Office of Proceedings

SEP 10 2010

Public Board

**FILED**

SEP 10 2010

**SURFACE  
TRANSPORTATION BOARD**

**FEE RECEIVED**

SEP 10 2010

**TRANSPORTATION BOARD**

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

AB-1069X  
~~Finance Docket No. 35409~~

KERN VALLEY RAILROAD COMPANY  
-- TERMINATION OF TRackage RIGHTS --  
IN LAS ANIMAS COUNTY, CO

PETITION FOR EXEMPTION

Fritz R. Kahn  
Fritz R. Kahn, P.C.  
1920 N Street, NW (8th fl.)  
Washington, DC 20036  
Tel.: (202) 263-4152

Attorney for

KERN VALLEY RAILROAD COMPANY

Dated: September 10, 2010

SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC

*AB-1069X*  
~~Finance Docket No. 35409~~

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KERN VALLEY RAILROAD COMPANY  
-- TERMINATION OF TRackage RIGHTS --  
IN LAS ANIMAS COUNTY, CO

---

PETITION FOR EXEMPTION

Petitioner, Kern Valley Railroad Company ("KVR"), pursuant to 49 U.S.C. §10502 and 49 C.F.R. §1121.4, seeks an exemption from the provisions of 49 U.S.C. §10903 and 49 C.F.R. §1152.20, *et seq.*, to terminate the trackage rights of the BNSF Railway Company ("BNSF") over its line of railroad. KVR is a Class III rail carrier subject to the regulatory jurisdiction of the Board, having purchased the approximately 30-mile line of Trinidad Railway, Inc. ("TRI"), between Milepost 0.0 at Jansen and Milepost 30.0 east of Stonewall in Las Animas County, Colorado, under the Notice of Exemption in STB Finance Docket No. 33956. Kern Valley Railroad Company—Acquisition and Operation Exemption—Trinidad Railway, Inc., served November 21, 2000.<sup>1</sup>

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<sup>1</sup> See, STB Finance Docket No. 33956, Kern Valley Railroad Company—Acquisition and Operation Exemption—Trinidad Railway, Inc., served December 12, 2001 ("Trinidad sold its entire 30-mile line . . . to Kern Valley Railroad Company (Kern Valley) which subsequently invoked the class exemption procedure at 49 CFR 1150.31 to obtain authorization for the purchase. Kern Valley Railroad Company—Acquisition and Operation Exemption—Trinidad Railway, Inc., STB Finance Docket No. 33956 (notice served and published Nov. 21 2000).") *Id.*, served August 13, 2001.

### Nature of the request

TRI had negotiated a Trackage Rights and Operating Agreement (“Agreement”) with the Burlington Northern Railroad Company (“BN”), granting BN the right to operate over TRI’s entire 30-mile line as authorized by the Notice of Exemption in Finance Docket No. 32232, Burlington Northern Railroad Company—Trackage Rights Exemption—Trinidad Railway, Inc., served January 29, 1993. Among other things, the Agreement provided that “[t]he rights granted to BN pursuant to this Agreement can be terminated by either Party at any time upon 3 months’ prior written notice to the other Party . . .” The Agreement further provided that “Trinidad shall have exclusive control of the management and operation of the Track . . .” The Agreement added that “BN shall have priority to use and operate over the Track for the period of time to be scheduled by Trinidad or its agent every day of the week . . .”

TRI on September 1, 2000, filed its Notice of Exemption, pursuant to the two-year out-of-service exemption of 49 C.F.R. §1152.50, to abandon the preponderance of its line, between Milepost 2.0 west of Jansen and the end of the line at Milepost 30.0 east of Stonewall. BN joined in the filing, requesting that its trackage right on the line being abandoned by TRI be discontinued. The railroads’ requests were approved by the Notices in STB Docket No. AB-573X, Trinidad Railway, Inc.—Abandonment Exemption—in Las Animas County, CO and STB Docket No. AB-6 (Sub-No. 388X), The Burlington Northern and Santa Fe Railway Company—Discontinuance of Trackage Rights Exemption—in Las Animas County, CO, served September 21, 2000. The Board noted that Trinidad was retaining the first two miles of its line, that is, the so-called Jansen Yard Segment, between Milepost 0.0 and Milepost 2.0.

In accordance with the Agreement, KVR now has given the BNSF, successor in interest to BN, three months' written notice terminating the Agreement. KVR deems continuing BNSF's trackage rights on the Jansen Yard Segment between Milepost 0.0 and Milepost 2.0 to be unnecessary and burdensome. In its management and operation of the track KVR has not provided for the operation of a single BNSF train over the Jansen Yard Segment in well over two years' time. Throughout that time KVR has not scheduled even one period when a BNSF train would operate under the Agreement on the two-mile line between Milepost 0.0 and Milepost 2.0. Nevertheless, KVR pursuant to the Agreement is obligated to manage and operate the two-mile Jansen Yard Segment in the event BNSF should seek to exercise the trackage rights it had been granted by the Agreement, and it has to be prepared to schedule the period of time for BNSF's use of the line. KVR can make better use of its resources than endlessly awaiting BNSF's operation on the two-mile Jansen Yard Segment.

The two-mile Jansen Yard Segment traverses U.S. Postal Service area code 81082, and there are no stations on the line. A map of the line is attached as Exhibit A.

KVR's line of railroad between Milepost 0.0 and Milepost 2.0, to the best of KVR's knowledge, does not contain any federally granted right-of-way. Any documentation in KVR's possession regarding the line will be made available to those requesting it.

#### Grounds for granting the request

A grant of trackage rights ordinarily cannot be extinguished without the Board's authorization, pursuant to 49 U.S.C. §10903 and 49 C.F.R. §1152.20, et seq. See, Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946); United Transp. Union v.

Surface Transp. Bd., 363 F.3d 465 (D.C. Cir. 2004); Finance Docket No. 31282, Arkansas & Missouri R.R. Co. v. Mo. Pac. R.R. Co., served March 17, 1989. The Board, however, must grant an exemption when, under 49 U.S.C. §10502 and 49 C.F.R. §1121.4, if it finds that regulation of the proposed transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101 and either the transaction is of limited scope or regulation is not needed to protect shippers from the abuse of market power. See, Docket No. AB 55 (Sub-No. 701X), CSX Transportation, Inc.—Abandonment Exemption—in Vigo County, Ind., served August 16, 2010; Docket No. AB 55 (Sub-No. 702X), CSX Transportation, Inc.—Abandonment Exemption—in Marion County, Ind., served August 12, 2010. The termination of BNSF's trackage rights on the two-mile Jansen Yard Segment clearly satisfies these exemption standards.

Detailed scrutiny by the Board of the termination of BNSF's trackage rights under 49 U.S.C. §10903 and 49 C.F.R. §1152.20, et seq., is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101. To the contrary, granting the exemption will avoid the needless time and expense of processing a full trackage rights discontinuance application. The granting of the requested exemption will expedite regulatory action and reduce regulatory barriers to discontinuance, consistent with sections 10101(2) and (7). The exemption moreover will foster sound economic conditions in the transportation industry, consistent with section 10101(5) by allowing KVR to utilize its railroad line without the restraints of the trackage rights grant conferred by its predecessor. See, Docket No. AB 6 (Sub-No. 470X), BNSF Railway Company—Discontinuance of Trackage Rights Exemption—in Peoria and Tazewell Counties, Ill., served June 4, 2010; STB Docket No. AB-6 (Sub-No. 466X), BNSF Railway Company—Discontinuance of

Trackage Rights Exemption—in Kootenai County, ID, served June 2, 2009; STB Docket No. AB-6 (Sub-No. 462X), BNSF Railway Company—Discontinuance of Trackage Rights Exemption—in Cook County, IL, served May 2, 2008; STB Docket No. AB-295 (Sub-No. 5X), The Indiana Rail Road Company—Abandonment and Discontinuance of Trackage Rights Exemption—in Monroe County, IN, served October 3, 2003.

The proposed transaction is demonstrably limited in scope. The Jansen Yard Segment is a scant two miles long, extending between Milepost 0.0 and Milepost 2.0. There is not a shipper situated on the line, and KVR in its management and control of the line has arranged for the operation of not a single BNSF train or scheduled a period of time for a single BNSF train's operation utilizing the trackage rights grant for more than two years. Id.

Finally, regulation of the proposed transaction is not required to protect shippers from the abuse of market power. As already noted, there is not a shipper situated on the two-mile Jansen Yard Segment. KVR, which under the Agreement, has exclusive control of the management and operation of the line between MP 0.0 and MP 2.0, has not arranged for use of the trackage rights by a single BNSF train or scheduled the period of time when BNSF pursuant to the trackage rights grant would operate even one train on the track in more than two years' time. Id.

The grant of the exemption is fully warranted.

#### Additional considerations

The discontinuance of trackage rights for BNSF to operate on the two-mile Jansen Yard Segment will not be consummated before November 19, 2010, three months from the date when BNSF received KVR's written notice of the termination of the Agreement.

Although KVR is unaware of any labor impacts that grant of the exemption would have, it nevertheless agrees to the imposition of the labor protective conditions of Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

The grant of the requested exemption is exempt from the need for an environmental assessment, pursuant to 49 C.F.R. §1105.6(b)(3), since KVR will continue to be available to operate the two-mile Jansen Yard Segment. For the same reason no historic report is required, pursuant to 49 C.F.R. §1105.6(c)(6). See, Docket No. AB 1066 (Sub-No. 2X), Central Illinois Railroad Company—Discontinuance of Service Exemption—in Cook County, Ill., served August 18, 2010.

A draft Federal Register Notice is attached as Exhibit B.

Notice of the proposed termination of BNSF's trackage rights was published on August 26, 2010, in The Chronicle News, a newspaper of general circulation in Las Animas County, Colorado. A copy of the proof of publication is attached as Exhibit C.

Notices of the proposed termination of BNSF's trackage rights on August 20, 2010, were mailed to the agencies identified in 49 C.F.R. §1152.50(d)(1), the Las Animas County Clerk and counsel for BNSF, and copies of the letters which were sent to them are attached as Exhibit D.

WHEEFORE, Petitioner, Kern Valley Railroad Company, respectfully requests that, pursuant to 49 U.S.C. §10502 and 49 C.F.R. §1121.4, it be granted an exemption from the provisions of 49 U.S.C. §10903 and 49 C.F.R. §1152.20, et seq., to terminate the grant of trackage rights for BNSF Railway Company to operate on its railroad line between Milepost 0.0 and Milepost 2.0 in Jansen, Las Animas County, Colorado.

Respectfully submitted,

KERN VALLEY RAILROAD COMPANY

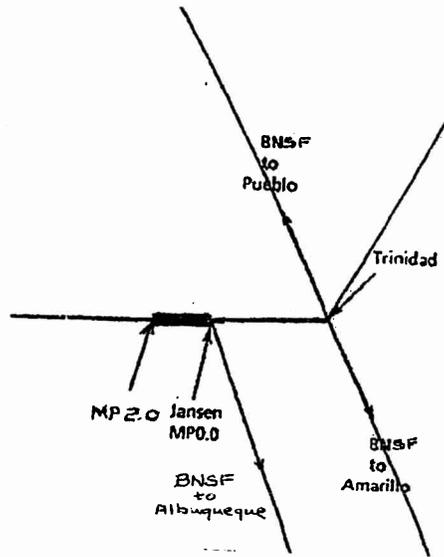
By its attorney,



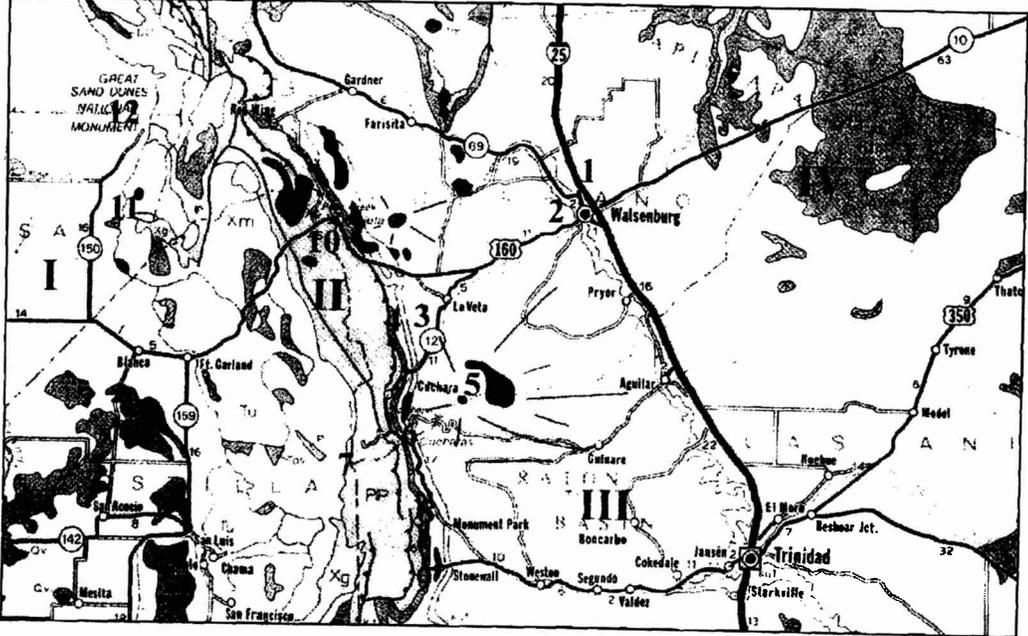
Fritz R. Kahn  
Fritz R. Kahn, P.C.  
1920 N Street, NW (8th fl.)  
Washington, DC 20036  
Tel.: (202) 263-4152

Dated: September 10, 2010

EXHIBIT A



Southern Rockies Geology



Geologic map adapted from *Colorado Geologic Highway Map* (1991).

**EXHIBIT B**

■

Draft Federal Register Notice

SURFACE TRANSPORTATION BOARD

Finance Docket No. 35409

KERN VALLEY RAILROAD COMPANY  
-- TERMINATION OF TRackage RIGHTS --  
IN LAS ANIMAS COUNTY, CO

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PETITION FOR EXEMPTION

On September 10, 2010, Kern Valley Railroad Company ("KVR") filed with the Board a petition for exemption under 49 U.S.C. §10502 from the provisions of 49 U.S.C. §10903 to terminate the grant of trackage rights for BNSF Railway Company ("BNSF") to operate over its two-mile Jansen Yard Segment, between Milepost 0.0 and Milepost 2.0 in Jansen, Las Animas County, CO. The line traverses United States Postal Service Zip code 81082 and includes no stations.

The trackage rights are cancelable on three months' written notice, which KVR has given BNSF. Moreover, KVR, which under trackage rights agreements is responsible for the management and operation of the line, has not provided for the operation of a single BNSF train under the trackage rights agreement in more than two years' time.

The line, to KVR's knowledge, does not contain federally granted rights-of-way. Any documentation in KVR's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions of Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. §10502(b). A final decision will be issued by December 10, 2010.

The proposed transaction is exempt from environmental analysis under 49 C.F.R. 1105.6(c) and from historic reporting requirements under 49 C.F.R. 1105.8(b).

Comments and/or offers of financial assistance for subsidy under 49 C.F.R. §1152.27(b)(2) are due 10 days after service of a Board decision granting the exemption. Each offer of financial assistance must be accompanied by a \$1,500 filing fee. See, 49 C.F.R. §1002.2(f)(25).<sup>1</sup> Comments and/or offers of financial assistance must be filed with the Board's Chief of the Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001. All filings in response to this notice must refer to Finance Docket No. 35409. A copy shall be served on KVR's representative, Fritz R. Kahn, Esq., Fritz R. Kahn, P.C., 1920 N Street, NW (8<sup>th</sup> fl.), Washington, DC 20036. Questions concerning offers of financial assistance may be directed to the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245-0238, or reference be made to the full abandonment and discontinuance regulations at 49 C.F.R. §1152, *et seq.* Assistance for the hearing impaired is available through the Federal Information Relay Service ("FIRS") at 1-800-877-8339.

Board decisions and notices are available on its website at [www.stb.dot.gov](http://www.stb.dot.gov).

Decided:

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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<sup>1</sup> Because a termination of trackage rights is being sought, trail use/rail banking and public use conditions are not appropriate.

EXHIBIT C

PROOF OF PUBLICATION

STATE OF COLORADO  
COUNTY OF LAS ANIMAS) SS

Sheila Hamlin, of lawful age, being first duly sworn upon oath, deposes and says that she is the authorized agent of The Chronicle-News, daily newspaper of general circulation which is published and circulated in the City of Trinidad, Las Animas County, Colorado, that said newspaper is a newspaper of general circulation complying with all of the requirements of Articles I to VII, Chapter 130, 1935, Colorado Statutes Annotated, and all other laws of said State, and that said legal / notice has been so published for the period of time prescribed in said newspaper proper and not a supplement, the first publication of which was made on the 26 day of Aug., 2010, and published thereafter on \_\_\_\_\_

\_\_\_\_\_ and final publication thereof was in the issue dated the 26 day of Aug., 2010.

*Sheila R Hamlin*

Subscribed and sworn to before me this 26 day of Aug. A. D. 2010.

*Noah G. Simpson*  
Noah G. Simpson  


My commission expires on November 18, 2012

**SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35409

**KERN VALLEY RAILROAD COMPANY  
-TERMINATION OF TRACKAGE RIGHTS-  
IN LAS ANIMAS COUNTY, CO**

**PETITION FOR EXEMPTION**

On or about September 10, 2010, Kern Valley Railroad Company ("KVR") anticipates filing a petition for exemption to terminate the grant of trackage rights for BNSF Railway Company ("BNSF") to operate over its two-mile Jansen Yard Segment, between Milepost 0.0 and Milepost 2.0 in Jansen, Las Animas County, CO. The line traverses United States Postal Service Zip code 81082, and there are no stations on the line.

Pursuant to an agreement between the railroads' predecessors, the trackage rights are cancelable on three months' written notice, which KVR has given BNSF. Moreover, KVR, which under trackage rights agreements is responsible for the management and operation of the line, has provided for the operation of not a single BNSF train under the trackage rights agreement in more than two years' time.

The line, to KVR's knowledge, does not contain federally granted rights-of-way. Any documentation in KVR's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions of Oregon Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979).

The proposed transaction is exempt from environmental analysis under 49 C.F.R. §1105.6(c) and from historic reporting requirements under 49 C.F.R. §1105.8(b).

Any offer of financial assistance for subsidy under 49 C.F.R. §1152.27(b)(2) will be due 120 days after the filing of the petition for exemption or 10 days after service of a Board decision granting the exemption, whichever occurs sooner. An offer of financial assistance must be accompanied by a \$1,500 filing fee. Comments and/or offers of financial assistance must be filed with the Board's Chief of the Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001. Copies of any comments and/or offers of financial assistance shall be served on KVR's representative, Fritz R. Kahn, Esq., Fritz R. Kahn, P.C., 1920 N Street, NW (8th fl.), Washington, DC 20036. Questions concerning comments and/or offers of financial assistance may be directed to the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245-0238.

Published August 26, 2010

EXHIBIT D

LAW OFFICES  
FRITZ R. KAHN, P.C.  
1920 N STREET, NW. (8<sup>TH</sup> FL.)  
WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xicccg@verizon.net

August 24, 2010

Chairman Ron Binz  
Colorado Public Utilities Commission  
1560 Broadway (Ste. 250)  
Denver, CO 80202

Dear Chairman Binz:

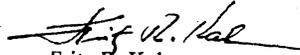
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The line traverses United States Postal Service Zip Code 81082, and there are no stations on the line.

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Sincerely yours,

  
Fritz R. Kahn

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FRITZ R. KAHN, P.C.  
1920 N STREET, NW. (8<sup>TH</sup> FL.)  
WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xicgc@verizon.net

August 24, 2010

MTMCTEA  
Attn.: SDTE-SE  
Railroads for National Defense  
709 Ward Dr. (Bldg. 1990)  
Scott AFB, IL 62225-5357

Dear Sir/Madam:

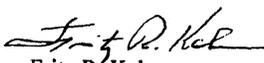
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WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xicccg@verizon.net

August 24, 2010

Mr. Bert Frost, Associate Director  
Natural Resource Stewardship and Science  
National Park Service  
1849 C Street, NW  
Washington, DC 20240

Dear Mr. Frost:

On or about September 10, 2010, Kern Valley Railroad Company ("KVR") anticipates filing with the Surface Transportation Board a petition for exemption to terminate the grant of trackage rights for BNSF Railway Company ("BNSF") to operate over its two-mile Jansen Yard Segment, between Milepost 0.0 and Milepost 2.0 in Jansen, Las Animas County, CO. The petition will be filed in Finance Docket No. 35409

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WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xiccgc@verizon.net

August 24, 2010

Mr. John Wessels, Regional Director  
Intermountain Region  
National Park Service  
12795 Alameda Parkway  
Denver, CO 80225

Dear Mr. Wessels:

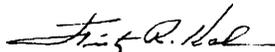
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WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xlccgc@verizon.net

August 24, 2010

Mr. Tom Tidwell  
Chief, Forest Service  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington, DC 20250-0003

Dear Mr. Tidwell:

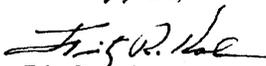
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WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xicccg@verizon.net

August 24, 2010

Las Animas County Clerk  
200 East 1<sup>st</sup> Street  
Trinidad, CO 81082

Dear Sir/Madam:

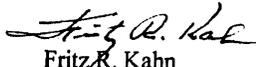
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Sincerely yours,

  
Fritz R. Kahn

LAW OFFICES  
FRITZ R. KAHN, P.C.  
1920 N STREET, NW. (8<sup>TH</sup> FL.)  
WASHINGTON, DC 20036  
Tel.: (202) 263-4152 Fax: (202) 331-8330  
e-mail: xicgc@verizon.net

August 24, 2010

Richard A. Weicher, Esq.  
Vice President and General Counsel – Regulatory  
BNSF Railway Company  
P. O. Box 961057  
Fort Worth 76161-0057

Dear Mr. Weicher:

On or about September 10, 2010, Kern Valley Railroad Company (“KVR”) anticipates filing with the Surface Transportation Board a petition for exemption to terminate the grant of trackage rights for BNSF Railway Company (“BNSF”) to operate over its two-mile Jansen Yard Segment, between Milepost 0.0 and Milepost 2.0 in Jansen, Las Animas County, CO. The petition will be filed in Finance Docket No. 35409

Pursuant to an agreement between the railroads’ predecessors, the trackage rights are cancelable on three months’ written notice, which KVR has given BNSF. Moreover, KVR which under trackage rights agreements is responsible for the management and operation of the line has provided for the operation of not a single BNSF train under the trackage rights agreement in more than two years’ time.

The line traverses United States Postal Service Zip code 81082, and there are no stations on the line.

The line, to KVR’s knowledge, does not contain federally granted rights-of-way. Any documentation in KVR’s possession will be made available promptly to those requesting it.

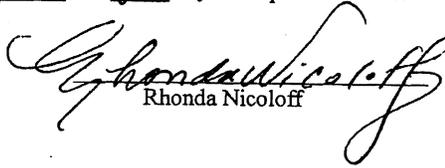
Sincerely yours,

  
Fritz R. Kahn

VERIFICATION

I, Rhonda Nicoloff, President of Kern Valley Railroad Company, declare under penalty of perjury, under the laws of the United States of America, that I have read the foregoing Notice of Exemption and that its assertions are true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this verification on behalf of Kern Valley Railroad Company. I know that willful misstatements or omission of material fact constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Salt Lake City, UT this 2<sup>nd</sup> day of September 2010.

  
Rhonda Nicoloff