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9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

<p>13 CITY OF FORT BRAGG,</p> <p>14</p> <p>15 Plaintiff,</p> <p>16</p> <p>17 MENDOCINO RAILWAY,</p> <p>18 Defendant,</p> <p>19</p> <p>20 CALIFORNIA COASTAL COMMISSION,</p> <p>21 Intervenor.</p>	<p>Case No. 4:22-cv-06317-JST</p> <p>CALIFORNIA COASTAL COMMISSION'S REQUEST FOR JUDICIAL NOTICE</p> <p>Date: February 2, 2023 Time: 2 p.m. Dept: Courtroom 6 Judge: The Hon. Jon S. Tigar Trial Date: Not Set Action Filed: October 28, 2021</p>
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22

23 Intervenor California Coastal Commission respectfully requests that the Court take judicial
 24 notice of the documents filed in the related state court proceedings and the related federal
 25 proceeding, pursuant to Federal Rule of Evidence Rule 201:

- 26 1. Exhibit A –A true and correct copy of Mendocino Railway’s Memorandum of Points
 27 and Authorities in support of Demurrer, *City of Fort Bragg v. Mendocino Railway*,
 Mendocino County Superior Court, Case No. 21CV00850, filed January 14, 2022.

EXHIBIT A

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10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF MENDOCINO**

12 CITY OF FORT BRAGG, a California
13 municipal corporation

14 Plaintiff,

15 v.

16 MENDOCINO RAILWAY and DOES 1-10,
17 inclusive,

18 Defendants.

Case No.: 21CV00850

[Assigned to the Hon. Clayton Brennan]

**DEFENDANT MENDOCINO RAILWAY'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO PLAINTIFF CITY OF
FORT BRAGG'S COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Hearing Date: February 10, 2022

Hearing Time: 2:00 p.m.

Complaint Filed: October 28, 2021

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I. INTRODUCTION

This case is about an extraordinary attempt by Plaintiff City of Fort Bragg (“City”) to have the Court terminate a well-established railroad’s legal status as a California public utility—long recognized and regulated as such by the California Public Utilities Commission (“CPUC”). The City’s attempt is doomed from the start because the Court has no subject matter jurisdiction to do the City’s bidding. California law unequivocally bars all Superior Court actions—like the City’s—that purport to second-guess or interfere with the CPUC’s ongoing jurisdiction over a railroad long deemed by that state agency to be a public utility.

As the City admits, Defendant Mendocino Railway “is currently listed as a class III railroad by the California Public Utilities Commission (CPUC)” and, “as such,” it “is subject to CPUC jurisdiction and has all legal rights of a public utility.” Complaint at 2:5-7. The CPUC has broad authority to assert jurisdiction over and regulate the State’s public utilities, including railroads like Mendocino Railway. But while the City has long trumpeted Mendocino Railway’s “public utility” status, the City now objects.

In a single cause of action for declaratory relief, the City asks the Court to nullify Mendocino Railway’s status as a CPUC-regulated public utility because the City thinks that the railroad no longer qualifies as such. If somehow successful in convincing the Court to terminate Mendocino Railway’s status—and, with it, the CPUC’s jurisdiction over it—the City hopes to also convince the Court to grant a sweeping injunction compelling Mendocino Railway to submit to “all” of the City’s “ordinances, regulations, . . . codes, jurisdiction and authority.” Complaint at 6:12-14, 6:15-18.

The objective of the City’s cause of action for declaratory relief is crystal clear: To substitute the City for the California Public Utilities Commission, and seize unfettered control over a state-regulated, public-utility railroad.

The City’s lawsuit fails as a matter of law. The CPUC has assumed jurisdiction over and regulated Mendocino Railway as a “*public utility*” for years. Complaint at 2:7 (emphasis added). A 1998 decision of the CPUC unequivocally affirms jurisdiction over Mendocino Railway. This Superior Court action asks the Court to unlawfully second-guess that CPUC decision and directly interfere with the agency’s continuing jurisdiction over it. But the law clearly bars such Superior Court actions. *See, e.g.*, Pub. Util. Code § 1759 (precluding Superior Court actions that interfere with CPUC). The Court has no

1 subject matter jurisdiction to convert a CPUC-regulated public utility into a nonpublic utility and thereby
 2 strip a state agency of its decades-long regulatory authority over that entity. Since the City has no
 3 cognizable claim, it can obtain no relief—whether it be a declaration or an injunction.

4 The City may argue it has an independent cause of action for “injunctive relief” that somehow
 5 survives dismissal of its “declaratory relief” claim. But injunctive relief is a remedy, not a cause of
 6 action. And even if a request for an injunction constituted a cause of action, it would be barred. The
 7 City’s injunction purports to subject Mendocino Railway to “all” of the City’s laws, jurisdiction, and
 8 authority. Complaint at 6:15-18. Such an injunction would give the City unlimited control over a CPUC-
 9 regulated public utility in violation of California law. Further, as the City has conceded, Mendocino
 10 Railway is also a *federally* recognized railroad subject to the jurisdiction of the federal Surface
 11 Transportation Board. The unlimited control that the City seeks would therefore be federally preempted.

12 The Court should sustain Mendocino Railway’s demurrer and dismiss the Complaint in its
 13 entirety without leave to amend.

14 **II. LEGAL AND FACTUAL BACKGROUND**

15 **A. Legal Background**

16 The only cause of action in this lawsuit is a claim for declaratory relief, which purports to
 17 challenge Mendocino Railway’s status as a public utility under California law.¹ This demurrer does not
 18 turn on whether Mendocino Railway continues to qualify as a public utility, because the Court lacks
 19 jurisdiction to decide the question in the first place. Nevertheless, for context, it is helpful to understand
 20 how public utilities are defined and regulated in California.

21 A “public utility” is defined, in relevant part, as “every common carrier . . . where the service is
 22 performed for, or the commodity is delivered to, the public or any portion thereof.” Pub. Util. Code §
 23 216(a)(1); *see also* Cal. Const. art. XII, § 3 (“[C]ommon carriers[] are public utilities.”). A “common
 24 carrier” is, in turn, defined as “every person and corporation providing transportation for compensation
 25

26 ¹ As explained in the “Standard of Review” section, while the City titles its only cause of action as a
 27 “Cause of Action” for “Declaratory and/or Injunctive Relief,” there is no such thing as a cause of action
 28 for injunctive relief. Injunctive relief is a remedy, not a cause of action. *County of Del Norte v. City of
 Crescent City* (1999) 71 Cal.App.4th 965, 973; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41,
 65.

1 to or for the public or any portion thereof.” *Id.* § 211. A “common carrier” includes “[e]very railroad
2 corporation.” *Id.* § 211(a).

3 Formerly called the Railroad Commission, the CPUC has plenary jurisdiction to “supervise and
4 regulate” California public utilities, including railroads. Pub. Util. Code § 701; *see also Public Utilities*
5 *Comm. v. Superior Court* (2010) 181 Cal.App.4th 364, 368-69 (recounting history of CPUC and its
6 regulation of railroads). It “is a state agency of constitutional origin with far-reaching duties, functions
7 and powers.” *San Diego Gas & Elec. Co. v. Super. Ct.* (1996) 13 Cal.4th 893, 914-15 (internal quotes
8 and citations omitted); *see also* Cal. Const. art. XII (establishing the CPUC). The CPUC’s jurisdiction
9 includes an expansive police power to “require every public utility to construct, maintain, and operate
10 its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and
11 safeguard the health and safety of its employees, passengers, customers, and the public.” Pub. Util. Code
12 § 768; *see also Sutter Butte Canal Company Co. v. Railroad Comm.* (1927) 202 Cal.179, 184 (holding
13 that to the CPUC “has been committed the execution of this police power”—i.e., all power “necessary
14 for the protection of the public health, safety, morals and welfare”—“over public utilities in California”).
15 “In particular, the commission has comprehensive jurisdiction over questions of public health and safety
16 arising from utility operations.” *San Diego Gas & Electric Co.*, 13 Cal.4th at 924. In matters over which
17 the CPUC has jurisdiction, its jurisdiction is “exclusive.” *City of Anaheim v. Pacific Bell Telephone Co.*
18 (2004) 119 Cal.App.4th 838, 842 (citing Cal. Const. art. XII, § 8 (“A city ... may not regulate matters
19 over which the Legislature grants regulatory power to the [Public Utilities] Commission.”)).

20 Further, the CPUC has the judicial power to determine in the first instance “that the status of [an
21 entity] is that of a public utility subject to regulation as contemplated by the Constitution of this state.”
22 *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 629-30. “That [the CPUC] . . . possesses judicial
23 powers”—such as the power to determine whether and how an entity should be regulated as a public
24 utility—“may not be questioned.” *Id.* at 630. “When its determinations within its jurisdiction have
25 become final they are conclusive in all collateral actions and proceedings.” *Id.*

26 **B. Factual Background**

27 Mendocino Railway is a railroad that has operated between the City of Fort Bragg and Willits,
28 in the County of Mendocino. Complaint at 2:19-20. The railroad owns real property in the City. *Id.* at

1 2:9-10.

2 As the Complaint admits, Mendocino Railway “is currently listed as a Class III railroad by the
3 California Public Utilities Commission.” Complaint at 2:5-6. The railroad therefore “is subject to CPUC
4 jurisdiction and has all legal rights of *a public utility*.” *Id.* at 2:6-7 (emphasis added). Consistent with
5 those admissions, the CPUC’s official website lists Mendocino Railway as a regulated railroad.
6 Declaration of Paul Beard II (“Beard Decl.”), Exh. A (CPUC webpage); Defendants’ Request for Judicial
7 Notice (“RJN”) at 2:6-17.

8 The Complaint cites to a January 21, 1998, decision of the CPUC regarding the railroad, which
9 also confirms the CPUC’s decades-long history of recognizing and regulating it as a public utility. *Id.*
10 2:2. There, at the request of the rail line’s prior owner, California Western Railroad (“CWRR”), the
11 CPUC agreed to deregulate fares for the railroad’s “excursion passenger service” only, which the CPUC
12 did not deem to be a “public utility” function. *In the Matter of the Application Calif. Western R.R., Inc.*
13 (“*In Re CWRR #1*”), 1998 Cal. PUC LEXIS 189, *11 (Jan. 21, 1998).² But in the same decision, the
14 CPUC reaffirmed its jurisdiction over the safety of the entire rail line (including its excursion service),
15 as well as all aspects of the railroad’s commuter service:

16 “The Commission currently regulates the safety of the operation of all
17 services provided by CWRR. . . . The safety of the operation of all services,
18 including excursion passenger service, shall remain subject to regulation by
the Commission. This proceeding shall remain open to consider CWRR’s
request to reduce its commuter service.”

19 *Id.* at **10-11.³ Soon after the CPUC’s decision, the CPUC granted CWRR’s motion to withdraw its
20 request to reduce commuter service. *In the Matter of the Application of Calif. Western R.R., Inc.* 1998
21 Cal. PUC LEXIS 384 (May 21, 1998) (“*In Re CWRR #2*”) (noting that CWRR “transports passengers
22 and freight”).⁴

23 Every decision of the CPUC has only *reaffirmed* its jurisdiction over the railroad as a public
24 utility.

25 _____
26 ² See Beard Decl., Exh. B, p. 4 (Jan. 21, 1998 CPUC Decision); RJN at 2:18-21.

27 ³ In its Complaint, the City grossly mischaracterizes the CPUC’s 1998 decision as somehow stripping
the railroad of its “public utility” status. Complaint ¶ 6. The City’s self-serving description in the
Complaint is belied by the decision itself, which expressly affirms the CPUC’s plenary jurisdiction over
the railroad, with the limited exception that it no longer regulates its excursion fares.

28 ⁴ See Beard Decl. Exh. E (May 21, 1998 CPUC Decision); RJN at 3:9-12.

1 The City concedes that, following the CPUC’s 1998 decision, Mendocino Railway “did or may
 2 have had the capacity to carry freight and passengers from point-to-point.” Complaint at 3:1-3. But the
 3 City claims that “no rail lines presently have any such capacity.”⁵ *Id.* The City alleges Mendocino
 4 Railway operates only “sightseeing excursions.” *Id.* at 3:26. The City attributes the railroad’s alleged
 5 loss of freight and passenger service to two events: (1) the 2013 “partial collapse of Tunnel No. 1, which
 6 buried nearly 50 feet of its 1,200 feet of track under rocks and soil,” and (2) the 2016 re-closure of Tunnel
 7 No. 1, purportedly following “damage from the 2015-16 El Niño.” *Id.* at 3:7-9, 3:16-17. Yet despite
 8 those 2013 and 2016 tunnel closures, the City readily defended Mendocino Railway’s “public utility”
 9 status *as late as August 2019*. Beard Decl., Exh. C (1/17/19 Letter from City) & Exh. D (8/1/19 City
 10 Analysis); Declaration of Mike Hart, ¶ 2; RJN at 2:22—3:7.

11 In a January 17, 2019, letter from the City Attorney to the California Coastal Commission, the
 12 City defended Mendocino Railway’s right, *as a public utility*, to proceed with a land purchase without
 13 having to first obtain a state land-use permit. *This defense came after the 2013 and 2016 tunnel closures*
 14 *that interrupted the railroad’s full freight and passenger service*. As the City explained in its letter, the
 15 CPUC has “recognized the Mendocino Railway as a regulated public utility” with the right to proceed
 16 with the transaction without a permit. Beard Decl., Exh. C, p. 2. The City also admitted that “[a]s an
 17 established railroad, the question of whether or not the Mendocino Railway is *federally* regulated has
 18 not been in question.” *Id.* (emphasis added).

19 Similarly, in an August 1, 2019, letter, the City supported Mendocino Railway’s application for
 20 a U.S. Department of Transportation grant to repair Tunnel No. 1, and thereby “restore freight and
 21 passenger operations over Mendocino Railway’s entire 40-mile rail line” (“the Project”). Beard Decl.,
 22 Exh. D, p. 2. *Again, the letter came years after the tunnel closures that the City claims disqualified*
 23 *Mendocino Railway of its “public utility” status*. In its letter, the City touted Mendocino Railway’s long
 24 history of providing, not just excursions, but freight and general passenger service as well—service that,

25 _____
 26 ⁵ Mendocino Railway disputes any and all allegations that cast doubt on the railroad’s uninterrupted and
 27 continued status as a “public utility” under state law and as a federally recognized railroad under federal
 28 law. But said allegations are legally irrelevant for purposes of this demurrer. As explained in the
 Argument, *infra*, even if those allegations were true (which they are not), the Superior Court has no
 subject matter jurisdiction to adjudicate whether the CPUC should continue to recognize and regulate a
 railroad as a public utility.

1 as the City readily acknowledged in the letter, Mendocino Railway was ready, willing, and able to fully
2 restore upon the collapsed tunnel's reopening:

3 The Project would *renew* freight services, increase passenger offerings, and
4 improve railroad safety and operations. . . . Mendocino Railway has a
5 storied legacy of transporting freight and passengers and being the
6 economic engine for the rural areas of Fort Bragg and greater Mendocino
7 County. Various industries are eagerly awaiting *reopening* of Mendocino
8 Railway's Line for freight services. . . . Additionally, it is anticipated that
9 the *reopening* of the approximately 40-mile rail Line for passenger services
10 should generate 25,000 or more passenger trips to be taken over the Line.

11 Beard Decl., Exh. D, pp. 2-3 (emphasis added).

12 Interestingly, the Complaint alleges no new facts or circumstances since the City's admissions
13 in August 2019 that would cast the slightest doubt on Mendocino Railway's status as a public utility.

14 Nevertheless, the City now complains that Mendocino Railway has previously invoked its right
15 as a CPUC-regulated public utility to rebuff City attempts to impose plenary control over the railroad
16 and its facilities. As examples, the Complaint cites City efforts, in 2017 and 2019, to regulate the use
17 and repair of a roundhouse⁶ and storage shed located on Mendocino Railway's land. Complaint at 4:1-
18 8. The Complaint also cites a more recent example from August 2021, when the City allegedly demanded
19 that Mendocino Railway obtain a "special event" permit for an unspecified late-night event. *Id.* at 4:8-
20 10. In each instance, claims the City, Mendocino Railway declined to subject itself to local inspections
21 and permit requirements because of its "public utility" status. *Id.* at 4:-1-12. Curiously, the City in the
22 first two instances attempted to assert regulatory authority over the railroad at a time when the City did
23 not dispute—and even vigorously *defended*—Mendocino Railway's status as a public utility exempt
24 from just such local regulation.

25 The City has had a sudden change of heart regarding Mendocino Railway's "public utility" status.
26 In a single cause of action, the City purports to seek "declaratory and/or injunctive relief" to the effect
27 that (1) "Mendocino Railway is not subject to regulation [by the CPUC] as a public utility" and (2)
28 Mendocino Railway must "comply with all City ordinances, regulations, and lawfully adopted codes,
jurisdiction and authority." Complaint at 4:27-28, 6:12-18. Mendocino Railway brings this demurrer on

⁶ A "roundhouse" is defined as a "a circular building for housing and repairing locomotives." *See* Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/roundhouse>.

1 the grounds that the Court lacks subject matter jurisdiction to adjudicate the City’s claim and grant the
2 relief it seeks.

3 **III. STANDARD OF REVIEW**

4 A defendant may object to a complaint by demurrer when the court lacks subject matter
5 jurisdiction. Code of Civ. Proc. § 430.10(a). A general demurrer serves to test the sufficiency of the
6 complaint as a matter of law. *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 306. While
7 courts “assume the truth of all material facts properly pleaded in the complaint” (*B&P Dev. Corp. v. City*
8 *of Saratoga* (1986) 185 Cal.App.3d 949, 953), they “do not . . . assume the truth of contentions,
9 deductions, or conclusions of fact or law” contained in the complaint (*Moore v. Regents of Univ. of Calif.*
10 (1990) 51 Cal.3d 120, 125). Moreover, courts must “disregard allegations that are contrary to law or to
11 facts that may be judicially noticed.” *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th
12 171, 178). “In cases when the pleading conflicts with facts judicially noticed, . . . the theory is that the
13 pleader should not be allowed to bypass a demurrer by suppressing facts that the court will judicially
14 notice.” *Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591.

15 The City alleges a cause of action for “declaratory and/or injunctive relief.” Complaint at 4:25.
16 Although section 1060 of the Code of Civil Procedure authorizes a cause of action for declaratory relief,
17 the law does not authorize a “cause of action for injunctive relief.” An “injunction is an equitable remedy,
18 not a cause of action, and thus it is attendant to an underlying cause of action.” *County of Del Norte*, 71
19 Cal.App.4th at 973. “A cause of action must exist before a court may grant a request for injunctive
20 relief.” *Allen*, 234 Cal.App.4th at 65. Thus, if the City’s declaratory-relief claim falls, its request for an
21 injunction falls with it.

22 **IV. ARGUMENT**

23 The Court lacks subject matter jurisdiction over the City’s declaratory-relief action, which seeks
24 to eliminate Mendocino Railway’s status as a CPUC-regulated public utility and substitute the City for
25 the CPUC as the railroad’s regulatory overseer. As explained in detail below, entertaining this action
26 directly undermines the CPUC’s already-assumed jurisdiction and regulatory authority over Mendocino
27 Railway, which the CPUC has long recognized as a public utility. The requested injunction also seeks
28 local authority over an admittedly CPUC-regulated utility and federally recognized railroad, even though

1 such local authority is preempted. For these reasons, and as explained in detail below, the Complaint
2 must be dismissed with prejudice.

3 **A. The Court Has No Jurisdiction Over the City’s Declaratory-Relief Claim**

4 The Public Utilities Code “vests the commission with broad authority to supervise and regulate
5 every public utility in the State and grants the commission numerous specific powers for the purpose.”
6 *San Diego Gas*, 13 Cal.4th at 915 (quoting Pub. Util. Code § 701) (internal quotation marks omitted).
7 To protect the CPUC’s broad mandate and limit judicial interference with the CPUC’s work, the
8 Legislature enacted section 1759 of the Public Utilities Code. Subsection (a) of that statute states:

9 No court of this state, except the Supreme Court and the court of appeal,
10 to the extent specified in this article, shall have jurisdiction to review,
11 reverse, correct, or annul any order or decision of the commission or to
12 suspend or delay the execution or operation thereof, or to enjoin, restrain,
or interfere with the commission in the performance of its official duties,
as provided by law and the rules of court.

13 Pub. Util. Code § 1759(a) (emphasis added).

14 “By its plain language, section 1759 deprives the superior court of jurisdiction to entertain an
15 action that could undermine the CPUC’s authority.” *Anchor Lighting v. Southern California Edison Co.*
16 (2006) 142 Cal.App.4th 541, 548. Thus, apart from the limited review procedures in section 1759 of the
17 Public Utilities Code, “no other court has jurisdiction either to review or suspend the commission’s
18 decisions or to enjoin or otherwise interfere with the commission’s performance of its duties.” *San Diego*
19 *Gas*, 13 Cal.4th at 916. Further, “after the commission has assumed jurisdiction over a public utility for
20 the purpose of administering the law applicable to the activities of the utility, the commission has
21 exclusive jurisdiction over the regulation and control of said utility.” *Pacific Tel. & Tel. Co. v. Superior*
22 *Court of San Francisco* (1963) 60 Cal.2d 426, 430. “The CPUC has exclusive jurisdiction over the
23 regulation and control of utilities and that jurisdiction, once assumed, cannot be hampered or second-
24 guessed by a superior court action addressing the same issue.” *Anchor Lighting*, 142 Cal.App.4th at 548.

25 Again, the sole cause of action in this case is for declaratory relief. “Injunctive relief” is “not a
26 cause of action.” *County of Del Norte*, 71 Cal.App.4th at 973. With respect to the declaratory relief
27 claim, the City seeks a “judicial declaration regarding the validity of the Mendocino Railway’s status as
28 a public utility.” Complaint 1:19-21. Specifically, the City demands “a declaration that the Mendocino

1 Railway is not subject to regulation [by the CPUC] as a public utility.” *Id.* at 6:12-14. There can be no
 2 serious question that this Court lacks subject matter jurisdiction to issue a declaration to that effect,
 3 because it would eliminate Mendocino Railway’s status as a public utility, long recognized as such by
 4 the CPUC, and thereby remove the railroad from the CPUC’s jurisdiction.

5 The City’s own allegations are fatal the City’s challenge. As the City admits, Mendocino Railway
 6 “is currently listed as a class III railroad by the California Public Utilities Commission,” “is subject to
 7 CPUC jurisdiction,” and “has all legal rights of a public utility.” Complaint at 2:3-7. That fact is
 8 confirmed by the CPUC’s official list that includes Mendocino Railway among “regulated California
 9 railroads.” Beard Decl., Exh. A (“CPUC regulates *all* railroads in California.” (emphasis added)).
 10 Further, it is confirmed in a final decisions of the CPUC, in which the CPUC expressly affirmed
 11 continuing jurisdiction and regulatory authority over the railroad. *In Re CWRR #1*, 1998 Cal. PUC
 12 LEXIS 189, *11 Beard Decl., Exh. B, p. 5 (“The safety of the operation of all services, including
 13 excursion passenger service, shall remain subject to regulation by the Commission.”). “When [the
 14 CPUC’s] determinations within its jurisdiction have become final they are conclusive in all collateral
 15 actions and proceedings.” *Western Air Lines, Inc.*, 42 Cal.2d at 629-30. As the Complaint concedes, the
 16 CPUC has “assumed jurisdiction over a public utility [i.e., Mendocino Railway] for the purpose of
 17 administering the law applicable to the activities of the utility.” *Pacific Tel. & Tel. Co.*, 60 Cal.2d at 430.
 18 Consequently, the CPUC’s “regulation and control of said utility” is “exclusive” (*id.*), and “that
 19 jurisdiction . . . cannot be hampered or second-guessed by a superior court action.” *Anchor Lighting*, 142
 20 Cal.App.4th at 548.⁷

21 Yet the City’s declaratory-relief action does just that. It second-guesses the CPUC’s clear
 22 determination that Mendocino Railway is a public utility and tries to eliminate that agency’s long-
 23 established jurisdiction over it. Since the CPUC’s jurisdiction over Mendocino Railway is based on its
 24 being a public-utility railroad, and no other legal basis for the CPUC’s jurisdiction over that railroad
 25 exists, a Superior Court judgment divesting Mendocino Railway of its “public utility” status would divest
 26

27 ⁷ The CPUC amply regulates public-utility railroads like Mendocino Railway under numerous
 28 provisions of the Public Utilities Code, including without limitation: Public Utilities Code sections
 309.7, 315, 421, 761, 765.5, 768, 7661, 7662, and 7665.2.

1 the CPUC of its jurisdiction over the railroad. If Mendocino Railway is no longer a public utility by
 2 declaration of the Court, then contrary to CPUC’s decisions and actions over the years, the railroad is no
 3 longer subject to regulation by the CPUC. It is difficult to imagine a clearer interference with the CPUC’s
 4 authority and a clearer violation of section 1759 of the Public Utilities Code.

5 In sum, the City is barred from obtaining a declaration nullifying Mendocino Railway’s status as
 6 a CPUC-regulated public utility. Because the City has no valid cause of action, its request for an
 7 injunction compelling Mendocino Railway to submit to its total and unfettered regulatory authority is
 8 also precluded. *Allen*, 234 Cal.App.4th at 65 (“A cause of action must exist before a court may grant a
 9 request for injunctive relief.”).

10 **B. If Deemed a “Cause of Action,” The City’s Request for an Injunction Is Also Barred**

11 Because the City has no cognizable claim, *all* the relief it requests—including its demand for an
 12 injunction—is categorically precluded. As explained above, an injunction “is an equitable remedy, not
 13 a cause of action” that is subject to demurrer; without a valid cause of action, there can be no injunctive
 14 relief. *County of Del Norte*, 71 Cal.App.4th at 973. As a result, the Court need not separately consider
 15 the viability of the City’s request for an injunction.⁸

16 However, if the Court decides to treat the request for injunction as a “cause of action” subject to
 17 demurrer, then the Court should also dismiss it under both state and federal law.

18 **1. Injunctive Relief Is Barred by State Law**

19 The City wants an injunction “commanding the Mendocino Railway to comply with all City
 20 ordinances, regulations, and lawfully adopted codes, jurisdiction and authority.” Complaint at 6:15-18.
 21 The City makes clear it wants full regulatory control over all railroad “property” and “operations.” *Id.* at
 22 5:25-26. The Court lacks jurisdiction to grant such a sweeping injunction for the same reason it lacks
 23 jurisdiction to nullify, through a declaration, Mendocino Railway’s “public utility” status: The injunction
 24 would substitute the City for the CPUC, and thereby undermine the CPUC’s ongoing jurisdiction over
 25 and regulation of the railroad. *Id.* at 2:4-7 (Mendocino Railway “is subject to CPUC jurisdiction”); Pub.

26
 27 ⁸ If the Court overrules this demurrer, then it should strike the City’s “injunctive relief” allegations
 28 including the prayer for an injunction, as requested in Mendocino Railway’s concurrently filed Motion
 to Strike.

1 Util. Code § 1759 (barring Superior Court actions to “enjoin, restrain, or interfere with the commission
2 in the performance of its official duties,” which include regulating public-utility railroads).

3 Also, the injunction requested by the City flies in the face of the California Constitution’s
4 mandate that “[a] city . . . may not regulate matters over which the Legislature grants regulatory power
5 to the [CPUC].” Cal. Const. art. XII, § 8. “[T]he commission has comprehensive jurisdiction over
6 questions of public health and safety arising from utility operations.” *San Diego Gas & Electric Co.*, 13
7 Cal.4th at 924. For example, the CPUC has the broad and exclusive power to “require every public utility
8 to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in
9 a manner so as to promote and safeguard the health and safety of its employees, passengers, customers,
10 and the public.” Pub. Util. Code § 768; *City of Anaheim*, 119 Cal.App.4th at 842 (CPUC jurisdiction is
11 “exclusive”). In its 1998 decision, the CPUC invoked that same broad authority over the railroad. *In Re*
12 *CWRR #1*, 1998 Cal. PUC LEXIS 189, *11; Beard Decl., Exh. B, p. 5. Yet an injunction purporting to
13 give the City unfettered regulatory authority over a CPUC-regulated public utility, including its
14 operations and rail facilities, would unlawfully encroach upon the CPUC’s exclusive jurisdiction.

15 **2. Injunctive Relief Is Barred by Federal Law**

16 Independent of its status as a public utility under California law, the City does not dispute that
17 Mendocino Railway is a *federally* recognized railroad. Beard Decl., Exh. C, p. 2 (City declaring that
18 “[a]s an established railroad, the question of whether or not the Mendocino Railway is federally regulated
19 has not been in question”). Mendocino Railway’s status as a federally recognized railroad carries with it
20 federally protected prerogatives that the City’s broad injunction would purport to extinguish.

21 To be a federally recognized railroad is to be regulated by the federal Surface Transportation
22 Board (“STB” or “Board”) under the Interstate Commerce Commission Termination Act (“ICCTA”).
23 That law gives plenary and exclusive power to the STB to regulate federally recognized railroads:

24 “The jurisdiction of the Board over—

25 (1) transportation by rail carriers, and the remedies provided in this
26 part [49 USCS §§ 10101 et seq.] with respect to rates,
27 classifications, rules (including car service, interchange, and other
operating rules), practices, routes, services, and facilities of such
carriers; and

28 (2) the construction, acquisition, operation, abandonment, or

1 discontinuance of spur, industrial, team, switching, or side tracks, or
 2 facilities, even if the tracks are located, or intended to be located,
 entirely in one State,

3 is *exclusive*. Except as otherwise provided in this part [49 USCS §§ 10101
 4 et seq.], the remedies provided under this part [49 USCS §§ 10101 et seq.]
 with respect to regulation of rail transportation are *exclusive* and preempt
 the remedies provided under Federal or State law.”

5 49 U.S.C. § 10501(b) (emphasis added).

6 The STB’s exclusive jurisdiction over a federally recognized railroad means that state and local
 7 regulatory and permitting requirements are broadly preempted. U.S. Const. art. VI, cl. 2 (Supremacy
 8 Clause); 49 U.S.C. § 10501(b); *City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1030-31
 9 (The ICCTA’s preemptive scope is “broad.”); *Friends of Eel River v. North Coast R.R. Auth’y* (2017) 3
 10 Cal.5th 677, 703 (holding that “state environmental permitting or preclearance regulation that would
 11 have the effect of halting a private railroad project pending environmental compliance would be
 12 categorically preempted”).

13 The injunction sought in this case would grant the City *unlimited* power over a federally
 14 recognized railroad. The injunction would require Mendocino Railway to submit to “*all*” local laws and
 15 regulations, as well as to the total “jurisdiction and authority” of the City. Complaint at 6:15-18
 16 (emphasis added). With such vast power, the City could force Mendocino Railway to halt or delay rail-
 17 related activities pending compliance with local permitting and other preclearance requirements. Indeed,
 18 the Complaint itself cites examples of the City purporting to exercise authority to inspect and permit
 19 certain of Mendocino Railway’s rail-related facilities (i.e., its roundhouse and storage shed). Complaint
 20 ¶ 12; *see also* 49 U.S.C. § 10501(b) (STB has exclusive jurisdiction over rail “facilities”); *id.* § 10102(9)
 21 (STB’s exclusive jurisdiction reaches “property” or “equipment ... related to the movement of
 22 passengers or property, or both, by rail,” including “services related to that movement”). The City’s
 23 injunction, which would confer on it plenary regulatory authority over Mendocino Railway’s operations
 24 and facilities, would violate 49 U.S.C. section 10501(b). The authority that the City seeks by way of an
 25 injunction is federally preempted.

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V. CONCLUSION

For all the reasons described above, the Court should dismiss the City’s action in its entirety without leave to amend.

DATED: January 14, 2022

/s/ Paul Beard II

Attorneys for Defendant MENDOCINO RAILWAY

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EXHIBIT B

FILED

04/28/2022

KIM TURNER, CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MENDOCINO

Jess, Dorothy

DEPUTY CLERK

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MENDOCINO, TEN MILE BRANCH**

CITY OF FORT BRAGG, a California
Municipal corporation

Plaintiff,

vs.

MENDOCINO RAILWAY and DOES
1-10, inclusive,

Defendants.

Case No.: 21CV00850

**RULING ON DEMURRER
TO THE COMPLAINT**

I. Standard of Review on Demurrer:

The function of a demurrer is to test the sufficiency of a pleading by raising questions of law. CCP §589(a); *Andal v. City of Stockton* (2006) 137 Cal.App.th 86, 90; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. A demurrer is directed to the face of the pleading to which objection is made (*Sanchez v. Truck Ins. Exch.* (1994) 21 Cal.App.4th 1778, 1787; and to matters subject to judicial notice (CCP §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 160.

The only issue a judge may resolve on a demurrer to a complaint is whether the complaint, standing alone, states a cause of action. *Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1224. On a demurrer, a judge should rule only on matters disclosed in the challenged pleading. *Ion Equip. Corp. v Nelson* (1980 110 Cal.App.3d 868, 881.

A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. *Cundiff v GTE Cal, Inc.* (2992) 101 Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for determining the truth of disputed facts, such as the correct interpretation of the parties' agreement or its enforceability (*Fremont Indem. Co. v Fremont Gen. Corp.* (207) 148 Cal.App.4th 97, 114-115. A judge may not make factual findings on a demurrer, including "implicit" findings. *Mink v Maccabee* (2004) 121 Cal.App.4th 835, 839.

For purposes of ruling on a demurrer, a judge must treat the demurrer as an admission of all material facts that are properly pleaded in the challenged pleading or that reasonably arise by implication, however improbably those facts may be. *Gervase v Superior Court* (1995) 31 Cal.App.4th 1218, 1224; *Yue v City of Auburn* (1992) 3 Cal.App.4th 751,756. A demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the challenged pleading. *Harris v Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149; *Hayter Trucking v Shell W. E&P* (1993) 18 Cal.App.4th 1, 12. For example, a demurrer does not admit the truth of argumentative allegations about the legal construction, operation, or effect of statutory provisions, or the truth of allegations that challenged actions are arbitrary and capricious or an abuse of discretion. *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645.

II. The Complaint:

The plaintiff's (City of Fort Bragg) complaint alleges a single cause of action for declaratory relief. Although the complaint denominates the cause of action as being for "Declaratory and/or Injunctive Relief," the court is construing the pleading as stating a cause of action for Declaratory Relief which seeks injunctive relief as a remedy if appropriate. Injunctive relief is a remedy—not a cause of action.

The City seeks a judicial determination that Defendant (Mendocino Railway), despite being a railroad subject to regulation by the California Public Utilities Commission ("CPUC"), is nevertheless "subject to the City's ordinances, regulations, codes, local jurisdiction, local control and local police power and other City authority." Fort Bragg contends that a judicial determination of these issues and of the respective duties of the parties is now necessary and appropriate because the Defendant continues to resist compliance with City directives to repair and make safe the dangerous building on its property, and to comply with the City Land Use and Development Codes, and/or other valid exercise of City governing authority.

III. The Demurrer:

Defendant, Mendocino Railway (hereinafter "MR"), raises two basic theories in support of its demurrer; namely, lack of subject matter jurisdiction, and preemption.

With regard to subject matter jurisdiction, MR contends that there is a decades long history of the CPUC recognizing and regulating its operations as a public utility. Moreover, MR argues that in the past, the City has vigorously defended MR's status as a "public utility" and thus should not be allowed to disavow those admissions now. More precisely, however, the gravamen of MR's contentions is that this court lacks subject matter jurisdiction based on Public Utilities Code Section 1759 which states:

No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court. Pub. Util Code § 1759

In short, MR contends that "the CPUC has exclusive jurisdiction over the regulation and control of utilities and that jurisdiction, once assumed, cannot be hampered or second-guessed by a superior court action addressing the same issue." (citing, *Anchor Lighting v. Southern California Edison* (2006) 142 Cal.App.4th 541, 548). Thus, the City is barred from obtaining a declaration from this court which might nullify Mendocino Railway's status as a CPUC-regulated public utility.

With regard to preemption, Mendocino Railway contends there is no dispute that it is a federally recognized railroad. As such, it is regulated by the federal Surface Transportation Board under the Interstate Commerce Commission Termination Act ("ICCTA") which gives plenary and exclusive power to the STB to regulate federally recognized railroads. Mendocino Railway contends that the STB's exclusive jurisdiction over a federally recognized railroad means that state and local regulatory and permitting requirements are broadly preempted. Mendocino Railway argues that the injunctive relief sought would necessarily confer to the City plenary regulatory authority over railroad operations and facilities and thus is in direct conflict with STB's exclusive grant of jurisdiction pursuant to 49 U.S.C. § 10501(b).

As explained more fully below, the court rules that for the purpose of determining the merits of this demurrer, Mendocino Railway's contentions, embrace an overly broad interpretation of both the subject matter jurisdiction limitation of Public Utilities Code Section 1759 and how the operation of federal preemption that might arise pursuant to 49 U.S.C. § 10501(b) on the facts of this case.

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A. Requests for Judicial Notice:

Mendocino Railway requests that the court take judicial notice of five documents, Exhibits A-E, attached to the declaration of Paul Beard II.

Although courts may notice various acts, law, and orders, judicial notice does not require acceptance of the truth of factual matters that might be deduced from the thing judicially noticed. e.g., from official acts and public records. *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062 Often what is being noticed is the existence of the act, not that what is asserted in the act is true. *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.

There is a mistaken notion that taking judicial notice of court records means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. The concept of judicial notice requires that the matter which is the proper subject of judicial notice be a fact that is not reasonably subject to dispute. Facts in the judicial record that are subject to dispute, such as allegations in affidavits, declarations, and probation reports, are not the proper subjects of judicial notice even though they are in a court record. In other words, while we take judicial notice of the existence of the document in court files, we do not take judicial notice of the truth of the facts asserted in such documents. *People v. Tolbert* (1986) 176 Cal.App.3d 685, 690.

Furthermore, the hearsay rule applies to statements in judicially noticed declarations from other actions and precludes consideration of those statements for their truth absent a hearsay exception. *Magnolia Square Homeowners Ass'n v. Safeco Ins.* (1990) 221 Cal.App.3d 1049, 1056. A court cannot take judicial notice of the truth of hearsay statements simply because they are part of the record.

1. Exhibit A: Page from CPUC website listing railroads it regulates:

While the court might take judicial notice that the website exists, the court will not take judicial notice of the webpage for the purpose of establishing, as a fact beyond dispute, that Mendocino Railway is a common carrier, engaged in railroad operations in interstate commerce, and regulated in that capacity by the CPUC. Such a factual or legal conclusion is directly contradicted by the CPUC decision in the Matter of the Application of California Western Railroad, Inc. for Authority to Modify Scheduled Commuter Passenger Service and Seek Relief from Regulated Excursion Passenger Scheduling and Fares 1998 Ca. PUC LEXIS 384. Accordingly, the factual content of the website is not a proper subject for judicial notice, and the document is not otherwise relevant to the issues to be decided. Accordingly, request for the court to take judicial notice of Exhibit A is denied.

2. Exhibit B: CPUC Decision 98-01-050:

The court will take judicial notice of this decision pursuant to Evidence Code Section 451(a)

3. Exhibit C: January 17, 2019 Letter from Fort Bragg City Attorney to California Coastal Commission:

The contents of the proffered letter are hearsay statements of opinion with respect to a matter of law. The content of the letter is not a proper subject for judicial notice. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. Accordingly, request for the court to take judicial notice of Exhibit C is denied

4. Exhibit D: August 1, 2019 Letter with Coastal Consistency Certification:

While the existence of the letter and certification may be judicially noticed, judicial notice is not proper as to their contents. Mendocino Railway requests the court take judicial notice of the documents because they are "relevant to, inter alia, the City's position on the history of Mendocino Railway's freight and passenger service as well as on whether the railroad is ready, willing, and able to resume full service upon the tunnel's reopening. For purposes of a demurrer, the court must assume the facts in the complaint as true. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. v F&H Constr.* (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. Accordingly, Mendocino Railway's stated purpose for the court to take judicial notice is irrelevant for determining the merits of its demurrer and thus the document is irrelevant to the motion at bar. Accordingly, request for the court to take judicial notice of Exhibit D is denied.

5. Exhibit E: CPUC Decision No. 98-05-054:

The court will take judicial notice of this decision pursuant to Evidence Code Section 451(a).

6. Mendocino Railways's Supplemental Request for Judicial Notice filed April 13, 2022:

Mendocino Railway filed a Supplemental Request for Judicial Notice on April 13, 2022. This matter, however, was deemed submitted for decision on February 24, 2022 after the court had reviewed all of the parties' pleading and papers and heard oral argument. The supplemental request for judicial notice, coming 48 days after the matter was deemed submitted is untimely. The supplemental request for judicial notice is denied.

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IV. Discussion:

A. Public Utilities Code Section 1759:

By way of the instant demurrer, MR contends that the City is asking this court to “nullify Mendocino Railway’s status as a CPUC-regulated public utility and thus empower the City to seize unfettered control over a state regulated, public-utility.” MR characterizes the City’s action as an “extraordinary” and “unlawful” attempt to “second guess” and “interfere with the agency’s continuing jurisdiction....” In support of its allegations, MR argues that the Public Utilities Code “vests the commission with broad authority to supervise and regulate every public utility in the State and grants the commission numerous specific powers for [that] purpose.” (citing, *San Diego Gas*, 13 Cal.4th at 915). MR notes that “to protect the CPUC’s broad mandate and limit judicial interference with the CPUC’s work, the Legislature enacted section 1759(a) of the Public Utilities Code which deprives the superior court of jurisdiction to entertain an action that could undermine the CPUC’s authority.” (citing *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 548.

While it is true that section 1749(a) grants the CPUC exclusive governing authority over public utilities, application of the jurisdictional limitations of 1749(a) is more nuanced and fact-driven than Mendocino Railway admits. For example, it is well established that a suit is not barred in superior court when it actually furthers the policies of the CPUC. (see, *North Gas Co. v. Pacific Gas & Electric Company* 2016 U.S. Dist. LEXIS 131684 (N.D. Cal. 2016). In fact, there are several legal issues that need to be evaluated in determining the applicability of Section 1749. These issues include a “careful assessment of the scope of the CPUC’s regulatory authority and [an]evaluation of whether the suit would thwart or advance... CPUC regulation.” (See, *PegaStaff v. Pacific Gas & Electric Company* (2015) 239 Cal.App.4th 1303, 1318.)

As noted in *Vila v. Tahoe Southside Water Utility*, (1965) 233 Cal.App.2d 469, 477, California courts have frequently proclaimed concurrent jurisdiction in the superior court over controversies between utilities and others not inimical to the purposes of the Public Utility Act. For example, as the Vila court explained,

“In *Truck Owners, etc. Inc. v. Superior Court*, *supra*, 194 Cal. 146, the court, after stating that the Legislature under the Constitution had full power to divest the superior court of all jurisdiction, and had exercised that power in denying jurisdiction to “enjoin, restrain or interfere with the commission in the performance of its official duties,” and had also vested in the Supreme Court sole power “to compel the commission to act,” held that the superior court, nevertheless, had power to hear and determine a cause involving a complaint against a transportation company seeking to enjoin its transportation of freight as a public carrier with a certificate of public convenience. The court noted that the suit did not involve an interference with any act of the commission since the latter had not acted; that if it ever did act any conflicting injunction would be superseded. A contention that

recognition of concurrent jurisdiction in the court and the commission would cause confusion was rejected.”

A three prong test to determine whether an action is barred by section 1759 was set forth by the California Supreme Court in *San Diego Gas & Electric Co. v. Superior Court* 13 Cal.4th 893 (*Covalt*). The test is as follows:

- (1) Whether the commission had the authority to adopt a regulatory policy;
- (2) Whether the commission had exercised that authority; and
- (3) Whether the superior court action would hinder or interfere with the commission’s exercise of regulatory authority.

Superior court jurisdiction is precluded only if all three prongs of the *Covalt* test are met.

As described in *Pegastaff, supra*, 239 Cal.App.4th at 1315,:

“The issue in *Covalt* was whether section 1759 barred a superior court action for nuisance and property damage allegedly caused by electric and magnetic fields from power lines owned and operated by a public utility. (citation) The court, considering the third prong of the test, concluded that a superior court verdict for plaintiffs would be inconsistent with the PUC’s conclusion “that the available evidence does not support a reasonable belief that 60 Hz electric and magnetic fields present a substantial risk of physical harm, and that unless and until the evidence supports such a belief regulated utilities need take no action to reduce field levels from existing powerlines.”

Since *Covalt* was decided, courts have had repeated occasion to apply the test it established. In *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, residents brought actions against, among others, water providers regulated by the PUC for injuries caused by harmful chemicals in the water they supplied. Asserting tort and other causes of action, the plaintiffs sought damages and injunctive relief against those defendants. The water companies argued that section 1759 deprived the superior court of jurisdiction over the plaintiff’s claims. The Supreme Court found that the first two prongs of the *Covalt* test were met: The CPUC had regulatory authority over water quality and safety and had exercised that authority. Applying *Covalt*’s third prong, it held that adjudication of some—but not all—of the plaintiff’s claims against the regulated water companies would hinder or interfere with the CPUC’s exercise of regulatory authority. The plaintiff’s injunctive relief claims would interfere with the PUC’s exercise of its authority because the PUC had determined that the water companies were in compliance with state water quality standards and impliedly declined to take remedial action against those companies. “A court injunction, predicated on a contrary finding of utility noncompliance, would clearly

conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." Plaintiff's damages claims were also barred by section 1759 to the extent they sought to recover for harm caused by water that met state standards but allegedly was unhealthy nonetheless."

As the Pegastaff court concludes,

"Hartwell demonstrates that application of the third prong of Covalt does not turn solely or primarily on whether there is overlap between conduct regulated by the PUC and the conduct targeted by the suit. The fact that the PUC has the power and has exercised the power to regulate the subject at issue in the case established the first and second prongs of Covalt, but will not alone establish the third. Instead, the third prong requires a careful assessment of the scope of the PUC's regulatory authority and evaluation of whether the suit would thwart or advance enforcement of the PUC regulation. Also relevant to the analysis is the nature of the relief sought—prospective relief, such as an injunction, may sometime interfere with the PUC's regulatory authority in ways that damages claims based on past harms would not. Ultimately, if the nature of the relief sought or the parties against whom the suit is brought fall outside the PUC's constitutional and statutory powers, the claim will not be barred by section 1759. (Emphasis added).

In the case at bar, it is clear that the superior court jurisdiction of the parties' dispute will not impair, hinder or interfere with the CPUC's exercise of regulatory authority. The reason is simple. As plaintiff contends, MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity.

"The Legislature enacted the Public Utilities Act (§ 201 et seq.) which 'vests the commission with broad authority to "supervise and regulate every public utility in the State.'" (*San Diego Gas & Electric v. Superior Court* (1996) 13 Cal.4th 893 (*Covalt*) This broad authority authorizes the commission to "do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient" in the exercise of its jurisdiction over public utilities." The commissions' authority has been liberally construed, and includes not only administrative but also legislative and judicial powers..." *Pegastaff, supra* at p. 620 .When the CPUC's determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings." *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 629.

As emphasized by the City of Fort Bragg in their opposition, the CPUC has already made judicial findings regarding MR's predecessor, California Western Railroad (CWRR), regarding its status as a public utility. Simply put, the CPUC found that the

railroad is not functioning as a public utility. Its services are limited to sightseeing excursions and do not constitute "transportation under Public Utilities Code section 1007.

The CPUC writes,

"The primary purpose of CWRR's excursion service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing.... [The Commission [has] also opined that public utilities are ordinarily understood as providing essential services... [But, CWRR's excursion service is not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility. Based on the above, we conclude that CWRR's excursion service should not be regulated by the CPUC." (1998 Cal. PUC LEXIS 189 (1998)

Obviously, if the CPUC has already found that the railroad should not be subject to its regulation, it is difficult to imagine how the superior court, by hearing the current dispute, would impair or hinder any exercise of the CPUC's regulatory authority.

City of St. Helena v. Public Utilities Commission (2004) 119 Cal.App.4th 793 lends further support to the conclusion that MR is not subject to regulation as a public utility in a manner that would deprive this court of subject matter jurisdiction. In that case, the City of St. Helena sought annulment of various decisions of the PUC conferring public utility status on the Napa Valley Wine Train. At issue in that case was whether the City was pre-empted, by reason of the Wine Train's public utility status, from exercising its local jurisdiction regarding the placement of a Wine Train station in downtown St. Helena. The case is strikingly similar to the case at bar in that, here, the MR has allegedly asserted any local regulatory authority of the City of Fort Bragg is also pre-empted.

The *City of St. Helena* court writes,

The Wine Train is not subject to regulation as a public utility because it does not qualify as a common carrier providing "transportation." Additionally, even if an up-valley station were permitted, it could be argued that any transportation provided would be incidental to the sightseeing service provided by the Wine Train. The PUC has previously held that sightseeing is not a public utility function. (*Western Travel, supra*, 7 Cal.P.U.C>2d 132 1981 WL 165289.) In *Western Travel*, the PUC found sightseeing is "essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service." (*Id.* at p. 135 1981 WL 165289.) Relying in part on *Western Travel*, the PUC previously found the Wine Train was not a public utility. (See, *NVWT IV, supra*, 2001 WL 873020, 2001 Cal. PUC LEXIS 407.) We leave for another day the question of whether a sightseeing service is subject to regulation

under section 216. Rather, we note the PUC's decisions in NVWT IV and Western Travel to illustrate the PUC's internal inconsistency.

This inconsistency is also evident in the California Western Railroad decision, in which the PUC concluded the Skunk Train, providing an excursion service between Fort Bragg and Willits, did not constitute "transportation" subject to regulation as a public utility. (78 Cal. P.U.C.2d at p. 295, 1998 WL 217965.) It is difficult to differentiate this service from that provided by the Skunk Train. The Skunk Train's excursion service involves transporting passengers from Fort Bragg to Willits, and then returning them to the point of origin for purpose of sightseeing. (Ibid.) The PUC does little to distinguish the Wine Train from the Skunk Train. Rather, it simply states the Wine Train would not provide a continuous loop service due to its proposed up-valley stops. As previously discussed, the proposed stops may give rise to public utility status in the future, but presently do not mandate such a determination. Finally, to the extent the PUC has made express findings of fact that that Wine train is a public utility, such findings are not supported by substantial evidence. Presently, the Wine Train provides a round-trip excursion that is indistinguishable from the Skunk Train.

It is quite clear from this decision that the correct finding of the CPUC regarding excursion service railroads, is that such railroads are not operating as public utilities and should not be regulated by the CPUC as such. Furthermore, as the City of St. Helena court noted, "The fact that the Wine Train could provide transportation in the future does not entitle it to public utility status now." The same holds true for MR. Accordingly, there is no basis for applying the jurisdictional bar of Section 1759 to the instant proceedings.

B. The Application of Federal Preemption Requires a Case-by-Case Factual Assessment Which Cannot Properly be Determined on Demurrer:

Mendocino Railway contends that the injunction sought in this case would grant the City unlimited power over a federally recognized railroad in that the injunction would require Mendocino Railway to submit to "all" local laws and regulations, as well as to the total "jurisdiction and authority of the City." MR claims that "with such vast power, the City could force Mendocino Railway to halt or delay rail-related activities pending compliance with local permitting and other preclearance requirements. Mendocino Railway asserts that the Surface Transportation Board, under the authority of the Interstate Commerce Commission Termination Act, has plenary regulatory power and exclusive jurisdiction over federally recognized railroads. Accordingly, any jurisdiction of this Superior Court is preempted.

This court finds that Mendocino Railway's preemption argument is overbroad. It fails to recognize that not all state and local regulations that affect railroads are preempted. It further fails to account for the fact that Mendocino Railway's is not involved in any interstate rail operations. As discussed above, from a regulatory standpoint, Mendocino

Railway is simply a luxury sightseeing excursion service with no connection to interstate commerce. As a result, its "railroad activities", for the purposes of federal preemption, are extremely limited.

Not all state and local regulations that affect railroads are preempted. State and local regulation is permissible where it does not interfere with interstate rail operations. Local authorities, such as cities and/or counties, retain certain police powers to protect public health and safety. *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999). As the S.T.B. noted, "manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption." (Ibid, at 23)

In the *Borough* decision the Surface Transportation Board issued a declaratory order regarding the "nature and effect of the preemption in 49 U.S.C. 10501(b) as it related to the appropriate role of state and local regulation (including the application of local land use or zoning laws or regulations and other state and local regulation such as building codes, electrical codes, and environmental laws and regulations.)" The *Borough* decision is particularly instructive because it specifically addresses how preemption might apply in analyzing local zoning ordinances, local land use restrictions, environmental and other public safety issues, building codes and non-transportation facilities. The question at the very core of the preemption analysis is whether local control would interfere with a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. If local control does not interfere with interstate rail operations, then preemption does not apply.

Borough makes clear that,

"local land use restriction, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are place on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA. Austell; City of Auburn. Of course, whether a particular land use restriction interferes with interstate commerce is a fact-bound question." (Emphasis added)

Mendocino Railway has already been the subject of a CPUC judicial determination that it is not engaged in interstate transportation related activities but rather simply provides a sightseeing excursion loop service. Accordingly, it is difficult to see how any of its non-railroad services could possibly trigger preemption.

Put another way, Mendocino Railway's it is far more likely that Mendocino Railways facilities and activities will be analyzed as "non-transportation facilities.

As noted in *Borough*,

“It should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption. According to the Borough, NYSW [the railroad] has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad’s ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities”

Accordingly, the applicability of preemption is necessarily a “fact-bound” question, not suitable to resolution by demurrer.

V. Order:

For the reasons set forth above Mendocino Railways Demurrer is overruled. Pursuant to Cal. Rules of Ct. 3.1320(g) defendants shall have ten (10) days from service of this order to file their answer.

SO ORDERED.

DATED: 4/28/2022



Clayton L. Brennan
JUDGE OF THE SUPERIOR COURT

**Superior Court of California, County of Mendocino
PROOF OF SERVICE**

Case: **21CV00850** **CITY OF FORT BRAGG VS MENDOCINO RAILWAY**

Document Served: **RULING ON DEMURRER TO THE COMPLAINT**

I declare that I am employed by the Superior Court of California, in and for the County of Mendocino; I am over the age of eighteen years and not a party to the within action. My business address is:

- Mendocino County Courthouse, 100 North State Street, Ukiah, CA 95482
- Ten Mile Branch, 700 South Franklin Street, Fort Bragg, CA 95437

I am familiar with the Superior Court of Mendocino County's practice whereby each document is placed in the Attorneys' boxes, located in Room 107 of the Mendocino County Courthouse or at the Ten Mile Branch, transmitted by fax or e-mail, and/or placed in an envelope that is sealed with appropriate postage is placed thereon and placed in the appropriate mail receptacle which is deposited in a U.S. mailbox at or before the close of the business day.

On the date of the declaration, I served copies of the attached document(s) on the below listed party(s) by placing or transmitting a true copy thereof to the party(s) in the manner indicated below.

Party Served	Ukiah US Mail	Ten Mile US Mail	Ukiah Attorney Box	Ten Mile Attorney Box	Inter Office Mail	Fax	E-mail
JONES & MAYER Atty. Russell A. Hildebrand 3777 North Harbor Boulevard Fullerton, CA. 92835 rah@jones-mayer.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
JONE & MAYER Atty. Krista MacNevin Jee 3777 North Harbor Boulevard Fullerton, CA. 92835 kmj@jones-mayer.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
FISHERBROYLES LLP Atty. Paul J. Beard II 4470 W. Sunset Blvd., Suite 93165 Los Angeles, CA. 90027 paul.beard@fisherbroyles.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
COUNTY COUNSEL COUNTY OF MENDOCINO Atty. Chrsitian M. Curtis 501 Low Gap Road, Room 1030 Ukiah, CA. 95482 curtisc@mendocinocounty.org cocosupport@mendocinocounty.org	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed at:

- Ukiah, California
- Fort Bragg, California

4/28/2022 10:22:37 AM

Date: 4/28/2022

KIM TURNER, Clerk of the Court

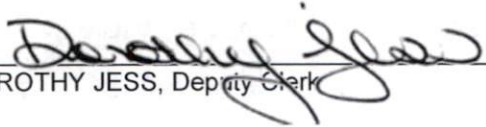


By: DOROTHY JESS, Deputy Clerk

EXHIBIT C

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Superior Court of California
County of Mendocino

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By:
Dorothy Jess
Deputy Clerk



5 Attorneys for Defendant
6 MENDOCINO RAILWAY

7 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **FOR THE COUNTY OF MENDOCINO**

9 CITY OF FORT BRAGG, a California
10 municipal corporation

11 Plaintiff,

12 v.

13 MENDOCINO RAILWAY and DOES 1-10,
14 inclusive,

15 Defendants.

Case No.: 21CV00850

[Assigned to the Hon. Clayton Brennan]

**VERIFIED ANSWER OF DEFENDANT
MENDOCINO RAILWAY**

Complaint Filed: October 28, 2021

16
17 Defendant MENDOCINO RAILWAY hereby answers the Complaint as follows:

18 Responding to the introductory paragraph at page 1, lines 19-22, Defendant admits that Plaintiff
19 has “file[d] this action seeking judicial declaration regarding the validity of the Mendocino Railway’s
20 status as a public utility,” under the purported authority of Code of Civil Procedure section 1060, “and/or
21 injunctive relief.” Except as specifically admitted, Defendant denies the allegations of the introductory
22 paragraph.

23 1. Responding to paragraph 1, Defendant denies each and every other allegation contained
24 therein.

25 2. Responding to paragraph 2, Defendant answers that the allegations are conclusions of law
26 to which no response is required. To the extent a response is required, Defendant denies the allegations.

27 3. Responding to paragraph 3, Defendant admits that it is currently listed as a class III railroad
28 by the California Public Utilities Commission (“CPUC”), and as such is subject to CPUC jurisdiction and

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1 has all the legal rights of a public utility. Defendant further admits that, among other operations and
2 services it provides to the public, it owns and operates the Skunk Train, which operates in part in the City
3 of Fort Bragg. Defendant further admits that some of its real property is located in the City of Fort Bragg.
4 Except as specifically admitted, Defendant denies each and every other allegation contained in paragraph
5 3.

6 4. Responding to paragraph 4, Defendant lacks sufficient information and belief to respond
7 to the allegations and on that basis denies them.

8 5. Responding to paragraph 5, Defendant admits that it has a long and storied history of
9 operations between Fort Bragg and Willits. Except as specifically admitted, Defendant denies each and
10 every other allegation contained in paragraph 5.

11 6. Responding to paragraph 6, Defendant admits that, in 1998, the Public Utilities
12 Commission issued at least two decisions of which Defendant is aware, concerning applications made by
13 the Skunk Train's then-owner and operator, California Western Railroad. Except as specially admitted,
14 Defendant denies each and every other purported fact allegation contained in paragraph 6. The remaining
15 allegations are conclusions of law to which no response is required. To the extent a response is required,
16 Defendant denies the allegations.

17 7. Responding to paragraph 7, Defendant admits that Mendocino Railway did have, and
18 continues to have, the capacity to carry freight and passengers. Except as specifically admitted, Defendant
19 denies each and every other purported fact allegation contained in paragraph 7. The remaining allegations
20 are conclusions of law to which no response is required. To the extent a response is required, Defendant
21 denies the allegations.

22 8. Responding to paragraph 8, Defendant answers as follows: As to the first sentence,
23 Defendant admits that, on or about April 11, 2013, its operations were disrupted following the partial
24 collapse of Tunnel No. 1, which buried nearly 50 feet of its 1,122 feet of track under rocks and soil.
25 Defendant lacks sufficient information and belief to respond to the remaining allegation in the first
26 sentence and, on that basis, denies it. As to the second sentence, Defendant admits that the collapse of
27 Tunnel No. 1 temporarily eliminated the ability of its rail operations between Fort Bragg and Willits to
28 continue. As to the third sentence, Defendant admits that, on or about June 18, 2013, Save The Redwoods

1 League announced that it had reached an agreement with Defendant to pay \$300,000 for an option to
2 purchase a conservation easement for the protection of redwoods along Defendant’s “Redwoods Route,”
3 and that Defendant applied said \$300,000 to the total cost for repair of Tunnel No. 1. Except as specifically
4 admitted, Defendant denies all other allegations contained in the third sentence. As to the fourth sentence,
5 Defendant admits that the \$300,000 payment from Save the Redwoods League assisted Defendant in
6 resuming all services on the entire line in August 2013. Except as specifically admitted, Defendant denies
7 all other allegations contained in paragraph 8.

8 9. Responding to paragraph 9, Defendant denies the allegations contained therein.

9 10. Responding to paragraph 10, Defendant admits that it is estimated to cost around \$5 million
10 to repair and reopen Tunnel No. 1. Except as specifically admitted, Defendant denies each and every other
11 allegation contained in paragraph 10.

12 11. Responding to paragraph 11, Defendant admits that among other services provided to the
13 public in various geographic areas, including freight, passenger, and other excursion services, it operates
14 a 3.5 mile excursion from Fort Bragg to Glenn Blair Junction, and a 16-mile excursion from Willits to
15 Crowley. Except as specifically admitted, Defendant denies each and every other allegation contained in
16 paragraph 11.

17 12. Responding to paragraph 12, Defendant answers as follows: As to the first sentence,
18 Defendant lacks sufficient information and belief to respond to the allegations and on that basis denies
19 them. As to the second sentence, Defendant denies the allegations contained therein. As to the third
20 sentence, Defendant admits that it refused Plaintiff’s attempts to trespass onto its rail property for permit-
21 related inspections of its rail facilities, on the grounds of state and federal preemption law, given
22 Defendant’s status as a public-utility railroad exclusively regulated as such by the CPUC and the STB.
23 Except as specifically admitted, Defendant denies each and every other allegation contained in the third
24 sentence. As to the fourth sentence, Defendant admits that when Plaintiff unlawfully posted a “Stop Work
25 Order” for failure to obtain a building permit for work on Defendant’s storage shed on rail property,
26 Defendant removed the unlawful order and proceeded with the work. Except as specifically admitted,
27 Defendant denies each and every allegation contained in the fourth sentence. As to the fifth sentence,
28 Defendant admits that in August 2021, Plaintiff emailed Defendant a “Limited Term Application,” on the

1 purported grounds that “[t]he Police Dept. notified [Plaintiff] that [Defendant] will be having evening
2 events that potentially can cause noise issues.” Except as specifically admitted, Defendant denies each
3 and every other allegation contained in the fifth sentence. As to the sixth sentence, Defendant admits that
4 Defendant responded to said email by stating, in relevant part: “these events to the extent they exist are
5 outside the city’s jurisdictional boundaries and are thus not subject to a permit.” Except as specifically
6 admitted, Defendant denies each and every other allegation contained in the sixth sentence.

7 13. Responding to paragraph 13, Defendant answers that the allegations constitute conclusions
8 of law to which no response is required. To the extent a response is required, Defendant denies the
9 allegations.

10 14. Responding to paragraph 14, Defendant restates and incorporates herein by reference each
11 and every answer contained in the paragraphs above.

12 15. Responding to paragraph 15, Defendant answers as follows: the first and second sentences
13 consist of allegations that are conclusions of law, to which no response is required. To the extent a response
14 is required, Defendant denies the allegations. As to the third sentence, Defendant admits that it is
15 Defendant’s position that its status as (a) a CPUC-regulated public-utility railroad and (b) a railroad within
16 the jurisdiction of the federal Surface Transportation Board (“STB”) broadly preempt environmental pre-
17 clearance review and land-use permitting of Defendant’s rail activities by Plaintiff, under both state and
18 federal preemption. As to the fourth sentence, Defendant admits that Plaintiff disagrees with Defendant’s
19 position. Except as specifically admitted, Defendant denies each and every other allegation contained in
20 the fourth sentence. As to the fifth sentence, Defendant denies each and every allegation contained therein.

21 16. Responding to paragraph 16, Defendant denies each and every allegation contained therein.

22 17. Responding to paragraph 17, Defendant denies each and every allegation contained therein.

23 18. Responding to paragraph 18, Defendant denies each and every allegation contained therein.

24 19. Responding to paragraph 19, Defendant admits that Plaintiff seeks injunctive relief against
25 Defendant under the purported authority of California Civil Code section 526. Defendant further admits
26 that Plaintiff seeks to require Defendant to submit fully to Plaintiff’s jurisdiction and authority without
27 regard to its status as a CPUC-regulated public utility and STB-regulated federal railroad. Except as
28 specifically admitted, Defendant denies each and every other allegation contained in paragraph 19.

20. Responding to paragraph 20, Defendant denies each and every allegation contained therein.

21. Responding to paragraph 21, Defendant denies each and every allegation contained therein.

Responding to all paragraphs under Plaintiff’s “Prayer,” Defendant admits that Plaintiff unlawfully seeks a declaration that Defendant is no longer a public utility because it purportedly does not qualify as a common carrier providing “transportation.” Further, Defendant admits that Plaintiff unlawfully seeks injunctive relief “commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority.” Further, Defendant admits that Plaintiff unlawfully seeks costs of the suit, and “such other and further relief” as the Court deems just and proper. Except as specifically admitted, Defendant denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint states insufficient facts to state a cause of action because Defendant is and remains a common-carrier, public-utility railroad.

SECOND AFFIRMATIVE DEFENSE

The Superior Court lacks subject matter jurisdiction to adjudicate Plaintiff’s cause of action under section 1759(a) of the Public Utilities Code.

THIRD AFFIRMATIVE DEFENSE

Plaintiff’s cause of action is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

The declaratory and injunctive relief sought by Plaintiff are barred by state and federal preemption, as embodied in statutory and constitutional law, because Defendant is a CPUC-regulated public utility and a railroad within the jurisdiction of the STB. *See, e.g.*, 49 U.S.C. §§ 10102, 10501(b); Pub. Util Code § 1759(a); U.S. Const. art. VI, ¶ 2.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff’s cause of action is barred by the equitable doctrines of estoppel, unclean hands, and/or waiver.

///

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SIXTH AFFIRMATIVE DEFENSE

Plaintiff’s cause of action is barred for failure to name and join indispensable and necessary parties, including without limitation the California Public Utilities Commission.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff’s cause of action is barred by the doctrine of laches, including without limitation because the City has unreasonably delayed in challenging Defendant’s current status as a CPUC-regulated public utility.

EIGHTH AFFIRMATIVE DEFENSE

Defendant does not presently have sufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, affirmative defenses. Defendant reserves the right to assert additional affirmative defenses in the event discovery indicates that they would be appropriate.

WHEREFORE, Defendant prays as follows that:

1. Plaintiff take nothing by this action and the Complaint be dismissed with prejudice;
2. Defendant be awarded costs and reasonable attorneys’ fees; and
3. The Court award such other and further relief as it deems just and proper.

DATED: June 24, 2022

/s/ Paul Beard II

Attorneys for Defendant MENDOCINO RAILWAY

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VERIFICATION

I, Robert Pinoli, am President of Defendant Mendocino Railway. I have read the foregoing answer and know the contents thereof. The same is true of my own personal knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true. If called upon to testify, I would and could testify thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed in Mendocino County, California, on this 24th day of June, 2022.



ROBERT PINOLI

PROOF OF SERVICE

I, Paul Beard II, declare:

My business address is: FisherBroyles LLP, 4470 W. Sunset Blvd., Suite 93165, Los Angeles, CA 90027. I am over the age of 18 and not a party to this action.

On June 24, 2022, I served **DEFENDANT’S VERIFIED ANSWER** on the following counsel for Respondent:

KRISTA MACNEVIN JEE

JONES MAYER

kmj@jones-mayer.com

Counsel for Plaintiff

BY ELECTRONIC TRANSMISSION—ONE LEGAL. When electronically filing the above entitled document with One Legal, I simultaneously opted for electronic service of the same on Ms. Jee at the email above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DATED: June 24, 2022

/s/ Paul Beard II

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EXHIBIT D

1 PAUL J. BEARD II (State Bar No. 210563)
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8 Attorneys for Plaintiffs
9 MENDOCINO RAILWAY

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

MENDOCINO RAILWAY, a California
corporation,

Plaintiff

v.

JACK AINSWORTH, in his official capacity as
Executive Director of the California Coastal
Commission; CITY OF FORT BRAGG, a
California municipal corporation; and DOES 1
through 20, inclusive,

Defendants.

Case No.: _____

**COMPLAINT FOR DECLARATORY
JUDGMENT**

INTRODUCTION

1
2 1. This case is about state and local authorities’ illegal efforts to impose land-use permitting
3 and preclearance requirements on a federal railroad’s land-use activities, in blatant violation of federal
4 preemption principles.

5 2. Plaintiff Mendocino Railway is a Class III, common-carrier railroad with facilities,
6 equipment and operations located partly in California’s coastal zone, including in the City of Fort Bragg.
7 Mendocino Railway has been and continues to be under the exclusive jurisdiction of the federal State
8 Transportation Board (“STB”), as mandated by the Interstate Commerce Commission Termination Act
9 (“ICCTA”), 49 U.S.C. § 10501(b). Consequently, Mendocino Railway’s rail-related work and operations
10 are not subject to state and local land-use permitting and preclearance regulation.

11 3. The California Coastal Commission (“Commission”)—a state agency that preclears land-
12 use projects in the coastal zone pursuant to state law—has demanded that Mendocino Railway apply for
13 a state land-use permit before performing any rail-related work on its railroad property located within the
14 coastal zone. As a federally regulated railroad with preemption rights, Mendocino Railway has refused to
15 submit to the Commission’s demands as to its rail-related activities. But the constant threat of enforcement
16 action by the Commission, including stop-work orders and prohibitively expensive penalties and fines,
17 for rail activities undertaken without that agency’s pre-approval has rendered Mendocino Railway unable
18 to proceed with its railroad projects as planned.

19 4. The City of Fort Bragg (“City”) has joined with the Commission in demanding that
20 Mendocino Railway submit to its plenary land-use authority over, and preclearance review of, rail-related
21 activities occurring within the City’s boundaries. The City has gone so far as to file a state-court action to
22 compel Mendocino Railway to apply for permits for any and all work on its railroad property and facilities
23 within City boundaries. As a federally regulated railroad with preemption rights, Mendocino Railway has
24 refused to submit to the City’s permit jurisdiction, as well.

25 5. This action seeks to resolve this ongoing controversy between Mendocino Railway on the
26 one hand, and state and local authorities on the other. To avoid the unlawful enforcement of federally-
27 preempted regulation, the concomitant disruption of its railroad operations and projects, and the
28 uncertainty generated by this dispute, Mendocino Railway seeks a declaration that the actions of the

1 Commission and the City to regulate Mendocino Railway's operations, practices and facilities are
2 preempted under 49 U.S.C. §10501(b) and that Mendocino Railways activities are subject to the STB's
3 exclusive jurisdiction. Therefore, Mendocino Railway has the right under the ICCTA to undertake any
4 and all rail-related activities within the coastal zone, including within the City's boundaries, without
5 preclearance or approval from the Commission or the City.

6 **JURISDICTION AND VENUE**

7 6. Jurisdiction is proper under 28 U.S.C. § 1331 because this action arises under the laws of
8 the United States, and this Court has the power to grant the declaratory judgment requested herein under
9 Fed. R. Civ. P. 57 and 28 U.S.C. § 2201.

10 7. Under 28 U.S.C § 1391(b), venue is proper in the Northern District, where Defendants are
11 located and a substantial part of the events or omissions giving rise to Plaintiff's claim occurred here.

12 **DIVISIONAL ASSIGNMENT**

13 8. Assignment of this case to the Eureka division is appropriate under L.R. 3-2, because all
14 actions, events or omissions giving rise to Plaintiff's claim occurred in Mendocino County.

15 **PARTIES**

16 9. Mendocino Railway is a railroad corporation organized under the laws of the State of
17 California. It owns real property, rail facilities and rail equipment in various regions of the State, including
18 but not limited to the coastal zone and the City of Fort Bragg in Mendocino County. It is a Class III
19 railroad subject to the STB's jurisdiction.

20 10. Defendant Jack Ainsworth is the Executive Director of the California Coastal Commission,
21 is charged with the day-to-day enforcement of the California Coastal Act, and is sued in his official
22 capacity. Under the Coastal Act, development on land in the coastal zone generally requires a land-use
23 permit (known as a "Coastal Development Permit" or "CDP"). The Executive Director has the authority
24 to, among other things, directly issue disruptive cease-and-desist orders to stop work he believes has been
25 performed without a CDP. Pub. Res. Code § 30809. He also has the authority to pursue other enforcement
26 orders against landowners, including severe penalties, through recommendations made to the Commission
27 at a public hearing. *See, e.g.*, Pub. Res. Code §§ 30811 (authorizing issuing of restoration orders requiring
28 landowner to restore property to condition before allegedly unlawful development occurred), 30821.3

1 (authorizing penalties of up to \$11,500 *per day* per violation for any Coastal Act violation, including
2 development without a CDP). Through his staff, the Executive Director has made clear its view that
3 Mendocino Railway's rail-related projects in the coastal zone require a CDP, and that *past* rail-related
4 work in the coastal zone required a CDP, rendering Mendocino Railway a violator that is exposed to
5 enforcement action and penalties.

6 11. Defendant City of Fort Bragg is a municipal corporation organized and existing under and
7 by virtue of the laws of the State of California. Except where preempted, the City has a general police
8 power to regulate land use within its jurisdiction. Under the Coastal Act, it has been delegated the authority
9 under state law to preclear and permit development within the City. The City wrongly contends that
10 Mendocino Railway requires its pre-approval, including via a CDP, for land-use activities occurring on
11 property within its jurisdiction.

12 GENERAL ALLEGATIONS

13 A. Legal Background

14 12. The STB has "exclusive" jurisdiction over (1) "transportation by rail carriers" and (2) "the
15 construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching,
16 or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State."
17 49 U.S.C. § 10501(b). The ICCTA defines "transportation" broadly to include "(A) a locomotive, car,
18 vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any
19 kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an
20 agreement concerning use; and (B) services related to that movement, including receipt, delivery,
21 elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of
22 passengers and property." *Id.* § 10102(9); *see also Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*,
23 841 F.3d 1069, 1072 (9th Cir. 2016).

24 13. The STB's exclusive jurisdiction over a railroad means that state and local permitting and
25 preclearance regulation of a railroad's activities are broadly preempted. U.S. Const. art. VI, cl. 2 (Supreme
26 Clause); 49 U.S.C. § 10501(b) (ICCTA "preempt[s] the remedies provided under Federal or State law");
27 *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (The ICCTA's preemptive scope
28 is "broad."); *Friends of Eel River v. North Coast R.R.*, 399 P.2d 37, 60 (Cal. 2017) (holding that "state

1 environmental permitting or preclearance regulation that would have the effect of halting a private railroad
2 project pending environmental compliance would be categorically preempted”); *North San Diego County*
3 *Transit Dev. Bd.—Petition for Declaratory Order*, 2002 WL 1924265 (STB 2002) (holding that the
4 Coastal Act was preempted by ICCTA as applied to rail projects); *Padgett v. STB*, 804 F.3d 103, 105 (1st
5 Cir. 2015) (ICCTA preempts state law governing “regulation of rail transportation”). “Under the ICCTA,
6 the [STB] has jurisdiction over ‘transportation by rail carrier,’ and “[w]here the [STB] has such
7 jurisdiction, it is exclusive. Whether or not the [STB] is exercising its regulatory authority over the
8 transportation, state and local laws governing such permitting are generally preempted.” *Del Grosso v.*
9 *STB*, 804 F.3d 110, 113-14 (1st Cir. 2015).

10 14. The ICCTA “shields railroad operations that are subject to the [STB’s] jurisdiction from
11 the application of many state and local laws, including local zoning and permitting laws and laws that
12 have the effect of managing or governing rail transportation.” *City of Alexandria, VA – Pet. for Decl.*
13 *Order*, STB Fin. Docket No. 35157, 2009 STB LEXIS 3, n.2 (Feb. 17, 2009). Courts and the STB have
14 long recognized that the ICCTA categorically preempts “any form of state or local permitting or
15 preclearance that, by its nature could be used to deny a railroad the ability to conduct some part of its
16 operations or proceed with activities that the [STB] has authorized.” *CSX Transp., Inc., STB Fin. Docket*
17 *No. 34662*, 2005 WL 1024490, at *2 (STB May 3, 2005). These categories of state and local regulation
18 constitute “per se unreasonable interference with interstate commerce.” *Id.* at *3.

19 15. Courts have applied this principle to find that rail carriers need not comply with state or
20 local permitting required as a condition of construction and operation. *See, e.g., Padgett*, 804 F.3d at 106-
21 07 (state and local zoning and permitting regulation preempted); *Norfolk S. Ry. Co. v. City of Alexandria*,
22 608 F.3d 150, 160 (4th Cir. 2010) (though city’s ordinance and permit requirements enhance public safety,
23 they unreasonably burden rail transportation); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642-
24 43 (2nd Cir. 2005) (state pre-construction permit process is preempted as it unduly interferes with
25 interstate commerce and unduly delays construction of railroad facilities); *City of Auburn*, 154 F.3d at
26 1029-31 (local environmental regulation of railroad preempted by ICCTA).

27 16. Similarly, the ICCTA preempts local noise ordinances and even nuisance suits by nearby
28 residents to the extent they would prevent, manage, or regulate rail operations. *See, e.g., Pace v. CSX*

1 *Transportation, Inc.*, 613 F.3d 1066 (11th Cir. 2010) (ICCTA preempts private nuisance suit claiming
2 operation of side track caused noise and smoke making land virtually unusable); *Delaware v. STB*, 859
3 F.3d 16, 21 (D.C. Cir. 2017) (state law prohibiting locomotives from idling to reduce noise is categorically
4 preempted as directly regulating rail transportation); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444
5 (5th Cir. 2001) (ICCTA unambiguously preempted state negligence claim); *Kiser v. CSX Real Prop.*, 2008
6 U.S. Dist. LEXIS 90676 (M.D. Fla. Nov. 7, 2008) (ICCTA preempts nuisance claims against intermodal
7 rail operation); *Norfolk S. Ry. Co. v. City of Maple Heights*, 2003 U.S. Dist. LEXIS 28282, * 9 - *15 (N.D.
8 Ohio, May 14, 2003) (ICCTA preempts application of local noise ordinance to intermodal rail facility);
9 *Cannon v. CSX Transp., Inc.*, 2005 Ohio App. LEXIS 77, *P 21 - *P 25 (Ohio App. 2005) (homeowner
10 nuisance suit for noise and vibration preempted). The ICCTA was enacted with the purpose of expanding
11 federal jurisdiction and preemption of railroad regulation. *Or. Coast*, 841 F.3d at 1072.

12 **B. History and Operations of Mendocino Railway**

13 17. The railroad at issue, which Mendocino Railway has owned and operated since 2004, has
14 a long and storied history in California. The railroad was built in 1885 to haul felled redwood trees from
15 the surrounding forest to a lumber mill on the coast of what is now known as the City of Fort Bragg. In
16 addition to hauling lumber and finished products to and from the mill, the railroad delivered mail on behalf
17 of the U.S. Postal Service, provided transportation services to loggers and tourist passengers, and provided
18 passenger transportation between Fort Bragg and the railroad's eastern terminus in Willits, California, to
19 and from which passengers arrived and departed via coach.

20 18. The mill closed in 2002, ending the need for the railroad to haul timber and finished
21 products to and from the mill, though the opportunity still existed to ship other commodities. Though the
22 railroad at that point became primarily a passenger train, including for excursions colloquially referred to
23 as the "Skunk Train," the railroad was and continues to be a federally licensed railroad subject to the
24 STB's jurisdiction. As a common carrier railroad, it publishes tariffs for shipping freight for local on-line
25 customers.

26 19. By 2003, the then-owner of the railroad, California Western Railroad ("CWR"), fell on
27 hard times and declared bankruptcy. Following fierce bidding from a number of interested parties who
28 recognized the railroad's continued value to the community, Mendocino Railway in 2004 purchased

1 CWR's railroad assets out of bankruptcy, with the intent of fully restoring its passenger and freight
2 operations. Because the sale involved a federally regulated, Class III railroad, the sale was overseen by
3 the STB, which authorized Mendocino Railway's acquisition of the CWR pursuant to 49 C.F.R. § 1150.31.
4 69 Fed. Reg. 18999 (April 9, 2004) (Notice of Acquisition Exemption).

5 20. The Mendocino Railway line runs 40 miles, from its main station in Fort Bragg to its
6 eastern depot in Willits ("Willits Depot"). Mendocino Railway's Fort Bragg station is fully developed as
7 a rail facility, with, among other things, passenger coaches and freight cars, an engine house, and a dry
8 shed for storage of railroad equipment. Since acquiring the line in 2004 and up through the present,
9 Mendocino Railway has operated tourist and non-tourist passenger services and freight services.

10 21. Approximately 77 acres of the land adjacent to the main rail station in Fort Bragg were
11 previously used for more than a century to conduct and support freight and passenger operations. After 15
12 years of discussions, in 2019, Mendocino Railway acquired those 77 acres from Georgia-Pacific LLC
13 ("GP") in order to further Mendocino Railway's efforts to fully restore freight and passenger services.
14 Subsequently, the railroad acquired another approximately 220 acres from GP at the mill site, another 70
15 acres of pudding Creek, and 14 acres from another entity (Harvest Market). The total acres of the former
16 mill site acquired totals approximately 300.

17 22. Mendocino Railway connects to the State-owned Northwestern Pacific Railroad ("NWP")
18 line, which connects Mendocino Railway to the rest of the national rail system. While the segment
19 connected to Mendocino Railway has been temporarily embargoed pending track repairs, that NWP
20 segment has not been abandoned and remains a part of the national rail system.

21 23. In furtherance of its freight operations, Mendocino Railway has pursued and continues to
22 pursue a variety of much-needed rail-related activities on its property and facilities located in the coastal
23 zone. These activities have included, without limitation: improvements to side tracks; repair and
24 maintenance work on its rail station and engine house; clean-up work in and around a dry shed and
25 elsewhere on railroad property; improvements to the dry shed in order to provide space for the storage of
26 rail cars and other railroad equipment, such as tires for steam locomotives, railcar axles, and other parts
27 and components for steam and diesel locomotives; a lot-line adjustment related to the railroad's
28 acquisition of historically rail-related property from GP; and development of the recently acquired acreage

1 for rail-related uses. The railroad has not obtained a CDP from either the Commission or the City—and
2 does not intend to do so—because any such preclearance review is and would be categorically preempted.

3 24. Mendocino Railway has always been and remains a Class III, common-carrier railroad
4 subject to the STB’s jurisdiction. While the NWP section connecting to the Mendocino Railway line is
5 currently out of service, the NWP’s line has never been abandoned and service is expected to be restored.

6 **C. The City and Coastal Commission Denial of Mendocino Railway’s Status as a Federal Railroad**

7 25. Until recently, the City has acknowledged Mendocino Railway’s status as a common-
8 carrier railroad within the exclusive jurisdiction of the STB. But after Mendocino Railway’s latest
9 purchase of some 300 acres from GP—property that City a had initially considered purchasing but then
10 seemingly lost interest in—the City changed its tune. Starting in 2021, the City sought to excuse its
11 decision not to purchase the property by waging a relentless campaign to make it appear as if Mendocino
12 Railway had stolen the opportunity from the City, while also attacking Mendocino Railway’s status as a
13 federally (and state) regulated railroad, so the City could dictate how Mendocino Railway could use the
14 property. In so doing, the City hoped to avoid public criticism for its decisions and effectively gaining
15 development control over the acquired property without having had to purchase it.

16 26. On October 28, 2021, the City filed a lawsuit against Mendocino Railway in Mendocino
17 County Superior Court. Among other things, the lawsuit seeks an injunction “commanding the Mendocino
18 Railway to comply with *all* City ordinances, regulations, and lawfully adopted codes, jurisdiction and
19 authority,” including the authority to pre-clear and approve work on railroad facilities through the City’s
20 land-use permitting processes

21 27. Similarly, for the last several years, the Commission has made clear its view that
22 Mendocino Railway is not part of the interstate rail network subject to STB jurisdiction, and is therefore
23 not entitled to federal preemption of the Commission’s oversight. The Commission contends that, in order
24 to be lawful, all prior and future rail-related work on Mendocino Railway’s property and facilities must
25 be approved by the Commission under its general authority to review and permit land-use activities in the
26 coastal zone.

27 ///

28 ///

FIRST CLAIM
For Declaratory Judgment
(By Plaintiff Against All Defendants)

1
2
3 28. Plaintiff incorporates herein by reference each and every allegation contained in the
4 preceding paragraphs of this Complaint as though fully set forth herein.

5 29. A justiciable controversy exists as to whether Mendocino Railway's freight rail-related
6 activities on its property and facilities, including without limitation, its efforts to improve side tracks;
7 repair and maintenance work on its rail station and engine house; construction of an extension of the
8 southern side of its engine house which is intended to cover existing passenger coaches and freight cars,
9 require a CDP permit or are otherwise within the STB's exclusive jurisdiction, such that the ICCTA
10 preempts the efforts of the City and the Commission to require Mendocino Railway to obtain state and
11 local land-use permits and other preclearance.

12 30. Mendocino Railway is a federally regulated common carrier that is a part of the interstate
13 rail network under the STB's exclusive jurisdiction, and that the ICCTA therefore preempts state and local
14 land-use permitting authority over its rail-related operations, property, and facilities.

15 31. Defendants assert that Mendocino Railway is not subject to the STB's exclusive
16 jurisdiction, and is subject to their plenary land-use permitting and preclearance authority for all rail-
17 related activities undertaken within the coastal zone, including the City's boundaries. Therefore, there is
18 a dispute over Mendocino Railway's rights and privileges under the ICCTA, giving rise to a case or
19 controversy over which this Court has jurisdiction.

20 32. Mendocino Railway seeks a declaration that the actions of the Commission and the City to
21 regulate Mendocino Railway's operations, practices and facilities are preempted under 49 U.S.C.
22 §10501(b) and that Mendocino Railways activities are subject to the STB's exclusive jurisdiction.

23 33. Mendocino Railway does not intend to apply for a CDP from either the Commission or the
24 City for rail-related work on its property and facilities in the coastal zone, on the grounds that such
25 preclearance is categorically preempted. Defendants have made clear they believe that, absent their
26 authorization, Mendocino Railway's rail-related work is unlawful, creating a cloud of uncertainty over the
27 railroad's operations and the real and imminent risk of enforcement action against it. Defendants have a
28 well-established history of pursuing alleged violators of the CDP requirement through such enforcement

1 actions as cease-and-desist orders, restoration orders, and penalty order.

2 34. Mendocino Railway has no adequate remedy at law and will suffer irreparable harm if this
3 controversy persists unresolved, and its rights and obligations are not established by declaratory judgment.
4 Without declaratory relief, Mendocino Railway will remain under the constant and imminent threat of
5 federally-preempted regulation, the complete disruption of its rail operations and rail-related development,
6 and the sheer uncertainty created by this controversy.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Mendocino Railway requests relief as follows:

9 1. A declaratory judgment that the actions of the Commission and the City to regulate
10 Mendocino Railway's operations, practices and facilities are preempted under 49 U.S.C. §10501(b) and
11 that Mendocino Railway's activities are subject to the STB's exclusive jurisdiction. Therefore Mendocino
12 Railway has the right under the ICCTA to undertake any and all rail-related activities within the coastal
13 zone, including within the City's boundaries without preclearance or approval from the Commission or
14 the City.

15 2. An injunction prohibiting Defendants from taking any action that would materially
16 interfere with Mendocino Railway's operation of its railroad as a federally regulated common carrier,
17 including by imposing and enforcing any land-use permitting or other preclearance requirement as the
18 pre-condition of any rail-related development on Mendocino Railway's property or facilities;

19 3. Costs of suit; and

20 4. Such additional relief as may be provided by law or the Court may deem just and proper.

21 DATED: August 9, 2022

FISHERBROYLES LLP

22
23 s/ Paul Beard II

24 _____
Attorneys for Plaintiff MENDOCINO RAILWAY

EXHIBIT E

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California Coastal Commission*

ELECTRONICALLY FILED
9/8/2022 12:03 PM
Superior Court of California
County of Mendocino

By: 
Dorothy Jess
Deputy Clerk

**NO FEE REQUIRED PURSUANT
TO GOVERNMENT CODE
SECTION 6103**

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MENDOCINO

CITY OF FORT BRAGG,

Plaintiff,

v.

MENDOCINO RAILWAY,

Defendant,

CALIFORNIA COASTAL COMMISSION,

Intervenor.

Case No. 21CV00850
**CALIFORNIA COASTAL
COMMISSION'S NOTICE OF MOTION
AND MOTION FOR LEAVE OF COURT
TO INTERVENE**
Date: 10/06/2022
Time: 2:00 p.m.
Dept: TM
Judge: The Honorable Clayton L.
Brennan
Trial Date:
Action Filed: October 28, 2021

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
NOTICE IS HEREBY GIVEN that on October 6th, 2022, at 2:00 pm., or as soon thereafter as
the matter may be heard, in Department TM of this court, the California Coastal Commission
("Commission") will, and hereby does, move the Court for an order granting leave to file a
complaint in intervention in this action for declaratory and injunctive relief on the side of

1 the Plaintiff City of Fort Bragg (“City”). The Commission’s motion will be made pursuant to the
2 provisions of section 387, subdivisions (d)(1) and (d)(2), on the grounds that the Commission has
3 an interest in the litigation and relief sought by the City, and that disposition of the action may as
4 a practical matter impede the Commission’s ability to protect its interests in implementing and
5 enforcing the California Coastal Act, which is not and cannot be adequately represented by the
6 existing parties. In the alternative, the Commission’s motion is further made on the grounds that it
7 has a direct an immediate interest in the action, its intervention will not enlarge the issues in this
8 litigation, and its reasons for intervening outweigh any opposition by the current parties.

9 This motion will be based on this notice of motion, the proposed complaint in intervention,
10 the declaration of Josh Levine, and the memorandum of points and authorities served and filed
11 herewith, on the papers and records and file herein, and on such oral and documentary evidence
12 as may be presented at the hearing on the motion.

13 Dated: September 8, 2022

14 Respectfully submitted,

15 ROB BONTA
16 Attorney General of California
17 DAVID G. ALDERSON
18 Supervising Deputy Attorney General



19 PATRICK TUCK
20 Deputy Attorney General
21 *Attorneys for Intervenor*
22 *California Coastal Commission*

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***NO FEE REQUIRED PURSUANT
TO GOVERNMENT CODE
SECTION 6103***

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MENDOCINO
11

12
13 **CITY OF FORT BRAGG,**

Plaintiff,

14
15 v.

16 **MENDOCINO RAILWAY,**

Defendant,

17
18
19 **CALIFORNIA COASTAL COMMISSION,**

Intervenor.
20
21

Case No. 21CV00850

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CALIFORNIA COASTAL
COMMISSION’S MOTION TO
INTERVENE**

Date:
Time:
Dept:
Judge: The Honorable Clayton L.
Brennan
Trial Date:
Action Filed: October 28, 2021

22
23 **INTRODUCTION**

24 Pursuant to Code of Civil Procedure section 387, subdivision (d), the California Coastal
25 Commission (“Commission”) moves this Court for an order granting the Commission leave to
26 intervene in this matter on the side of Plaintiff City of Fort Bragg (“City”). In this action, the City
27 seeks an injunction ordering that Defendant Mendocino Railway (“Railway”) must comply with
28

1 the City’s ordinances, regulations, and authority. The City also seeks a judicial declaration that
2 the Railway is not exempt from the City’s laws and authority.

3 The Commission is the state agency responsible for administering the California Coastal
4 Act (“Coastal Act”). Because the City implements the permitting requirements of the Coastal Act
5 via the City’s Local Coastal Program, the Commission has a strong interest in the relief sought by
6 the City. In particular, the Commission relies on the City’s ability and authority to require coastal
7 development permits in the coastal zone of the City pursuant to its LCP. Thus, if allowed to
8 intervene on the side of the City, the Commission will similarly seek a judicial declaration that
9 the development activities of the Railway in the coastal zone of the City are properly subject to
10 the City’s LCP permitting requirements, as well as any applicable provisions of the Coastal Act.
11 Based on the Railway’s ongoing unpermitted development activities in the coastal zone, the
12 Commission will also seek injunctive relief and civil penalties related to the Railway’s violations
13 of the Coastal Act.

14 This case is still in its infancy, with the Railway filing its responsive pleading just over two
15 months prior to the filing of this motion, and the Court just set trial for June 2023. The
16 Commission’s intervention will not delay this case in any way and will not enlarge the issues at
17 hand. Intervention by the Commission should be granted.

18 **BACKGROUND**

19 The California Coastal Commission is a state agency created by the Coastal Act (Pub.
20 Resources Code, § 30000-30900). The Commission has the authority and responsibility, pursuant
21 to Public Resources Code section 30330, to take any action necessary to carry out the provisions
22 of the Coastal Act, including the filing of lawsuits. (See Pub. Resources Code, § 30334, subd.
23 (b).) The Commission is charged with administering the Coastal Act and its policies, including a
24 permitting system for any proposed development in the “coastal zone.” (Pub. Resources Code, §
25 30600.) The Commission is the original permitting authority, but local governments with
26 territory within the coastal zone are required to develop Local Coastal Programs (LCPs) to
27 implement the Coastal Act. Once the Commission certifies the local government’s LCP, the local
28 government reviews development applications for consistency with the LCP and issues permits

1 for development in the coastal zone. (See Pub. Resources Code, §§ 30600, subd. (d), 30500, and
2 30519.) The Commission nonetheless may take action to enforce any requirements of a certified
3 LCP, particularly when the local government requests that the Commission do so. (See Pub.
4 Resources Code, § 30810.)

5 The Commission has certified the City of Fort Bragg’s LCP, and the Commission contends
6 that a number of the Railway’s land use activities described in the City’s complaint, such as
7 replacing the roundhouse, lie within the coastal zone of the City. (See Complaint, at ¶ 12; see also
8 Coastal Commission Notice of Violation Letter, issued August 10, 2022 (“Notice of Violation”),
9 attached as Exhibit A to the Declaration of Josh Levine (“Levine Decl.”), at pp. 2-3.) Thus, the
10 Commission contends that the Railway’s development activities in the coastal zone are subject to
11 the permitting requirements in the City’s LCP. (Notice of Violation, at pp. 2-4.) Because the
12 Commission further contends that the Railway has undertaken development activities in the
13 coastal zone without applying for or obtaining a coastal development permit from the City, the
14 Railway is in violation of the City’s LCP and the Coastal Act, and is subject to an enforcement
15 action. (See Notice of Violation, at p. 2.) In July 2022, the City requested that the Commission
16 assume primary responsibility for enforcing the Railway’s violations of the Coastal Act and the
17 City’s LCP with respect to the Railway’s activities in the coastal zone, and the Commission has
18 agreed to do so, recently issuing the Notice of Violation to the Railway discussed above. (See
19 Levine Decl., at ¶ 2.)

20 However, the Railway continues to allege that its status as a public utility railroad regulated
21 by the California Public Utilities Commission and the federal Surface Transportation Board
22 preempts “environmental pre-clearance review and land-use permitting,” under state and federal
23 law. (Railway’s Verified Answer, ¶¶ 12, 15.) The Commission disputes the Railway’s claim to
24 preemption from the permit requirements of the City’s LCP and the Coastal Act, and has a strong
25 interest in a judicial declaration settling the issue of the Railway’s claimed preemption once and
26 for all.

27 //

28 //

RELIEF SOUGHT BY THE CITY AND THE COMMISSION

1
2 In its complaint, the City seeks a declaratory judgment that the Railway is not a public
3 utility, so as to foreclose the argument that the Railway’s purported regulation by the CPUC
4 preempts any local regulation. The City additionally seeks injunctive relief requiring the Railway
5 to comply with the City’s codes, regulations, jurisdiction, and authority for any development it
6 undertakes in the City going forward. (See Complaint, Prayer for Relief, ¶¶ 1-2.)

7 Similarly, the Commission’s proposed complaint in intervention seeks a declaration that the
8 Railway’s development activities in the coastal zone of the City are subject to the Coastal Act and
9 the City’s LCP. (Proposed Complaint in Intervention, filed herewith, Prayer for Relief ¶ 1.) The
10 Commission’s complaint further seeks a declaration that the Commission’s and City’s regulation
11 of the Railway’s development activities and their enforcement of those requirements are not
12 preempted under state or federal law. (Proposed Complaint in Intervention, Prayer for Relief ¶ 2.)
13 Finally, the Commission seeks civil penalties related to the Railway’s violations of the Coastal
14 Act, exemplary damages, and an injunction ordering the Railway to cease all unpermitted
15 development in the coastal zone of the City and apply for coastal development permits pursuant
16 to the City’s LCP. (Proposed Complaint in Intervention, Prayer for Relief ¶¶ 3-5.)

ARGUMENT

I. THE COMMISSION IS A PROPER INTERVENOR.

A. The Commission fulfills the requirements for mandatory intervention.

20 Code of Civil Procedure section 387, subdivision (d)(1)(B) requires courts to allow a non-
21 party to intervene where the party “claims an interest relating to the property or transaction that is
22 the subject of the action,” and where the non-party “is so situated that the disposition of the action
23 may impair or impede that person’s ability to protect that interest, unless that person’s interest is
24 adequately represented by one or more of the existing parties.” (Code Civ. Proc., § 387, subd.
25 (d)(1)(B).) Mandatory intervention pursuant to section 387, subdivision (d)(1) ““should be
26 liberally construed in favor of intervention.”” (*Crestwood Behavioral Health, Inc. v. Lacy* (2021)
27 70 Cal.App.5th 560, 572, quoting *Simpson Redwood Co. v. State of California* (1987) 196
28 Cal.App.3d 1192, 1200.)

1 The Commission readily meets the requirements for mandatory intervention. First, there is
2 no question that the Commission has a strong interest in the subject of this litigation. The
3 Commission believes that many, if not all, of the Railway's activities complained of by the City
4 lie within the coastal zone of the City, and are therefore subject to the Commission's authority
5 under the Coastal Act. (See Complaint, at ¶ 12; see also Notice of Violation, at pp. 2-3.) The
6 Commission believes the Railway has undertaken development in the coastal zone of the City in
7 violation of the City's LCP and the Coastal Act. (See Notice of Violation, at pp. 2-3.) The City
8 has asked the Commission to be the primary enforcer of the LCP with respect to the Railway's
9 development activities in the coastal zone of the City. (Levine Decl., ¶ 2.) The Commission is the
10 statewide entity responsible for ensuring compliance with the Coastal Act, and the City's LCP is
11 designed to implement the Coastal Act's coastal zone permitting requirements. Thus, the
12 Commission has a strong interest in enforcing the LCP and the Coastal Act here, and in defending
13 those laws from the Railway's invalid and unsupported preemption claims.

14 Second, a ruling that the Railway's development activities in the coastal zone of the City
15 are exempt from requirements in the City's LCP and the Coastal Act would impair the
16 Commission's ability to enforce the City's LCP and the Coastal Act. Such a ruling would also
17 threaten coastal resources, considering the City's LCP and the Coastal Act are designed to protect
18 the coast. (See Notice of Violation, at pp. 1-2.) .

19 Third, the City cannot adequately represent the Commission's interests. The Commission
20 is the statewide entity charged with implementing the whole of the Coastal Act and oversight of
21 local governments' issuance of coastal development permits. Without the Commission's
22 presence in this case, the City may not achieve clarity as to its authority to require coastal
23 development permits from the Railway under its LCP and the Coastal Act. Additionally, if the
24 Commission is not permitted to intervene, the Commission would not achieve clarity regarding its
25 ability to enforce its current Notice of Violation against the Railway, as well as its ability to
26 support the City in enforcing the applicable provisions of its LCP.

27 Finally, the Commission has significantly more expertise in the implementation and
28 enforcement of the Coastal Act than the City. Consequently, the Commission's intervention is

1 necessary to ensure that the State’s interests in managing and protecting the coastal zone are
2 adequately safeguarded from unpermitted development along the coast.

3 **B. The Commission should be granted permissive intervention.**

4 Alternatively, the Court should grant permissive intervention to the Commission under
5 Code of Civil Procedure section 387, subdivision (d)(2). “Permissive intervention is appropriate
6 if: ‘(1) the proper procedures have been followed; (2) the nonparty has a direct and immediate
7 interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the
8 reasons for the intervention outweigh any opposition by the parties presently in the action.’”
9 (*Carlsbad Police Officers Association v. City of Carlsbad* (2020) 49 Cal.App.5th 135, 148,
10 quoting *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386.) In *Pappas v. State*
11 *Coastal Conservancy* (2021) 73 Cal.App.5th 310, the Second District Court of Appeal upheld a
12 lower court’s ruling permitting intervention under section 387, subdivision (d)(2), finding that the
13 trial court’s ruling “adhered to the principle that courts should construe section 387 liberally in
14 favor of intervention.” (*Pappas*, at pp. 318-319, citing *City of Malibu v. California Coastal*
15 *Com.* (2005) 128 Cal.App.4th 897, 906.) The court “must balance the interests of those affected
16 by a judgment against the interests of the original parties in pursuing their case unburdened by
17 others.” (*South Coast Air Quality Management District v. City of Los Angeles* (2021) 71
18 Cal.App.5th 314, 320, citing *City and County of San Francisco v. State* (2005) 128 Cal.App.4th
19 1030, 1036.)

20 Permissive intervention is appropriate here. First, the Commission has followed the proper
21 procedures of Code of Civil Procedure section 387 in seeking leave to intervene in a timely
22 fashion, just over two months after the Railway filed its Answer and finally put the case at issue,
23 and just a few days after this Court set the case for trial in June 2023.

24 Second, the Commission has a direct and immediate interest in the lawsuit, as explained
25 above in Section I.A.

26 Third, intervention will not enlarge the issues raised by the original parties. The
27 Commission and the City are aligned in their prosecution of this action and in seeking declaratory
28 relief as to the merits, or lack thereof, of the Railway’s preemption arguments, as well as the

1 applicability of the permitting and enforcement requirements of the Coastal Act and the City's
2 LCP to the Railway's development actions within the coastal zone.

3 Finally, the Commission's reasons for intervening outweigh any potential opposition by the
4 Railway. Because the Commission and the Railway dispute the applicability of the City's LCP
5 and the Coastal Act to a number of the Railway's development activities (Notice of Violation, at
6 pp. 2-3), the rights of all parties can only be adequately addressed with the Commission's
7 involvement in this action. The Court should grant the Commission's motion to intervene here.

8 **C. Intervention is timely.**

9 There is no statutory deadline to file a motion to intervene. (*Noya v. A.W. Coulter Trucking*
10 (2006) 143 Cal.App.4th 838, 842.) "Timeliness is determined by the totality of the circumstances
11 facing would-be intervenors, with a focus on three primary factors: '(1) the stage of the
12 proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the
13 reason for the delay.'" (*Crestwood Behavioral Health, Inc. v. Lacy* (2021) 70 Cal.App.5th 560,
14 574, quoting *Smith v. Los Angeles Unified School District* (9th Cir. 2016) 830 F.3d 843, 854.)

15 Although the instant lawsuit was filed in October 2021, the Court only denied the
16 Railway's demurrer this past April, the Court of Appeal denied the Railway's appeal petition less
17 than three months ago, and the California Supreme Court denied the Railway's petition for review
18 just over two months ago, on June 23, 2022. The Railway then filed its answer to the City's
19 complaint the next day, on June 24, 2022, and the court just set trial for June 2023. This
20 proceeding is still in its earliest stages; no prejudice will be incurred by the other parties by the
21 Commission's intervention just a couple of months after the Railway filed its Answer. Moreover,
22 the City only requested that the Commission assume primary enforcement authority related to the
23 Railway's unpermitted development activities in the coastal zone of the City less than two months
24 ago, in July 2022, and that is when that the Commission became aware that its interests may not
25 "be protected adequately by the parties," and was compelled to seek to intervene. (Levine Decl, ¶
26 2; *Crestwood Behavioral Health, Inc. v. Lacy* (2021) 70 Cal.App.5th 560, 575.) For all of these
27 reasons, this motion is timely.
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CONCLUSION

For the foregoing reasons, the Commission requests that the Court grant the Commission’s motion to intervene. A copy of the Commission’s proposed Complaint in Intervention is filed herewith.

Dated: September 8, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
DAVID G. ALDERSON
Supervising Deputy Attorney General



PATRICK TUCK
Deputy Attorney General
*Attorneys for Intervenor
California Coastal Commission*

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Attorneys for Intervenor
8 *California Coastal Commission*

***NO FEE REQUIRED PURSUANT
TO GOVERNMENT CODE
SECTION 6103***

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MENDOCINO

11
12
13 **CITY OF FORT BRAGG,**
14
Plaintiff,
15
v.
16
17 **MENDOCINO RAILWAY,**
18
Defendant,
19
20 **CALIFORNIA COASTAL COMMISSION,**
21
Intervenor.
22

Case No. 21CV00850

[PROPOSED] COMPLAINT IN INTERVENTION

Date:
Time:
Dept:
Judge: The Honorable Clayton L Brennan
Trial Date:
Action Filed: October 18, 2021

23
24 **COMPLAINT IN INTERVENTION**

25 By leave of court, the California Coastal Commission (“Commission”) files this
26 complaint and intervenes in this action. In its complaint filed on October 28, 2021, Plaintiff City
27 of Fort Bragg (“City”) seeks an injunction ordering that Defendant Mendocino Railway
28 (“Railway”) must comply with the City’s ordinances, regulations, jurisdiction, and authority.

1 The City also seeks a judicial declaration that the Railway is not a public utility exempt from
2 those local laws and regulations. As set forth below, the Commission joins with the City in the
3 relief it seeks against the Railway that is specific to the Commission’s interest in protecting the
4 coast and in upholding laws enacted to protect coastal resources.

5 The Commission alleges as follows:

6 1. As shown by the facts alleged below, the Commission has a right to intervene in
7 this matter pursuant to Code of Civil Procedure section 387, subdivision (d)(1)(B) because: (1)
8 the Commission has a direct interest in this action; (2) adjudication of the parties’ claims in the
9 Commission’s absence will impair its ability to protect that interest; and (3) the Commission’s
10 interest is not adequately represented by the existing parties. Alternatively, the Commission
11 should be permitted to intervene pursuant to subdivision (d)(2) of section 387 because of its
12 direct and immediate interest in the action, and that its reasons for intervening outweigh any
13 opposition by the existing parties. Moreover, the Commission’s intervention request is timely,
14 will not delay the matters before the Court, nor enlarge the issues before the Court. Specifically,
15 the Commission’s direct and immediate interest is in obtaining clarity and relief regarding the
16 Railway’s contentions that its activities in the coastal zone are exempt from the Commission’s
17 and City’s authority, regulations, and enforcement under the Coastal Act and the City’s Local
18 Coastal Program.

19 2. The California Coastal Commission is a state agency created by Public Resources
20 Code section 30300 of the California Coastal Act of 1976. (“Coastal Act”) (Pub. Resources Code,
21 § 30000-30900.) The Commission has the authority and responsibility pursuant to Public
22 Resources Code section 30330 to take any action necessary to carry out the provisions of the
23 Coastal Act, including the filing of lawsuits. (See Pub. Resources Code, § 30334.)

24 3. The Commission is charged with administering the Coastal Act and its policies,
25 including a permitting system for any proposed development in the “coastal zone.” (Pub.
26 Resources Code, § 30600.) The Commission is the original permitting authority, but local
27 governments with territory within the coastal zone are required to develop Local Coastal
28 Programs (LCPs) to implement the Coastal Act. Once the Commission certifies the local

1 government's LCP, the local government reviews development applications and issues permits
2 for development in the coastal zone. (See Pub. Resources Code, §§ 30600, subd. (d), 30500, and
3 30519.) The Commission nonetheless remains authorized to take action to enforce any
4 requirements of a certified LCP and the applicable provisions of the Coastal Act, particularly
5 when the local government requests that the Commission do so. (See Pub. Resources Code, §
6 30810, subd. (a)(1).) The Commission further retains appellate authority over many coastal
7 development permit (CDP) decisions rendered by the City. (See City's LCP, § 17.92.040.)

8 4. The Commission has certified the City of Fort Bragg's LCP. Pursuant to the
9 Coastal Act and the City's LCP, "development" is broadly defined and includes the Railway's
10 recent replacement of a roundhouse (which remains ongoing) and storage shed within the coastal
11 zone of the City, as well as the Railway's recent lot line adjustment. (See section 30106 of the
12 Coastal Act and sections 17.71.045(B)(1) and 17.100.020(A) of the City's LCP; see also *La Fe,*
13 *Inc. v. Los Angeles County* (1999) 73 Cal.App.4th 231, 240 [“development,” as defined in
14 section 30106, includes lot line adjustments”].) These development activities, as well as other
15 activities undertaken by the Railway, and far more substantial activities the Railway is
16 threatening to undertake, all require a CDP from the City pursuant to the City's LCP and the
17 Coastal Act. (See Pub. Resources Code, §§ 30106, 30810.) The Railway disputes this
18 requirement and has not obtained CDPs for the replacement of the roundhouse or its other
19 development activities in the coastal zone of the City, and the Railway has indicated that it plans
20 to undertake much more extensive development on the coastal zone property that it recently
21 acquired, without stating that it will always seek a CDP or other authorization before doing so.
22 The Railway claims that the permitting requirements in the Coastal Act and the City's LCP for
23 these activities are preempted by state and federal law.

24 5. In July 2022, the City asked the Commission to assume primary responsibility for
25 enforcing the Railway's violations of the Coastal Act and LCP with respect to the Railway's
26 replacement of the roundhouse and other actions in the coastal zone. The Commission
27 subsequently sent the Railway a Notice of Violation letter, dated August 10, 2022, describing and
28 notifying the Railway of its violations. As discussed in the Notice of Violation letter, the

1 Commission disagrees with the Railway's alleged preemption from the CDP requirements of the
2 Coastal Act and the City's LCP.

3 6. Because the Railway's unpermitted land use activities threaten the "quality of the
4 coastal zone environment and its natural and artificial resources," its assertion that no coastal
5 development permits are required for any of its activities in the coastal zone is in direct conflict
6 with the Coastal Act, the City's LCP, and the mission and authority of the Commission. (Pub.
7 Resources Code, § 30001.5; see also City of Fort Bragg LCP, § 17.71.045(B)(1) [requiring a
8 coastal development permit for "any development in the coastal zone"].)

9 7. Pursuant to Public Resources Code section 30805, "[a]ny person may maintain an
10 action for the recovery of civil penalties provided for in Section 30820 or 30821.6." "Person" is
11 defined in Public Resources Code section 30111 and includes "any utility, and any federal, state,
12 local government, or special district or an agency thereof." As an agency of the state, the
13 Commission may properly maintain an action for the recovery of civil penalties under the Coastal
14 Act. As provided in Public Resources Code section 30820, subdivision (a)(1), "[c]ivil liability
15 may be imposed by the superior court . . . on any person who performs or undertakes
16 development that is in violation of [the Coastal Act] . . . in an amount that shall not exceed thirty
17 thousand dollars (\$30,000) and shall not be less than five hundred dollars (\$500)." Subdivision
18 (b) of that same section 30820 provides that "[a]ny person who performs or undertakes
19 development that is in violation of [the Coastal Act] . . ., when the person intentionally and
20 knowingly performs or undertakes the development in violation of [the Coastal Act] . . ., may, in
21 addition to any other penalties, be civilly liable in accordance with this subdivision." Such civil
22 liability "may be imposed by the superior court in accordance with this article for a violation as
23 specified in this subdivision in an amount which shall not be less than one thousand dollars
24 (\$1,000), nor more than fifteen thousand dollars (\$15,000), per day for each day in which the
25 violation persists." (*Id.*) Finally, Public Resources Code section 30822 specifically allows the
26 Commission to maintain an additional action for an award of exemplary damages "[w]hen a
27 person has intentionally and knowingly violated any provision of [the Coastal Act]," the amount
28 of which is to be determined by the court. (Pub. Resources Code, § 30822.)

1 Resources Code section 30820, subdivision (b) in an amount which is not less than one thousand
2 dollars (\$1,000) nor more than fifteen thousand dollars (\$15,000) per day for each day in which
3 the violation persisted and persists.

4 21. The Commission is informed and believes, and on that basis alleges, that the
5 Railway intentionally and knowingly violated the permit requirements of the Coastal Act.
6 Consequently, the Railway is liable to the Commission for exemplary damages pursuant to Public
7 Resources Code section 30822, which are necessary to deter further violations by the Railway.

8 22. Unless and until the Railway is enjoined and restrained by order of this Court, the
9 Railway will continue to undertake unpermitted development in the coastal zone. This
10 unrestrained development will continue to threaten the delicate coastal ecosystem and the
11 residents of the coastal zone.

12 23. The Commission has no adequate remedy at law for the injuries being suffered and
13 may be suffered as a result of the Railway's conduct.

14 24. The Commission is entitled to an injunction restraining and preventing the
15 Railway from proceeding with any actions in the coastal zone of the City that constitute
16 development under the Coastal Act and the City's LCP without a coastal development permit.

17 **PRAYER FOR RELIEF**

18 Wherefore, the Commission prays for judgment as follows:

19 On the First Cause of Action:

20 1. For a declaration that the Coastal Act and the City's LCP apply to the Railway's
21 actions in the coastal zone of the City that constitute development under the Coastal Act and the
22 City's LCP;

23 2. For a declaration that the application of the Coastal Act and the City's LCP to the
24 Railway's actions in the coastal zone of the City that constitute development under the Coastal
25 Act and the City's LCP are not preempted by any state or federal law, including, but not limited
26 to, Public Utilities Code sections 701 and 1759, subdivision (a); sections 10102 and 10501,
27 subdivision (b) of Title 49 of the United States Code; and clause 2 of Article VI of the United
28 States Constitution.

1 On the Second Cause of Action:

2 3. For civil penalties pursuant to Public Resources Code sections 30805 and 30820 in
3 an amount to be determined by the court for the Defendant's past and ongoing violations of the
4 Coastal Act;

5 4. For temporary, preliminary, and/or permanent injunctive relief requiring the
6 Railway to: (a) cease all actions taken by the Railway without a coastal development permit in the
7 coastal zone of the City that constitute development under the Coastal Act and the City's LCP;
8 (b) submit an application to the City and obtain a permit or other authorization under the City's
9 LCP before commencing or resuming any such development; and (c) comply with any other
10 applicable requirements in the Coastal Act and the LCP, including but not limited to mitigation of
11 the unauthorized development;

12 5. For exemplary damages pursuant to Public Resources Code section 30822, in an
13 amount to be determined by the court as necessary to deter further violations of the permit
14 requirements of the Coastal Act;

15 On All Causes of Action:


16 6. For all its costs of investigating and prosecuting this case, including expert fees,
17 reasonable attorney's fees, and costs as provided in Code of Civil Procedure section 1021.8; and

18 7. For the Court to award such other and further relief as it may deem necessary and
19 proper.

20
21 Dated: September 8, 2022

Respectfully submitted,

22 ROB BONTA
23 Attorney General of California
24 DAVID G. ALDERSON
25 Supervising Deputy Attorney General

26 
27 PATRICK TUCK
28 Deputy Attorney General
 Attorneys for Intervenor
 California Coastal Commission

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8 *Attorneys for Intervenor*
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***NO FEE REQUIRED PURSUANT
TO GOVERNMENT CODE
SECTION 6103***

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MENDOCINO

11
12
13 **CITY OF FORT BRAGG,**

Plaintiff,

14
15 **v.**

16 **MENDOCINO RAILWAY,**

17 Defendant,

18
19 **CALIFORNIA COASTAL COMMISSION,**

20 Intervenor.
21
22

Case No. 21CV00850

**DECLARATION OF JOSH LEVINE IN
SUPPORT OF CALIFORNIA COASTAL
COMMISSION’S MOTION TO
INTERVENE**

Date:

Time:

Dept:

Judge: The Honorable Clayton L.
Brennan

Trial Date:

Action Filed: October 28, 2021

23 **DECLARATION OF JOSH LEVINE**

24 I, Josh Levine, declare as follows:

25 1. I am the North Coast District Enforcement Analyst for the California Coastal
26 Commission (“Coastal Commission”). My duties as an Enforcement Analyst for the Coastal
27 Commission include review and investigation of complaints regarding unpermitted development
28

1 and other land use activities within the coastal zone and issuance of Notices of Violation and
2 other enforcement notices related to these unpermitted activities on behalf of the Coastal
3 Commission.

4 2. On July 12, 2022, I participated in a phone call with staff of the City of Fort Bragg
5 (“City”) wherein the City staff requested that the Coastal Commission assume primary
6 enforcement responsibility related to Plaintiff Mendocino Railway’s unpermitted development
7 activities in the coastal zone of the City of Fort Bragg.

8 3. On August 10, 2022, I prepared, signed, and mailed a copy of a Notice of Violation
9 letter (File Number V-1-22-0070) to Christopher G. Hart at Mendocino Railway, on behalf of the
10 Coastal Commission. A true and correct copy of that Notice of Violation letter is attached hereto
11 as Exhibit A.

12 4. I have confirmed that four of the parcels cited in the Notice of Violation letter (APNs
13 008-053-29, 008-054-16, 008-053-34, and 008-151-23) are owned by Mendocino Railway and
14 are located within the coastal zone, pursuant to section 30103 of the California Coastal Act of
15 1976. I am also informed and believe that the other parcel referenced in the Notice of Violation
16 letter (APN 008-151-26) was recently acquired by Mendocino Railway from Georgia-Pacific
17 LLC, and is also located in the coastal zone.

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct.

20 Executed this 6th day of September, 2022, in Arcata, California.

21
22 

23 Josh Levine
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CALIFORNIA COASTAL COMMISSION

1385 8th Street, Suite 130
 Arcata, CA 95521
 FAX (707) 826-8960
 TDD (707) 826-8950



August 10, 2022

Christopher G. Hart
 Mendocino Railway
 100 West Laurel St
 Fort Bragg, CA 95437

Violation File Number: V-1-22-0070 - Mendocino Railway Roundhouse
 Property Location: 100 West Laurel Street, Fort Bragg, CA 95437;
 Mendocino County Assessor's Parcel Numbers
 ("APNs") 008-053-29, 008-054-16, 008-020-18, 008-
 053-34, 008-151-26, and 008-151-23.

Violation¹ description: Unpermitted development, that includes, but is not
 limited to, the replacement of the "Roundhouse", the
 replacement of a structure located off of West Alder
 Street with an added concrete patio, the replacement
 of a storage shed allegedly used to store rail bikes, a
 lot line adjustment, and restricting public parking.

Dear Mr. Hart:

The California Coastal Act² was enacted by the State Legislature in 1976 to provide long-term protection of California's coastline through implementation of a comprehensive planning and regulatory program designed to manage conservation and development of coastal resources. The California Coastal Commission ("Commission") is the state agency created by, and charged with administering, the Coastal Act of 1976. In making its permit and land use planning decisions, the Commission carries out Coastal Act policies, which, amongst other goals, seek to protect and restore sensitive habitats; protect natural landforms; protect scenic landscapes and views of the sea;

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the subject property that is in violation of the Coastal Act and/or the City of Fort Bragg LCP that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the subject property as indicative of Commission acceptance of, or acquiescence in, any such development. Please further note that "violation" as used in this letter refers to alleged violations of the Coastal Act and/or the City of Fort Bragg LCP, as determined by Commission staff.

² The Coastal Act is codified in sections 30000 to 30900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

August 10, 2022

Page 2 of 5

protect against loss of life and property from coastal hazards; protect and enhance public recreation opportunities; and, provide maximum public access to the sea.

The Coastal Act establishes a permitting system for proposed development, as that term is defined in the act (see below), in the “Coastal Zone.” The Commission is the original permitting authority, but local governments with territory within the Coastal Zone are required to develop Local Coastal Programs (“LCP”s) to implement the Act, and once the Commission certifies a local government’s LCP, permitting and enforcement authority in the area covered by that LCP is generally delegated to that local government. Although the property at issue here is within the City of Fort Bragg’s LCP jurisdiction, the Commission can assume primary responsibility for enforcement of any Coastal Act and LCP violations at issue in this case pursuant to Section 30810(a) of the Coastal Act, which provides that the Commission may issue an order to enforce the requirements of a certified LCP in the event that the local government, in this case the City of Fort Bragg (“the City”), requests the Commission to assist with or assume primary responsibility for issuing such order. During a July 12, 2022, phone call with City staff, Commission staff were asked to assume primary enforcement responsibility for this case.

Commission staff was notified on July 7, 2022, and on August 4, 2022, of unpermitted development occurring on APNs 008-053-29, 008-054-16, 008-020-18, 008-053-34, 008-151-26, and 008-151-23 (“subject property”), including, the replacement of the entire roof and the windows/walls of the structure known as the “Roundhouse,” which constitutes the replacement of the entire structure. The potential impacts of the unpermitted development include the disturbance and removal of toxic construction materials that may have been used in the Roundhouse’s original structure. These materials have the potential - especially during their disturbance/resuspension, deconstruction, temporary storage, removal, and disposal - to impact hydrologic and biologic coastal resources.

Commission staff became aware of further unpermitted development during our investigation of the Roundhouse replacement. Unpermitted development including, but not limited to, the replacement of a structure off of West Alder Street, on APN 008-151-26, including completely new interior, wiring, plumbing, flooring, roof, windows, fencing, and a concrete slab partially enclosed patio, imposing new restrictions on parking on the subject property that has historically been available to the public, and the replacement of a shed on APN 008-054-16, which reportedly is being used to store rail bikes. Additionally, the Lot Line Adjustment (“LLA”) that Commission staff first addressed in our December 21, 2018 letter to the City, which letter was then sent to you as an attachment to Commission staff’s June 11, 2019 letter to Anthony LaRocca as counsel for Mendocino Railway (“MR”), remains unpermitted development.

Section 30600(a) of the Coastal Act and Section 17.71.045(B) of the City of Fort Bragg’s certified LCP require that any development occurring within the Coastal Zone

August 10, 2022

Page 3 of 5

must first be authorized by, and must be undertaken in accordance with, an approved coastal development permit (“CDP”).

Section 30106 of the Coastal Act and Section 17.71.045(B) of the City’s certified LCP defines “development” as:

“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of materials; change in the density or intensity of use of land, ... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z’berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

Commission staff have sent several letters to MR, including letters dated June 11, 2019, November 2, 2020, and February 3, 2021. In our November 2, 2020, letter we stated that:

“We also remain unconvinced that Mendocino Railway’s (“MR”) rail holdings are necessarily still appropriately considered to be a part of the interstate rail network for purposes of the ICCTA, and thus believe that the proposed development plans at the former Georgia-Pacific Mill site may be outside the jurisdiction of the Surface Transportation Board (“STB”) pursuant to 49 U.S.C. § 10501(a). Finally, even if MR’s holdings were determined to be subject to STB jurisdiction, we believe that certain portions of the proposed development would also be subject to federal consistency review by the Commission.”³

Furthermore, as we have also mentioned elsewhere, even if MR’s rail operations are still subject to STB’s jurisdiction, that jurisdiction does not extend to non-rail-related activities merely because they are conducted by an organization that also operates rail lines. Thus, any such activities would remain subject to the Coastal Act’s permitting requirements, in addition to potentially being subject to the Commission’s federal consistency review authority.

We request a full description of all development that has occurred on the subject property without a CDP. Please include all staging areas and construction debris

³ Jessica Reed letter to Mendocino Railway dated November 2, 2020 p.1.

Violation File No. V-1-22-0070 – Mendocino Railway Roundhouse

August 10, 2022

Page 4 of 5

removal plans in your description. Depending on the extent, type and nature of the unpermitted development that has occurred, resolution may require that you obtain authorization to remove, and then do remove, the unpermitted development or that you obtain authorization of the development “after-the-fact,” as well as compliance with other provisions of the Coastal Act, including potential requirements for mitigation and the payment of penalties. **In order to ensure no further harm to coastal resources and to avoid the potential for continuing accrual of penalties, please cease all unpermitted development immediately and respond by August 26, 2022.**

While we are hopeful that we can resolve this matter amicably, please be advised that the Coastal Act has a number of potential remedies to address violations of the Coastal Act including the following:

Sections 30803 and 30805 authorize the Commission to initiate litigation to seek injunctive relief and an award of civil fines in response to any violation of the Coastal Act. Section 30820(a)(1) provides that any person who undertakes development in violation of the Coastal Act may be subject to a penalty amount that shall not exceed \$30,000 and shall not be less than \$500 per violation. Section 30820(b) states that, in addition to any other penalties, any person who “knowingly and intentionally” performs or undertakes any development in violation of the Coastal Act can be subject to a civil penalty of not less than \$1,000 nor more than \$15,000 per violation for each day in which each violation persists.

Sections 30821 and 30821.3 authorize the Commission to impose administrative civil penalties in an amount of up to \$11,250 per violation of the Coastal Act, for each day that each violation persists. The administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.

Finally, Section 30812 authorizes the Executive Director to record a Notice of Violation against any property determined to have been developed in violation of the Coastal Act. If the Executive Director chooses to pursue that course, you will first be given notice of the Executive Director's intent to record such a notice, and you will have the opportunity to object and to provide evidence to the Commission at a public hearing as to why such a notice of violation should not be recorded. If a notice of violation is ultimately recorded against your property, it will serve as notice of the violation to all successors in interest in that property.

I look forward to hearing from you by **Friday, August 26, 2022**. If you have any additional questions or concerns, please contact me at (707) 826-8950, by email at joshua.levine@coastal.ca.gov, or by writing to the address in the letterhead above.

Violation File No. V-1-22-0070- Mendocino Rail Roundhouse

August 10, 2022

Page 5 of 5

Sincerely,

A handwritten signature in black ink, appearing to read "JL", written over a horizontal line.

Josh Levine

North Coast District Enforcement Analyst

Cc: Lisa Haage, Chief of Enforcement
Aaron McLendon, Deputy Chief of Enforcement
Alex Helperin, Assistant General Counsel
Melissa Kraemer, North Coast District Manager
Sarah McCormick, City of Fort Bragg, Assistant to the City Manager

**DECLARATION OF ELECTRONIC SERVICE VIA
ONE LEGAL**

Case Name: *City of Fort Bragg v. Mendocino Railway*
No.: **21CV00850**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, P. O. Box 70550, Oakland, California 94612-0550.

On **September 8, 2022**, I electronically served the attached

- **CALIFORNIA COASTAL COMMISSION'S NOTICE OF MOTION AND MOTION FOR LEAVE OF COURT TO INTERVENE**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CALIFORNIA COASTAL COMMISSION'S MOTION TO INTERVENE**
- **[PROPOSED] COMPLAINT IN INTERVENTION**
- **DECLARATION OF JOSH LEVINE IN SUPPORT OF CALIFORNIA COASTAL COMMISSION'S MOTION TO INTERVENE (with Exhibit A – Notice of Violation to his Declaration)**

BY ELECTRONIC TRANSMISSION—ONE 00LEGAL, addressed as follows:

KRISTA MACNEVIN JEE JONES MAYER

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When electronically filing the above entitled document with One Legal, I simultaneously opted for electronic service of the same on Ms. Jee and Mr. Beard at the email above.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **September 8, 2022**, at Oakland, California.

Najaree Hayfron

Declarant



Signature