Paul J. Beard II (SBN: 210563)
FISHERBROYLES LLP
453 S. Spring Street, Suite 400-1458
Los Angeles, CA 90013
Telephone: (818) 216-3988
Email: paul.beard@fisherbroyles.com

Attorneys for Defendant
MENDOCINO RAILWAY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation

Plaintiff,

v.

MENDOCINO RAILWAY and DOES 1-10, inclusive,

Defendants.

CALIFORNIA COASTAL COMMISSION,

Intervenor.

Case No.: 21CV00850

[Assigned to the Hon. Clayton Brennan]

DECLARATION OF PAUL BEARD IN SUPPORT OF CONSOLIDATED REPLY IN SUPPORT OF STAY

Hearing Date: October 19, 2023
Hearing Time: 2:00 p.m.

Complaint Filed: October 28, 2021
Trial Date: None Set

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DECLARATION

I, Paul Beard II, declare and state as follows:

1. I am counsel to Defendant Mendocino Railway in this case. I have personal knowledge of the facts stated herein. If called upon to testify, I could and would testify thereto.

2. Attached as Exhibit 1 is a true and correct copy of a 2020 letter I sent to the California Coastal Commission.

3. Attached as Exhibit 2 is a true and correct copy of the January 21, 1999 Decision of the California Public Utilities Commission ("PUC").

4. Attached as Exhibit 3 is a true and correct copy of the May 21, 1998 Decision of the PUC.

5. Attached as Exhibit 4 is a true and correct copy of the August 6, 1998 Decision of the PUC.

6. Attached as Exhibit 5 is a true and correct copy of the Motion to Dismiss of California Coastal Commission, filed in the *Ainsworth* Action.

7. Attached as Exhibit 6 is a true and correct copy of the Motion to Dismiss of the City of Fort Bragg, filed in the *Ainsworth* Action.

8. Attached as Exhibit 7 is a true and correct copy of the federal district court's order of dismissal in the *Ainsworth* Action.

9. Attached as Exhibit 8 is a true and correct copy of the Opening Brief filed by Mendocino Railway in the Ninth Circuit Court of Appeals in the *Ainsworth* Action.

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

DATED: October 12, 2023 /s/ Paul Beard II

Attorneys for Defendant MENDOCINO RAILWAY

EXHIBIT 1

FisherBroyles

Paul Beard II
Partner
paul.beard@@fisherbroyles.com
Direct: 818-216-3988
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
www.FisherBroyles.com

April 9, 2020

VIA EMAIL

Alex Helperin (Alex.Helperin@coastal.ca.gov)
Jessica Reed (Jessica.Reed@coastal.ca.gov)
Cristin Kenyon (Cristin.Kenyon@coastal.ca.gov)
Larry Simon (Larry.Simon@coastal.ca.gov)
California Coastal Commission
45 Fremont St. Suite 1900
San Francisco, CA 94105

Re: Mendocino Railway Activities at the Former Mill Site (Fort Bragg)

Dear Alex, Jessica, Cristin, and Larry,

During our December 19, 2019 meeting, you asked Mendocino Railway to provide a more detailed description of the history of its railroad line (the California Western Railroad ("CWR")), the operations of the U.S. Surface Transportation Board ("STB"), the laws concerning the federal preemption of rail-related activities, and Mendocino Railway's plans for the portion of the former Georgia Pacific property (which previously constituted part of the CWR's rail operations) that Mendocino Railway purchased in order to return its railroad operations to more historic levels. This letter provides that information.

As part of the commitment of the California Coastal Commission and Mendocino Railway to maintain open and active communications, we hope that the Coastal Commission will provide us with a written response to this letter, letting us know its thoughts and views as to the issues presented herein.

I.
The California Western Railroad: General Background

The CWR was originally built in 1885 to haul felled redwood trees from the surrounding forest to a lumber mill on the coast of what is now known as the City of Fort Bragg. In addition to hauling lumber to the mill and finished products from the mill, the CWR also delivered mail on behalf of the U.S. Postal Service and provided passenger service between Fort Bragg and the CWR's eastern terminus (ultimately Willits), to and from which passengers arrived and departed via coach. The mill ultimately closed in 2002, ending the need for the CWR to haul timber to

the mill and finished products from the mill. Although it continued to haul some freight, the CWR became primarily a passenger train.

The CWR ultimately fell on hard times and declared bankruptcy in 2003. Following fierce bidding from a number of interested parties who recognized the value of the CWR, Mendocino Railway[1] purchased the railroad out of bankruptcy in 2004, with the intent of reviving the railroad's passenger and freight operations. The demand for full restoration of freight service on the CWR line is evidenced, in part, by shippers who have provided letters of interest to Mendocino Railway. *See* Attachment A (Letters of Interest). Because the sale involved a Class III common-carrier railroad (a railroad federally authorized as part of the interstate rail system), the sale was overseen by the STB. The STB authorized Mendocino Railway's acquisition of the CWR pursuant to 49 C.F.R. § 1150.31. *See* 69 Fed. Reg. 18999 (April 9, 2004) (Notice of Acquisition Exemption).[2]

In addition to being a federally recognized railroad, CWR also is classified by the California Public Utilities Commission as a Class III railroad regulated as a public utility.[3]

The CWR's line runs 40 miles, from its main station in Fort Bragg to its eastern depot in Willits ("Willits Depot"). Approximately 77 acres of the land adjacent to the CWR's main station in Fort Bragg—***previously used for more than a century to conduct and support freight and passenger rail operations***—was recently reacquired for rail operations by Mendocino Railway from Georgia-Pacific LLC ("GP"). That land purchase allows Mendocino Railway to restore its Fort Bragg railroad facilities to their former glory. Maps of the CWR's line and of the CWR's railroad tracks on the former GP property are depicted below at Figures 1 and 6, respectively.

The CWR connects to the Northwestern Pacific Railroad ("NWP"). In the map below (Figure 1), the dashed line running in the north-south direction along U.S. Highway 101 depicts a segment of the NWP. The NWP connects the CWR to the rest of the national rail system.[4]

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[1] Mendocino Railway is a California corporation formed for the purpose of acquiring and operating the CWR. It is a wholly owned subsidiary of Sierra Railroad Company.

[2] Available at https://www.federalregister.gov/documents/2004/04/09/04-8082/mendocino-railway-acquisition-exemption-assets-of-the-california-western-railroad.

[3] *See* https://www.cpuc.ca.gov/General.aspx?id=973 (list of "Regulated California Railroads").

[4] The entire length of the NWP runs from Schellville (Sonoma County) to Eureka. *See* The NCRA's Final EIR, Introduction, at http://www.northcoastrailroad.org/Acrobat/FEIR/docs/2_Section_1-Introduction.pdf (describing the NRCA line).

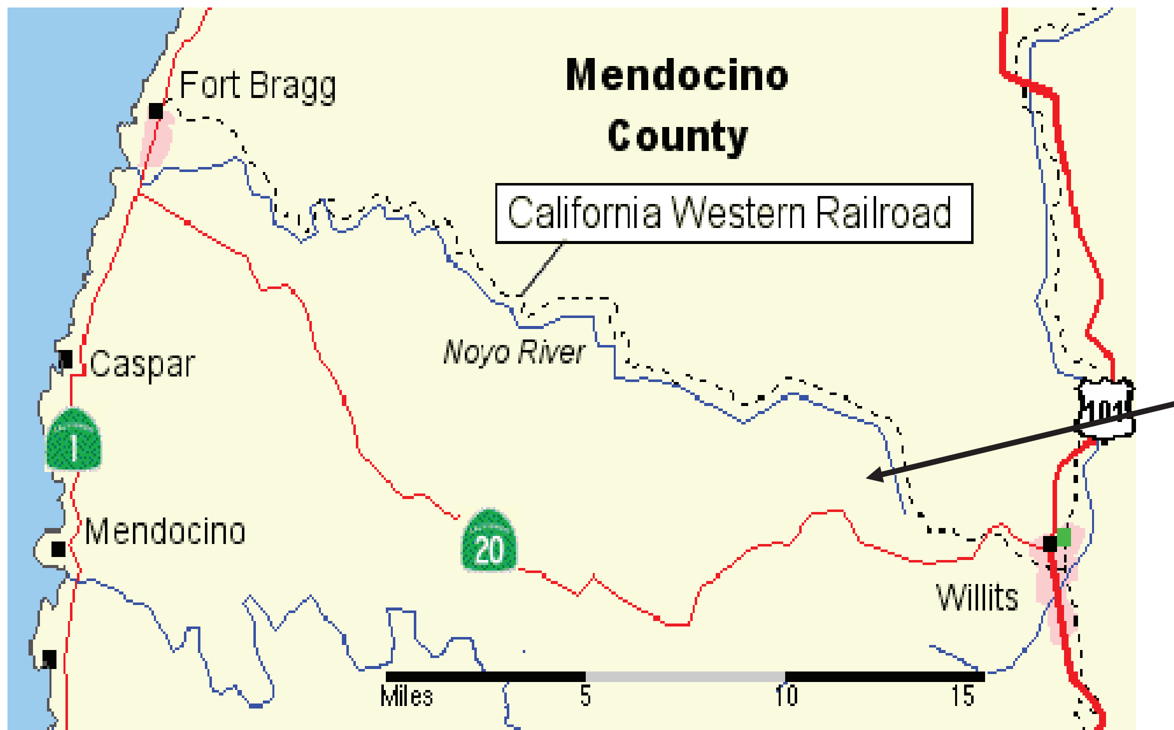

FIGURE 1

Figure 2, below, shows the entire NWP line,[5] which is dissected by the CWR line. The northern portion of the line lies north of the Willits Depot. The southern portion of the line lies south of the Willits Depot.

[5] http://www.northcoastrailroad.org/map.html.

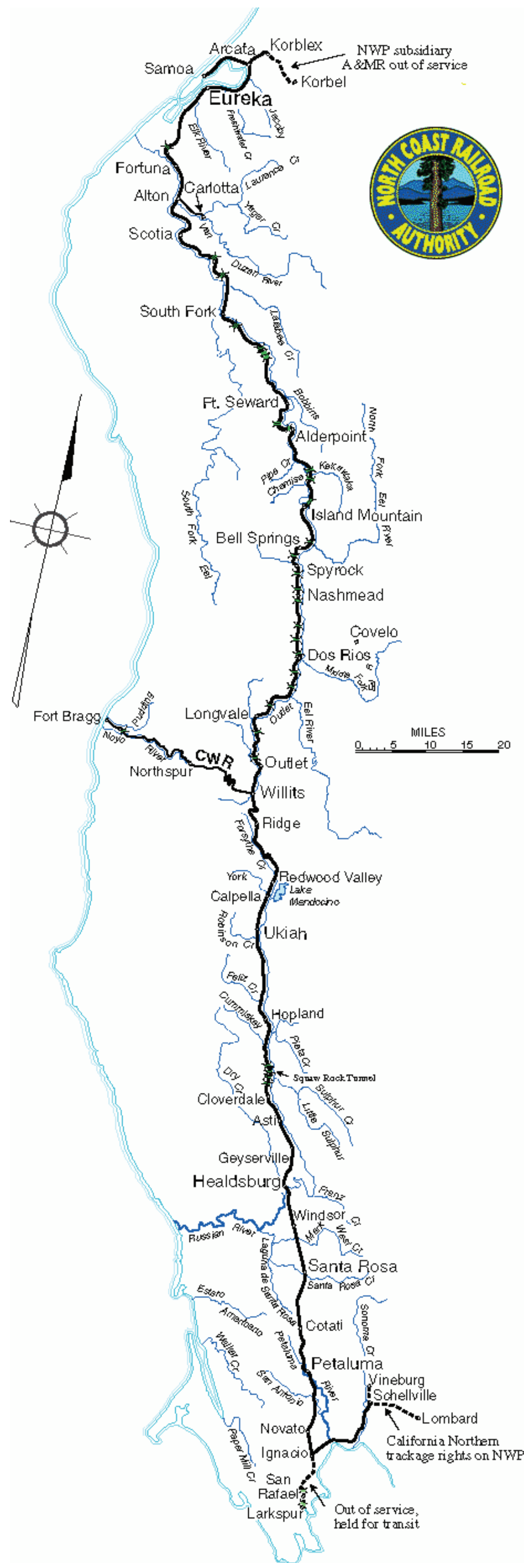

FIGURE 2

The NWP is currently owned by a public agency (the North Coast Railroad Authority) and is active across a 62-mile stretch between Schellville and Windsor, shipping freight and running commuter trains that are operated by the Sonoma-Marin Area Rail Transit District ("SMART"). The section of the NWP that connects the CWR to the interstate rail network has been temporarily embargoed and is, at present, out of service pending ongoing track repairs.[6] But that embargoed section of the NWP line has not been abandoned, and the expectation is that service will be restored. In fact, state legislation has been enacted to implement that very goal.

In 2002, AB 2224 created SMART within the Counties of Sonoma and Marin. Gov't Code §§ 105000 *et seq.* (the "Sonoma-Marin Area Rail Transit District Act"). Among other things, the law required SMART to "work with the North Coast Railroad Authority, the Federal Railroad Administration, and any of its successor agencies, to achieve safe, efficient, and compatible operations of both passenger rail and freight service along the rail line in Sonoma and Marin Counties." Gov. Code § 105104. Pursuant to that law, SMART developed a passenger rail service from Larkspur to Sonoma County Airport (with immediate plans to expand that service to Cloverdale).[7] Then, in 2018, SB 1029 directed various state agencies to assess plans for the dissolution of the North Coast Railroad Authority's assets and liabilities. Among other things, the law requires the California State Transportation Agency to assess "options for transferring the southern portion of the rail corridor [i.e., from Willits Depot, south] to the Sonoma-Marin Area Rail Transit District" for operating "freight rail." Gov. Code § 13978.9(a)(5). The law makes clear that "[i]t is the intent of the Legislature that information and recommendations regarding the potential transfer of the southern portion of the rail corridor to the Sonoma-Marin Area Rail Transit District be provided as expeditiously as possible …." *Id.* § 13978.9(c). Thus, state law makes the restoration of freight service on the southern portion of the North Coast Rail Authority's line a priority.

Mendocino Railway's significant work on and plans for the CWR, which are the subject of this letter and described below in greater detail, are, and always have been, premised on this governmentally required reopening of the NWP. In the meantime, as STB's map below shows,[8] the NWP remains a federally recognized part of the "National Rail Network."

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[6] http://www.northcoastrailroad.org/Media/2017/2016-10-05_Decision_45502.pdf (describing NCRA).

[7] https://sonomamarintrain.org/

[8] https://stb.maps.arcgis.com/home/webmap/viewer.html?webmap=96ec03e4fc8546bd8a864e39a2c3fc41. Contrast the NWP's appearance on the STB's national rail system map, with the STB's map of abandoned and railbanked lines, which does not include the NWP:

Home National Rail Network Map

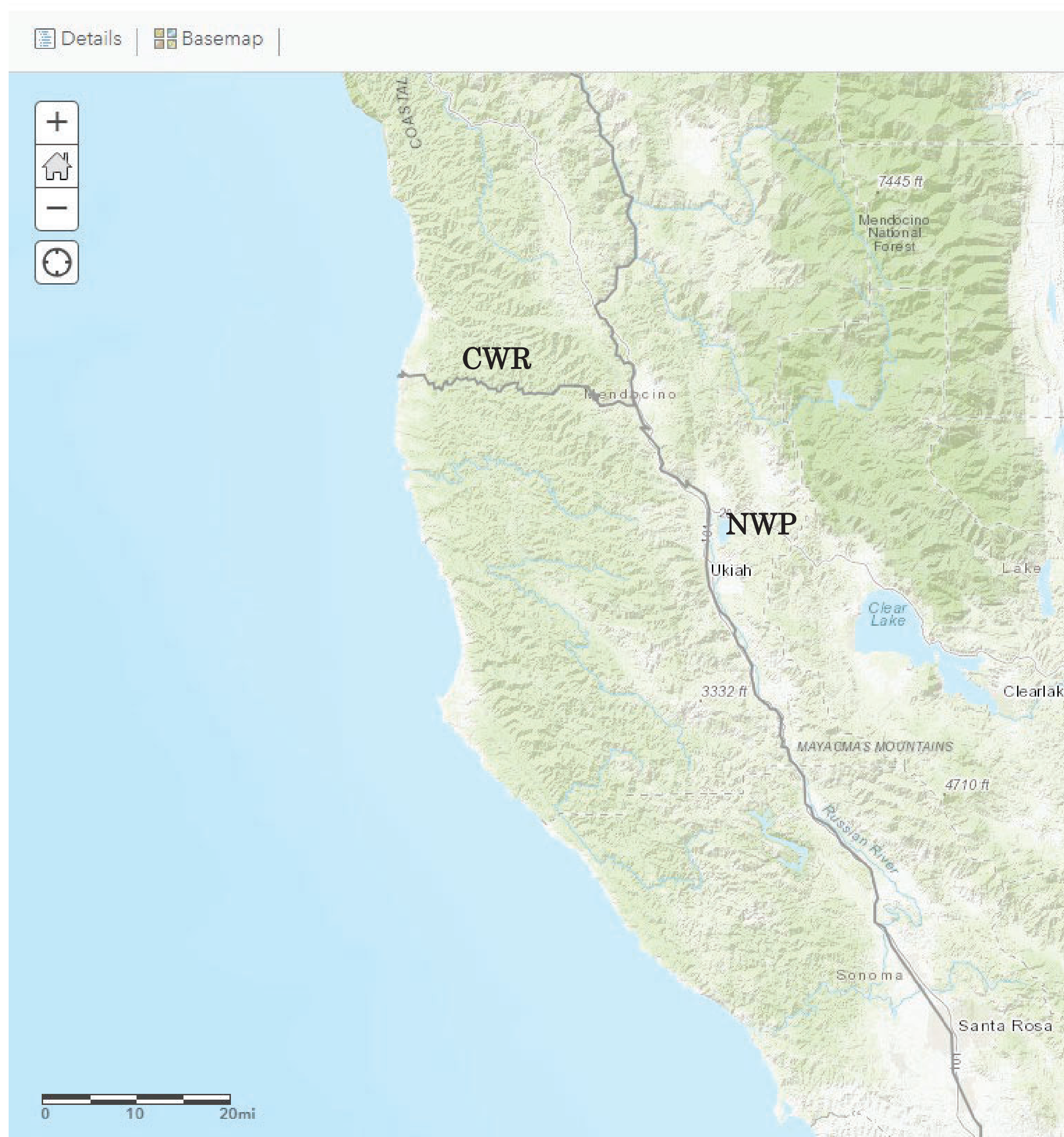

FIGURE 3

In addition to its connection via NWP, the CWR also connects via Amtrak, which runs a thruway service at Mendocino Railway's Willits Depot, connecting the CWR to Amtrak's national railway system.[9] The image below is taken from

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https://stb.maps.arcgis.com/home/webmap/viewer.html?webmap=59c5662600854756a7e6f18bca1a0f44

[9] https://www.amtrak.com/stations/wts (Amtrak's Willits depot site).

Amtrak's Network map.[10] The green line represents Amtrak's Thruway Connecting Services, which, as shown in the image, stops and provides service at the Willits Depot. The red line represents Amtrak's train routes.

FIGURE 4

While Mendocino Railway has been able to continue—and even expand—the CWR's passenger operations and some freight shipping, two events have temporarily stalled its ability to further revive freight operations to their former capacity, particularly through the interstate rail system: (1) the 2001 embargo of the NWP segment described above, and (2) the 2015 collapse of Tunnel No. 1, just east of Fort Bragg, which effectively cut off the CWR's main station in the Fort Bragg from the rest of its rail line. The diagram below indicates where Tunnel No. 1 is located along the CWR's rail line:

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10 https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/Maps/Amtrak-System-Map-1018.pdf.

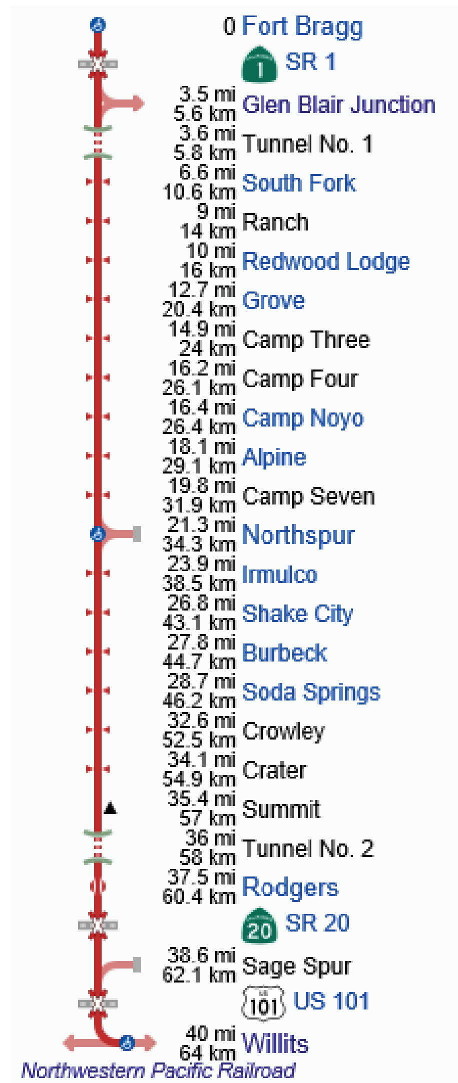

FIGURE 5

Before those two events occurred, Amtrak passengers arriving at Mendocino Railway's Willits Depot could take the CWR's line west to Fort Bragg and those arriving from Fort Bragg could embark on Amtrak. Despite the occurrence of the two events described above, Mendocino Railway never abandoned any part of the CWR. To the contrary, Mendocino Railway took and continues to take concrete steps to improve the CWR's line so that Tunnel No. 1 can be re-opened and full service can be restored with both the NWP and Amtrak.

For example, Mendocino Railway immediately set about to repair the collapsed tunnel by hiring a contractor to do so. The company expected the tunnel to be repaired within a couple of months. But the contractor negligently brought down the hillside, forcing a halt to the repair work. Mendocino Railway has since

that time been completing a $1 million hillside stabilization project needed to restart work on the tunnel.

Other efforts include Mendocino Railway's 2019 acquisition of 77 acres of former railroad property from GP, as discussed above, to allow Mendocino Railway to restore its Fort Bragg railroad facilities and more of its former freight and passenger traffic. In close collaboration with the City and community of Fort Bragg, Mendocino Railway already has developed plans for implementing its strategic vision for the mill site. The development of Mendocino Railway's railroad has been a priority for the City of Fort Bragg, which last year applied for a BUILD[11] grant from the U.S. Department of Transportation ("DOT") to generate public funding, including for the repair and reopening of Tunnel No. 1.[12] The proposal was on the short-list of recommended projects (among around 800 proposals), but the City did not receive the grant. The City and Mendocino Railway remain optimistic about obtaining a BUILD grant in the near future.

II.
State and Local Environmental Review of CWR-Related Work on the Former Mill Site Is Preempted

A. Background Principles

The Interstate Commerce Commission Termination Act ("ICCTA") was passed "with the purpose of expanding federal jurisdiction and preemption of railroad regulation." *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). To that end, the STB not only has jurisdiction over interstate rail carriers, but also over intrastate rail carriers that are "part of the interstate rail network." 49 U.S.C. § 10501(a)(1)-(2). "Whether an intrastate passenger rail service is part of the interstate rail network is a fact-specific determination based on the totality of circumstances." *Texas Central R.R. & Infrastructure, Inc. & Texas Central R.R., LLC—Petition for Exemption*, FD 36025, at 9 (STB served July 18, 2016). "[S]everal factors" are relevant, "such as whether the proposed service shares stations or has a through ticketing arrangement with Amtrak or another interstate passenger rail carrier, but no one factor is controlling." *Id.*

The mere nonuse or nonoperation of a rail line does not remove that line from the interstate rail network. *See, e.g.*, *Joseph R. Fox—Petition for Declaratory*

[11] BUILD stands for "Better Utilizing Investments to Leverage Development."
[12] A very small part of the BUILD grant application was for the restoration of the CWR's existing engine house and construction of an extension to the south of the engine house in order to cover existing passenger coaches and freight cars that currently sit on the open tracks in the salt air.

Order, FD 35161 (STB served May 18, 2009) (holding that, absent evidence of an "intent to take [a] track segment out of the national rail system," mere nonoperation of a track—including "removing the switch," which "can be easily replaced"—did not "sever [the line] from the national rail network"). The ***only*** way to lawfully remove a rail line from the interstate rail network is through a formal application process before the STB. *See* 49 U.S.C. § 10903(a) ("An abandonment or discontinuance may be carried out only as authorized under this chapter [49 USCS §§ 10901 et seq.]."")." Specifically, "[a] rail carrier providing transportation subject to the jurisdiction of the Board . . . who intends to—(A) abandon any part of its railroad lines; or (B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board." *Id.* The STB will not authorize abandonment or discontinuance—even of a line that is not being used or operated—unless the STB can find that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." *See* 49 U.S.C. § 10903(d). In making that finding, the Board "shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." *Id.* If the STB cannot conclude that "public convenience and necessity" justify abandonment or discontinuance, "it shall deny the application." *Id.* § 10903(e)(2).

The STB has "exclusive" jurisdiction over (1) "transportation by rail carriers" and (2) "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). The ICCTA defines "transportation" broadly to include "(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." *Id.* § 10102(9); *see also Or. Coast Scenic R.R.*, 841 F.3d at 1073.

The STB's exclusive jurisdiction over a railroad's project means that state and local environmental permitting and preclearance regulation of that project are broadly preempted. U.S. Const. art. VI, cl. 2 (Supreme Clause); 49 U.S.C. § 10501(b); *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (The ICCTA's preemptive scope is "broad."); *Friends of Eel River v. North Coast R.R.*, 399 P.2d 37, 60 (Cal. 2017) (holding that "state environmental permitting or preclearance regulation that would have the effect of halting a private railroad project pending environmental compliance would be categorically preempted"); *North San Diego County Transit Dev. Bd.—Petition for Declaratory Order*, 2002 WL 1924265 (STB 2002) (holding that the Coastal Act was preempted by ICCTA as applied to rail projects).

It is important to observe that the STB's jurisdiction over a railroad's project does ***not*** mean that that STB must first issue a permit, license, or other authorization before the railroad can undertake that project. The STB's jurisdiction and its licensing authority are two separate issues. The STB reviews and approves only certain rail-related activities over which it has jurisdiction. *See* 49 U.S.C. § 10901, et seq. ("Licensing") (discussing circumstances under which the STB reviews and approves plans to construct, operate, acquire, abandon, or discontinue railroad lines).

For instance, the STB has the authority to license a railroad's proposal to "construct an extension to any of its railroad lines" or to "construct an additional railroad line." 49 U.S.C. § 10901. But even as to that class of projects, there is an exception that provides in relevant part: "The Board does not have authority under this chapter [i.e., "Chapter 109—***Licensing***"] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks." *Id.* § 10906 (emphasis added). The "authority" referred to in section 10906 is *licensing* authority—i.e., the STB's power to require pre-clearance of an activity before it is undertaken—and does not concern the STB's *jurisdiction* over such activity. The STB may have jurisdiction over an activity, so that state and local governments cannot regulate it, while at the same time lack the authority to require a license, permit or other approval for that activity. For exempted projects like those under section 10906, "***all*** regulation"—whether by the STB, or by state and local agencies—is "preclude[d]." *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (Congress intended to occupy the field and preempt state jurisdiction over excepted track, even though Congress allowed rail carriers to construct, operate, and abandon such track without STB approval) (emphasis in original); *see also Cities of Auburn and Kent*, STB Finance Docket No. 33200 (1997) ("When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management.").

To reiterate: It is the STB's jurisdiction over a railroad project—not the STB's authority to license—that preempts state and local environmental regulation. The STB and the courts have stated that "[f]ederal preemption applies without regard to whether or not the STB actively regulates the railroad operations or activity involved." *Wichita Terminal Ass'n, BNSF Railway Co. & Union Pacific R.R. Co.—Pet. For Declaratory Order*, FD 35765, at 6 (STB served June 23, 2015); *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068-69 (11th Cir. 2010) (holding that state law claims were preempted even though the STB does not actively regulate—by pre-clearance review and approval—work on a side track).

B. The CWR Is Undisputedly a Part of the Interstate Rail Network

The CWR is a Class III, common-carrier intrastate railroad, whose line runs from Fort Bragg to Willits. While it is an ***intra***state line, the CWR is part of the interstate rail network. That is evidenced by the STB's jurisdiction over and approval of the 2004 sale of the CWR to Mendocino Railway, which approval was required by order of the United States Bankruptcy Court for the North District of California. *See* Attachment B (STB approval and bankruptcy court order). Among other "interstate rail" attributes, the CWR shares its Willits Depot with both Amtrak and the NWP—two well-established, interstate rail-service providers.

Further, the CWR historically carried passengers and freight to and from the interstate rail networks of both the NWP and Amtrak before NWP's line was temporarily embargoed and Mendocino Railway's Tunnel No. 1 collapsed. For example, in the 1990s, the NWP operated "The Redwood Adventurer" train that ran to and from Willits Depot, where passengers would connect to and from the CWR line. While the NWP section connecting to the CWR is currently out of service, the NWP's line has never been abandoned and service is expected to be restored. Indeed, Mendocino Railway's substantial investments to facilitate the repair of its collapsed tunnel and to improve its line are premised on the fact that the CWR's access to the interstate rail network will be fully restored. *California High-Speed Rail Auth'y—Construction Exemption*, FD 35724, at 12 n.59 (STB served June 13, 2013) (rejecting calls to focus exclusively on the specific rail project at issue, without reference to whether and the extent to which it will connect to the national rail network). But "even if [Mendocino Railway's] work did not result in full reconnection of the track, the repairs [and other improvements to the CWR's line] would still be considered 'part of the interstate rail network,' because they involve track that is still federally authorized as part of the interstate rail system." *Or. Coast Scenic R.R.*, 841 F.3d at 1075; *see also City of Creede, Co.—Petition for Declaratory Order*, STB Finance Docket No. 34376 (STB served May 3, 2005) (concluding that the STB had jurisdiction over a project to rehabilitate a depot serving a rail line that had not been in service for years but was still federally authorized).

Under the ICCTA, as well as relevant case law and STB decisions, the CWR easily qualifies as an intrastate rail line that is part and parcel of the interstate rail network. *See, e.g., California High-Speed Rail*, *supra,* at 12 (finding STB jurisdiction over wholly intrastate rail line, in part because of its physical connection to Amtrak's Thruway Bus connection service); *cf. Texas Central R.R.*, *supra* (finding no STB jurisdiction over rail line, because, unlike with the CWR line, it was "undisputed that the Line would provide only intrastate passenger service between Dallas and Houston," and because it would not "directly connect" with Amtrak or any other interstate rail service); *All Aboard Florida-Operations LLC and All Aboard Florida-Stations—Construction and Operation Exemption*,

FD 35680 (STB served Dec. 21, 2012) (finding no STB jurisdiction over an intrastate rail line, where it was "undisputed" (unlike here) that "the proposed Line is to be used solely as an intrastate passenger service," with no connection "with Amtrak or any other interstate passenger rail service provider").

C. Mendocino Railway's Rail-Related Activities Are Subject to the STB's Exclusive Jurisdiction

As discussed in our December 19 meeting, we agree that nonexempt[13] development in the coastal zone that has no relationship to railroad transportation may trigger CDP regulation. But the vast majority of the activities that Mendocino Railway has pursued or is pursuing lie *outside* the coastal zone and therefore are beyond the reach of CDP regulation.[14] As for those activities that may occur *inside* the coastal zone, all of Mendocino Railway's currently-planned activities are directly related to restoring the CWR to full operational capacity, with respect to both passenger and freight travel in the interstate rail network. As such, and for the reasons described below, the ICCTA preempts those activities from state and local environmental pre-clearance review and permitting. *Friends of Eel River*, 399 P.2d at 60. While Mendocino Railway may, at some future date, reach agreement with the City of Fort Bragg as to non-railroad related uses for some parts of its property, no such agreement yet exists. If and when agreement is reached on a plan for such non-railroad uses, Mendocino Railway commits to ensuring that the Coastal Commission is appropriately informed.

<u>Repair to and Extension of Side Tracks</u>: These improvements involve work on CWR's side tracks, which are within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b).

<u>Repair and Maintenance Work on the Rail Station and Engine House</u>: This involves work on rail "facilities," which are within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b).[15] It also more broadly involves work on "property" or "equipment … related to the movement of passengers or property, or both, by rail," including "services related to that movement," which are also within the exclusive jurisdiction of the STB. *Id.* § 10102(9).

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[13] "Nonexempt" developments are those developments that are not subject to those provisions of the City's Local Coastal Program and/or the Coastal Act that exempt certain developments from the CDP requirement.

[14] And, for the reasons stated in the City's September 6, 2019, letter to NOAA and the DOT, future application for federal funding of said activities would not be subject to the Commission's consistency-review authority.

[15] Even if not preempted under ICCTA, these repair-and-maintenance activities would be exempt from the CDP requirement under section 17.71.040(B)(2) of the City's Coastal Land Use & Development Code, because they do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities.

<u>Construction of an Extension to the South of the Engine House</u>: The purpose of this work is to cover existing passenger coaches and freight cars that currently sit on the open tracks in the salt air. It consists of work on a rail "facilit[y]," which is within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b). It also more broadly involves work on "property" or "equipment … related to the movement of passengers or property, or both, by rail," including "services related to that movement," which are also within the exclusive jurisdiction of the STB. *Id.* § 10102(9).

<u>Clean-Up Work in and Around Dry Shed 4 and Elsewhere on Railroad Property</u>: This involves work in and around a rail "facilit[y]," which is within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b). It also more broadly involves work on "property … related to the movement of passengers or property, or both, by rail," including "services related to that movement," which again are also within the exclusive jurisdiction of the STB. *Id.* § 10102(9). Preventing or delaying the clean-up of the railroad's property interferes with the railroad's operations, which are within the exclusive jurisdiction of the STB.

<u>Dry Shed 4 Improvements:</u> Improvements to Dry Shed 4 consist of roof repair, wall replacement and repair, and other structural improvements within the same footprint of the dry shed. The purpose of the improvements is to provide space for the storage of rail cars and other railroad equipment (e.g., tires for steam locomotives, railcar axles, and other parts and components for steam and diesel locomotives).[16] As such, it is work on a rail "facilit[y]," which is within the exclusive jurisdiction of the STB. 49 U.S.C. § 10501(b). It also more broadly involves work on "property … related to the movement of passengers or property, or both, by rail," including "services related to that movement," which are within the exclusive jurisdiction of the STB. *Id.* § 10102(9).

<u>Lot-line Adjustment Related to Mendocino Railways' Acquisition of Historically Rail-Related Property</u>. Mendocino Railway purchased three parcels from GP, none of which are in any natural state. All three parcels are almost entirely covered in concrete and asphalt, and have for over a century been subject to industrial and rail use. The parcels have long had, and continue to have, railroad tracks and other rail-related facilities that serve the CWR line, which in turn is part of the interstate rail network. To reiterate, those tracks and rail

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[16] It is possible that parts of the Dry Shed may, in the future, be leased by two local businesses for storage or operational purposes, one or both of whom may become rail customers. But there currently are no such leases in place. Regardless, the Dry Shed is and will remain under the ownership and operation of a federally recognized railroad (CWR), and, irrespective of future lease arrangements, it will serve as a storage facility for railroad cars and equipment used in the rail movement of passengers and property.

facilities on the three parcels in question historically have been used and operated for rail-related purposes.

Below are a number of images showing the extensive nature of the rail system on the acquired property, both currently and historically. The first (Figure 6) is from the USGS, with double hash marks denoting the location of railroad tracks. The second (Figure 7) is a 1957 aerial photograph retrieved from U.C. Davis's image collection. The third and fourth images (Figures 8 and 9) are postcards from the early 20th century depicting early railroad activity at the acquired site.

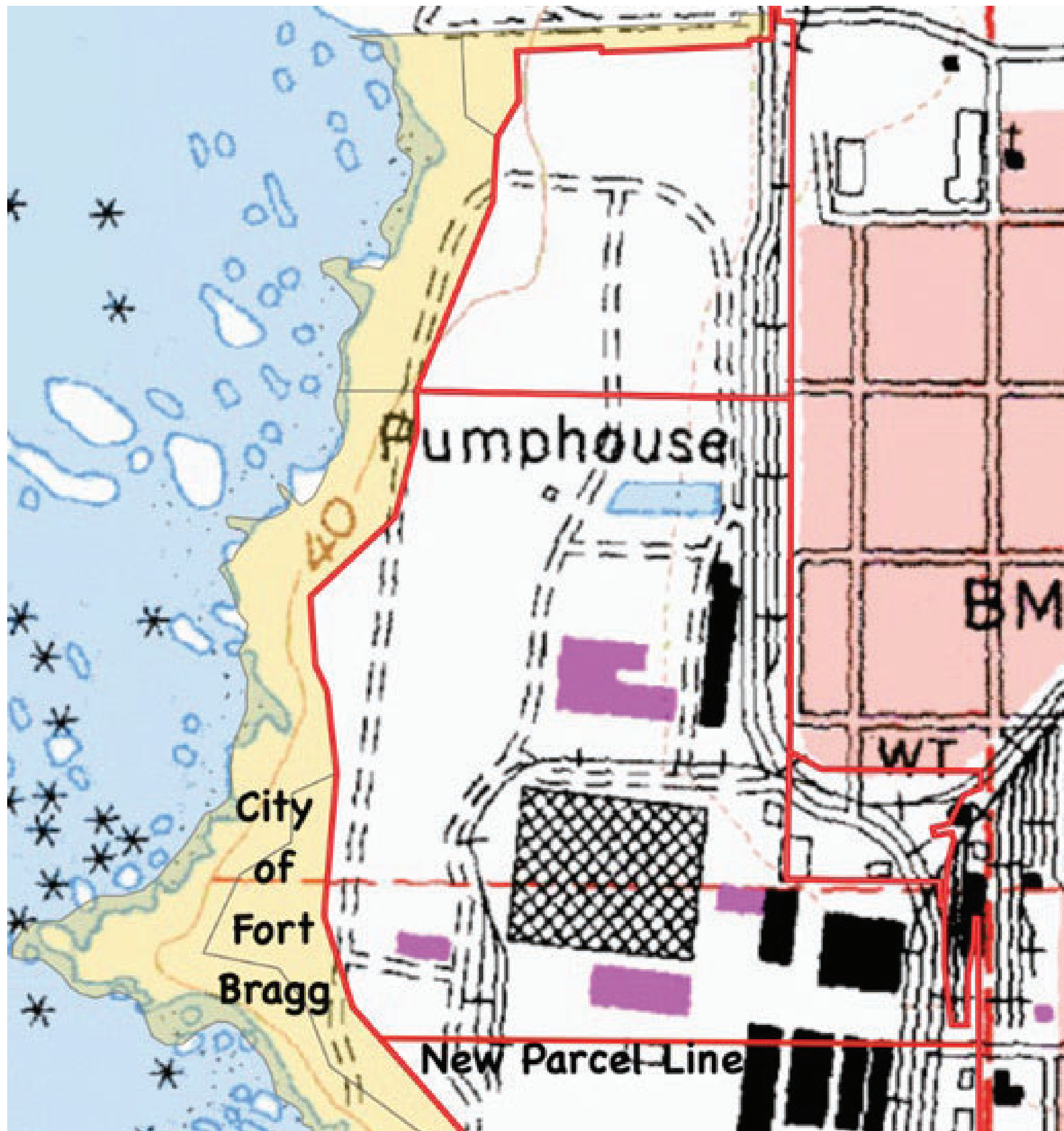

FIGURE 6

FIGURE 7

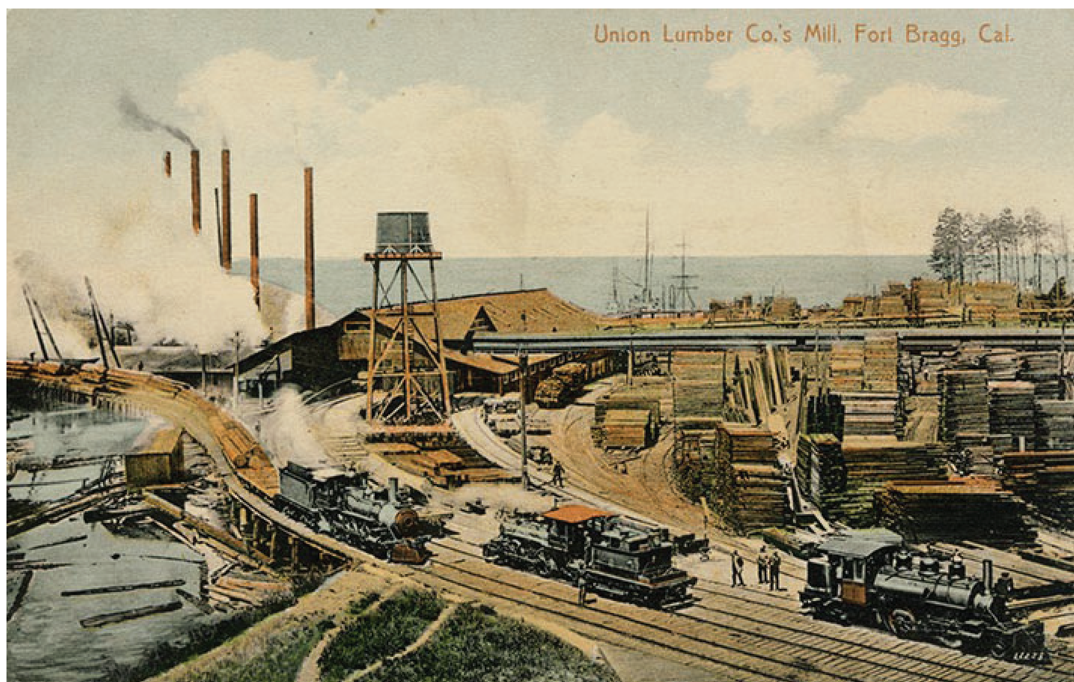

FIGURE 8

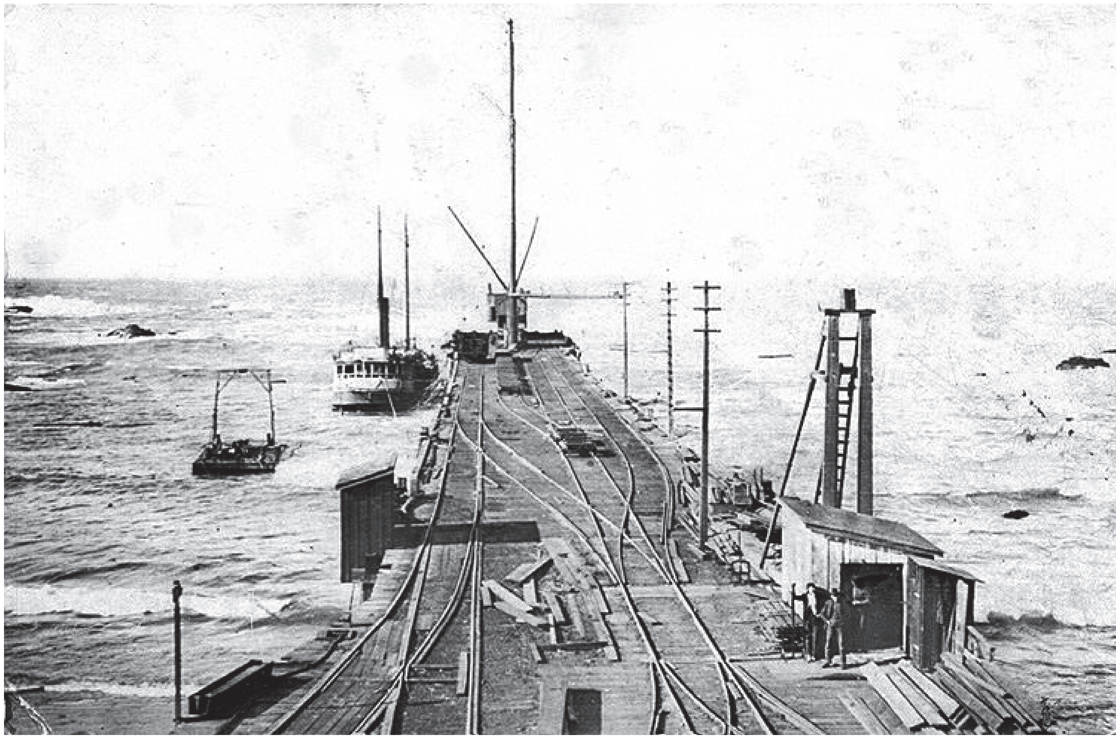

FIGURE 9

A lot-line adjustment on one of those three parcels facilitated that parcel's sale to Mendocino Railway. The resulting new line is indicated in Figure 6 above as "New Parcel Line." Without the lot-line adjustment, Mendocino Railway could not have acquired the historically rail-related parcel, with its rail tracks and other rail facilities, from GP. As a transaction inexorably tied to the "acquisition" and "operation" of "spur, industrial, team, switching, or side tracks, or facilities," the lot-line adjustment was within the exclusive jurisdiction of the STB and thus preempted from state or local jurisdiction. 49 U.S.C. §§ 10501(b); 10102(9); *see also Dakota, Minn. & E. R.R. Corp. v. S.D.*, 236 F. Supp. 2d 989 (D.S.D. 2002), *aff'd on other grounds*, 362 F.3d 512 (8th Cir. 2004) (holding that revisions to state law burdening railroad's ability to acquire property through eminent domain were preempted under the ICCTA).[17]

[17] Staff's letter, dated December 21, 2018, asserts "there is no existing railroad service, facilities, or operations on the subject property" that was sold by GP to Mendocino Railway. That is not true. CWR operated rail facilities, including tracks, across the parcels Mendocino Railway purchased. Staff also notes that the sold parcels were not owned by a railroad. But we could find no authority to suggest only parcels sold by a railroad are subject to preemption under the ICCTA. To the contrary, the broad terms of the ICCTA establish that a railroad's acquisition of rail-related assets is preempted. 49 U.S.C. §§ 10501(b); 10102(9).

D. The STB Has Exclusive Jurisdiction Over, But Does Not License or Otherwise "Authorize" the Above-Listed Activities

Commission staff has asked for "letters or determinations from the STB regarding the Railway's proposed development." *See* Dec. 3, 2019 Letter from Jessica R. Reed to Paul Beard II. In a letter dated December 21, 2018, staff asserted that the STB "has not authorized any railroad activities on the property." However, the premise underlying those assertions is incorrect.

None of the rail-related activities listed above require a license or other pre-authorization from the STB in order to be carried out. Repair to and extension of side tracks do not require the STB's pre-authorization. 49 U.S.C. § 10906. Repair and maintenance of railroad facilities and property (i.e., the rail station, the engine house, and the dry shed) do not require the STB's pre-authorization. *Id.* § 10901, *et seq.* (omitting reference to facility work as requiring the STB's pre-authorization). Nor does a transaction facilitating a railroad's acquisition of a historically rail-related parcel.

But the fact that none of those activities require the STB's pre-authorization is legally irrelevant. *Wichita Terminal*, *supra* ("Federal preemption applies without regard to whether or not the Board actively regulates the railroad operations or activity involved."); *Pace*, 613 F.3d at 1068-69 (finding state law claims preempted even though the STB does not actively regulate side track); *Port City*, 518 F.3d at 1188 (Congress intended to occupy the field and preempt state jurisdiction over excepted track, even though Congress allowed rail carriers to construct, operate, and abandon such track without Board approval). Mendocino Railway's activities are preempted from state and local environmental and pre-clearance review because the STB has exclusive ***jurisdiction*** over the activities, not because the STB actively ***regulates*** those activities (through a licensing or other permitting mechanism). To the extent it delays or otherwise burdens Mendocino Railway's ability to proceed with rail-related work, any state or local demand for non-existent "authorization" would, by itself, constitute an illegal violation of federal pre-emption.

III.
CONCLUSION

Mendocino Railway is currently focused on pursuing rail-related activities on its properties. Mendocino Railway has conferred with the City of Fort Bragg about the possible future development of some portions of the GP site for other, non-railroad, uses—uses which may include visitor-serving, residential, and open-space/recreational uses. But Mendocino Railway is not currently embarking on any projects related to any such non-railroad uses. If and when Mendocino Railway does so, both the City of Fort Bragg and the Coastal Commission will be

appropriately involved. It is simply premature at this time to confer about any such hypothetical non-railroad uses.[18]

As we believe the federal preemption of Mendocino Railway's rail-related work on its properties is supported by black-letter law, we ask that the Coastal Commission confirm that it agrees with the analysis and conclusions contained in this letter. If the Coastal Commission for some reason disagrees with any of the analysis or conclusions set forth herein, we request that legal authorities be provided so that we can assess the grounds for any such disagreement.

Thank you in advance for your cooperation. We remain committed to an ongoing dialogue with the Commission that is open, transparent, and pro-active.

Very truly yours,

FisherBroyles, LLP

Paul J. Beard II
Counsel for Mendocino Railway

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[18] Nothing in this letter should be construed as an express or implied admission or waiver of any kind as to whether a particular activity undertaken by Mendocino Railway, whether or not specifically described herein, is subject to state or local environmental review, including CDP review. That includes Mendocino Railway's agreement to keep the Coastal Commission abreast of rail-related activities. The purpose of this letter is to resolve actual and potential legal disagreements concerning, among other things, the extent to which CDP review of any of Mendocino Railway's activities in the Coastal Zone is federally preempted. Consequently, this letter and future communications regarding said activities are subject to Federal Rule of Civil Procedure, Rule 408, as well as California Evidence Code, section 1152.

EXHIBIT 2

[1998 Cal. PUC LEXIS 189; 78 CPUC2d 292](#)

California Public Utilities Commission

January 21, 1998

Decision 98-01-050, Application 97-08-007 (Filed August 5, 1997)

CA Public Utilities Commission ***Decisions***

Reporter
1998 Cal. PUC LEXIS 189 *; 78 CPUC2d 292

In the Matter of the Application CALIFORNIA WESTERN RAILROAD, INC. for authority to modify scheduled commuter passenger service and seek relief from regulated excursion passenger scheduling and fares

Core Terms

excursion, transport, sightseeing, passenger service, passenger, train, fare, public utility, commuter, was, deregulate, tourist, wine, subject to regulation, companies, bus

Counsel

Gary Milliman and Sean J. Hogan, Attorneys at Law, for California Western Railroad, Inc., applicant; Bruce Richard, for Mendocino Transit Authority, and Johanna Burkhardt, Emile's Station, for herself, interested parties; James T. Quinn, Attorney at Law, and James R. Panella, for the Rail Safety and Carriers Division.

Panel: P. Gregory Conlon, President; Jessie J. Knight, Jr., Henry M. Duque, Josiah L. Neeper, Richard A. Bilas, Commissioners

Opinion

INTERIM OPINION

The decision concludes that the excursion passenger service provided by California Western Railroad (CWRR) should not be subject to regulation by the Commission.

Background

CWRR transports passengers and freight between Fort Bragg and Willits, California. CWRR also serves a few communities between Fort Bragg and Willits in the Noyo River Valley.

CWRR currently provides one round trip daily except on Thanksgiving Day, Christmas Day and New Year's Day (362 days a year) from Fort Bragg to Willits and returning to Fort Bragg. CWRR charges commutation fares and special intermediate point round-trip-ticket fares for its service. Additionally, at various times of the year, CWRR operates trains between Fort Bragg and Northspur and less **[*2]** frequently between Willits and Northspur. Northspur is located approximately midway between Fort Bragg and Willits.

CWRR's route between Fort Bragg and Willits is very scenic and CWRR attracts several tourists to ride its train. CWRR provides excursion passenger service to tourists on its famous "Skunk Train. " CWRR's excursion service is provided for the same fare as the fare for commuter service.

According to the information provided by CWRR, CWRR's excursion service constitutes over 90% of its operations.

CWRR filed this application to seek Commission approval to reduce its commuter service to three days a week during the winter months of October through March. CWRR also seeks relief from regulation by the Commission of its excursion service.

Hearings

Public participation hearings (PPHs) on the application were held in Willits (on October 22, 1997) and Fort Bragg (on October 23, 1997) before Administrative Law Judge (ALJ) Garde. In addition to the PPHs, a prehearing conference (PHC) was held on October 23, 1997 in Fort Bragg.

At the PHC, the ALJ bifurcated the proceeding into two phases. The first phase would address CWRR's request to deregulate its tourist or excursion passenger **[*3]** service. The second phase would address the issue of reduction in commuter passenger service.

It was agreed that the issue of deregulation being a legal issue could be addressed through the filing of briefs. Accordingly, concurrent opening and reply briefs were filed on November 17, 1997 and November 25, 1997, respectively.

An evidentiary hearing in the second phase was held in Fort Bragg on December 4, 1997.

This interim decision addresses the issue of deregulation of CWRR's tourist or excursion passenger service. A separate order will be issued regarding CWRR's request to reduce its commuter passenger service.

CWRR and the Commission's Rail Safety and Carriers Division (RSCD) filed opening briefs. RSCD and Mendocino Transit Authority filed reply briefs.

Commission Regulation of Railroads

Before considering CWRR's request for deregulation, it would be helpful to examine Commission's regulation of other railroads.

There are 15 railroad companies in California that provide excursion passenger service of which all but two are not regulated by the Commission. The two railroads regulated by the Commission are CWRR and the Napa Valley Wine Train (Wine Train) .

In the case of Wine Train, **[*4]** the Commission regulation involves the monitoring and enforcement of a program to mitigate any adverse impact of the operation of Wine Train on the environment. The Mitigation Implementation Program adopted by the Commission, under Section 21081.6 of the California Environmental Quality Act (CEQA), was part of the assessment of environmental impact of the operation of trains. Under the Mitigation Implementation Program, the Commission specifies, among other things, the hours of the day during which Wine Train can operate. The Commission does not regulate Wine Train's schedule or rates.

In the case of CWRR, the Commission regulates both the commuter service and excursion service.

Discussion

All parties support deregulation of CWRR's excursion service. The following discussion is a distillation of opinions expressed in the briefs.

In considering CWRR's request for deregulation, we have determined whether CWRR's excursion service qualifies as "transportation" under Public Utilities (PU) Code § 1007 and whether in rendering such service CWRR functions as a public utility. We will examine CWRR's operations in that perspective.

Does CWRR's Excursion Service Constitute Transportation? [*5]

What does the term "transportation" mean and what services qualify as transportation addressed by the *California Supreme Court in Golden Gate Scenic Steamship Lines v. Public Utilities Commission, 57 C.2d 373 (1962)*. The steamship company operated sightseeing vessels on San Francisco Bay. The passengers being served by the steamship company boarded vessels at a certain point in San Francisco and after cruising the bay in a loop returned to the point of origin. Golden Gate Scenic Steam Ship Lines contended that its operations did not come under the Commission's regulatory authority because it did not transport people between points and thus was not providing transportation as provided in PU Code § 1007.

In that case, the court determined that "transportation" was a key word and that when applied to passenger vessels "plainly" meant transportation of persons between two different points. The court concluded that the steamship company's sightseeing cruises did not come under PU Code § 1007.

In a subsequent proceeding, (Application (A.) 59818 et al.), the Commission, based on the Supreme Court's determination, issued Decision (D.) 93726 (7 CPUC2d at 135-136), which concluded that sightseeing **[*6]** service is not passenger stage corporation service. The Commission stated that:

> "Aside from the legal analysis of the statutory scheme, concluding tour or sightseeing service is not passenger stage corporation service, we note that sightseeing or tour service is essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service. In those cases members of the public may be in a situation where they have no other mode for essential travel. And, there it is in the public interest to regulate rates, schedules, and service for what may very well be captive patrons.
>
> "We recognize that today's decision is a departure from past Commission precedent. We are sure those companies who are already in business and doing well under regulation will take vocal exception with this decision. However, we believe our analysis of the statutory scheme for bus regulation in California is sound. Aside from the legal analysis requiring us to find sightseeing-tour service is not common carriage, we believe this change in our regulation will allow us to engage in better entry and rate regulation over point-to-point common **[*7]** carriers, and ultimately enable us to provide better regulation for the user of regular route, point-to-point bus service." (7 CPUC2d at 135-136.)

CWRR's excursion service involves transporting passengers from Fort Bragg either all the way to Willits or to midpoint Northspur, and then returning them to Fort Bragg. Also, at some times of the year, CWRR operates a train from Willits to Northspur and then returning to Willits.

The operations described above involve transporting people from one point to a destination and returning them to the point of origin. While the operation does not entail transporting people in a continuous loop as the people using excursion buses or boats, the operation is comparable to the operation of excursion buses or boats. The difference in the operations is of degree, not kind, and should not be determinative of whether or not CWRR's operations meet the judicial definition of transportation under PU Code § 1007.

We conclude that CWRR's excursion service does not constitute "transportation" under PU Code § 1007.

Next, we will consider whether CWRR, in providing its excursion service, functions as a public utility. The primary purpose of CWRR's excursion **[*8]** 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. In D.82-09-087, the Commission stated the following about sightseeing:

> "The basic question is whether sightseeing is a public utility function. In the absence of a clear declaration by the Legislature, we conclude that it is not." (9 CPUC2d at 687.)

Further, the Commission also opined that public utilities are ordinarily understood as providing essential services, the kind that other industries and the public generally require.

While the excursion service provided by CWRR may be beneficial to the economy of Mendocino County and may even be considered essential by the tourist industry, it 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 Commission.

We believe that discontinuance of Commission regulation of schedules and fares of CWRR's excursion service will have no adverse impact in the area **[*9]** of the public interest. Moreover, it would conform the Commission's regulation over CWRR's excursion service with Commission regulation of other such rail services.

Consideration of Safety of CWRR's Operations

While we have concluded that CWRR's excursion services be free from regulation by the Commission as regards to scheduling and fares, we believe that CWRR's excursion services should be subject to regulation in certain other areas. Foremost among these would be regulation with regard to the safety of CWRR's operations, which the Commission conducts as an arm of the Federal Railroad Administration (FRA). It is essential that the Commission staff and FRA personnel continue to inspect CWRR's track, signal and safety practices of CWRR's passenger and freight operations. It is also essential for the Commission to continue to regulate the upkeep and reliability of grade crossings and crossing protection devices under PU Code §§ 1201 et seq.

While the Commission ceased to regulate the schedules and fares of sightseeing tours provided by bus, the safety of bus operators was subject to regulation by state agencies. Accordingly, we conclude that CWRR should remain under the Commission's **[*10]** regulation in all areas of safety of its passenger and freight operations, as it is now.

Findings of Fact

1. CWRR seeks relief from regulation by the Commission of its excursion passenger service.

2. CWRR's excursion service does not constitute "transportation" under the provisions of PU Code § 1007.

3. The primary purpose of CWRR's excursion service is to provide its passengers an opportunity for sightseeing.

4. The Commission has concluded that sightseeing is not a public utility function.

5. The Commission currently regulates the safety of the operation of all services provided by CWRR.

6. While the Commission ceased to regulate the schedules and fares of sightseeing service provided by bus operators, the safety of the operations remained subject to regulation by state agencies.

Conclusions of Law

1. In providing excursion passenger service, CWRR does not function as a public utility.

2. The Commission should not regulate the schedules and fares for the excursion passenger service provided by CWRR.

3. The Commission should continue to regulate the safety of the operation all services provided by CWRR.

4. This order should be made effective today to provide CWRR an opportunity **[*11]** to publish its schedules and fares for the expected tourist season in 1998.

INTERIM ORDER

IT IS ORDERED that:

1. The schedules and fares for the excursion passenger service provided by California Western Railroad (CWRR) shall not be subject to regulation by the Commission.

2. The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission.

3. This proceeding shall remain open to consider CWRR's request to reduce its commuter service.

This order is effective today.

Dated January 21, 1998, at San Francisco, California.

CA Public Utilities Commission Decisions

End of Document

EXHIBIT 3

[*1998 Cal. PUC LEXIS 384*]

California Public Utilities Commission

May 21, 1998

Decision No. 98-05-054, Application No. 97-08-007 (Filed August 5, 1997)

CA Public Utilities Commission ***Decisions***

Reporter
1998 Cal. PUC LEXIS 384 *

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

Core Terms

commuter, passenger service, remainder, proposed decision, excursion, was, motion to withdraw, second phase, passenger, withdraw, best interest, final order, deregulate, interim, tourist, phase, train, fare

Counsel

Gary Milliman and Sean J. Hogan, Attorney at Law, for ***California Western Railroad***, Inc., applicant.

Bruce Richard, for Mendocino Transit Authority, and Johanna Burkhardt, Emile's Station, for herself, interested parties.

James T. Quinn, Attorney at Law, and James R. Panella, for the Rail Safety and Carriers Division.

Panel: Richard A. Bilas, President, P. Gregory Conlon, Jessie J. Knight, Jr., Henry M. Duque, Josiah L. Neeper, Commissioners

Opinion

FINAL OPINION

Summary of Decision

In response to a motion by ***California Western Railroad***, Inc. (applicant), this decision dismisses without prejudice the remaining issues in this proceeding and closes the proceeding.

Background

California Western Railroad, Inc. (CWRR) transports passengers and freight between Fort Bragg and Willits, California. CWRR also serves a few communities between Fort Bragg and Willits in the Noyo River Valley.

CWRR currently provides one round trip daily except on Thanksgiving Day, Christmas Day, and New Year's Day (362 days a year) from Fort Bragg to Willits and returning to Fort Bragg. CWRR charges commutation fares and special intermediate point round-trip-ticket fares for its service. Additionally, at various **[*2]** times of the year, CWRR operates trains between Fort

ATTACHMENT 2

Bragg and Northspur and less frequently between Willits and Northspur. Northspur is located approximately midway between Fort Bragg and Willits.

In addition to the passenger service CWRR also provides excursion passenger service to tourists on its famous "Skunk Train."

CWRR filed this application to seek Commission approval to reduce its commuter service to three days a week during the winter months of October through March. CWRR also seeks relief from regulation by the Commission of its excursion service.

Hearings

Public participation hearings (PPHs) on the application were held in Willits (on October 22, 1997) and Fort Bragg (on October 23, 1997) before Administrative Law Judge (ALJ) Garde. In addition to the PPHs, a prehearing conference (PHC) was held on October 23, 1997 in Fort Bragg.

At the PHC, the ALJ bifurcated the proceeding into two phases. The first phase addressed CWRR's request to deregulate its tourist or excursion passenger service. The second phase addressed the issue of reduction in commuter passenger service.

It was agreed that the issue of deregulation being a legal issue could be addressed through the **[*3]** filing of briefs.

Based on the briefs filed, the Commission issued Decision (D.) 98-01-050 on January 21, 1998, which concluded that the excursion passenger service provided by CWRR should not be subject to Commission's regulation.

An evidentiary hearing in the second phase was held in Fort Bragg on December 4, 1997.

Concurrent briefs in the second phase were filed on January 21, 1998.

On February 17, 1998, CWRR filed a motion withdrawing its request to reduce commuter service. CWRR requests that the Commission Interim Opinion be made the final order in this proceeding and that the remainder of the application be dismissed without prejudice.

In the interim, on February 11, 1998, Commission's Rail Safety and Carriers Division (RSCD) filed a motion to strike portions of CWRR's briefs that challenges the Commission's jurisdiction over CWRR's passenger service or, in the alternative, a motion for leave to file response to CWRR's position. Based on CWRR's February 17th motion, RSCD's motion is moot. We will deny the motion.

No comments or protest on CWRR's motion to withdraw its request to reduce its commuter service have been filed.

Discussion

CWRR's request to reduce its commuter **[*4]** service is opposed by majority of the parties. Granting of CWRR's motion will be in the best interest of passengers which use CWRR's services. We will grant CWRR's motion to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice.

Comments on ALJ's Proposed Decision

ALJ's proposed decision was filed and mailed to parties on April 20, 1998. No party has filed comments on the proposed decision. Accordingly, we will issue the decision as proposed after correcting an error from the proposed decision.

Findings of Fact

1. CWRR requests to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice.

2. Granting of CWRR's motion would be in the best interest of the passengers which use CWRR's service.

Conclusions of Law

1. CWRR's motion to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice should be granted.

2. The proceeding should be closed.

FINAL ORDER

IT IS ORDERED that:

1. ***California Western Railroad***'s motion to withdraw its request to reduce its commuter service and to dismiss **[*5]** the remainder of the application without prejudice is granted.

2. Since there are no issues remaining to be considered in this proceeding, this proceeding is closed.

This order is effective 30 days from today.

Dated May 21, 1998, at San Francisco, California.

CA ***Public Utilities Commission*** Decisions

End of Document

EXHIBIT 4

California Public Utilities Commission

August 6, 1998

Decision No. 98-08-017, Application No. 98-04-034 (Filed April 22, 1998)

CA Public Utilities Commission ***Decisions***

Reporter

1998 Cal. PUC LEXIS 606 *; 81 CPUC2d 514

Application and request for Nunc Pro Tunc Authority, Authority to Merge Corporations, to Split Stock and to Issue Common Stock, and for Expedited Ex Parte Relief

Core Terms

stock issue, stock, was, issuance, railroad, acquisition, passenger, rehabilitate, companies, exempt, merger, public utility, common stock, outstanding shares, locomotive, ownership, notice, shares of common stock, split, has, retroactive, outstand, track, train, working capital, common carrier, investor, finance, bridge, merge

Panel: Richard A. Bilas, President, P. Gregory Conlon, Jessie J. Knight, Jr., Henry M. Duque, Josiah L. Neeper, Commissioners

Opinion

OPINION

Summary

In this decision we grant the application of ***California Western Railroad***, Inc. (California Western or applicant) for retroactive approval of previous stock issues, and for prospective approval of a transaction which would merge California Western Land Associates, Inc. (Land Company) into the applicant, split applicant's currently outstanding shares of common stock 2.407 for 1, and make a new public offering of an additional 614,000 common shares. Upon conclusion of this transaction, the applicant's present shareholders will have a 50.5% share ownership of California Western, and the newly offered shares will constitute the remaining 49.5%.

No protest has been filed in response to the application. We have held no hearing, and we make no determination under Public Utilities (PU) Code Section 822 concerning the fairness of the transaction or the underlying stock issues. The application is granted ex parte, as requested by the applicant.

Background

The applicant is a common carrier railroad engaged in interstate commerce. The application **[*2]** states that it operates railroad passenger excursion and commuter services, and common carrier freight service, between Fort Bragg and Willits,

California. [1] We recently relieved the applicant from certain regulatory requirements in connection with its operation of excursion services, but the company otherwise remains subject to regulation under various provisions of the PU Code. (Decision (D.) 98-01-050.)

California Western was organized as a close corporation under California law in July 1996 under the name CWRR, Inc., and the affiliated Land Company was concurrently incorporated as a California close corporation. [2] According to the application, the **[*3]** two corporations were organized to acquire the assets of California Western, an Arizona corporation. The directors and shareholders of the two corporations were, and have remained, identical. In order to obtain operating authority from the federal Surface Transportation Board (STB) to operate the railroad, CWRR, Inc. filed a verified notice of exemption under 49 CFR Section 1150.31 on August 9, 1996. [3] On August 12, 1996, the STB published its notice of exemption. (*STB Finance Docket No. 33005, 61 FR 42936* (August 19, 1996).)

[*4]

According to the companies' audited combined financial statements, on August 1, 1996, the applicants' Board of Directors approved the sale of 171,350 shares to certain stockholders for $ 5.00 per share. Pursuant to a Stockholders' Agreement dated August 16, 1996, for each share of CWRR, Inc. stock purchased, the stockholders received a share of Land Company stock. In order to maintain identical ownership in both companies, the shares are restricted in that the stockholder may not sell shares of either company without selling the identical shares in both companies. No authority was requested from this Commission for the initial stock issuance.

The asset purchase was completed on August 16, 1996. The total purchase price and closing costs for acquisition of the assets was $ 1,642,503. Initial capitalization consisted of $ 855,750 received in exchange for issuance of the common stock to the initial investors, and the proceeds of a mortgage in the amount of $ 900,000 secured by all of the railroad's property. The applicant's resultant initial working capital was $ 113,247. The applicant acquired the entire business operation of the railroad, and Land Company holds title to all of the **[*5]** real property used in the railroad's operation. [4]

In March 1997, the companies sold 20,000 shares of common stock for $ 5.00 per share, with the acquiring stockholders receiving a share in each company. However, the proceeds from these sales were not allocated to each company, as was done initially. All proceeds were recorded as CWRR common stock. This was part of the sale of a total of 50,000 shares to new investors for a total consideration of $ 250,000 after the initial issuance. No authority was requested from the Commission for any part of this stock issuance. Sometime after May 31, 1997, an additional 38,879 shares were issued to stockholders **[*6]** for $ 194,385. No authority was requested from the Commission for this stock issuance.

Consistent with this account of share transactions, the most recent combined financial statement shows 260,229 shares of California Western common stock, and an equivalent number of shares of Land Company shares, issued and outstanding.

As noted above, the applicant did not ask this Commission to authorize the issuance of any of these shares. Applicant does not explain its failure to seek authorization for the initial issue, although with respect to the subsequent issues the application offers the explanation that applicant was "under the impression that such issuance was subsumed within the federal exemption

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[1] The characterization of some of California Western's passenger services as commuter service may be misleading. No trains are operated specifically to serve commuters; the terminology is used to refer to certain tariffs which govern multiple rides. According to the application, commuter passengers constitute about one percent of California Western's total business.

[2] On May 30, 1997, CWRR, Inc.'s articles were amended to change its name to ***California Western Railroad***, Inc.

[3] By this means certain types of applicants can bypass the formal application procedure specified in *49 U.S Code Section 10901*. See *49 CFR Section 1150.1* et seq. The STB approves the acquisition by publishing a notice in the Federal Register within 30 days of the filing without making a determination of public convenience and necessity. The exemption is effective 7 days after it is filed, and the filing thus creates a presumption of public convenience and necessity. The exemption is void ab initio if the notice contains false or misleading information.

[4] Note 7 of the audited financial statements indicates that the proceeds from the initial sale of shares were allocated between CWRR, Inc. and Land Company, based upon the respective company's pro-rata share of the assets acquired during the purchase of the railroad. This resulted in 68% and 32% of the proceeds being allocated to CWRR, Inc. and Land Company, respectively.

authorizing acquisition of control." (P. 7.) The application states that the uses to which all funds raised through stock issues have been put are the repair of storm and disaster damage, performance of deferred maintenance, purchase of maintenance-related assets, and maintenance of working capital.

The applicant proposes to issue more shares of common stock to the public to raise an additional $ 4.6 million as part of a three-part transaction. First, Land Company will merge into California **[*7]** Western, leaving California Western as the surviving corporation holding all assets. Land Company's real estate would be transferred to California Western, and all outstanding shares in Land Company would be canceled. Because the two companies have identical share ownership, no new California Western shares would need to be issued, and no exchange of shares would be necessary. Second, California Western would split its common stock 2.407 shares for 1, resulting in 626,404 shares of common stock issued and outstanding. [5] The boards of the two companies have determined the amount of capital which will have to be raised for capital projects, and have decided that the present shareholders should retain 50.5% ownership of the surviving company after the stock transaction. Accordingly, the third part of the transaction is to issue additional common shares to be offered publicly in return for the remaining 49.5% ownership interest.

[*8]

The applicant calculates that the new issue must consist of 614,000 additional common shares in order to maintain an ownership ratio of 50.5/49.5% between current and prospective shareowners. The offering price is set at $ 7.50 per share to raise a total of $ 4,605,000 from the sale of this number of shares. [6] At the conclusion of the transaction the total capitalization of the corporation would be $ 5.9 million with 1,249,404 shares of stock issued and outstanding, according to the applicant.

According to the application, the purposes for which these proceeds would be used are:

1. Rehabilitation or upgrading of track and structures to handle 265,000-lb. gross weight cars (compared to 240,000-lb. maximum gross weight cars currently) for handling **[*9]** traffic of the railroad's principal shipper. The current weight limitation places this customer at a competitive disadvantage because it must pay a higher rail rate per unit than other lumber companies, and many shipments are allegedly lost to the railroad as a result. The applicant has given this project the highest priority, and estimates that 47% of the proceeds of the new stock issuance will be devoted to this purpose.
2. Acquisition of a diesel locomotive and passenger cars to restore Willits-based passenger trains, which were eliminated some years ago.
3. Acquisition of an additional steam locomotive and passenger train set to add more steam-powered passenger trains out of Fort Bragg.
4. Refurbishment of passenger equipment, stations, and facilities.
5. Replacement of debt with equity to reduce fixed charges, currently amounting to about $ 96,000 annually.

The applicant states that the public offering of the new shares will be made pursuant to a permit issued by the California Commissioner of Corporations, and a Regulation A Exemption from the United States Securities and Exchange Commission.

Discussion

Section 817 of the PU Code specifically restricts the issuance **[*10]** of stock by a public utility to use for certain enumerated purposes. [7] Those purposes include the acquisition of property; construction, completion, extension, or improvement of its facilities; improvement or maintenance of its service; and discharge of lawful obligations.

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[5] We note that when we multiply the number of issued and outstanding shares, 260,229, by 2.407, the product is 626,371 shares, rounded down to the nearest whole number. We do not know the reason for the discrepancy between the figure offered in the application and that which we obtain by means of this computation.

[6] Our calculation of the number and price of newly issued shares would differ slightly from that of the applicant, based upon the number of currently outstanding shares. See previous note. Shares issued both before and after the new issuance would be of the same class.

[7] Applicant is a common carrier, see PU Code Section 211, and is therefore a public utility under California law. PU Code 216(a). Provisions in the PU Code which regulate public utilities in general regarding the issuance of securities consequently apply to the activities of the

Before a public utility may issue stocks and stock certificates, it must obtain an order from this Commission authorizing the issue, stating the amount of the issue and the purposes to which the proceeds are to be applied, setting forth the Commission's opinion that the things to be paid for by the issue **[*11]** are reasonably required for the purposes specified in the order, and specifying that such purposes are not reasonably chargeable to operating expenses or income. PU Code Section 818. In addition to refusing or granting permission for the issue, the Commission may grant permission for the issue in lesser amount than applied for, or grant it subject to such conditions as it deems reasonable and necessary. PU Code Section 819.

The application essentially asks us to approve all of California Western's past and proposed stock issues, including those for which it previously failed to obtain approval through its error or inadvertence. Our task is to ensure that all stock was (and will be) issued for proper purposes, and that the proceeds were (or will be) applied to those purposes. Although PU Code Section 822 also gives us discretion to approve the terms and conditions of issuance and the fairness of such terms and conditions after a hearing, we have not held a hearing, nor have we made a determination regarding the fairness of any past or future stock issue.

Nunc Pro Tunc Authority for Previous Stock Issues

California Western seeks approval for several previous stock issues, completed **[*12]** in each instance without this Commission's prior approval. California Western explains it was operating under the belief that authority for these stock issues was subsumed under the STB exemption, and now seeks to correct the error. It cites D.97-02-007 as authority for retroactively approving a stock issue that had not received timely approval before the transaction took place, on the grounds that the issue was for proper purposes and not adverse to the public interest.

The STB exemption process, as explained above, is available in appropriate circumstances as a substitute for formal approval of the construction, acquisition, or operation of a railroad line pursuant to *49 U.S. Code Section 10901*. That statute only regulates those activities enumerated in the statute. Although an application for exemption is required to include information about the manner by which the applicant proposes to finance construction or acquisition, and specifically about the kind and amount of securities to be issued, the authority granted under the exemption plainly does not address the financing aspects. *49 CFR Section 1150.6 (a)*. In the present instance, the Notice published by STB refers only to exempting **[*13]** acquisition of the rail line and other assets from the applicant's predecessor, but makes no reference whatever to the type or manner of financing.

Under these circumstances, the applicant's assertion it was "under the impression" that authority for several stock issues was granted through the exemption process strikes us as disingenuous. Moreover, D.97-02-007, which the applicant cites as authority for granting retroactive approval, is inapposite. In that decision the Commission merely extended authority which had been granted several years before, and which was about to expire at the time the application was filed. To bridge the gap after the authority lapsed until the decision was issued several months later, the Commission granted the authority nunc pro tunc on the decision. Here the Commission has given no prior approval whatever, and the request therefore comes before us for the first time in the present application.

Although the grounds for applicant's request are flawed, the application reflects that the proceeds of previous stock issues were used for proper purposes. Specifically, the application states that those proceeds were used for acquisition of the railroad and **[*14]** associated property, repair of the property, performance of deferred maintenance, acquisition of maintenance equipment, maintenance of working capital, and payment of interest expense on debt. This is consistent with the results reported in the financial statements submitted with the application, and complies with the requirements of PU Code Section 817, and no harm will result from belated approval. On the other hand, withholding approval of previous stock issues would create a hardship for the investors who have already acquired California Western and its associated properties, and jeopardize rail service which now serves shippers and the general public. Although we disfavor granting retroactive approval of stock issues, we will do so here subject to a requirement that California Western account for its disposition of past stock issuance proceeds pursuant to PU Code Section 824.

Approval of the Merger, Stock Split, and New Stock Issue

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applicant. Jurisdiction to regulate the issuance of stock or other evidence of ownership by a public utility is vested in this Commission. See PU Code Section 816.

California Western's request for approval of the transaction which will result in issuance of approximately 614,000 additional shares of common stock to raise $ 4.6 million is timely. We are principally concerned whether the purposes for which **[*15]** the proceeds will be spent will conform to the requirements of PU Code Section 817. Our approval of other aspects of the transaction is essentially ministerial. PU Code Section 854 requires the applicant to secure our authorization to merge Land Company into California Western, but because both companies now have identical ownership, this merger is merely one of form rather than substance. No public interest is involved, and we will approve the merger transaction.

Any permissible use to which the sale proceeds will be applied, as reflected in the application, will benefit the public by improving the safety, service, and reliability of the railroad. The application sets forth the following list of purposes for which California Western proposes to use the proceeds of the public offering over an 18-month period. The applicant states that if less than the entire $ 4.6 million is raised, the proceeds will be used in the indicated order of priority:

1. Cost of Issuance	$ 200,000
2. Track, Roadbed and Bridge Rehabilitation	1,000,000
3. Purchase Maintenance of Way Equipment	70,000
4. Purchase/Rehabilitation of Locomotives/ Passenger Equipment	250,000
5. Track Roadbed and Bridge Rehabilitation	1,150,000
6. Purchase/Rehabilitation Steam Locomotives	300,000
7. Rehabilitate Existing Coaches	80,000
8. Northspur and Picnic Area Improvements	180,000
9. Willits Depot Rehabilitation	125,000
10. Debt Retirement	1,245,000
TOTAL	$ 4,600,000

[*16]

These purposes comply with PU Code Section 817. [8] We will therefore approve the proposed transaction.

---

[8] Section 817 specifically allows a public utility to issue stocks for the acquisition of property; the construction, extension, or improvement of its facilities; the improvement or maintenance of its service; the discharge or lawful refunding of its obligations; and the reorganization or readjustment of its indebtedness or capitalization upon a merger, consolidation, or other reorganization. The proposed stock issue would be used for all of these purposes.

Conclusion

We will approve the application. PU Code Section 823(a) prohibits a public utility, without the consent of the Commission, to apply any part of the stock issue, or any proceeds thereof, to any purpose not specified in the Commission's order, or to any purpose specified in the order in excess of the amount authorized for such purpose, or issue or dispose thereof on any terms less favorable than those specified in the order. The burden is therefore **[*17]** upon the applicant to ensure that it uses the proceeds in the manner and to the extent set forth in the application.

In Resolution ALJ 176-2992 dated May 7, 1998, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status, public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-2992.

Findings of Fact

1. Applicant is a common carrier railroad engaged in interstate commerce. Applicant operates railroad passenger and freight services between Fort Bragg and Willits, California.

2. Land Company is a nonutility affiliated with applicant.

3. The directors and shareholders of applicant and Land Company respectively are, and at all material times have been, identical.

4. Applicant obtained its operating authority from the federal STB by filing a verified Notice under *49 CFR Section 1150.31* on August 9, 1996. On August 12, 1996, the STB published the Notice in Finance Docket No. 33005 (*61 FR 42936* (August 19, 1996)). The Notice, on its face, does not address any financial aspect of the acquisition, **[*18]** including the issuance of stock to raise funds for the purchase.

5. Applicant and Land Company were organized to purchase the railroad and associated real property and other assets from ***California Western Railroad***, Inc.,an Arizona corporation.

6. At the time applicant and Land Company acquired the railroad and other assets, applicant issued 171,350 shares of common stock. For each share of applicant's stock purchased, the stockholders received a share of Land Company stock. No authority was requested from this Commission for applicant's initial stock issue.

7. Between March and the end of May 1997, a total of 50,000 shares of applicant's common stock were issued to investors in various transactions. No authority was requested from the Commission for these stock issues.

8. Sometime after May 31, 1997, 38,879 shares of applicant's common stock were issued. No authority was requested from the Commission for this issue.

9. The application states that the uses to which all funds raised through previous stock issues have been devoted are the repair of storm and disaster damage, performance of deferred maintenance, purchase of maintenance-related assets, and maintenance of working capital. **[*19]** Nothing in the record of this proceeding is inconsistent with the applicant's claim that these proceeds were used in this manner.

10. The applicant proposes to merge with Land Company. Applicant would be the surviving corporation. As part of this transaction all of Land Company's stock would be canceled.

11. Following the merger of applicant with Land Company, applicant proposes to split its issued and outstanding shares 2.407 shares for one.

12. Following the stock split, applicant proposes to issue an additional number of shares to the public in an amount equivalent to 49.5% of the total number of issued and outstanding shares, at a price of $ 7.50 per share. All shares would be common stock of the same class. Sale of the new issue is intended to raise approximately $ 4.6 million of capital.

13. The applicant states that the purposes for which the proceeds of the proposed issue will be used are to rehabilitate or upgrade track and structures to be able to handle rail cars of 265,000 pounds gross weight; acquire a diesel locomotive and passenger coaches for a new Willits-based passenger operation; acquire an additional steam locomotive and passenger train set for operation of an **[*20]** additional Fort Bragg-based steam train; refurbish passenger equipment, stations and facilities; and replace debt with equity to reduce fixed charges.

14. The items for which the applicant states the proceeds of previous stock issues have been used were reasonably required for the purposes specified in this order, and such purposes were not reasonably chargeable to operating expenses or to income.

15. The items to be paid for by the proposed stock issue are reasonably required for the purposes specified in this order, and such purposes are not reasonably chargeable to operating expenses or to income.

16. Granting this Commission's approval of applicant's previous stock issues must be retroactive.

17. The Commission disfavors granting any authority retroactively, and does so only in extraordinary circumstances.

18. Withholding approval of applicant's previous stock issues would create a hardship for existing investors and jeopardize the operation of common carrier rail services by the applicant.

19. Approving applicant's proposed new issue of approximately 614,000 shares of common stock is in the public interest.

20. No protest has been filed in response to the application.

21. No hearing **[*21]** has been held in this proceeding.

22. No finding is made in relation to the terms and conditions of any transaction which is the subject of this proceeding, or the fairness thereof.

Conclusions of Law

1. Applicant is a public utility within the meaning of Section 216 (a) of the PU Code.

2. The purposes for which applicant states the proceeds of all previous stock issues have been used comply with Section 817 of the PU Code.

3. The purposes for which the proceeds of the proposed stock issue will be used comply with Section 817 of the PU Code.

4. Applicant's previous stock issues should be approved nunc pro tunc.

5. Applicant's proposed merger with Land Company should be approved.

6. The approvals granted in the order should be subject to requirements to account for the disposition of the proceeds of stock issues, pursuant to PU Code Section 824.

ORDER

IT IS ORDERED that:

1. ***California Western Railroad***, Inc. (applicant) is authorized nunc pro tunc to issue 260,229 shares of common stock at a par (stated) value of $ 5.00 per share for the purposes of acquiring a railroad and associated property from ***California Western Railroad***, Inc., an Arizona corporation; repairing **[*22]** said property; performing maintenance on said property; acquiring additional equipment and rolling stock for the maintenance of the property; maintaining the level of initial working capital available as of the date of acquisition; and paying interest expense on debt.

2. On or after the effective date of this order, but not more than 30 days after applicant has received all regulatory approvals required by law, applicant is authorized to merge with California Western Land Associates, Inc., with applicant to be the

surviving corporation following the merger. All issued and outstanding shares of California Western Land Associates, Inc. shall be canceled, and there shall be no new issue or exchange of shares as part of this merger transaction.

3. Applicant is authorized, immediately upon completion of the merger transaction as specified in the preceding paragraph, to split its then existing shares of common stock in the amount of 2.407 shares for one, such that the total number of shares issues and outstanding shall be the product of 2.407 and the number of shares issued and outstanding upon completion of the merger.

4. Applicant is authorized, immediately upon completion of the stock **[*23]** split as described in the preceding paragraph, to issue additional shares of common stock of the same class as the shares which are then issued and outstanding, at no par value, in a number that is equivalent to 49.5% of the sum of the new issue and the otherwise issued and outstanding shares, for total consideration not exceeding $ 4,600,000.

5. The purposes and maximum amounts for which the proceeds of the newly issued shares may be used are as follows:

(1.) Cost of Issuance	$ 200,000
(2.) Track, Roadbed and Bridge Rehabilitation	1,000,000
(3.) Purchase Maintenance of Way Equipment	70,000
(4.) Purchase/Rehabilitation of Locomotives/ Passenger Equipment	250,000
(5.) Track Roadbed and Bridge Rehabilitation	1,150,000
(6.) Purchase/Rehabilitation Steam Locomotives	300,000
(7.) Rehabilitate Existing Coaches	80,000
(8.) Northspur and Picnic Area Improvements	180,000
(9.) Willits Depot Rehabilitation	125,000
(10.) Debt Retirement	1,245,000
TOTAL	$ 4,600,000

If the total proceeds received from the sale of this issue are less than the maximum authorized by this order, the actual proceeds received shall be applied in the amounts and in the priority order indicated **[*24]** in this paragraph until such proceeds are exhausted. In no event shall the proceeds of this issue be used for any purpose other than the acquisition of property by the applicant; the construction, extension, or improvement of applicant's facilities; the improvement or maintenance of applicant's service; the discharge or lawful refunding of applicant's obligations; or the reorganization or readjustment of applicant's indebtedness or capitalization as part of the merger and stock issue, without the specific approval of this Commission.

6. In no event may the proceeds of any stock issue authorized by this order be charged to operating expenses or income.

7. Within 30 days after the effective date of this order applicant shall pay all fees with respect to previous stock issues as required by Public Utilities Code (PU) Section 1904.1. The amounts of these fees shall be computed in accordance with PU Code Section 1904 (b), and interest at the legal rate shall be added to each fee from the actual date of the issue until the date of payment of the fee.

8. Applicant shall pay the fee required by PU Code Section 1904.1, and computed in accordance with PU Code Section 1904 (b), before issuing **[*25]** any shares pursuant to Paragraph 4 of this Order.

9. The staff of this Commission shall conduct such inquiry or investigation regarding the disposition of the proceeds of all sales of stocks and stock certificates, in such detail as is necessary, to insure that such disposition has been, and will be, for the purposes specified in this order. The applicant shall account for such disposition in the form and detail required by staff in the discharge of this duty, and upon reasonable request shall produce such witnesses, books, papers, documents and contracts, and file such data as staff deems to be of assistance in conducting its inquiry or investigation.

This order is effective today.

Dated August 6, 1998, at San Francisco, California.

CA ***Public Utilities Commission*** Decisions

End of Document

EXHIBIT 5

ROB BONTA
Attorney General of California
DAVID G. ALDERSON
Supervising Deputy Attorney General
PATRICK TUCK
Deputy Attorney General
State Bar No. 305718
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1006
Fax: (510) 622-2270
E-mail: Patrick.Tuck@doj.ca.gov
Attorneys for Defendant Jack Ainsworth, in his official capacity as Executive Director of the California Coastal Commission

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MENDOCINO RAILWAY, Plaintiff, **v.** **JACK AINSWORTH, in his official capacity as Executive Director of the California Coastal Commission; CITY OF FORT BRAGG, a California municipal corporation,** Defendants.	22-cv-04597-JST **DEFENDANT JACK AINSWORTH'S NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM OF POINTS AND AUTHORITIES** Date: December 22, 2022 Time: 2 p.m. Dept: Courtroom 6 Judge: Honorable Jon S. Tigar Trial Date: Not Set Action Filed: August 9, 2022

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NOTICE OF MOTION AND MOTION TO DISMISS

TO THE COURT AND ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 22, 2022, at 2:00 p.m., at the United States District Court, Northern District of California, United States Courthouse, 1301 Clay Street, Oakland, California 94612, Defendant Jack Ainsworth will and hereby does move to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds of abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

Defendant Jack Ainsworth respectfully requests that this Court find that *Younger* abstention applies and on that basis, dismiss Plaintiff's Complaint for Declaratory Judgment in its entirety.

This motion is based on this Notice of Motion and Motion to Dismiss; the accompanying Memorandum of Points and Authorities; the accompanying Request for Judicial Notice; all pleadings and papers on file in this action; and such other matters as the Court may deem appropriate. This motion is made pursuant to Local Rule 7-2.

Dated: September 22, 2022

Respectfully submitted,

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

/s/ Patrick Tuck
PATRICK TUCK
Deputy Attorney General
Attorneys for Defendant
California Coastal Commission

1 ## MEMORANDUM OF POINTS AND AUTHORITIES

2 ## INTRODUCTION

3 Plaintiff Mendocino Railway ("Plaintiff") is an excursion rail service located in Mendocino
4 County that operates separate out-and-back sightseeing trips from both Willits and Fort Bragg,
5 California. Portions of Plaintiff's property and operations in the City of Fort Bragg ("City") are
6 also located within the State's coastal zone, and thus, any proposed development in those
7 locations are subject to the California Coastal Act ("Coastal Act") and to Defendant City of Fort
8 Bragg's Local Coastal Program ("City's LCP"). Pursuant to both the Coastal Act and the City's
9 LCP, Plaintiff is required to apply for a coastal development permit for any development it
10 intends to undertake in the coastal zone. The permitting requirements of the City's LCP ensure
11 that no person undertakes development within the City's jurisdiction that may harm the fragile
12 coastal zone.

13 In its Complaint for Declaratory Judgment ("Complaint"), Plaintiff contends that
14 imposition of local and state permitting requirements by the City and the California Coastal
15 Commission ("Coastal Commission" or "Commission") to Plaintiff's land-use activities is
16 preempted under federal law. Plaintiff has named Jack Ainsworth, in his official capacity as the
17 Executive Director of the Coastal Commission ("Defendant Ainsworth") as one of the two
18 Defendants in this case, along with the City. According to Plaintiff, that is because Defendant
19 Ainsworth is "charged with the day-to-day enforcement of the California Coastal Act." Plaintiff's
20 Complaint also admits that, more than nine months before Plaintiff filed its federal Complaint, the
21 City filed suit in Mendocino County Superior Court ("Mendocino County action") seeking to
22 enforce the City's laws and regulations (which includes the City's LCP), and Plaintiff has already
23 asserted in the state proceeding a federal preemption defense in all substantive respects identical
24 to its claim in the instant federal matter. That state proceeding is ongoing, and the Coastal
25 Commission filed and served a motion to intervene in the Mendocino County action on
26 September 8, 2022. In the Coastal Commission's proposed complaint in intervention, the
27 Commission is seeking declaratory and injunctive relief, specifically with regard to Plaintiff's
28 preemption contention.

1 Defendant Ainsworth respectfully requests that the court dismiss this federal action under
2 the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger*"). At the
3 time this federal suit was filed, the City had already initiated the aforementioned state proceeding
4 wherein the parties have requested a determination regarding the state and federal preemption
5 claims asserted by Plaintiff, and the Coastal Commission has filed a motion seeking to intervene
6 in that proceeding, similarly seeking a declaratory judgment and injunctive relief pertaining to
7 Plaintiff's purported preemption arguments. Granting the relief Plaintiff seeks in this federal
8 action would interfere with and effectively enjoin the state proceeding. This federal action should
9 therefore be dismissed on the basis of *Younger* abstention.

10 **ALLEGATIONS IN THE PLEADINGS**

11 **I. MENDOCINO COUNTY ACTION**

12 On October 28, 2021, Defendant City of Fort Bragg ("City") filed and served its Verified
13 Complaint for Declaratory and Injunctive Relief ("Verified Complaint") in Mendocino County
14 Superior Court (Case No. 21CV00850), naming Plaintiff Mendocino Railway ("Plaintiff") as the
15 sole Defendant. See Coastal Commission's Request for Judicial Notice (RJN), attached hereto
16 and filed herewith, Exhibit A. In its Verified Complaint, the City alleges that, in 2017, the City
17 deemed a roundhouse operated by Plaintiff within the City's jurisdiction to be in such disrepair
18 that it may have to be demolished rather than repaired. RJN, Ex. A, ¶ 12. Subsequently, Plaintiff
19 refused to allow the roundhouse to be inspected by local authorities, claiming that "the City has
20 no authority over a railroad." *Id.* Two years later, the City alleged that it red tagged Plaintiff's
21 work on a storage shed due to the fact that Plaintiff failed to obtain a necessary building permit
22 before commencing work on the shed, but Plaintiff removed the red tag and went forward with
23 the unpermitted work. *Id.* And in August 2021, after the City informed Plaintiff that it needed to
24 obtain a Limited Term Permit for an evening event, Plaintiff stated that it was "outside the City's
25 jurisdictional boundaries and thus not subject to a permit." *Id.*

26 Due to Plaintiff's multiple refusals to obtain necessary permits from the City, the City
27 alleges that Plaintiff is "responsible for continuing violations of the laws and public policy of the
28 State of California and/or local codes, regulations and/or requirements" applicable to its

1 operations and activities within the City, and such use and activities by Plaintiff and the condition
2 of its real property "are inimical to the rights and interests of the general public and constitute a
3 public nuisance and/or violations of law." RJN, Ex. A, ¶ 13.

4 Because Plaintiff "failed to comply with the City's code enforcement efforts" and Plaintiff
5 has claimed that its purported status as a public utility preempts local jurisdiction and
6 applicability of the City's local ordinances, as alleged in the City's Verified Complaint, the City
7 was compelled to file suit against Plaintiff. RJN, Ex. A, ¶¶ 15-16. In the Verified Complaint, the
8 City seeks declaratory relief stating that Plaintiff is not a public utility subject to regulation by the
9 California Public Utilities Commission (thus foreclosing Plaintiff's state preemption argument)
10 and injunctive relief commanding Plaintiff to comply with the City's laws and regulations. RJN,
11 Ex. A, Prayer for Relief, ¶¶ 1-2.

12 On January 14, 2022, Plaintiff filed a demurrer to the City's Verified Complaint. RJN,
13 Exhibit B. In its points and authorities in support of its demurrer, Plaintiff argued that the superior
14 court lacked subject matter jurisdiction over the City's declaratory relief action due to exclusive
15 regulation of Plaintiff by the California Public Utilities Commission, and, as is relevant here, that
16 "state and local regulatory and permitting requirements are broadly preempted" by the federal
17 Surface Transportation Board's purported exclusive jurisdiction over Plaintiff. RJN, Ex. B. at 16.
18 The Mendocino County Superior Court subsequently overruled Plaintiff's demurrer on April 28,
19 2022, finding that "[Plaintiff]'s preemption argument is overbroad" and noting that, with regard
20 to Plaintiff's federal preemption argument, "[n]ot all state and local regulations that affect
21 railroads are preempted." RJN, Exhibit C, at 11-12. The Superior Court specifically stated that
22 "[Plaintiff] is not involved in any interstate rail operations" and "is simply a luxury sightseeing
23 excursion service with no connection to interstate commerce." RJN, Exh C. at 10-11. Finally, the
24 court held that "the applicability of preemption is necessarily a 'fact-bound' question, not suitable
25 to resolution by demurrer." RJN, Exh. C at 12.

26 Plaintiff then appealed the Superior Court's decision on its demurrer to the California Court
27 of Appeal, which, after initially issuing a stay and requesting briefing on the state preemption
28 issue, denied Plaintiff's petition for extraordinary writ review. See RJN, Exhibit D. And on June

23, 2022, the California Supreme Court denied Plaintiff's Petition for Review of that appellate decision, in effect upholding the Superior Court's ruling on the demurrer.

The next day, June 24, 2022, Plaintiff filed an answer to the City's Verified Complaint, admitting that Plaintiff refused the City's entry onto its rail property "on the grounds of state and federal preemption law" and stated that Plaintiff's position that its status as "a railroad within the jurisdiction of the federal Surface Transportation Board ('STB') broadly preempt environmental pre-clearance review and land-use permitting of Defendant's rail activities." RJN, Exhibit E, ¶ 12, 15. Similarly, Plaintiff's "Fourth Affirmative Defense" in its answer states that "[t]he declaratory and injunctive relief sought by [the City] are barred by state and federal preemption, as embodied in statutory and constitutional law, because [Plaintiff] is a CPUC-regulated public utility and a railroad within the jurisdiction of the STB." RJN, Ex. E. at 5:19-22.

Because of the overlap in local regulation of activities in the coastal zone pursuant to the City's LCP and the Coastal Commission's enforcement of the Coastal Act, in July 2022, the City requested that the Commission assume responsibility for enforcement against Plaintiff. RJN, Exhibit F, at 13-14, ¶ 5. Consequently, the Commission sent a Notice of Violation letter to Plaintiff on August 10, 2022, one day before Plaintiff served the Commission with the instant Complaint. *Id.*[1] The Coastal Commission subsequently filed and served a Motion to Intervene and a proposed Complaint in Intervention on September 8, 2022, seeking to intervene in the Mendocino County action. RJN, Exh. F. In its Motion to Intervene, the Coastal Commission argues that it meets the requirements for both mandatory and permissive intervention, as it has a strong and direct interest in the litigation and the implementation and enforcement of the Coastal Act and the City's LCP to Plaintiff's activities in the coastal zone. RJN, Ex. F at 5-6. In its proposed Complaint in Intervention, the Coastal Commission seeks a "declaration that the application of the Coastal Act and the City's LCP to Plaintiff's actions in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP are not preempted by

[1] In fact, as the City noted on June 27, 2022 in its Opposition to a Notice of Related Case filed by Plaintiff, the Coastal Commission was considering seeking to intervene in the Mendocino County action in mid-July 2022, well before Plaintiff filed its federal Complaint. RJN, Exhibit G, at 3:3-5, 5:25-6:2.

any state or federal law," as well as civil penalties, injunctive relief, and exemplary damages for Plaintiff's past and ongoing violations of the Coastal Act. RJN, Ex. F at 17-18, & Prayer for Relief.

II. THE FEDERAL COMPLAINT

On August 9, 2022, Plaintiff filed the instant Complaint in the Eureka Division of the U.S. District Court for the Northern District of California. In its Complaint, Plaintiff states that the Coastal Commission "has demanded that [Plaintiff] apply for a state land-use permit before performing any rail-related work on its railroad property located within the coastal zone" and that the City "has joined with the [Coastal] Commission in demanding that [Plaintiff] submit to its plenary land-use authority over, and preclearance review of, rail-related activities occurring within the City's boundaries." Complaint, at ¶¶ 3-4. The Railroad goes on to state in its Complaint that "[t]he City has gone so far as to file a state-court action to compel [Plaintiff] to apply for permits for any and all work on its railroad property and facilities within City boundaries," referencing the Mendocino County action described above. Complaint, at ¶ 4.

Just as it alleged in its demurrer and verified answer in the state court proceeding, Plaintiff asserts in its federal Complaint that "its rail-related work and operations are not subject to state and local land-use permitting and preclearance regulation" and "[a]s a federally regulated railroad with preemption rights, [Plaintiff] has refused to submit to the City's permit jurisdiction, as well." Complaint, at ¶¶ 2, 4. Finally, Plaintiff alleges only one cause of action in its federal Complaint, for Declaratory Judgment against both "the Commission" (which Plaintiff apparently imputes to Defendant Ainsworth, in his official capacity as Executive Director of the Coastal Commission), and the City. Complaint, at ¶ 32. In its Prayer for Relief, Plaintiff seeks a declaration that the actions of "the Commission" and the City to regulate any and all of Plaintiff's "operations, practices and facilities" are federally preempted and subject to the Surface Transportation Board's exclusive jurisdiction, and an injunction prohibiting the Defendants from interfering with its operations under the same argument. Complaint, Prayer for Relief, ¶ 1-2.

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LEGAL STANDARD

The Ninth Circuit "ha[s] not squarely held whether abstention is properly raised under Rule 12(b)(6), Rule 12(b)(1), both, or neither." *Courthouse News Service v. Planet*, 750 F.3d 776, 779 n.2 (9th Cir. 2014). As such, the Coastal Commission has filed this motion pursuant to both Rule of Civil Procedure 12(b)(1) and 12(b)(6).

Under Rule 12(b)(1), a party may move to dismiss a complaint on the basis that there is no subject matter jurisdiction. In such situations, the party asserting jurisdiction has the burden of proving it exists. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). A Rule 12(b)(1) challenge to subject matter jurisdiction may be "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack challenges the sufficiency of the jurisdictional allegations in the complaint, whereas in resolving a factual attack the court "need not presume the truthfulness of the plaintiff's allegations." *Id.*

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A "threadbare recital[] of the elements of a cause of action, supported by mere conclusory statements, do[es] not suffice." *Id.* In ruling on a motion to dismiss under Rule 12(b)(6), the court may consider documents referenced in a complaint as well as matters subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

ARGUMENT

In light of the state proceeding in Mendocino County in which both Plaintiff's state and federal preemption arguments will inherently be addressed and decided, *Younger* abstention applies and this federal case should be dismissed.

A federal court ordinarily has "a strict duty to exercise the jurisdiction that is conferred . . . by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). At the same time, the Supreme Court has recognized that "federal courts may decline to exercise their jurisdiction in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an

important countervailing interest." *Id.* (citation omitted). One such situation is when hearing a case "would interfere . . . with certain types of state civil proceedings." *Id.* In such situations, abstaining from jurisdiction "preserve[s] respect for state functions" and avoids "'unduly interfer[ing] with the legitimate activities of the States.'" *Gilbertson v. Albright*, 381 F.3d 965, 970-971 (9th Cir. 2004) (en banc) (quoting *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)). This type of abstention is known as *Younger* abstention.

In civil cases, the Ninth Circuit has articulated four elements to determine if *Younger* abstention is appropriate, namely "when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). "If these 'threshold elements' are met, we then consider whether the federal action would have the practical effect of enjoining the state proceedings and whether an exception to *Younger* applies." *Id.* "The critical date for purposes of deciding whether abstention principles apply is the date the federal action is filed." *Gilbertson v. Albright*, 381 F.3d 965, 969, n. 4 (9th Cir. 2004).

All four elements are met here as of the time of filing of Plaintiff's federal Complaint.

I. THE STATE PROCEEDING IS ONGOING

As to the first element, the City filed and served its Verified Complaint against Plaintiff in Mendocino County Superior Court nearly 11 months ago, on October 28, 2021, and that case remains ongoing, with the Coastal Commission's Motion to Intervene currently scheduled to be heard on October 6, 2022. Plaintiff filed its federal Complaint on August 9, 2022.

II. THE STATE PROCEEDING IS A QUASI-CRIMINAL ENFORCEMENT ACTION

The Mendocino County proceeding also meets the second requirement, as it is a quasi-criminal enforcement action whereby the City and the Coastal Commission are seeking confirmation of their authority to regulate Plaintiff's activities within their jurisdictions and to enforce the City's LCP and the Coastal Act with regard to those activities. Additionally, the Coastal Commission issued a Notice of Violation against Plaintiff prior to being served with this

Complaint and prior to filing its Motion to Intervene in the state proceeding, and that Notice of Violation sets forth the primary basis for the Coastal Commission's requested civil penalties and exemplary damages against Plaintiff. RJN, Ex. F, Proposed Complaint in Intervention, ¶¶ 5, 17-24, & Prayer for Relief, ¶¶ 3-5.

The City's Verified Complaint explains in detail the efforts the City has undertaken in its attempt to enforce its land use, code enforcement, and permitting regulations upon Plaintiff. RJN, Ex. A. at ¶¶ 12, 13, & 15. The City's Verified Complaint further describes the multiple occasions when Plaintiff has refused to comply with its local laws and regulations and asserted that it is preempted from such local regulation, which prompted the City to file suit in state court, seeking a declaration that the City's regulation of Plaintiff is not preempted, and an injunction commanding Plaintiff to comply with the City's local laws and regulations. RJN, Ex A. at ¶¶ 12, 15, 16, & Prayer, at ¶¶ 1-2. Therefore, the state proceeding is "akin to a criminal prosecution" and was "initiated to sanction [Plaintiff], i*.e.,* the party challenging the state action, for [its] wrongful act." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013), *quoting Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) and *citing Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Because the City's Verified Complaint and the Coastal Commission's Motion to Intervene have been initiated to enforce local and state law against Plaintiff, the state proceeding is "a civil enforcement proceeding within the scope of the *Younger* doctrine," meeting the second requirement. *Herrera v. City of Palmdale*, 918 F.3d 1037, 1045 (9th Cir. 2019).

Additionally, as California courts have previously made rulings pertaining to the potential preemptive effects of public utility regulation with regard to sightseeing excursion trains, including Plaintiff's predecessor and the Napa Valley Wine Train, (see, e.g., *City of St. Helena v. Pub. Utilities Com.*, 119 Cal. App. 4th 793, 803 (2004), *as modified on denial of reh'g* (July 21, 2004), and *disapproved of on other grounds by Gomez v. Superior Ct.*, 35 Cal. 4th 1125, (2005)), this state proceeding involves a state's interest in enforcing the orders and judgments of its courts. This is a further basis for finding that the Mendocino County action meets the second *Younger* requirement.

III. THE STATE PROCEEDING IMPLICATES AN IMPORTANT STATE INTEREST

The third *Younger* requirement is also met, as the state proceeding implicates an important state interest. Plaintiff has asserted in its overruled demurrer and verified answer that local and state regulation of its activities are preempted under state and federal law. The corollary to this assertion is that Plaintiff is claiming that it is permitted to undertake whatever activities and alterations to its property in the coastal zone it would like, particularly if it believes those activities are "rail-related," without any oversight or regulation by the Coastal Commission or the City. A ruling allowing such unrestricted and unpermitted activities by Plaintiff threatens vulnerable coastal resources and would significantly hinder the Coastal Commission's ability to protect the coast, in contravention of the Coastal Act, as well as the City's LCP and land-use ordinances. See *San Remo Hotel v. City & Cnty. of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) ("We have held that strong, local, *i.e.,* municipal, interests in land-use regulation qualify as important 'state' interests for purposes of *Younger* abstention."). Therefore, the state proceeding involves and implicates important state interests, satisfying the third *Younger* requirement.

IV. THE STATE PROCEEDING ALLOWS LITIGANTS TO RAISE FEDERAL CHALLENGES

As to the fourth and final *Younger* requirement, the review and rulings on Plaintiff's demurrer and its affirmative defense provided in its answer, discussed above, (which assert federal preemption challenges to the City's Verified Complaint), demonstrate that the litigants have already raised, and will continue to be able to raise, federal challenges in the state proceeding. Moreover, on multiple occasions in the past decade California state courts have evaluated and ruled on claims of federal preemption by railroad operators, and in each case, the parties were allowed to raise federal challenges. *See, e.g., Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 327-34 (2014); *Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 704-11, 740 (2017); *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528-31 (2012). There is no reason to believe such would not be the case in the ongoing Mendocino County action. Further, "under California law, a litigant may seek judicial review of an adverse decision and, in doing so, may raise federal claims." *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 953 F.3d 655, 657 (9th Cir. 2020), citing Cal. Code. Civ. P. §

1 1094.5 and *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986).
2 Therefore, the fourth *Younger* requirement is met.

3 **V. THE FEDERAL ACTION WILL HAVE THE PRACTICAL EFFECT OF ENJOINING THE**
4 **STATE PROCEEDING**

5 As discussed above, the four threshold *Younger* factors are satisfied here. As to the question
6 of "whether the federal action would have the practical effect of enjoining the state proceedings,"
7 if this federal action is not dismissed, both the court handling the state proceeding and this Court
8 will be forced to address Plaintiff's federal preemption claim. *ReadyLink Healthcare,* 754 F.3d at
9 759. The concern over wasting judicial resources with regard to identical claims by Plaintiff in
10 two separate courts may cause the state court to stay its action until this Court decides the federal
11 preemption issue, thus effectively enjoining that state action. *See Citizens for Free Speech* 953
12 F.3d at 657 (delay in abatement proceeding caused by federal action would have "the practical
13 effect of enjoining it."). Further, the City and the Coastal Commission will not have clarity on
14 whether they may proceed with their enforcement actions against Plaintiff so long as this Court
15 continues to consider Plaintiff's federal preemption claim, (even if the state court were to
16 separately rule on both preemption arguments), thus enjoining the ultimate goal of the City's
17 Verified Complaint and the Coastal Commission's Motion to Intervene.

18 **VI. NO EXCEPTION TO *YOUNGER* APPLIES**

19 Finally, no exception to the *Younger* principles apply to the state proceeding. The Ninth
20 Circuit discussed potential exceptions to *Younger* abstention in *Gilbertson v. Albright*, 381 F.3d
21 965 (9th Cir. 2004). In *Gilbertson*, the court explained that some examples of exceptions to
22 *Younger* include where the state proceeding is "motivated by a desire to harass or is conducted in
23 bad faith" or where there are flagrant violations of express constitutional prohibitions by the state
24 or local actor. *Id.* at 983, quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *see also Citizens*
25 *for Free* Speech, 953 F.3d at 657–58.

26 Here, there is no evidence that the City or the Coastal Commission is acting in bad faith or
27 trying to harass Plaintiff in seeking a determination regarding their land-use authority and
28 Plaintiff's asserted preemption arguments, and no violations of constitutional prohibitions are

implicated. Plaintiff has refused to comply with local and state laws and is now subject to enforcement for those violations. That was the impetus for the City's lawsuit and the Coastal Commission's Motion to Intervene, and thus, no exception to *Younger* applies.

CONCLUSION

Plaintiff Mendocino Railway's Complaint should be dismissed. *Younger* abstention applies here in light of the ongoing state proceeding in Mendocino County. In that state proceeding, Plaintiff's federal preemption claim has already been raised and will be addressed by the state court. Plaintiff's filing of this federal Complaint more than nine months after the City filed its complaint in state court is a blatant attempt at forum shopping. For all of the reasons set forth above, Defendant Jack Ainsworth, in his official capacity as Executive Director of the California Coastal Commission, respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

Dated: September 22, 2022

Respectfully submitted,

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

/s/ Patrick Tuck

PATRICK TUCK
Deputy Attorney General
Attorneys for Defendant Jack Ainsworth, in his official capacity as Executive Director of the California Coastal Commission

EXHIBIT 6

1 JONES MAYER
Krista MacNevin Jee, Esq., SBN 198650
2 kmj@jones-mayer.com
3777 North Harbor Boulevard
3 Fullerton, CA 92835
Telephone: (714) 446-1400
4 Facsimile: (714) 446-1448
5
6 Attorneys for Defendant,
CITY OF FORT BRAGG
7
8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11

EXEMPT FROM FILING FEES
PURSUANT TO GOVERNMENT CODE SECTION 6103

12 MENDOCINO RAILWAY, 13 Plaintiff, 14 v. 15 16 JACK AINSWORTH, et al., 17 Defendants. 18 19 20 21 22 23	Case No. 4:22-CV-04597-JST *Assigned for all purposes to:* *Hon . John S. Tigar, Ctrm. 6* Action Filed: August 9, 2022 **CITY OF FORT BRAGG'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF MENDOCINO RAILWAY'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [FED. RULES CIV. PROC. 12(B).] *[Filed concurrently with [Proposed] Order]* Date: December 22, 2022 Time: 2:00 p.m. Crtrm.: 6

24 TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS
25 OF RECORD:
26 PLEASE TAKE NOTICE that on December 22, 2022 at 2:00 p.m. or as soon
27 thereafter as the matter may be heard in Courtroom 6, of the above-entitled Court, located
28 at Oakland Courthouse, Courtroom 6 – 2nd Floor, 1301 Clay Street, Oakland, California

94612, although civil motion hearings in this Courtroom are held by Zoom webinar, unless otherwise ordered, Defendant CITY OF FORT BRAGG will and does hereby move to dismiss Plaintiff MENDOCINO RAILWAY'S Complaint pursuant to Federal Rule of Civil Procedure Rule 12 (b)(1), (b)(6) and (h)(3), as the Complaint fails to state a claim upon which relief can be granted based on the following grounds:

Plaintiff's first and only Claim for Relief, for Declaratory Judgment pursuant to Fed. Rules Civ. Proc. 57 and 28 U.S.C. § 2201 provides an insufficient and improper basis for this Court's jurisdiction, in that there is no federal subject matter jurisdiction merely for a claimed federal preemption defense, and this Court may decline declaratory judgment under the circumstances; the claims in the Complaint are subject to abstention by this Court; and there is no federal preemption as alleged by Plaintiff.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice filed concurrently herewith, the file and records in this case, and any further argument the Court deems just and proper to hear at or before the hearing on this Motion.

Dated: September 22, 2022 JONES MAYER

By: s/Krista MacNevin Jee
Krista MacNevin Jee
Attorneys for Defendant,
CITY OF FORT BRAGG

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

At its heart, this Declaratory Judgment action is merely Plaintiff Mendocino Railway's additional attempt, among several previous ones, at forum/judge shopping. Further, Plaintiff Mendocino Railway attempts to avoid any local regulatory authority of Defendant City of Fort Bragg by expansively overstating the City's pending State court action against Plaintiff, and attempting to leave no room for local jurisdiction of its multi-varied activities that are *not* limited to rail activities – even assuming *arguendo* that this limitation were to apply. Perhaps most importantly, Mendocino Railway far overstates its own status and authority – ignoring State and Federal agency conclusions that the trains it operates are *only* tourist excursion trains, its rail activities are *not* conducted in interstate commerce, and it does *not* act as a common carrier.

Mendocino Railway's action herein in this matter seeks primarily to directly interfere with and curtail *pending State court* jurisdiction in *City of Fort Bragg v. Mendocino Railway,* Mendocino County Superior Court Case No. 21CV00850, on claimed federal preemption by the Surface Transportation Board ("STB"), which is an improper basis for any exercise of jurisdiction by this Court, is not the proper subject of Declaratory Judgment, as to matters for which this Court should abstain to exercise any jurisdiction, and to which Mendocino Railway is not even entitled as a matter of law. Indeed, Mendocino Railway desperately seeks merely to avoid Judge Brennan, whose only ruling to date has been to deny its demurrer in the above-referenced State court action. Its desperation extends to unwarranted appeals and effort possible to attempt to move the case anywhere but Judge Brennan's court -- meritless appeals, alleging relation to another case where the only similarity is both cases involve Mendocino Railway as a party, and potential federal defense of preemption that does not exist, or its public utility status under State law, which is not a federal question at all. Our judicial system is not a grocery store where one can select the judge one prefers.

In sum, no valid claim is stated, this Court does not have valid federal jurisdiction and this Court should decline it in any event. The matter should be dismissed entirely.

II. STATEMENT OF FACTS AND CASE.

The City commenced an action against Plaintiff Mendocino Railway in *City of Fort Bragg v. Mendocino Railway,* Mendocino County Superior Court Case No. 21CV00850 ("Mendocino County Action") on October 28, 2021. This action is for Declaratory Judgment as to the City's regulatory authority of Mendocino Railway. Although the authority at issue in that matter is stated broadly as "whether [Mendocino Railway] is subject to the City's ordinances, regulations, codes, local jurisdiction, local control, local police power, and other City authority," the City seeks "a stay, temporary restraining order, preliminary injunction, and permanent injunction commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority," but *only* "as applicable." *See* Request for Judicial Notice, filed concurrently herewith ("City's RJN"), Exhibit A. A related issue to the City's regulatory authority is Mendocino Railway's status as a public utility under the authority of the California Public Utilities Commission ("CPUC"), which has determined that Mendocino Railway does not function as a "public utility" pursuant to State law.

Mendocino Railway challenged the validity of the City's Complaint by demurrer filed on or about January 14, 2022. The demurrer was denied by The Honorable Clayton L. Brennan on April 28, 2022. *See* RJN, Exhibit B. In the demurrer ruling, the State court confirmed that Mendocino Railway is not a public utility according to the CPUC (citing I*n the Matter of the Application California Western Railroad, Inc.*, 1998 Cal. PUC LEXIS 189, 78 CPUC2d 292, Decision 98-01-050 (January 21, 1998)), and the CPUC has subsequently confirmed this by letter. *See* RJN, Exhibits B and C.

Thereafter, Mendocino Railway proceeded to challenge the demurrer ruling to the Court of Appeal and the Supreme Court. There is no right of appeal as to a denial of a demurrer, so Mendocino Railway filed a Petition for Writ of Mandate in the California Court of Appeal, which was denied, and then a Petition for Review with the California

1 Supreme Court, which was also denied. The trial court proceedings were briefly stayed
2 by the Court of Appeal pending decision, until June 9, 2022. *See* Declaration of Krista
3 MacNevin Jee ("Jee Decl."), filed concurrently herewith, at ¶ 2.
4 Between Mendocino Railway's filing of its Petition for Review with the California
5 Supreme Court on June 20, 2022, and the Supreme Court's summary denial of the Petition
6 on June 23, 2022, Mendocino Railway also filed a Notice of Related Case in another case
7 pending in Mendocino County Superior Court, in which Mendocino Railway had been
8 participating as a party for nearly two years, *Mendocino Railway v. John Meyer, et al.*,
9 Mendocino County Superior Court Case No. SCUK-CVED-20-74939 ("Eminent Domain
10 Action"). (Jee Decl., at ¶ 3.) The Eminent Domain Action relates to Mendocino
11 Railway's attempt to take the private property of an individual, Defendant John Meyer, in
12 the City of Willits by eminent domain. *Id.* Testimony before Judge Nadel has already
13 concluded as to a bifurcated trial in the Eminent Domain Action on or about August 29,
14 2022. (Jee Decl., at ¶ 4.)
15 Given its lack of success with the appellate courts and in order to avoid the
16 demurrer ruling issued the Mendocino County Action by Judge Brennan, Mendocino
17 Railway apparently sought to avoid Judge Brennan by attempting to have the earlier
18 Eminent Domain Action deemed related to the Mendocino County Action, thereby
19 necessitating the transfer of the latter from Judge Brennan in the Ten Mile Courthouse in
20 Mendocino County to the Honorable Jeanine Nadel in the Ukiah Courthouse. (Jee Decl.,
21 at ¶¶ 2-3.) The Notice of Related Case is still pending and currently set for hearing on
22 September 30, 2022. (Jee Decl., at ¶ 3.)
23 After a case management conference in the Mendocino County Action, Mendocino
24 Railway filed a Request for Disqualification of Judge Brennan, on September 12, 2022,
25 for which no hearing is yet scheduled with a neutral judge pursuant to California Civil
26 Procedure Code Section 170.3. Judge Brennan had disclosed that he had a permit
27 application currently pending before Mendocino County for development in the coastal
28 zone, which could be subject to California Coastal Commission appeal authority. (Jee

1 Decl., at ¶ 4.) He concluded that this did not pose any conflict of interest or basis for him
2 to recuse himself from the matter. *Id.* At the time of Judge Brennan's oral disclosure to
3 the parties, the City had notified the Court and the parties that the Commission had
4 expressed its intention to file a Motion to Intervene in the Mendocino County Action,
5 which it thereafter filed on or about September 8, 2022. *Id.* This motion is scheduled to
6 be heard on September 30, 2022.

7 Mendocino Railway commenced the above-captioned matter on August 9, 2022,
8 naming the Executive Director to the California Coastal Commission, and the City of Fort
9 Bragg. The sole cause of action is for Declaratory Judgment.

10 Plaintiff acknowledges that the City has a pending "state-court action" against
11 Mendocino Railway, which is the Mendocino County Action. (Complaint, at ¶ 4.)
12 Plaintiff asserts a very broad scope of that action, although the actual scope and nature of
13 the City's claims in the Mendocino County Action, and the Superior Court's actual
14 exercise of authority, has not yet moved past initial pleading stages, due to the delay of
15 Mendocino Railway's appellate challenges.

16 Plaintiff alleges that it is a "federally regulated railroad with preemption rights,"
17 and by the within action, it seeks "[t]o avoid the unlawful enforcement of federally-
18 preempted regulation, the concomitant disruption of its railroad operations and projects,
19 and the uncertainty generated by this dispute. (Complaint, at ¶¶ 4-5.) Specifically,
20 Plaintiff claims that it is "subject to the STB's jurisdiction," that it "was and continues to
21 be a federally licensed railroad subject to the STB's jurisdiction," and that it is a
22 "common-carrier railroad subject to the STB's jurisdiction." (Complaint, at ¶¶ 9, 18.)
23 Plaintiff's primary claim is that it "is a federally regulated common carrier that is part of
24 the interstate rail network under the STB's exclusive jurisdiction." (Complaint, at ¶ 30.)
25 It "seeks a declaration that the actions of the Commission and the City to regulate
26 Mendocino Railway's operations, practices and facilities are preempted . . . and that
27 Mendocino Railway's activities are subject to the STB's exclusive jurisdiction."
28

1 None of these matters establish any valid claim or any valid basis for federal
2 subject matter jurisdiction, and are, in fact, false. Further, this Court should abstain from
3 exercising jurisdiction in this matter due to comity and the fact that Declaratory Judgment
4 is not warranted under the facts and circumstances.

5 **III. LEGAL STANDARD.**

6 The City of Fort Bragg seeks dismissal of the Complaint in this matter based on
7 Federal Rules of Civil Procedure, Rule 12 (b)(1) for lack of subject matter jurisdiction, 12
8 (b)(6) for failure to state a claim upon which relief can be granted, and 12 (h)(3).

9 Generally, a complaint must be supported by factual allegations. *Ashcroft v. Iqbal*,
10 556 U.S. 662 (2009). "While legal conclusions can provide the framework of a
11 complaint, they must be supported by factual allegations." *Id*. at 679. "[N]either legal
12 conclusions nor conclusory statements are themselves sufficient, and such statements are
13 not entitled to a presumption of truth. *Wicks v. Chrysler Group, LLC,* 2011 U.S. Dist.
14 LEXIS 98439, *4 (E.D. Cal. August 31, 2011) (citing to *Iqbal*, 556 U.S. at 678-679).

15 Dismissal under Federal Rule of Civil Procedure 12 (b)(6) is appropriate when it is
16 clear that no relief could be granted under any set of facts that could be proven consistent
17 with the allegations set forth in the Complaint. *See* Bi*g Bear Lodging Ass'n v. Snow*
18 *Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999); *Newman v. Universal Pictures*, 813
19 F.2d 1519, 1521-22 (9th Cir. 1987). A court should dismiss a claim if it lacks a cognizable
20 legal theory or if there are insufficient facts alleged under a cognizable legal theory.
21 *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008).

22 In ruling on a motion to dismiss, the Court must view all allegations in the
23 complaint in the light most favorable to the non-movant and must accept all material
24 allegations - as well as any reasonable inferences to be drawn from them - as true. *See Big*
25 *Bear Lodging Ass'n*, 182 F.3d at 1101; *North Star Int'l v. Arizona Corp. Comm'n*, 720
26 F.2d 578, 581 (9th Cir. 1983). However, "courts 'are not bound to accept as true a legal
27 conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
28 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A plaintiff must allege

"enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct." *Iqbal*, 556 U.S. at 697 (citations omitted).

If an amendment cannot cure a defect, the district court can deny leave to amend. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). Further, leave to amend "need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." *Ascon Properties, v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989).

Rule 12 (h)(3) provides that, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." A motion under Rule 12 may be made at any time and if the court lacks subject matter jurisdiction, the suit must be dismissed. *See Augustine v. United States*, 704 F.2d 1074, 1075 n. 3 (9th Cir. 1983); *Csibi v. Fusto*, 670 F.2d 134, 136 n. 3 (9th Cir. 1982). Where a case meets the criteria for *Younger* abstention, subject matter jurisdiction cannot be retained. *Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th Cir. 1988).

Finally, "in deciding a motion to dismiss for failure to state a claim, courts must [normally] limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint. However, courts may also consider matters of which they may take judicial notice." *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (citing Fed. Rules Evid., Rule 201(f) ("Judicial notice may be taken at any stage of the proceeding."). *See also, e.g., Bowers Inv. Co., LLC v. United States*, 104 Fed. Cl. 246, 258 n.9 (2011) ("the court may consider materials outside the pleadings—for example, matters of public record of which the court can take judicial notice—under a Rule 12(b)(6) motion to dismiss").

IV. ARGUMENT.

A. THIS CASE MUST BE DISMISSED BECAUSE THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CLAIMS.

The United States Constitution establishes that federal courts have authority to hear cases "arising under [the] Constitution, the laws of the United States, and treaties." U.S.

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1 Const., art. III, § 2. With respect to the original jurisdiction of the courts to hear matters
2 based on a federal question, Congress has provided authority similar to the Constitution:
3 "The district courts shall have original jurisdiction of all civil actions arising under the
4 Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Even though both
5 of the above provisions refer broadly to matters "arising under" federal law, the Supreme
6 Court has applied the language more narrowly. *See, e.g., Merrell Dow Pharmaceuticals,*
7 *v. Thompson*, 478 U.S. 804, 813 (1986) (federal question jurisdiction requires a cause of
8 action based on federal statute). The Complaint does not present a federal question that
9 meets these standards, or which can be adjudicated by this Court.

10 Federal question jurisdiction under Title 28 United States Code section 1331 exists
11 in two types of cases: (1) when it is apparent on the face of plaintiff's complaint that the
12 plaintiff's cause of action was created by federal law; or (2) when the plaintiff's cause of
13 action was created by state law, but resolution requires determination of a substantial
14 question of federal law and the implicated federal law provides the plaintiff with a cause
15 of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-
16 28 (1983) (there is a federal question if the law creates the cause of action); *Merrell Dow*,
17 478 U.S. at 817 (federal question exists if an element of the state cause of action is a
18 federal statute that creates a federal cause of action for plaintiff).

19 Notably, the Complaint does not rely upon a cause of action created by federal law.
20 Instead, it relies on the Declaratory Judgment Act to assert subject matter jurisdiction in
21 this Court. To be sure, the Act creates a federal remedy in a case of actual controversy,
22 but it "does not provide an independent jurisdictional basis for suits in federal court.
23 *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (citing *Skelly Oil Co. v. Phillips*
24 *Petroleum Co.*, 339 U.S. 667, 671-74 (1950). As here, "where the complaint in an action
25 for declaratory judgment seeks in essence to assert a defense to [a] state court action, it is
26 the character of the . . . action, and not of the defense, which will determine federal-
27 question jurisdiction in the District Court." *Public Service Comm. v. Wycoff Co.*, 344 U.S.
28 237, 248 (1952). If a claim in federal court "does not itself involve a claim under federal

1 law, it is doubtful if a federal court may entertain an action for a declaratory judgment
2 establishing a defense to that claim. This is dubious even though the declaratory
3 complaint sets forth a claim of federal right, if that right is in reality in the nature of a
4 defense to a . . . cause of action." *Id.*
5 As the Eighth Circuit has recognized, "[t]he Declaratory Judgment Act is
6 procedural; it does not expand federal court jurisdiction. Federal-question jurisdiction may
7 not be created by a declaratory-judgment plaintiff's 'artful pleading [that] anticipates a
8 defense based on federal law.'" *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011) (change
9 in original) (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950).
10 The Ninth Circuit has also found similarly, in circumstances that are instructive
11 here: "In an effort to engineer federal jurisdiction, the Stillaguamish Tribe of Indians
12 ('the Tribe') sued the State of Washington in federal court, seeking a declaration that the
13 Tribe's sovereign immunity barred any lawsuit arising from a particular contract with
14 Washington. The trouble with this approach is that the Tribe's anticipatory defense to a
15 state court lawsuit does not net federal jurisdiction." *Stillaguamish Tribe of Indians v.*
16 *Washington*, 913 F.3d 1116, 1118 (9th Cir. 2019). The Ninth Circuit found "the district
17 court lacked subject matter jurisdiction" as to the "Tribe's sovereign immunity defense."
18 *Id.* The court concluded that "[n]either a defense based on federal law nor a plaintiff's
19 anticipation of such a defense is a basis for federal jurisdiction." *Id. See also, Chicago*
20 *Tribune Co. v. Board of Trs. of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("it
21 is blackletter law that a federal defense differs from a claim arising under federal law").
22 As for the second basis for jurisdiction stated above, save for the remedy provided
23 by the declaratory judgment procedure, the Complaint only arises as a defense to the
24 Mendocino County Action already pending in State court, and which relates to state-
25 created actions therein. Thus, it is directly prohibited by the principles states above. It is
26 well-established that anticipation of a federal defense does not establish federal
27 jurisdiction. *See Louisville & Nashville Rd. Co. v. Mottley*, 211 U.S. 149, 152 (1908);
28 *City Nat'l Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982) (anticipation of federal

defense does not establish federal jurisdiction). The claims in the Complaint simply do *not* arise directly from a federal cause of action or implicate a federal law that provides Plaintiff with any valid, independent cause of action, and thus federal question jurisdiction under section 1331 does not exist. There is no federal cause of action to support the derivative declaratory relief sought under the Declaratory Judgment Act. The Court thus lacks subject matter jurisdiction over the Complaint and it must be dismissed.

B. THIS CASE SHOULD ALSO BE DISMISSED BECAUSE IT RAISES QUESTIONS FROM WHICH THIS COURT SHOULD ABSTAIN.

Under the *Younger* doctrine, federal courts should abstain from enjoining or interfering with pending state judicial actions. *Younger v. Harris*, 401 U.S. 37 (1971). Indeed, this action improperly seeks to do just that, although it is indirectly stated as seeking a declaration or prohibition against the *City* interfering with Plaintiff, by the City's local regulatory authority. Although this action does not seek to directly restrict the Superior Court from continuing the Mendocino County Action, the practical effect is no different, in that this action will necessarily directly interfere with the Superior Court's exercise of jurisdiction that is already underway. Plaintiff seeks to have this Court issue a declaratory judgment and/or enjoin the City from exercising certain local regulations assertedly preempted by federal law, and such declaration or injunction necessarily includes the City's continuing prosecution of the Mendocino County Action. Importantly, whether those regulations are subject to federal preemption is a fact-intensive issue that has yet to be decided at any substantive level by the Mendocino County Superior Court.

Indeed, Mendocino Railway impermissibly seeks to have this Court intervene, as mere forum shopping, and in circumstances where this Court's involvement is not even warranted under the law. Federal law supports the fact that local regulations are permissible where they do not interfere with interstate rail operations – *assuming* any such operations would even be implicated in the Mendocino County Action. *See, e.g., 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) ("Many

1 rail construction projects are outside of the Board's regulatory jurisdiction. For example,
2 railroads do not require authority from the Board to build or expand facilities such as
3 truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad
4 operations, or to upgrade an existing line or to construct unregulated spur or industrial
5 team track."); ("preemption does not apply to operations that are not part of the national
6 rail network" or "to state or local actions under their retained police powers so long as
7 they do not interfere with railroad operations or the Board's regulatory programs") (citing
8 *Hi Tech Trans, LLC-- Petition for Declaratory Order--Hudson County, NJ*, STB Finance
9 Docket No. 34192, 2003 STB LEXIS 475 at *10-11, 2003 WL 21952136 (2003), *aff'd Hi-*
10 *Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) ("no preemption for activity
11 that is not part of 'rail transportation'"). Thus, Plaintiff seeks to avoid these limitations by
12 claiming to this Court that preemption under 49 U.S.C. § 10501(b) subsumes and
13 prohibits *all* local regulatory efforts, but this is an inaccurate statement of the law.

14 Further, such claim does not serve to negate the fact that Plaintiff has an adequate
15 opportunity to litigate its preemption defense in state court. To permit Plaintiff's matter to
16 proceed would be a violation of the principles laid down in *Younger*. "As a matter of
17 comity, federal courts should maintain respect for state functions and should not unduly
18 interfere with the state's good faith efforts to enforce its own laws in its own courts."
19 *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994).

20 *Younger* abstention is appropriate where, as here, three factors are present: (1) at
21 the time the federal action was filed, state judicial proceedings were ongoing; (2) the
22 proceedings implicate an important state interest; and (3) the federal plaintiff maintains an
23 adequate opportunity to raise federal questions in the state court proceedings. *Lebbos v.*
24 *Judges of the Superior Court*, 883 F.2d 810, 814 (9th Cir. 1989) (citing *World Famous*
25 *Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir. 1987). Based on
26 satisfaction of these standards here, this Court should dismiss this within action.

27 First, state judicial proceedings were pending in the Mendocino County Action at
28 the time Plaintiff filed this action, these proceedings have yet to be concluded. Since the

1 Mendocino County Action is a pending judicial proceeding within the meaning of the
2 *Younger* factors, this Court should exercise its abstention discretion under the
3 circumstances and the first factor is met. *San Remo Hotel v. City and County of San*
4 *Francisco,* 145 F.3d 1095, 1104 (9th Cir. 1998).

5 In fact, the very purpose of this action is to have a federal court issue declaratory
6 relief before the state court can adjudicate the underlying issues in the City's State action
7 and/or for Plaintiff to obtain an alternative forum and/or judge, since Plaintiff was not
8 satisfied with Judge Brennan's ruling on the demurrer and the lack of intervention by writ
9 of mandate from the state appellate courts. This action is just the last among a string of
10 attempts by Plaintiff to try to escape Judge Brennan's court.

11 Second, the state court proceedings in the Mendocino County Action that are
12 challenged by this action implicate important state interests. It is well-established that
13 states have an important stake in administering their judicial system and seeing that their
14 "orders and judgments are not rendered nugatory." *Lebbos v. Judges of the Superior*
15 *Court*, 883 F.2d 810, 814-815 (9th Cir. 1989). As well, "municipal interests in land-use
16 regulation qualify as important 'state' interests." *San Remo*, at 1104; *see also Rancho*
17 *Palos Verdes Corp v. City of Laguna Beach*, 547 F.2d 1092, 1094-95 (9th Cir. 1976)
18 (recognizing California municipalities' interest in land-use regulation). Similarly, "[t]he
19 Supreme Court has . . . recognized that a state nuisance proceeding may warrant *Younger*
20 abstention from federal claims." *Herrera v. City of Palmdale*, 918 F.3d 1037, 1044 (9th
21 Cir. 2019) (citing *Huffman v. Pursue*, 420 U.S. 592, 607 (1975)).

22 In fact, because Mendocino Railway operates a sightseeing excursion service only,
23 with no service connection to interstate commerce, its railway activities are limited, and
24 not subject to federal preemption. Indeed, the federal Railroad Retirement Board has so
25 held as to Mendocino Railway's operations. *See* City's RJN, Exhibit D. The Board
26 issued a decision in B.C.D. 06-42 in 2006, finding that, even though the STB authorized
27 Mendocino Railway's acquisition in 2004 of the assets of California Western Railroad,
28 Mendocino's rail lines "between Fort Bragg and Willits . . connects to another railway

1 line over which there has been no service for approximately ten years," and significant
2 "problems on the line will prevent service for some time to come." The line was, at that
3 time, "unusable" – and it remains so today.[1] The Board concluded that "Mendocino's
4 ability to perform common carrier service is thus limited to the movement of goods
5 between points on its own line, a service it does not perform." *Id.* Further, its services
6 were "characterized as a tourist or excursion railroad operated solely for recreational and
7 amusement purposes. Since passengers are transported solely within one state, under
8 section 10501 (a)(2)(A), above, Sierra Entertainment [, Plaintiff's parent company,] would
9 not be subject to [STB] jurisdiction. . . ." The Board concluded that "[s]ince Mendocino
10 reportedly does not and cannot now operate in interstate commerce, the Board finds that it
11 is not currently an employer under the Acts." *Id.*

12 In the Mendocino County Action, the City seeks to exercise legitimate police
13 powers not within the jurisdiction of the STB and not subject to federal preemption.
14 Further, as noted above, the Railroad Retirement Board concluded, since 2006, that
15 Mendocino Railway does *not* conduct activities in interstate commerce, is *not* a common
16 carrier, and is *not* subject to STB authority or jurisdiction. Thus, the allegations Plaintiff
17 has asserted as to STB exclusive authority and preemption are also simply false. This
18 Court both lacks jurisdiction over the matters asserted, as well as *Younger* abstention
19 being warranted, so that the City may further its significant interest in its local regulatory
20 authority, particularly when there is no federal preemption at issue in any event.

21 Even to the extent Plaintiff's assertion of preemption remains to be decided, or
22 factual or legal issues relating thereto, Plaintiff seeks to avoid those altogether by merely
23 asserting in the Complaint by bare allegation, its purported legal status (e.g. as a common
24 carrier, acting in interstate commerce, etc.), which is contradicted by judicially noticeable
25
26
27
28

[1] As alleged in the City's Complaint in the Mendocino County Action, this line has had a collapsed tunnel since in or about 2016, and Plaintiff admits that the further connection of its line at the Willits Depot end of the Fort Bragg-Willits disconnected line has been "temporarily" under federal embargo (since in or about 1998, *see* FRA Emergency Order No. 21, Northwestern Pacific Railroad) (Jee Decl., Ex. A, ¶ 9; Complaint, at ¶ 22.)

matter. Their bald and unproven essential allegation is insufficient as a matter of law to establish either this Court's jurisdiction, or any grounds for this Court to refuse to abstain.

As to the third *Younger* factor, Plaintiff will have an adequate opportunity to raise questions of alleged federal preemption in the Mendocino County Action. Compliance with this element is established by the fact that Plaintiff has already addressed its federal preemption claims in its Answer, and it also did so in its demurrer. (Jee Decl., at ¶ 2.) Even though the demurrer posed insufficient grounds for dismissal of the entire action at an early stage, this does not mean that Plaintiff will not be able to adequately address any preemption defense as the action proceeds, or that the Superior Court cannot properly determine those issues. *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976) ("State courts, like federal courts, have a constitutional obligation . . . to uphold federal law.").

Indeed, since the case is still in its early stages, federal authority and jurisdiction has not yet been substantively decided. Further, the action may not end up implicating federal law or preemption at all. Plaintiff's action is not only insufficient but premature, and may be ultimately unnecessary.

To be sure, "[w]here vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of constitutional claims.'" *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (internal citation omitted). Since no constitutional claims are at stake in the Mendocino County Action and the City's claims have yet to be fully litigated or fleshed out, abstention is eminently proper. In fact, ascertainment of the validity of disputed facts in the Mendocino County Action is no bar to the asserted preemption defense set forth in this matter.

Abstention may only be overcome if "federal preemption of the state law at issue is readily apparent," meaning that the specific matter at issue has been the Supreme Court has already decided such issue. *Woodfeathers v. Wash. County*, 180 F.3d 1017, 1021 (9th Cir. 1999) (internal changes and quotations omitted). Not only is there no such readily apparent decision, but the matters in the Mendocino Court Action implicate *State law*, and are likely to be heavily fact laden, whereas the preemption declaration and/or injunction

1 Plaintiff seeks herein would be far too broad and would likely be overinclusive as to
2 many, if not all, matters subject to local authority and/or valid State court jurisdiction.
3 Moreover, the likelihood of success in state court proceedings is immaterial for
4 *Younger* purposes. *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 224 (9th Cir.
5 1994) (lack of opportunity to raise federal claims only demonstrated when *procedural bar*
6 prevents presentation of federal claims.). The superior court has not denied Plaintiff's
7 federal preemption claims, and may yet still even be required to decide such defenses. In
8 fact, disputed facts have yet to be fully adjudicated, which means that Plaintiff still
9 possesses an adequate opportunity to raise its federal defenses and litigate its claims in
10 this matter in the Mendocino County Action. This Court should thus not prematurely
11 interfere with that process, as sought to be done by Plaintiff's broad and unwarranted
12 Complaint in this matter. Therefore, the third factor for *Younger* abstention is satisfied.
13 Since this case meets the three elements required for *Younger* abstention, this Court
14 should dismiss the within action against the City. The Ninth Circuit has expressly held
15 that, "where a case is properly within the *Younger* category of cases, there is no discretion
16 to grant relief." *Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353,
17 1356 (9th Cir. 1986) (citing *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S.
18 800, 816 n. 22 (1976), internal quotations omitted). Accordingly, this Court should
19 abstain in this matter, refuse jurisdiction, and dismiss the Complaint in its entirety.
20 Further, it is also appropriate for this Court to defer to the Mendocino County
21 Action under similar principles in *Colorado River Water Conservation District v. United*
22 *States*, 424 U.S. 800 (1976). Even when a case may not fall within one of the recognized
23 grounds for abstention, the United States Supreme Court recognized that "there are
24 principles unrelated to considerations of proper constitutional adjudication and regard for
25 federal-state relations which govern in situations involving the contemporaneous exercise
26 of concurrent jurisdictions, either by federal courts or by state and federal courts. These
27 principles rest on considerations of wise judicial administration, giving regard to
28 conservation of judicial resources and comprehensive disposition of litigation." *Colorado*

River, 424 U.S. at 817 (internal quotation omitted). Although noting that no one factor was determinative, the Court listed several instances warranting deferral to state action, including: the court first assuming jurisdiction over the property; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 818.

Further, the preemption Plaintiff claims does not appear nearly as broach as Plaintiff would like. "Congress narrowly tailored the ICCTA pre-emption provision to displace only regulation, i.e., those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010) (internal quotations and changes omitted) (citing *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)). *Franks* distinguished *categorical* preemption, which is what Plaintiff seeks herein, with *as applied* preemption, which cannot yet be determined because the State court action has not yet proceeded. *See also, e.g., Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1131-1132 (10th Cir. 2007) (regarding disposal of "detritus or maintain[ance of] drainage ditch vegetation not preempted by ICCTA; also, not nuisance due to water pooling from "railroad's construction of an earthen berm," as not "directly relate[d]" to rail activities or federal economic regulation of railroads) (citing *Rushing v. Kansas City So. Railway Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001)). In point of fact, "'not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety.'" *Id*. at 1133-1134. Most importantly, this is a *factual* issue. *Id.*

In this matter, the Mendocino County Action was filed long before this action. The possibility of piecemeal litigation exists if both state and federal forums are contemporaneously construing state law issues and/or federal defenses, which the State court is equally able to determine. Thus, abstention is necessary and appropriate.

C. <u>THIS CASE IS NOT APPROPRIATE FOR DECLARATORY RELIEF AND THIS COURT SHOULD REFUSE SUCH RELIEF.</u>

Plaintiff seeks a declaration of its rights regarding federal preemption under 49 U.S.C. § 10501(b), and bases its request on the Declaratory Relief Act in 28 U.S.C. § 2201. As noted above, the Declaratory Relief Act creates a federal remedy and is not an independent basis for federal jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). As a result, declaratory relief is not available and this Court does not have subject matter jurisdiction over this case, but even assuming *arguendo* that it did, it may still deny such relief as improper.

Federal courts are empowered to abstain from requests for declaratory relief when there is a pending state court action involving the same issues and parties. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-289 (1995); *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (federal courts should generally decline to here "reactive declaratory actions"). In fact, the superior court's ruling on the demurrer merely found that Plaintiff's preemption argument was overly broad, not that federal preemption did not apply to the broad set of "railroad activities" included under 49 U.S.C. § 10501(b). *See* City's RJN, Exhibit B. Indeed, the superior court concluded that "the applicability of preemption is necessarily a 'fact-bound question,' not suitable to resolution by demurrer." *Id.* Thus, the question of preemption could not be answered in the abstract, or until the parties have been afforded the opportunity to more fully litigate the underlying issues pending in the superior court relating to local jurisdiction. As the superior court properly determined, Mendocino Railway's preemption argument

> 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 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.

1 *Id.* Consequently, this Court should not entertain declaratory relief while a parallel state
2 action is pending. In particular, the state court has not yet decided any substantive
3 matters, including the scope and applicability of the very federal preemption Plaintiff
4 seeks to enforce in this Court, in such overbroad and abstract manner.

5 Further, declaratory relief is inappropriate to adjudicate past conduct. *See, e.g.,*
6 *American Civil Liberties Union v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53
7 (1st Cir. 2013) ("With limited exceptions, … issuance of a declaratory judgment deeming
8 past conduct illegal is … not permissible as it would be merely advisory."); *Gruntal &*
9 *Co. v. Steinberg*, 837 F. Supp. 85, 89 (D.N.J. 1993) (declaratory relief inappropriate solely
10 to adjudicate past conduct). Thus, to the extent Plaintiff seeks a declaration from this
11 Court as to past acts of the City that have been completed, declaratory relief is improper.

12 Injunctive relief is also inappropriate for similar reasons. "'A court of the United
13 States may not grant an injunction to stay proceedings in a State court except as expressly
14 authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect
15 or effectuate its judgments.'" Younger, 401 U.S. at 40. *See also, Steffel v. Thompson,*
16 415 U.S. 452, 460-61 (1974) ("the intrusive effect of declaratory relief will result in
17 precisely the same interference with and disruption of state proceedings that the long-
18 standing policy limiting injunctions was designed to avoid") (internal quotations omitted).

19 For all of these reasons, this Court should refrain from exercising jurisdiction for
20 either declaratory or injunctive relief, assuming *arguendo* that such claims were even
21 proper in the first instance.

22 **V. <u>CONCLUSION.</u>**

23 Mendocino Railway has not stated any valid federal cause of action, and thus this
24 Court has no subject matter jurisdiction over this matter and, absent subject matter
25 jurisdiction. This action should be dismissed. In addition, principles of comity require
26 that the state court, in which the City's Mendocino County Action is already pending, be
27 given an opportunity to resolve questions relating to the scope of its own jurisdiction and
28 the applicability and scope of claimed federal preemption by Plaintiff. The City must be

1 permitted the opportunity for its action, which precedes this one, to proceed, and that the
2 state court that has already exercised jurisdiction be permitted to resolve questions
3 regarding the validity and scope of the City's local authority, which may have no
4 implications as to federal law or federal preemption, or which can properly be determined
5 by the state court. For these reasons, Mendocino Railway's misguided attempt to obtain
6 an alternate forum to avoid valid State court authority, and in essence to enjoin its exercise
7 of jurisdiction at all, should be rejected and this case should be dismissed in its entirety.
8 Dated: September 22, 2022 JONES MAYER
9
10 By: s/Krista MacNevin Jee
11 Krista MacNevin Jee
Attorneys for Defendant,
12 CITY OF FORT BRAGG
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EXHIBIT 7

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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

MENDOCINO RAILWAY, Plaintiff, v. JACK AINSWORTH, et al., Defendants.	Case No. 22-cv-04597-JST **ORDER GRANTING MOTIONS TO DISMISS** Re: ECF Nos. 15 & 16

Before the Court are Defendants Jack Ainsworth's and the City of Fort Bragg's motions to dismiss. ECF Nos. 15 & 16. The Court will grant the motions.

I. BACKGROUND

This case is the second in an ongoing controversy between the City of Fort Bragg ("City") and the California Coastal Commission ("Commission"), on the one hand, and Mendocino Railway, on the other, over whether state and local laws apply to Mendocino Railway. In the first case, *City of Fort Bragg v. Mendocino Railway*, No. 21CV00850 (Cal. Super. Ct.) ("state court action"), the City and the Commission sued Mendocino Railway in the Superior Court of Mendocino County, primarily seeking a declaration that Defendant Mendocino Railway is subject to such laws and regulations. *See* ECF No. 15-1 at 6-11, 69-76.[1] The City also seeks an injunction requiring Mendocino Railway to comply with local law as it applies to dilapidating railroad infrastructure within City boundaries. *Id.* at 6-11. In addition, the Commission seeks a declaration that the Railway is subject to the California Coastal Act of 1976 ("Coastal Act"), Cal.

[1] The Commission's request that the Court take judicial notice of filings from the state court action, ECF No. 15-1 at 1-2, is granted. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

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Pub. Res. Code § 30000 *et seq.*, and an injunction requiring Mendocino Railway to comply with the Act's permitting requirements. *Id.* at 69-76.

In the state court action, the City filed its complaint on October 28, 2021. ECF No. 15-1 at 11. Mendocino Railway demurred to the complaint on January 14, 2022, arguing, *inter alia*, that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, preempts the City's claims. ECF No. 15-1 at 28-29. The court overruled the demurrer on April 28, 2022. *Id.* at 32-43. The court rejected Mendocino Railway's federal preemption argument as "overbroad" because "not all state and local regulations that affect railroads are preempted" by the ITCCA. *Id.* at 41. Rather "the applicability of preemption" in this context "is necessarily a 'fact bound' question." *Id.* at 43. The court further concluded that because Mendocino Railway "is simply a luxury sightseeing excursion service with no connection to interstate commerce," "its 'railroad activities,' for the purposes of federal preemption, are extremely limited." *Id*. at 42. Mendocino Railway filed its answer to the City's complaint on June 24, 2022, asserting federal preemption as an affirmative defense. *Id.* at 54. On September 8, 2022, the Commission moved to intervene and filed a proposed complaint-in-intervention. *Id.* at 59-84. The complaint notes that Mendocino Railway "contends that state and federal law preempts" the permitting requirements of the Coastal Act, *id.* at 74, and, as part of the Commission's prayer for relief, asks the court to declare that the Coastal Act and the City's local laws "are not preempted by any state or federal law," *id.* at 75.

Mendocino Railway removed the state court action to this Court on October 20, 2022. *See* Notice of Removal, *City of Fort Bragg, et al. v. Mendocino Railway*, No. 22-cv-06317-JST (N.D. Cal. Oct. 20, 2022), ECF No. 1. The notice of removal invokes this Court's federal question jurisdiction on the ground that the resolution of the City's and the Commission's claims requires "a judicial determination of *federal questions* arising under ICCTA." *Id.* at 2 (emphasis in original). The City and Commission moved to remand the action to state court, and this Court granted the motions. *See* Order Granting Motions to Remand, *City of Fort Bragg, et al. v. Mendocino Railway*, No. 22-cv-06317-JST (N.D. Cal. May 11, 2023), ECF No. 33.

Mendocino Railway filed the instant complaint in this case on August 9, 2022, against the

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City and Jack Ainsworth in his official capacity as Executive Director of the Commission. ECF No. 1. Mendocino Railway seeks a declaration that the ICCTA preempts state and local law and an injunction prohibiting the City and the Commission from "interfer[ing] with Mendocino Railway's operation." ECF No. 1 at 10. Ainsworth and the City filed motions to dismiss Mendocino Railway's complaint. ECF Nos. 15 & 16. The Court took the motions under submission without a hearing on December 12, 2022.

II. JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1331.

III. LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While this standard is not "akin to a 'probability requirement' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). In determining whether a plaintiff has met the plausibility requirement, a court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

IV. DISCUSSION

The parties dispute, *inter alia*, whether a *Colorado River* stay or dismissal is appropriate in

this case. Before staying or dismissing a case under *Colorado River*, the Court must find that there are concurrent state and federal court proceedings involving the same matter. If the Court makes such a finding, it then weighs a "complex [set]" factors to determine whether "exceptional circumstances justify such a stay" or dismissal. *Intel Corp. v. Advanced Micro Devices*, 12 F.3d 908, 912 (9th Cir. 1993). These factors include:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Seneca Ins. Co., Inc. v. Strange Land, Inc., 862 F.3d 835, 841 (9th Cir. 2017) (quoting *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011)). In balancing these factors, the Court must remain "mindful that '[a]ny doubt as to whether a factor exists should be resolved against a stay.'" *R.R. St.*, 656 F.3d at 979 (quoting *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990)). However, "these factors are not a 'mechanical checklist'; indeed, some may not have any applicability to a case." *Seneca Ins. Co.*, 862 F.3d at 842 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)). "Courts generally rely on the state of affairs at the time of the *Colorado River* analysis." *R.R. St.*, 656 F.3d at 982.

The Court finds the predicate existence of concurrent state and federal court proceedings, as discussed above. The first factor is "irrelevant" because "the dispute does not involve a specific piece of property." *R.R. Street*, 656 F.3d at 979. The second factor is neutral because the state proceedings are in the Mendocino County Superior Court in Fort Bragg, California, and the federal proceeding is in the Northern District of California in Oakland, California, which are approximately 150 miles apart. *Montanore Minerals Corp v. Bakie*, 867 F.3d 1160, 1167 (9th Cir. 2017) (treating a distance of 200 miles as neutral); *accord Travelers Indem. Co. v. Madonna*, 912 F.3d 1364, 1368 (9th Cir. 1990) ("Although 200 miles is a fair distance, it is not sufficiently great that this factor points toward abstention. The district court did not err in finding this factor 'unhelpful.'").

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1 The third factor – the desire to avoid piecemeal litigation – is a "substantial factor in the
2 *Colorado River* analysis." *Seneca Ins. Co.*, 862 F.3d at 835. "Piecemeal litigation occurs when
3 different tribunals consider the same issue, thereby duplicating efforts and possibly reaching
4 inconsistent results." *Id.* (quoting *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*,
5 843 F.2d 1253, 1258 (9th Cir. 1988)). "[T]here must be exceptional circumstances present that
6 demonstrate that piecemeal litigation would be particularly problematic." *Id.* Such exceptional
7 circumstances are present here, as the issue of federal preemption under the ICCTA is squarely
8 before the state court. As discussed above, in overruling Mendocino Railway's demurrer, the state
9 court rejected Mendocino Railway's federal preemption argument as overbroad and deferred
10 resolution of the issue to a later juncture. ECF No. 15-1 at 42-43. Federal preemption is the sole
11 issue raised in Mendocino Railway's complaint in this action, and for the Court to adjudicate that
12 claim would necessarily duplicate the state court's efforts and risk the possibility of this Court and
13 the state court reaching different results. Because "[p]ermitting this suit to continue would
14 undeniably result in piecemeal litigation," the third factors "weighs significantly against
15 jurisdiction." *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989); *R.R. St.*, 656 F.3d at 966.
16 The fourth factor requires the Court to assess "'the order in which the forums gained
17 jurisdiction,'" considering "'the realities of the case at hand' 'in a pragmatic, flexible manner.'"
18 *Montanore Minerals Corp.*, 867 F.3d at 1168 (first quoting *Moses H. Cone*, 460 U.S. at 21; and
19 then quoting *Am. Int'l Underwriters*, 843 F.2d at 1257). The Court "consider[s] not only the
20 order, but also the relative progress of the state and federal proceedings." *Id.* Mendocino Railway
21 filed its complaint in this case on August 9, 2022, which is nearly two years after the state court
22 action commenced on October 28, 2021. Additionally, the state court action is largely past the
23 pleading stage, as the Court overruled Mendocino Railway's demurrer to the City's complaint,
24 Mendocino Railway filed its answer to the complaint on June 24, 2022, and trial was scheduled to
25 begin on June 21, 2023. ECF No. 15-1 at 102. Because the state forum gained jurisdiction first,
26 and because the state court action has progressed further than the federal court action, the fourth
27 factor weighs in favor of dismissal.
28 The fifth factor requires the Court to "consider 'whether federal law or state law provides

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the rule of decision on the merits.'" *Seneca Ins. Co.*, 862 F.3d at 844 (quoting *R.R. St.*, 656 F.3d at 978). "The 'presence of federal-law issues must always be a major consideration weighing against surrender' of jurisdiction, but 'the presence of state-law issues may weigh in favor of that surrender' only 'in some rare circumstances.'" *Id.* (quoting *Cone Mem'l Hosp.*, 460 U.S. at 26). Federal law supplies the rule of decision on the merits of Mendocino Railway's complaint. The text of the ICCTA determines whether Mendocino Railway falls within the statute's ambit so as to trigger the statute's preemptive effect, *see* 49 U.S.C. §§ 10102, 10501(b), and federal preemption law determines the extent to which the ICCTA preempts the state and local laws that substantiate the challenged actions of the City and the Commission, *see BNSF Ry. Co. v. Cal. Dep't of Tax and Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018) ("The ICCTA 'preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. What matters is the degree to which the challenged regulation burdens rail transportation[.]'" (alteration in original) (quoting *Ass'n of Am. R.Rs. v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010)). Accordingly, this factor weighs against dismissal.

The sixth factor "looks to whether the state court might be unable to enforce federal rights." *Seneca Ins. Co.*, 862 F.3d at 845. This factor weighs in favor of dismissal "[w]hen it is clear that 'the state court has authority to address the rights and remedies at issue.'" *Montanore Minerals Corp.*, 867 F.3d at 1169 (quoting *R.R. St.*, 656 F.3d at 981). Here, "[t]here is no doubt that California state courts have the authority" to determine the preemptive effect, if any, of the ICCTA on the City's and the Commission's regulatory authority over Mendocino Railway. *Id.* Not only do state courts have the authority to determine the preemptive effect of federal law, but those determinations are often entitled to preclusive effect as well. *Cf. Readylink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754, 761-62 (9th Cir. 2014). And Mendocino Railway does not "claim that the state court would . . . lack the power to enter any orders to protect its rights." *Montanore Minerals Corp.*, 867 F.3d at 1169. The sixth factor weighs in favor of dismissal.

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1 The seventh factor requires the Court to "consider whether either party sought more
2 favorable rules in its choice of forum of pursued suit in a new forum after facing setbacks in the
3 original proceeding." *Seneca Ins. Co.*, 862 F.3d at 846. Following the state court's overruling of
4 the demurrer in the state court action, Mendocino Railway filed a petition for writ review in the
5 California Court of Appeal, which the Court of Appeal denied. ECF No. 15-1 at 47-48. The
6 California Supreme Court denied Mendocino Railway's petition for review of the Court of
7 Appeal's denial on June 10, 2022. *Id.* at 100. Mendocino Railway then filed the instant complaint
8 on August 9, 2022, asserting a claim premised entirely on the argument rejected on demurrer by
9 the state court. Subsequently, in the state court action, Mendocino Railway moved to disqualify
10 the presiding judge, Judge Clayton L. Brennan, who had overruled Mendocino Railway's
11 demurrer. ECF No. 15-1 at 101-102. After Judge Brennan denied the motion on September 14,
12 2022, *id.*, the Commission moved to intervene on October 6, 2022, *id.*, and Mendocino Railway
13 removed that action to federal court on October 20, 2022 – nearly two years after the action had
14 commenced. Mendocino Railway's notice of removal cited the federal preemption issue in the
15 Commission's complaint as the basis for federal question jurisdiction. But Mendocino Railway
16 was already aware of – and indeed had made – the very same argument in its demurrer to the
17 City's complaint, and that argument now serves as the sole basis for the claims in this case. The
18 only "reasonably infer[ence]" from this litigation conduct, considered as a whole, is that
19 Mendocino Railway "has become dissatisfied with the state court and now seeks a new forum."
20 *Montanore Minerals Corp.*, 867 F.3d at 1160; *Nakash*, 882 F.2d at 1411. Accordingly, this factor
21 weighs in favor of dismissal.

22 The eighth factor requires the Court to consider "whether the state court proceeding
23 sufficiently parallels the federal proceeding" in order "to ensure 'comprehensive disposition of
24 litigation.'" *R.R. St.*, 656 F.3d 656 F.3d at 982 (quoting *Colo. River*, 424 U.S. at 817). "'[E]xact
25 parallelism'" is not required; rather, "it is sufficient if the proceedings are 'substantially similar.'"
26 *Montanore Minerals Corp.*, 867 F.3d at 1170 (quoting *Nakash*, 882 F.2d at 1416). Courts are to
27 be "particularly reluctant to find that the actions are not parallel when the federal action is but a
28 'spin-off' of more comprehensive state litigation." *Nakash*, 882 F.2d at 1416. Mendocino

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Railway has asserted ICCTA preemption as a defense in the state action, so there the state court must resolve that issue in the course of adjudicating the City's and the Commission's claims against Mendocino Railway. Because that issue is the sole issue in this case, it is difficult for the Court to conceptualize this action as anything but a spinoff of the state court action. Accordingly, the Court concludes that the state court proceeding sufficiently parallels the federal court proceeding. The eighth factor thus weighs in favor of dismissal.

In sum, only the fifth factor weighs against dismissal, and the remaining factors weigh in favor of dismissal. Therefore, "[o]n balance, the *Colorado River* factors strongly counsel in favor of" dismissal. *Montanore Minerals Corp.*, 867 F.3d at 1170.

The Court recognizes that the Ninth Circuit "'generally require[s] a stay rather than dismissal' under *Colorado River*." *Montanore Minerals Corp*., 867 F.3d at 1171. The general rule ensures "that the federal forum will remain open if for some unexpected reason the state forum . . . . turn[s] out to be inadequate." *Id.* at 886 (quoting *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 243 (9th Cir. 1989)). That purpose is not served here because the adjudication of the state court action will necessarily resolve the sole issue in this case and the state court proceedings can undoubtedly protect Mendocino Railway's rights.[2] And although the Ninth Circuit has not delineated the circumstances warranting dismissal rather than a stay, its framing of the rule as general necessarily contemplates exceptions. Indeed, *Colorado River* itself involved dismissal of a federal action. *See Colo. River*, 424 U.S. at 821; *accord Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983); *cf. Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2006). Thus, to the extent that there are exceptions to the general rule, the strength of the factors and the degree to which their balance tips sharply in Defendants' favor demonstrate "the clearest of justifications . . . warrant[ing] dismissal."[3] *Colo. River*, 424 U.S. at

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[2] Additionally, the state court's decision on the issue would likely be entitled to preclusive effect. *Cf. Readylink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d at 761-62.

[3] Although the fact that federal law supplies the rule of decision weighs against dismissal, that weight is substantially lessened because "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *accord Yellowbear v. Atty. Gen. of Wyoming*, 380 F. App'x 740, 741 (10th Cir. 2010) (Gorsuch, J.) (Under our federal system, . . . there is nothing inherently

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819. Accordingly, the Court will dismiss the case.

CONCLUSION

For the foregoing reasons, Defendants' motions are granted, and this case is dismissed. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: May 12, 2023

JON S. TIGAR
United States District Judge

suspect about state courts deciding questions of federal law. . . . Indeed, the Supremacy Clause contemplates that state courts *will* decide questions of federal law . . . ."). The balance would differ if, for example, the eighth factor weighed against a stay or dismissal. *Cf. United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1203 (9th Cir. 2021) (explaining that "doubt" as to "whether the state proceedings will resolve the federal action" is "'a significant countervailing consideration that' can be 'dispositive.'" (quoting *Intel Corp.*, 12 F.3d at 913)).

EXHIBIT 8

No. 23-15857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MENDOCINO RAILWAY,

Plaintiff-Appellant,

v.

JACK AINSWORTH, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 22-cv-04597-JST
Hon. Jon S. Tigar

APPELLANT'S OPENING BRIEF

Paul J. Beard II
FISHERBROYLES LLP
453 S. Spring St., Suite 400-1458
Los Angeles, CA 90013
Telephone No.: 818-216-3988
Email: paul.beard@fisherbroyles.com

Attorney for Appellant MENDOCINO RAILWAY

DISCLOSURE STATEMENT

Sierra Railroad Company owns 100% of the stock of Appellant Mendocino Railway.

Date: September 6, 2023

Respectfully submitted,

s/ Paul Beard II

Attorney for Appellant
MENDOCINO RAIWAY

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I. INTRODUCTION

This is an appeal from the district court's dismissal of Plaintiff Mendocino Railway's federal action against Defendants California Coastal Commission ("Commission") and City of Fort Bragg ("City"), under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Railway filed the action in response to the Commission's and City's relentless efforts to impose land-use permitting and other pre-clearance requirements on the Railway's railroad-related operations in Fort Bragg. As detailed in the Railway's complaint, those requirements fly in the face of the Railway's status as a federal railroad within the exclusive jurisdiction of the Surface Transportation Board ("STB")—a status that renders ***all*** such state and local interference with railroad-related operations federally preempted under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). Despite there being no comparable state proceeding that can definitively resolve the Railway's federal claims, and in light of other factors weighing decisively against dismissal, the district court erroneously invoked *Colorado River*'s "exceptional circumstances" to dismiss the case. The Railway seeks reversal and reinstatement of its action.

The parties' dispute began soon after the Railway, in its capacity as a California public utility with eminent-domain power, acquired 300 acres in Fort Bragg that the City desired for itself. In a clear effort to cast doubt on that purchase, impede future land acquisitions, and control how the Railway developed its railroad property, the City sued the Railway for a declaration that it is not a

public utility. Significantly, the City's lawsuit—filed in October 2021—had no cause of action regarding the Railway's "federal railroad" status or "federal preemption" rights.

During this time, the Railway also faced threats and demands by the Commission concerning certain repairs and other rail-related activities the Railway was undertaking at its property in the City. The Commission repeatedly ordered the Railway to submit to its land-use permitting authority on pain of an enforcement action, which the Railway resisted based on federal preemption. Eventually, the dispute came to a head, and, in August 2022, the Railway was forced to file this federal action for declaratory and injunctive relief to put an end to the unlawful assertion of permitting and pre-clearance authority over the Railway's railroad-related activities.

When the Railway filed this action, no party had asserted any claim regarding the Railway's "federal railroad" status or "federal preemption" rights. The only pending state action consisted of the City's claim for a declaration that the Railway is not a California public utility. It was only ***after*** the Railway filed this action that the Commission rushed to intervene in the City's case, asserting a declaratory relief claim that tried to mirror the Railway's federal claims, but only partially did. Whereas the Railway seeks relief comprehensively enjoining ***all*** Commission efforts to enforce land-use permitting requirements or to pre-clear the Railway's railroad-related activities—whatever the claimed source of authority for doing so—the Commission seeks a declaration only that its permitting authority under the Coastal Act and the City's Local Coastal Program (the City's rules for

coastal development within its jurisdiction) is not federally preempted. As for the City, it has never had, and still does not have, a cause of action concerning the Railway's "federal railroad" status or "federal preemption" rights.

As soon as the Commission intervened in the state case with its "federal preemption" claim, the Railway removed it to federal court. But the district court remanded the action. The day after its remand order, the district court granted the Commission's and City's abstention motions. The Commission moved for abstention under *Younger v. Harris*, 401 U.S. 37 (1971). The City 's motion was also based largely on *Younger*, though it also cited *Colorado River*. The district court ultimately dismissed this case on *Colorado River* grounds only.

The court's reliance on *Colorado River* was misplaced, principally because there is no sufficiently-parallel state action that will undoubtedly and completely resolve the claims in this federal action. For example, as noted above, the "federal preemption" claim in the state case reaches only part of the Commission's purported authority over the Railway—i.e., its permitting authority under the Coastal Act and the LCP. It doesn't reach the Commission's authority under the federal Coastal Zone Management Act (16 U.S.C. § 1451, *et seq.*) to ***pre-clear*** federally-funded or federally-licensed projects that the Railway proposes. As for the City, its state-law "public utility" claim cannot resolve the Railway's "federal preemption" claims. Because there is "substantial doubt" that the state case can dispose of the Railway's federal claims, this factor is "sufficient to preclude a *Colorado River* stay" or dismissal without recourse to the remaining factors.

Ernest Bock, LLC v. Steelman, 2023 U.S. App. LEXIS 20045, at *20 (9th Cir. Aug. 3, 2023).

But even if a sufficiently-parallel state action existed, the remaining factors on balance weigh against a stay or dismissal. Those factors are: "(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping." *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017). Properly applied, none of them weigh against jurisdiction, and at least one—the fact that federal law provides the rule of decision for the Railway's claims—strongly favors jurisdiction.

Finally, *Younger* abstention is improper, which may explain why the district court disregarded it. At the time the Railway filed this federal action, there was no parallel state proceeding with a "federal preemption" claim. Further, *Younger* applies only to criminal and quasi-criminal state proceedings, but the state case concerns the power to impose land-use permitting authority and civil penalties on the Railway. It is not a criminal or quasi-criminal proceeding.

The Court should reverse the district court's dismissal, with instructions to reinstate this case.

II. JURISDICTIONAL STATEMENT

The district court has original jurisdiction over Mendocino Railway's claim

under 28 U.S.C. sections 1331 and 2201, and FRCP 57, because the claim arises under the laws of the United States, and the district court has the power to grant a declaratory judgment. 28 U.S.C. § 1343. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because the district court dismissed the Railway's claim.

The district court dismissed the case and entered judgment on May 12, 2023. The Railway filed a notice of appeal on June 8, 2023. The appeal is timely under FRAP 4(a)(1)(A).

III. STATEMENT OF ISSUES PRESENTED

1. Did the district court err in dismissing this action pursuant to *Colorado River*, 424 U.S. 800, in deference to a pending state action, where the state and federal actions are insufficiently parallel, and the *Colorado River* factors weigh decisively against a stay or dismissal?

2. Is abstention appropriate under *Younger*, 401 U.S. 37, where no relevant state action was pending at the time of this action's filing, and the state action is not a criminal or quasi-criminal prosecution?

IV. STATEMENT OF THE CASE

A. Mendocino Railway, the ICCTA, and the STB

Mendocino Railway is a Class III common-carrier railroad with facilities, equipment and operations located partly in California's coastal zone, including the City. ER-105 (Mendocino Railway's Complaint ("Federal Complaint"), ¶ 2). Mendocino Railway's specific railroad line at issue—one of several lines that it owns and operates in California—runs 40 miles, from its main station in Fort

Bragg to its eastern station in Willits. ER-106, 109-10 (Federal Complaint, ¶¶ 9, 17, 20). The Fort Bragg station is fully developed as a railroad facility, with, among other things, passenger coaches and freight cars, an engine house, and a dry shed for storage of railroad equipment. *Id.* Since acquiring the line in 2004, the Railway has operated tourist and non-tourist passenger services, as well as freight services, consistent with its common-carrier obligations. *Id.*

The Railway line at issue connects to the Northwestern Pacific Railroad line, which in turn connects to the rest of the national rail system. ER-110 (Federal Complaint, ¶ 22). Thus, though Mendocino Railway is an ***intrastate*** railway, it is part of the ***interstate*** rail network. As such, it is a federal railroad under the ICCTA and within the exclusive jurisdiction of the STB. The STB itself has acknowledged the Railway's "federal railroad" status under its exclusive jurisdiction when, for example, it oversaw the Railway's 2004 acquisition of the line under 49 C.F.R. section 1150.31. *Id.* ¶ 19 (citing 69 Fed. Reg. 18999 (April 9, 2004)). As explained below, Mendocino Railway's status means that state and local land-use permitting and other pre-clearance requirements imposed on its railroad-related activities are federally preempted.[1]

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[1] As the Federal Complaint shows, the Railway claims federal preemption only of its ***railroad***-related activities. Non-railroaded-related activities remain subject to state and local regulation.

Under the ICCTA, the STB has exclusive jurisdiction over (1) "transportation by rail carriers" and (2) "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). The ICCTA broadly defines "transportation." It includes "(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." *Id.* § 10102(9). Further, the ICCTA defines a "rail carrier" is "a person providing common carrier railroad transportation for compensation." The ICCTA does not define "common carrier," but "courts have assumed that the term should be given the same meaning as it is given in the common law: an entity that holds itself out to the public as offering transportation services to all who are willing to pay its tariff." *Herzog Transit Servs. v. United States RRB*, 624 F.3d 467, 473 (7th Cir. 2010). A railroad offering common-carrier transportation remains a "rail carrier" for purposes of the ICCTA even if the railroad also provides, say, commuter or excursion services. *City of Encinitas v. N. San Diego County Transit Dev. Bd.*, 2002 U.S. Dist. LEXIS 28531, at *11. As noted above, Mendocino Railway qualifies as a common carrier railroad because it provides transportation. ER-110 (Federal Complaint, ¶ 20).

The STB's jurisdiction over Mendocino Railway is "exclusive." *Id.*; see also 49 U.S.C. § 10501(b) ("[T]he remedies provided [by that statute] with respect to regulation of rail transportation are ***exclusive*** and ***preempt*** the remedies provided under Federal or State law." (emphasis added)). Therefore, state and local efforts to impose permitting and other environmental pre-clearance requirements on any of the Railway's railroad-related activities are preempted. *Id.* (ICCTA "preempt[s] the remedies provided under Federal or State law"); *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (holding that the ICCTA's preemptive scope is "broad."); *Friends of Eel River v. North Coast R.R.*, 3 Cal. 5th 677, 716 (2017) (holding that "state environmental permitting or preclearance regulation that would have the effect of halting a private railroad project pending environmental compliance would be categorically preempted"); *Padgett v. STB*, 804 F.3d 103, 105 (1st Cir. 2015) (ICCTA preempts state law governing "regulation of rail transportation").

B. Efforts To Impose Permitting and Other Pre-Clearance Requirements on Its Rail-Related Activities Lead Mendocino Railway To File This Action

1. The City Sues Mendocino Railway Over Its "Public Utility" Status under California Law

For years, the City repeatedly acknowledged Mendocino Railway's status as a common-carrier railroad. ER-111 (Federal Complaint, ¶ 25). But after Mendocino Railway acquired some 300 acres of land that the City was vying for, the political winds changed, and the City abruptly reversed course. *Id.*

Starting two years ago, the City began waging an unprecedented campaign to impede and control the Railway's development of its railroad land. Then, in October 2021, it filed a court action against Mendocino Railway in the Mendocino County Superior Court ("State Action"), wherein it pleads a single cause of action for a declaration that the Railway is not a California public utility. ER-111 (Federal Complaint, ¶ 26); ER-31 (City Complaint, Prayer, ¶ 1). Based on that "public utility" cause of action, the City seeks an injunction requiring the Railway to submit entirely to its laws and authority. ER-111 (Federal Complaint, ¶ 26); ER-31 (City Complaint, Prayer, ¶ 2).

2. Mendocino Railway Sues To Confirm Its "Federal Preemption" Rights Against Permitting and Other Pre-Clearance Overreach

While the City's "public utility" case was pending, Mendocino Railway filed a complaint in the federal court on August 9, 2022 ("Federal Action"). That filing was prompted by a series of threats and demands against the Railway by the Commission, which insisted it had plenary permitting and pre-clearance authority over the Railway's rail-related operations in the coastal zone. ER-105, 111 (Federal Complaint, ¶¶ 3, 27). The utter uncertainty and disruption that the Commission's threats and demands caused the Railway, as well as similar acts by the City, compelled the Railway to file this federal action. ER-105-06, 113 (Federal Complaint, ¶¶ 5, 34).

Given its status as a federal railroad within the STB's exclusive jurisdiction, Mendocino Railway claims that the Commission's and the City's "efforts to

impose land-use permitting and preclearance requirements" are "in blatant violation of federal preemption principles" under the ICCTA. ER-105 (Federal Complaint, ¶¶ 1-2). The Federal Action is not premised on the Railway's "public utility" status, though it continues to defend that status in the State Action. The Federal Action concerns only the Railway's status as a federal railroad within the STB's exclusive jurisdiction.

Specifically, Mendocino Railway seeks a declaration "that the actions of the Commission and the City to regulate [its] operations, practices and facilities are preempted under 49 U.S.C. § 10501(b) and that [its] activities are subject to the STB's exclusive jurisdiction." ER-105 (Federal Complaint, ¶ 1). The Railway further seeks a declaration of its "right under the ICCTA to undertake any and all rail-related activities within the coastal zone, including within the City's boundaries without preclearance or approval from the Commission or the City." *Id.* Finally, Mendocino Railway seeks "[a]n injunction prohibiting Defendants from taking any action that would materially interfere with Mendocino Railway's operation of its railroad as a federally regulated common carrier, including by imposing and enforcing any land-use permitting or other preclearance requirement as the pre-condition of any rail-related development on [its] property or facilities." *Id.* ¶ 2.

Mendocino Railway seeks a complete resolution of the full scope of its "federal preemption" rights as against the Commission and the City. In the Railway's view, the agencies have no authority whatsoever—under the Coastal

Act, the LCP, or any other law or pretense— to impose any permitting or other pre-clearance requirement on Mendocino Railway's railroad-related activities.

3. After the Federal Action Is Filed, the Commission Intervenes in the State Action to Partially Challenge the Railway's "Federal Preemption" Rights

The Commission repudiated Mendocino Railway's choice of forum—federal court—for resolving their dispute over the Railway's "federal preemption" rights. So, after the Federal Action was filed on August 9, 2022, the Commission filed a motion to intervene in the State Action on September 8, 2022, which was granted on October 20, 2022. Motion for Judicial Notice ("MJN"), Exh. 1 (Docket in State Action). The Commission filed its complaint-in-intervention a week later, on October 27. *Id.*; ER-36 (Commission Complaint).

Denying any preemption of its permitting authority, the Commission bases its complaint on Mendocino Railway's alleged violations of the California Coastal Act and the City's Local Coastal Program ("LCP"). By way of background, the Coastal Act is a state statute that generally requires a landowner to obtain a land-use permit—known as a "Coastal Development Permit" ("CDP")—before undertaking "development" in the coastal zone. Cal. Pub. Res. Code § 30600(a). Development is evaluated against certain environmental and land-use policies contained in Chapter 3 of the Act. *Id.* § 30200(a).

The Commission is charged with administering the Coastal Act and its policies, including a permitting system for any development in the coastal zone. *Id.*

§ 30600. Further, the Commission has original permitting authority, but local governments in the coastal zone are required to develop their own LCPs to implement the Coastal Act. Once the Commission certifies an LCP, the local government reviews development applications, and issues or denies CDPs. *Id.* §§ 30600(d), 30500, 30519. Even where there's an LCP, the Commission retains limited jurisdiction to review local CDP approvals. *Id.* § 30603. In addition, the Commission is authorized to enforce the land-use requirements of an LCP and any applicable provisions of the Coastal Act. *Id.* § 30800, *et seq.* (Chapter 9).

As noted above, the Commission's complaint concerns only its permitting authority under the Coastal Act and the City's LCP. The Commission seeks a declaration that (1) "the Coastal Act and the City's LCP apply to the Railway's actions in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP," and (2) "the application of the Coastal Act and the City's LCP to the Railway's actions in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP are not preempted by any state or federal law, including, but not limited to, Public Utilities Code sections 701 and 1759, subdivision (a); sections 10102 and 10501, subdivision (b) of Title 49 of the United States Code; and clause 2 of Article VI of the United States Constitution." ER-42 (Commission Complaint, Prayer, ¶¶ 2). Disregarding federal preemption of its authority, the Commission also seeks civil penalties and exemplary damages associated with purported "past and ongoing violations of the Coastal Act." *Id.* Prayer, ¶¶ 3, 5. Further, the Commission seeks injunctive relief "requiring the Railway to: (a) cease all actions taken by the

Railway without a coastal development permit in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP; submit an application to the City and obtain a permit or other authorization under the City's LCP before commencing or resuming any such development; and (c) comply with any other applicable requirements in the Coastal Act and the LCP, including but not limited to mitigation of the unauthorized development." *Id.*, Prayer, ¶ 4.

There are important differences between the Commission's "federal preemption" argument in the State Action and Mendocino Railway's claims in this Federal Action. For example, the Commission seeks resolution only of the question whether its ***permitting*** authority under the Coastal Act and LCP is federally preempted. *Id.* By contrast, Mendocino Railway more broadly seeks resolution of the question whether ***any*** effort by the Commission to exercise land-use control over the Railway's railroad activities is federally preempted—irrespective of the purported legal basis for doing so. ER-113 (Federal Complaint, Prayer, ¶¶ 1-2). As explained in greater detail below, one important area of land-use control that the Commission regularly exercises its pre-clearance authority over federally-licensed or federally-funded projects that have purported impacts in the coastal zone. Such pre-clearance authority rests, not on the Coastal Act or the City's LCP, but on the federal Coastal Zone Management Act ("CZMA"). That pre-clearance is at issue in this Federal Action, but not in the State Action.

To summarize, the chronology of court actions filed by the various parties in this case is as follows:

- **October 21, 2021**: The City files a state-law claim in state court, challenging Mendocino Railway's "public utility" status under California law. ER-26, 31 (City Complaint, p. 1 & Prayer, ¶ 1).
- **August 9, 2022**: Mendocino Railway files broad claims in federal district court to establish its "federal preemption" rights against any and all actions by the Commission and City to impose their permitting and preclearance authority over the Railway's railroad-related activities. ER-113 (Federal Complaint, ¶¶ 1-2).
- **October 27, 2022**: The Commission intervenes and files a complaint in the State Action, seeking limited resolution of its permitting authority under the Coastal Act and the City's LCP is federally preempted. ER-42 (Commission Complaint, Prayer, ¶ 2).

C. Mendocino Railway Removes the State Action, But the Federal District Court Remands It, Then Grants the Commission's and City's Motions to Dismiss The Federal Action

After the state court granted the Commission's motion to intervene, Mendocino Railway removed the entire State Action to federal court given the limited federal issue raised in the Commission's complaint. On May 11, 2023, the district court granted the Commission's and the City's motions to remand. MJN, Exh. 1 (Docket in State Action).

The following day, on May 12, the district court also granted the Commission's and the City's motions to dismiss Mendocino Railway's Federal

Action. ER-3 (Dismissal Order). In its motion and reply brief, the Commission urged the court to dismiss based exclusively on *Younger* abstention. Dkt. No. 15, 28.[2] For its part, the City also relied almost exclusively on *Younger* abstention. Dkt. 16, 29. But buried in the City's motion was a half-page argument about *Colorado River*. Dkt. 16, pp. 21-22.

The district court seized on the City's reference and dismissed the Federal Action under *Colorado River*. Having remanded the State Action back to state court just the day before, the court was able to create "the predicate existence of concurrent state and federal court proceedings" required by *Colorado River*. ER-4, 6 (Dismissal Order, pp. 2:25-26, 4:19-20). Thus, the court proceeded to consider the eight *Colorado River* factors.

The court held that the first factor—which court first assumed jurisdiction over any property—was "irrelevant," since this action does not involve a specific piece of property. *Id.* at 4:20-21. The court concluded that the second factor—the inconvenience of the federal forum—was "neutral" given that the state court in Fort Bragg and the federal district court in Oakland were only 150 miles apart. *Id.* at 4:21-24. In the court's view, the third factor—the desire to avoid piecemeal litigation—favored dismissal, because "the issue of federal preemption under the

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[2] "Dkt. No." refers to the number on the District Court's docket in this case.

ICCTA is squarely before the state court." *Id.* at 5:6-8. Here, the court misapplied the relevant standard governing this factor, which looks to whether there is a federal policy or preference for state-court resolution of an issue; a general desire to avoid piecemeal litigation is not enough. *United States v. Morros*, 268 F.3d 695, 706-07 (9th Cir. 2001).

The court held that the fourth factor—the order in which the forums obtained jurisdiction and how far the state action has progressed—weighed in favor of dismissal. The court noted that, "[b]ecause the state forum gained jurisdiction first, and because the state court action has progressed further than the federal court action, the fourth factor weighs in favor of dismissal." *Id.* at 5:25-27. But the court did not consider the fact that the state court gained jurisdiction first only over a ***state-law claim***, and that it was only after the Railway filed this Federal Action that the Commission forum-shopped its limited "federal preemption" argument into the State Action. Thus, the state court gained jurisdiction over a ***relevant*** claim—a "federal preemption" claim—only after the federal district court did. Further, the district court overstated the substantive progress that had been made in the State Action compared to this action.

The court correctly held that the fifth factor—whether federal or state law provides the rule of decision on the merits—weighed against dismissal, given that Mendocino Railway's complaint in this case is governed entirely by federal law. *Id.* at 5:5, 5:15-16. As for the sixth factor—whether the state court can enforce federal rights—the court concluded it weighed in favor of dismissal because the state court can theoretically adjudicate the Railway's federal claims. *Id.* at 6:17-28.

But as explained below, the district court should have characterized this factor as "neutral"—not as one weighing in favor of dismissal.

The court stated that the seventh factor—the desire to avoid forum shopping—weighed in favor of dismissal. *Id.* at 7:1-21. The court mistakenly concluded that the Railway's Federal Action was somehow motivated by unfavorable rulings on its demurrer to and motion to strike the City's state-law claim—rulings that did not pass on any foundation issues or on the merits of Mendocino Railway's "federal preemption" argument. The record simply does not bear out any improper forum-shopping by the Railway. On the other hand, the district court did not take into account the Commission's strategic decision to file a limited "federal preemption" claim in the State Action ***after*** the Railway this case.

Finally, the court held that the eighth factor—whether the State Action will completely dispose of the Federal Action—weighed in favor of dismissal. The court reasoned that the state court will adjudicate, in its entirety, the very claims at issue in the Federal Action. *Id.* at 7:22-8:6. But the court did not consider that Mendocino Railway's "federal preemption" claims seek much broader relief, or that the State Action carries potential outcomes that decidedly will ***not*** result in the complete disposition of the Federal Action.

V. SUMMARY OF THE ARGUMENT

Through this Federal Action, the Railway seeks to establish the full breadth of its "federal preemption" rights against the purported land-use permitting and pre-clearance authority of two agencies: the Commission and City. When the Railway filed this action in federal court in August 2022, there was no parallel

state proceeding in which a party was seeking declaratory or injunctive relief based on the Railway's "federal railroad" status or "federal preemption" rights. There was only the City's cause of action in state court regarding the Railway's "public utility" status under California law. Even after the Railway filed this case—when the Commission forum-shopped a more limited "federal preemption" argument against the Railway into the City's "public utility" case—substantial doubt remained (and remains) about whether the state case can completely resolve the Railway's more expansive "federal preemption" claims in this case.

Nevertheless, the district court erroneously invoked *Colorado River* to dismiss this action. The court misanalyzed *Colorado River*'s eight factors, concluding that "only the fifth factor weighs against dismissal, and the remaining factors weigh in favor of dismissal." ER-10 (Dismissal Order, p. 8).

In this Court, the eighth factor—whether the state court proceedings will resolve all issues before the federal court—"should be addressed as a preliminary matter" before the other factors. *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1203 (9th Cir. 2021). That threshold factor weighs dispositively in favor of federal jurisdiction.

As this Court recently reaffirmed, "[w]hen one possible outcome of parallel state court proceedings is continued federal litigation, we find a 'substantial doubt' that the state court action will provide a 'complete and prompt resolution of the issues,' because the federal court may well have something further to do.'" *Ernest Bock*, 2023 U.S. App. LEXIS 2004, at *22 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. ("Cone Mem'l Hosp.")*, 460 U.S. 11, 28 (1983)). Here,

one outcome of the City's state claim is a ruling that the Railway is a public utility under California law. But that ruling would not address, let alone dispose of, the Railway's "federal preemption" claims, which are governed by federal law.

Similarly, one outcome of the Commission's claims is a state-court ruling that its ***permitting*** authority under the ***Coastal Act*** and ***City's LCP*** is federally preempted. But that disposition would not resolve the additional question raised in the Railway's claims in this case—namely, whether the Commission's ***pre-clearance*** authority under the CZMA, pursuant to which it reviews federally-licensed or federally-funded projects proposed and carried out by the Railway, is also federally preempted. Further, it is possible the state court decides the Railway is a public utility, and on that basis alone, finds state preemption of the City's and Commission's permitting authority. Again, that outcome would not dispose of the Federal Action. Because there are outcomes that cast substantial doubt on the State Action's ability to completely resolve the Federal Action, this factor weighs heavily in favor of federal jurisdiction.

The other seven factors are either neutral or favorable to federal jurisdiction. The first factor is inapplicable, given there's no "property at stake." The second factor is neutral because the distance between the two courts (150 miles) "is not sufficiently great that this factor points toward abstention." *Travelers Indem. Co. v. Madonna*, 914 F.3d 1364, 1368 (9th Cir. 1990). The third factor concerning piecemeal litigation is neutral because there is no "strong federal policy that all [federal preemption] claims should be tried in the state courts." *Morros*, 268 F.3d

at 706-07. A “general preference for avoiding piecemeal litigation is insufficient” as a matter of law “to warrant a stay or dismissal.” *Seneca*, 862 F.3d at 842-43.

The fourth factor is neutral, as the relative progress of the State and Federal Actions was substantially the same at the time of the district court’s review of the abstention motions, and neither court had resolved any “foundational legal claims”—a fact weighing against a stay or dismissal. *Seneca*, 862 F.3d at 843. The fifth factor weighs in favor of federal jurisdiction, as federal law clearly provides the rule of decision on the merits of the Federal Action. *Cone Mem’l Hosp.*, 460 U.S. at 2. The sixth factor is neutral, as there is no bar to state-adjudication of “federal preemption” claims. *Id.* at 26-27.

Finally, the seventh factor concerning forum-shopping is neutral, if not favorable to jurisdiction. When the Federal Action was filed, no party had asserted a cause of action in favor of or against the Railway’s “federal preemption” rights. In choosing a federal forum for its previously unasserted “federal preemption” claims, the Railway simply acted within its rights as a plaintiff. *Seneca*, 862 F.3d at 846. On the other hand, ***after*** the Railway filed its “federal preemption” claims in federal court, the Commission strategically brought its own limited version of the same in state court—knowing full well that the federal court could and would fully resolve the “federal preemption” dispute between the parties. If any party engaged in improper forum shopping under this factor, it was the Commission.

In sum, the balance of all eight factors weighs emphatically against a *Colorado River* stay or dismissal and in favor of retaining federal jurisdiction.

The same is true of *Younger* abstention, which was the focal point of the underlying abstention motions, but not addressed by the district court. Among other things, *Younger* requires, at the time of the federal action's filing, the existence of a parallel criminal or quasi-criminal proceeding in state court. Neither condition was met to justify *Younger* abstention.

The Court should reverse the district court and require it to reinstate this federal action.

VI. STANDARD OF REVIEW

The underlying motions to dismiss are a facial attack on Mendocino Railway's federal complaint. Whether brought as a motion under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), a facial attack accepts the "the truth of the plaintiff's allegations," but asserts that they are "insufficient on their face to invoke federal jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (internal quotation marks and citation omitted); *see also S. Natural Res. v. Nations Energy Solutions*, 2021 U.S. Dist. LEXIS 171477, at *7 (S.D. Cal. May 6, 2021).

The only reviewable order is the district court's order dismissing the case under *Colorado River.* The court did not address *Younger* abstention in that order. Nevertheless, Mendocino Railway closes this Opening Brief with its argument as to why *Younger* abstention does not apply, in the event the Court reaches that issue.

Review of the district court's order under *Colorado River* proceeds in two steps. The "first task is to review *de novo* whether, in light of the eight factors enumerated above, the facts here conform to the requirements for a *Colorado River*

stay" or dismissal. *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *13. "If [the Court] conclude[s] that the *Colorado River* requirements have been met," then, in the second step, the Court "review[s] for abuse of discretion the district court's decision to stay or dismiss the action." *Seneca*, 862 F.3d at 840. However, "this standard is stricter than the flexible abuse of discretion standard used in other areas of law because discretion must be exercised within the narrow and specific limits prescribed by the *Colorado River* doctrine." *R.R. Street & Co. Inc. v. Transp. Ins. Co. (R.R. Street)*, 656 F.3d 966, 973 (9th Cir. 2011) (internal citation and quotation marks omitted).

The Court need not reach the second step and determine if the district court abused its discretion if it "conclude[s] that the district's error in applying the *Colorado River* factors is dispositive." *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *23 n.22.

VII. ARGUMENT

A. *Colorado River* Does Not Support a Stay or Dismissal

1. *Colorado River* Provides an Exceedingly Rare Exception to Federal Jurisdiction

"Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River*, 424 U.S. at 817 (internal citation and quotation marks omitted). However, in "exceptional circumstances," "'considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'" can "support a stay

of federal litigation in favor of parallel state proceedings." *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *10-11 (quoting *Colorado River*, 424 U.S. at 813, 817). "Only the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 819.

If concurrent state and federal court proceedings exist, then the Court weighs the following eight factors to determine whether exceptional circumstances justify abdicating federal jurisdiction:

> "(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court."

Ernest Bock, 2023 U.S. App. LEXIS 20045, at *12.

The eighth factor is actually a "threshold" factor that "should be addressed as a preliminary matter" before the other factors. *State Water*, 988 F.3d at 1203; *Dana Innovations v. Trends Elecs. Int'l Inc.*, 2023 U.S. Dist. LEXIS 70203, at *11 (C.D. Cal. Apr. 21 2023) ("Because the parallel actions must be substantially similar' to justify a stay or dismissal under *Colorado River*, courts often consider the eighth factor as a threshold, and potentially dispositive, matter.").

The factors "are not a mechanical checklist" and must instead be applied "in a pragmatic, flexible manner with a view to the realities of the case at hand." *State Water*, 988 F.3d at 1203. Further, the "weight to be given to any one factor may

vary greatly from case to case." *Id.* Some factors may "not apply in some cases" and, in others, "a single factor"—such as the eighth factor—"may decide whether a stay" or dismissal "is permissible. *Id.* (cleaned up). "The underlying principle guiding this review is a ***strong presumption*** against federal abstention," and "***any*** doubt as to whether a factor exists should be resolved against a stay" or dismissal, "not in favor of one." *Id.* at **12-13 (emphasis added) (cleaned up). After all, a stay or dismissal "of federal litigation in favor of state court proceedings 'is the exception, not the rule.'" *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *11 (quoting *Colorado River*, 424 U.S. at 813). "The court's task in [*Colorado River*] cases . . . is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the surrender of that jurisdiction." *State Water*, 988 F.3d at 1203 (quoting *Cone Mem'l Hosp.*, 460 U.S. 11).

Some of this Court's precedents characterize *Colorado River* as an "abstention" doctrine. However, "*Colorado River* is not an abstention doctrine." *State Water*, 988 F.3d at 1202. "The instances in which a court can stay an action pursuant *to Colorado River* 'are considerably more limited than the circumstances appropriate for abstention.'" *Id.* (quoting *Colorado River*, 424 U.S. at 818).

2. Together, the Eight Factors Weigh In Favor of Jurisdiction

a. Insufficient Parallelism (Factor 8)

Mendocino Railway analyzes the eighth factor—whether the state court proceedings will resolve all issues before the federal court—first. That factor is

dispositive and dispenses with the need to weigh the other seven factors. *State Water*, 988 F.3d at 1203; *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *20 (holding that "substantial doubt" on this factor is "sufficient to preclude a *Colorado River* stay" or dismissal).

Under this factor, "[w]hen ***one possible outcome*** of parallel state court proceedings is continued federal litigation, we find a substantial doubt that the state court action will provide a complete and prompt resolution of the issues, because the federal court may well have something further to do." *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *22-23 (emphasis added). "[T]he existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes the granting of a stay" or dismissal, and "[s]uch doubt is a significant countervailing consideration that can be dispositive." *State Water*, 988 F.3d at 1203 (internal citation and quotation marks omitted). Indeed, "a district court may enter a *Colorado River* stay [or dismissal] order only if it has 'full confidence' that the parallel state proceeding will end the litigation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988)). "If there is any substantial doubt as to whether the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties . . . it would be a serious abuse of discretion to grant the stay or dismissal at all." *State Water*, 988 F.3d at 1203 (internal citation and quotation marks omitted). All "contingencies"—all potential outcomes in the state-court action—inform whether a "substantial doubt" precludes a *Colorado River* stay or dismissal. *Intel Corp.*, 12

F.3d at 913. Further, "[t]his factor is more relevant when it counsels against abstention, because while . . . insufficient parallelism may preclude abstention, the alternatives never compel abstention." *Id.* (internal citation and quotation marks omitted).

It is substantially doubtful that resolution of the State Action would completely resolve this Federal Action. The Commission's and City's claims in the State Action are analyzed in turn.

The Commission's Claims: The Commission seeks a declaration that (1) "the Coastal Act and the City's LCP apply to the Railway's actions in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP," and (2) "the application of the Coastal Act and the City's LCP to the Railway's actions in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP are not preempted by any state or federal law, including, but not limited to, Public Utilities Code sections 701 and 1759, subdivision (a); sections 10102 and 10501, subdivision (b) of Title 49 of the United States Code; and clause 2 of Article VI of the United States Constitution." ER-42 (Commission Complaint, Prayer, ¶ 2). The Commission also seeks civil penalties and exemplary damages associated with purported "past and ongoing violations of the Coastal Act." *Id.*, Prayer, ¶¶ 3, 5. Further, the Commission seeks injunctive relief "requiring the Railway to: (a) cease all actions taken by the Railway without a coastal development permit in the coastal zone of the City that constitute development under the Coastal Act and the City's LCP; (b) submit an application to the City and obtain a permit or other authorization under the City's

LCP before commencing or resuming any such development; and (c) comply with any other applicable requirements in the Coastal Act and the LCP, including but not limited to mitigation of the unauthorized development." *Id.*, Prayer, ¶ 4.

One outcome is that the state court rules in Mendocino Railway's favor, holding that the ICCTA preempts the Commission's permitting authority under the Coastal Act and the City's LCP. But that would leave open the question whether the Commission could interfere in the Railway's railroad-related activities under another law: the CZMA.

The CZMA generally authorizes the Commission to pre-clear federally-licensed or federally-funded projects proposed and/or undertaken by private parties, like Mendocino Railway, that the Commission deems may impact coastal zone resources. *See, e.g.*, 16 U.S.C. § 1456(c)(3)(A) (pre-clearance process for federally licensed/permitted projects); *id.* § 1456(d) (pre-clearance process for projects with federal assistance). For instance, if the Railway applies for a permit from the federal STB to undertake railroad construction in the coastal zone, the Commission will insist upon review of the project before the federal permit is issued. *Id.* § 1456(c)(3)(A). After review of the project, the Commission typically will either communicate concurrence that the project meets certain land-use and environmental standards, or object to the project. *Id.* Significantly, "[n]o license or permit shall be granted by the Federal agency"—in this example, the STB—"until the state or its designated agency [the Commission] has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary [of Commerce], on his own initiative

or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security." *Id.* In other words, while it would not have any CDP authority, the Commission would insist on a kind of pre-clearance power—a power that inevitably would delay and potentially stop a railroad-related project.

The Commission already has a track record of inserting itself into Mendocino Railway's projects through its purported pre-clearance authority under the CZMA. MJN, Exh. 2 (December 3, 2019 Letter from Commission to Mendocino Railway). The Railway's claims seek to put an end, not just to the Commission's permitting authority under the Coastal Act and the City's LCP, but also to the Commission's pre-clearance authority over railroad-related projects proposed by the Railway that are federally-funded or federally-licensed by such federal agencies as the Department of Transportation and the STB.

The Commission's claims in the State Action do not reach the question whether such pre-clearance authority is federally preempted. But the Railway's Federal Action clearly does. Mendocino Railway seeks a comprehensive declaration that "Mendocino Railway has the right under the ICCTA to undertake any and all rail-related activities within the coastal zone . . . without ***preclearance or approval*** from the Commission." ER-113 (Federal Complaint, Prayer, ¶ 1) (emphasis added). Moreover, Mendocino Railway seeks a comprehensive injunction prohibiting the Commission from "taking ***any*** action that would materially interfere with Mendocino Railway's operation of its railroad as a

federally regulated common carrier, including by imposing and enforcing any land-use permitting ***or other preclearance requirement*** as the pre-condition of any rail-related development on Mendocino Railway's property or facilities. ER-113 (Federal Complaint, Prayer, ¶ 2) (emphasis added). Those claims are not limited to the Commission's authority under the Coastal Act and the City's LCP. Thus, even if the state court decided that the Commission's permitting authority under the Coastal Act and LCP were preempted, the federal court still would need to decide whether the Commission's authority to pre-clear railroad projects under the CZMA is ***also*** preempted.

Another outcome of the Commission's claims is that the state court rules that the Railway is a California public utility under California law and, on that basis, state law preempts the Commission's permitting authority under the Coastal Act and LCP. The Commission's own claim for declaratory relief contemplates that outcome. ER-42 (Commission Complaint, Prayer, ¶ 2 (citing Cal. Pub. Util. Code). In that scenario, the state court could conclude it is unnecessary to reach whether the Railway is also a federal railroad under the STB's exclusive jurisdiction since such a finding "would have little practical effect in terms of altering parties' behavior" given the "public utility" finding. *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 648 (2009); *Poniktera v. Seiler*, 181 Cal. App. 4th 121, 139 (2010) ("A trial court's decision to grant or deny declaratory relief is reviewable for abuse of discretion. Courts have considerable discretion to deny declaratory relief when resolution of the controversy would have little practical effect in terms of altering parties' behavior."). If the state court were to limit its

decision to the parties' "public utility" claims, "the federal court may well have something further to do" with respect to the Railway's "federal preemption" claims, thereby precluding a *Colorado River* stay or dismissal. *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *22-23.

<u>The City's Claim</u>: Similarly, resolution of the City's state-law claim cannot resolve the Railway's "federal preemption" claims. In the State Action, the City pleads a single cause of action "[f]or a declaration that the Mendocino Railway is not subject to regulation as a public utility because it does not qualify as a common carrier providing 'transportation'" under California law. ER-31 (City Complaint, Prayer ¶ 1). Based on its claim that the Railway is not a public utility, the City seeks an injunction "commanding" the railroad "to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority, as applicable." ER-31 (City Complaint, Prayer ¶ 2). An "injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action." *County of Del Norte v. City of Crescent City*, 71 Cal. App. 4th 965, 973 (1999). "A cause of action must exist before a court may grant a request for injunctive relief." *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 65 (2015). Thus, if the City's "public utility" claim falls, so too does its request for an injunction.

One outcome is for the state court to deny the City's cause of action, finding that Mendocino Railway ***is*** a public utility. In that case, the City's request for an injunction—attendant to its "public utility" claim—would fall. Consequently, the

state court would not reach the question whether the ICCTA federally preempts the City's land-use authority and laws, as applied to Mendocino Railway.

As this Court recently has held, "[w]hen one possible outcome of parallel state court proceedings is continued federal litigation, we find a substantial doubt that the state court action will provide a complete and prompt resolution of the issues, because the federal court may well have something further to do." *Ernest Bock*, 2023 U.S. App. LEXIS 20045, at *22-23. Given the above-described contingencies that would result in continued federal litigation, this factor weighs dispositively against a stay or dismissal. But even a finding that this factor establishes sufficient parallelism between the State and Federal Actions does not compel a stay or dismissal; it means only that the remaining seven factors must be weighed. *Intel Corp.*, 12 F.3d at 913 ("[W]hile . . . insufficient parallelism may preclude abstention, the alternatives never compel abstention."). That flows from the fundamental principle articulated in *Colorado River* that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River*, 424 U.S. at 817.

b. First Factor

The first factor—which court first assumed jurisdiction over any property at stake—is inapplicable. As the district court correctly found (ER-6 (Dismissal Order)), "the dispute does not involve a specific piece of property." *R.R. Street*, 656 F.3d at 979.

c. Second Factor

The second factor—the inconvenience of the federal forum—does not weigh against jurisdiction. As the district court concluded, "the state proceedings are in the Mendocino County Superior Court in Fort Bragg, California, and the federal proceeding is in the Northern District of California in Oakland, California, which are approximately 150 miles apart." ER-6 (Dismissal Order). This Court has concluded that a distance of 200 miles "is not sufficiently great that this factor points toward abstention." *Travelers*, 914 F.3d at 1368*; see also Montanore Minerals Corp v. Bakie*, 867 F.3d 1160, 1167 (9th Cir. 2017) (holding, where state and federal courts were 200 miles apart, that factor was "neutral").

d. Third Factor

The third factor—the issue of piecemeal litigation—does not weigh against jurisdiction. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Seneca*, 862 F.3d at 842 (citation and quotation omitted). But a "general preference for avoiding piecemeal litigation is insufficient to warrant abstention," because "[a]ny case in which *Colorado River* is implicated will inevitably involve the possibility of conflicting results, piecemeal litigation, and some duplication of judicial efforts." *Id.* at 842-43. Such is the "unavoidable price of preserving access to . . . federal relief." *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1195 (9th Cir. 1991).

Instead, this factor considers whether there is a "***special concern*** counseling in favor of federal abstention, such as a ***clear federal policy*** of avoiding piecemeal

adjudication." *Seneca*, 862 F.3d at 842 (emphasis added). "*Colorado River* does not say that every time it is possible for a state court to obviate the need for federal review by deciding factual issues in a particular way, the federal court should abstain." *Morros*, 268 F.3d at 706. "Rather, *Colorado River* stands for the proposition that when Congress has passed a law expressing a preference for unified state adjudication, courts should respect that preference." *Id.* "[I]t is evident that the avoidance of piecemeal litigation factor is met, as it was in … *Colorado River* itself, ***only*** when there is evidence of a ***strong federal policy*** that all claims should be tried in the state courts." *Id.*at 706-07 (quoting *Ryan v. Johnson*, 115 F.3d 193, 197-98 (3d Cir. 1997)) (emphasis added); *see also Seneca*, 862 F.3d at 843 (holding this factor weighs in favor of a stay or dismissal when there is a "special or important rationale or legislative preference for resolving [all] issues in a single proceeding"); *Travelers*, 914 F.2d at 1369 ("A correct evaluation of this factor involves considering whether exceptional circumstances exist which justify special concern about piecemeal litigation," such as "federal legislation evincing a federal policy to avoid piecemeal litigation").

Here, no federal policy or preference embodies the requisite "special concern" for resolving the Railway's claims in state court. Certainly, the district court identified no such federal policy or preference. Instead, the court relied on a general preference for avoiding potential piecemeal litigation, which is categorically "insufficient to warrant abstention." *Seneca*, 862 F.3d at 842-43. This factor is neutral.

e. Fourth Factor

The fourth factor—the order in which the forums obtained jurisdiction—does not weigh against jurisdiction. Under this factor, the Court analyzes, not just the order in which the state and federal cases were filed, but "how much progress has been made in the two actions." *Cone Mem'l Hosp.*, 460 U.S. at 21.

The State and Federal Actions are parallel only insofar as the Commission's and the Railway's claims concern, to a lesser or greater extent, the Railway's "federal preemption" rights. The first party to assert a "federal preemption" claim was Mendocino Railway, when it filed this case in August 2022. ER-104 (Federal Complaint). Two months later, the Coastal Commission filed its own, more limited "federal preemption" claims against the Railway. ER-42 (Commission Complaint, Prayer, ¶ 2). Thus, the state court took jurisdiction over the relevant "federal preemption" claim only after the federal court had done so. Before the Railway filed this case, there was only the City's cause of action for a declaration that the Railway is not a public utility under California law—a claim that has no parallel here. ER-26, 31 (City Complaint, p. 1 & Prayer, ¶ 1).

Further, neither the State nor the Federal Action saw significant activity by the time the district court reviewed the underlying abstention motions. In the State Action, the state court had denied Mendocino Railway's demurrer to and motion to strike ***the City's complaint***—which, again, consists only of a cause of action challenging Mendocino Railway's "public utility" status under California law. ER-72 (Demurrer Ruling). The state court did not take jurisdiction over any "federal preemption" claim until the Commission filed its complaint in October 2022—

after this Federal Action was filed. At the time the federal district court reviewed the abstention motions, no progress whatsoever had been made on the Commission's complaint—the only complaint asserting any kind of "federal preemption" claim. The Railway had not yet even responded to it. MJN, Exh. 1 (Docket in State Action).

In sum, the relative progress of the State and Federal Actions was substantially the same at the time of the district court's review of the abstention motions, and "[n]either court had resolved any foundational legal claims"—a fact that causes this factor to weigh against a stay or dismissal. *Seneca*, 862 F.3d at 843.

Even if the Court evaluates the fourth factor in light of the relative status of the two cases today, the result remains the same. The State Action is still in its infancy. No dispositive motions have been filed, and no trial date has been set; the trial date that the district court's order states was set was vacated weeks before the dismissal order even issued. MJN, Exh. 1 (Docket in State Action). This factor thus does not weigh against jurisdiction.

f. Fifth Factor

The fifth factor—whether federal or state law provides the rule of decision on the merits—weighs heavily in favor of jurisdiction. The "presence of federal-law issues must always be a major consideration weighing ***against*** surrender" of federal jurisdiction." *Cone Mem'l Hosp.*, 460 U.S. at 26 (emphasis added). As one federal district court put it, "while the presence of federal-law issues weighs heavily in the court's abstention calculus, only 'in some rare circumstances' does the presence of state-law issues tip the scales in favor of surrender." *Corner Edge*

Interactive LLC v. Johnson, 2020 U.S. Dist. LEXIS 105386, at *14 (D. Ariz. 2020) (quoting *Cone Mem'l Hosp.*, 460 U.S. at 26). Indeed, even in cases where state law has provided the rules of decision, the Court has concluded this factor does not defeat federal jurisdiction. *See, e.g., R.R. Street*, 656 F.3d at 980-81.

There's no dispute that Mendocino Railway's case turns entirely on federal law. Whether Mendocino Railway is a federal railroad subject the STB's exclusive jurisdiction, and whether federal preemption precludes state and local efforts to subject railroad-related activities to permitting and other pre-clearance requirements, all rest on federal law. The case implicates no state-law issues. Thus, this factor also weighs strongly in favor of jurisdiction.

g. Sixth Factor

The sixth factor—whether the state court proceedings are inadequate to protect Mendocino Railway's federal rights—is neutral. "A district court may not stay or dismiss the federal proceeding if the state proceeding cannot adequately protect the rights of the federal litigants." *R.R. Street*, 656 F.3d at 981. "This factor is most often employed, and is most important, where there are exclusively federal claims that could not be brought as part of the state-court action." *Bushansky v. Armacost*, 2012 U.S. Dist. LEXIS 112315 (N.D. Cal. Aug. 9, 2012).

Mendocino Railway does not dispute that a "federal preemption" claim can be adjudicated by a state court, making this factor is neutral. *Dana Innovations*, 2023 U.S. Dist. LEXIS 70203, at *25-26 (finding sixth factor "neutral" where different forums are capable of protecting litigant's rights); *McDonald v. Gurson*, 2017 U.S. Dist. LEXIS 131762, at *20 (W.D. Wa. Aug. 17, 2017) (same);

Stockman-San v. McKnight, 2013 U.S. Dist. LEXIS 187245, at *14 (C.D. Cal. Mar. 25, 2013) (same); *SiRNA Therapeutics, Inc. v. Protiva Biotherapeutics, Inc.*, 2006 U.S. Dist. LEXIS 90773, at *10 (E.D. Cal. Dec. 1, 2006) (same).

The district court concluded that, because the state court can adjudicate Mendocino Railway's "federal preemption" claim, this factor "weighs in favor of dismissal." ER-8 (Dismissal Order at 6:27-28). But the far better view is that this factor can never weight in ***favor*** of a stay or dismissal; it can only be neutral, or weigh ***against*** a stay or dismissal. The Supreme Court in *Cone Mem'l Hosp.*, 460 U.S. at 26-27, first "introduced this factor, and it is clear from its nature that it can only be a neutral factor or one that weighs against, not for, abstention. A party who could find adequate protection in state court is not thereby deprived of its right to the federal forum, and may still pursue the action there since there is no ban on parallel proceedings." *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1193 (5th Cir. 1988); *see also Starr Indem. & Liab. Co. v. Avenatti*, 2019 U.S. Dist. LEXIS 230988, at *11-12 (C.D. Cal. Dec. 30, 2019) (agreeing that "the Ninth Circuit has never applied this factor *against* the exercise of jurisdiction only in favor of it" and finding this factor to be "neutral" where "the state court can protect the rights of all parties").

It does not appear this Court has directly addressed whether the sixth factor can ever weigh in favor of a stay or dismissal. But it has held that "the possibility that the state court proceeding might adequately protect the interests of the parties is not enough to justify the district court's deference to the state action." *Travelers*, 914 F.2d at 1370. The rule that this factor can only be neutral or weigh against a

stay or dismissal has been adopted by the Fifth and Eleventh Circuit Courts of Appeals, as well. *Noonan South, Inc. v. County of Volusia*, 841 F.2d 380, 383 (11th Cir. 1988) ("The fact that both forums are adequate to protect the parties' rights merely renders this factor neutral on the question of whether the federal action should be dismissed."); *Am. Family Life Assur. Co. v. Biles*, 714 F.3d 887 (5th Cir. 2013) (holding that "the sixth factor, by its very nature, does not weigh in favor of abstention," and is "either a neutral factor or one that weighs against abstention"); *but see PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 208 (6th Cir. 2001) (the sixth factor weighs in favor of "abstaining, because the state court action is adequate to protect PaineWebber's interests").

h. Seventh Factor

The "forum shopping" factor is neutral, if not favorable to jurisdiction. "When evaluating forum shopping under *Colorado River*, we consider whether either party improperly sought more favorable rules in its choice of forum or pursued suit in a new forum after facing setbacks in the original proceeding." *Seneca*, 862 F.3d at 846. "Forum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers*, 914 F.2d at 1371 (cleaned up). "It typically does not constitute forum shopping where a party acted within his rights in filing a suit in the forum of his choice, even where the chronology of events suggests that both parties took a somewhat opportunistic approach to the litigation." *Id.* (cleaned up) (internal citations and quotation marks omitted). The Court is especially "cautious about labeling as

'forum shopping' a plaintiff's desire to bring previously unasserted claims in federal court." *R.R. Street*, 656 F.3d at 982.

Mendocino Railway did not engage in forum shopping when it filed this lawsuit. At the time of the Federal Action's filing, only the City's ***state-law*** claim was pending in state court. The State Action consisted of a single claim for declaratory relief that Mendocino Railway was not a public utility under California law, coupled with a request for injunctive relief. ER-31 (City Complaint, Prayer, ¶ 1-2). The City did not plead any claim concerning Mendocino Railway's status as a federal railroad under federal law, and there was no cross-claim raising "federal preemption." When Mendocino Railway filed this lawsuit, it represented the first time a "federal preemption" claim was asserted. "[T]he presence of the exclusively federal claim gives Plaintiff a legitimate reason to come to federal court." *Stockman-San*, 2013 U.S. Dist. LEXIS 187245, at *15.

The Commission and City may argue that, prior to filing this Federal Action, the Railway made a "federal preemption" ***argument*** in its demurrer and motion to strike the City's complaint, as well as in an affirmative defense contained in its subsequent answer to the same. ER-1, 91 (Answer to City Complaint). Arguing an issue defensively is not the equivalent of pleading a claim for affirmative relief. In any event, while the state court may have overruled the demurrer and denied the motion to strike, it did not adversely decide the merits of Mendocino Railway's "federal preemption" argument; it held only that the argument did not require dismissal of the City's complaint or the striking of its broad injunctive-relief allegations. ER-72 (Demurrer Ruling). There is no evidence in the record that

Mendocino Railway filed this case to "avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers*, 914 F.2d at 1371.

On the other hand, after Mendocino Railway sued the Commission in federal court, the Commission responded by intervening in the State Action with its own version of a "federal preemption" claim, presumably in hopes of finding a better forum in state versus federal court. ER-42 (Commission Complaint, Prayer, ¶ 2). Thus, if any party engaged in forum shopping, it was the Commission. In fact, forum-shopping is the only reasonable explanation for the Commission's decision to raise its limited "federal preemption" claim in state court, when Mendocino Railway's broader "federal preemption" claims were already pending in federal court. As for Mendocino Railway, it simply "acted within [its] rights in filing a suit in the forum of [its] choice" on an "unasserted claim[]." *Seneca*, 862 F.3d at 846; *R.R. Street*, 656 F.3d at 982 (emphasis added).

The Balance of Factors: "To determine whether a [*Colorado River*] stay [or dismissal] is warranted, the relevant factors must be balanced, with the balance ***heavily*** weighted in favor of the exercise of jurisdiction." *Travelers*, 914 F.2d at 1372 (emphasis added). If the eighth factor does not conclusively establish—without more—that a *Colorado River* stay or dismissal is impermissible, then the balance of the other seven factors certainly does. All of them are either neutral or weigh decisively in favor of jurisdiction. The district court therefore erred in dismissing this case under *Colorado River*.

B. *Younger* Does Not Justify Abstention

1. *Younger* Abstention Law

In the underlying motions to dismiss, the Commission and City argued for abstention under *Younger*, 401 U.S. 37. *Younger* abstention is rooted in "the basic doctrine of equity jurisprudence that courts of equity should not act . . . to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44. Following a period of continuous expansion, the Supreme Court limited the doctrine to "three exceptional categories" of cases: "(1) parallel, pending state criminal proceedings, (2) state civil proceedings that are akin to criminal prosecutions, and (3) state civil proceedings that implicate a State's interest in enforcing the orders and judgments of its courts." *ReadyLink Healthcare, Inc. v. State Compensation Insurance Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (internal citation and quotation marks omitted) (cleaned up).

"If a state proceeding falls into one of those three categories, *Younger* abstention is applicable, but only if the three additional factors laid out in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982) are also met: that the state proceeding is 1) 'ongoing'; 2) 'implicate[s] important state interests'; and 3) 'provide[s] adequate opportunity . . . to raise constitutional challenges.'" *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 588 (9th Cir. 2022) (quoting *Middlesex*, 457 U.S. at 432) (emphasis added). Thus, the necessary predicate for *Younger* abstention is that there be a pending and relevant state proceeding. "Absent any pending proceeding in state tribunals, . . .

application by the lower courts of *Younger* abstention [is] clearly erroneous." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992). The "critical question is not whether the state proceedings are still ongoing, but whether the state proceedings were underway before initiation of the federal proceedings." *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987) (internal citation and quotation marks omitted).

As these and other applicable cases reveal, the grounds for abstaining based on a parallel state proceeding are narrow. If not a criminal action, the state proceeding must at least be "akin to a criminal prosecution" in "important respects." *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 79 (2013) (cleaned up). A quasi-criminal prosecution is the "hallmark of the civil enforcement proceeding category for *Younger* purposes." *Applied Underwriters*, 37 F.4th at 588. Accordingly, the proceeding must be either "in aid of and closely related to criminal statutes," or "aimed at punishing some wrongful act through a penalty or sanction." *Id.* at 589 (citing *Huffman v. Pursue Ltd.*, 420 U.S. 592, 607 (1975) and *Ohio Civ. Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986)). In *Applied Underwriters*, this Court indicated that, where the overriding purpose of a state proceeding is "to rehabilitate, to deter, or to protect the public," the proceeding lacks the quasi-criminal quality needed for *Younger* abstention. *Applied Underwriters*, 37 F.4th at 601 (Nguyen, J., concurring).

"*Younger* abstention is not jurisdictional, but reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses." *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994). Thus, the Supreme Court cautions that "even in

the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the exception, not the rule." *Sprint*, 571 U.S. at 82.

The Court "conduct[s] the *Younger* analysis in light of the facts and circumstances existing at the time the federal action was filed." *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018).

2. No Parallel State Proceeding Existed When the Federal Action Was Filed

As explained above, when this Federal Action was filed in August 2022, no parallel state proceeding was pending. The City and Commission pointed to the State Action, which, at the time, consisted only of the City's claim for a declaration that the Railway is not a California public utility. ER-31 (City Complaint, Prayer, ¶ 1). But that claim was (and is) not "parallel" to the Railway's federal claims, which center on the Railway's "federal railroad" status and "federal preemption" rights.

Thus, the predicate of *Younger* abstention—the existence of a parallel state proceeding—did not exist at the filing of the Federal Action. Without a parallel state proceeding, the district court could not abstain under *Younger*. *Ankenbrandt*, 504 U.S. at 705 ("Absent any pending proceeding in state tribunals, . . . application by the lower courts of *Younger* abstention [is] clearly erroneous.").

3. The State Action Is Not a Criminal or Quasi-Criminal Prosecution, So *Younger* Does Not Apply

There is an independent reason why *Younger* abstention does not apply: The State Action is not among the narrow categories of cases that can justify abstention

under *Younger*. That is because neither the City's claim nor the Commission's claims resemble quasi-criminal prosecutions.

The City's complaint is aimed at establishing the City's authority over Mendocino Railway and compelling it to comply with land use laws. The City's complaint is "not intended to punish or criminalize" anyone. *Ojavan Investors v. Cal. Coastal Com.*, 54 Cal. App. 4th 373, 393 (1997) (rejecting argument that injunction compelling compliance with land-use laws is intended to punish or criminalize the property owner). Nor is the City's complaint "in aid of and closely related to [any] criminal statute." *Applied Underwriters*, 37 F.4th at 588; *cf. Dayton Christian Schools*, 477 U.S. at 629 (state-initiated administrative proceedings to enforce state civil rights laws, noting "potential sanctions for the alleged sex discrimination"); *Middlesex*, 457 U.S. at 427, 433-34 (state-initiated disciplinary proceedings against lawyer for violation of state ethics rules, noting the availability of "private reprimand" and "disbarment or suspension for more than one year"); *Moore v. Sims*, 442 U.S. 415, 419-20 (1979) (state-initiated proceeding to gain custody of children allegedly abused by their parents, noting the action was "in aid of and closely related to criminal statutes"); *Trainor v. Hernandez*, 431 U.S. 434, 435 (1977) (civil proceeding "brought by the State in its sovereign capacity" to recover welfare payments defendants had allegedly obtained by fraud, "a crime under Illinois law"); *Huffman*, 420 U.S. at 596-98 (state-initiated proceeding to enforce public nuisance laws, which provided for "closure for up to a year of any place determined to be a nuisance," "preliminary injunctions

pending final determination of status as a nuisance," and "sale of all personal property used in conducting the nuisance").

The same holds for the Commission's claims, which do resemble a quasi-criminal prosecution. The Commission's first and primary cause of action is for a declaration concerning whether its permitting authority under the Coastal Act and LCP is preempted. ER-42 (Commission Complaint, Prayer, ¶¶ 1-2). Like the City's complaint, the chief purpose of the Commission's first claim is evident—to establish the Commission's land-use permitting authority over the Railway, a federally regulated railroad. The first cause of action is not "in aid of and closely related to [any] criminal statute," and does not aim to "punish[]" Mendocino Railway. *Applied Underwriters*, 37 F.4th at 588.

The Commission's second cause of action (falsely) alleges violations of state and City land-use laws, including the Coastal Act. ER-43 (Commission Complaint, Prayer, ¶¶ 3-5). The alleged violations are based exclusively on the Commission's mistaken notion that Mendocino Railway was required to, but did not, obtain land-use permits before repairing its railroad roundhouse and storage shed, and completing a lot-line adjustment on railroad parcels it owned. ER-38 (Commission Complaint, ¶ 4). The Commission also seeks an injunction requiring Mendocino Railway to (a) cease "all" work (even rail-related work) on railroad property located in the coastal zone, (b) undo its rail improvements and/or apply to the Commission for land-use permits to regularize past work and perform future work, and (c) pay fines associated with the alleged violations. Commission Complaint, p. 8.

An injunction compelling compliance with land-use laws like the Coastal Act and LCP is "not intended to punish or criminalize" Mendocino Railway. *Ojavan*, 54 Cal. App. 4th at 393. "Rather, the purpose of the injunction [is] to protect the public from violations of the Coastal Act" and the related LCP. *Id*. (rejecting argument that permanent injunction enjoining violations of the Coastal Act constituted punishment).

The Commission argued below that the "civil liability" and "exemplary damages" authorized by sections 30820(b) and 30822 of the Public Resources Code convert its civil action into a criminal prosecution. Not so. The provisions are not "in aid of and closely related to [any] criminal statute," or even "aimed at punishing" Mendocino Railway. *Applied Underwriters*, 37 F.4th at 588. The Commission never identified a relevant criminal statute, because no such statute exists.

Moreover, the Commission's pursuit of a monetary exaction under sections 30820 and 30822 is not aimed at punishing the Railway. As the complaint shows, it is aimed at securing compliance with the Coastal Act. ER-42-43 (Commission Complaint, Prayer). Even if particular "civil penalties may have a punitive or deterrent aspect, their primary purpose"—their ultimate aim—"is to secure obedience to statutes and regulations imposed to assure important public policy objectives." *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 147-148 (1991); *City and County of San Francisco v. Sainez*, 77 Cal. App. 4th 1302, 1315 (2000) (same); *see also Hale v. Morgan*, 22 Cal. 3d 388, 398 (1978) (observing that state-law penalties serve "as a means of securing obedience to statutes"). The ICCTA

federally preempts the Commission's efforts to subject a federally regulated railroad to unfettered state and local land-use permitting and pre-clearance authority. But whatever the demerits of the Commission's claims, the State Action unequivocally evinces the primary objective of compelling Mendocino Railway to submit to the Commission's land-use authority under the Coastal Act and LCP, including through the tool of imposing monetary liability.

The California Court of Appeal recently addressed the nature and purpose of a similar Coastal Act provision—section 30821 of the Public Resources Code, which authorizes monetary liability against individuals. *Lent v. California Coastal Com.*, 62 Cal. App. 5th 812 (2021). Section 30821 authorizes the imposition of a so-called "administrative civil penalty" against an individual who violates the Coastal Act's "public access" policies. Cal. Pub. Res. Code § 30821. Section 30820 (at issue in this case) differs from section 30821 in terms of who can impose liability. Under section 30820, only a court may impose monetary liability; on the other hand, section 30821 allows the Commission to unilaterally impose a penalty at an administrative hearing. *Compare* Cal. Pub. Res. Code § 30820 *with id.* § 30821. Otherwise, the two statutes are substantially the same for purposes of this analysis.

In *Lent*, property owners challenged the facial constitutionality of section 30821. *Lent*, 62 Cal. App. 5th at 843-849. The owners argued that, because section 30821 imposes a "quasi-criminal penalty" that "is more serious than a purely civil remedy," the statute has insufficient due process protections for those facing such a

penalty. *Id*. at 849. The Court of Appeal rejected the owners' characterization of the penalty statute, explaining:

> [T]he Lents assert that, by definition, a quasi-criminal penalty is more serious than a purely civil remedy, and that point is appropriately considered in the balancing-factor analysis under procedural due process. But the Legislature has characterized the penalty imposed under section 30821 as an "administrative ***civil*** penalty" (§ 30821, subd. (a)), not a "***criminal***" penalty or fine. Like the civil penalty the Supreme Court considered in [*People v. Super. Ct. ("Kaufman")*, 12 Cal. 3d 421 (1974)], a penalty imposed under section 30821 does not expose the defendant to the stigma of a criminal conviction.

Id. (cleaned up) (emphasis added).

Simply put, even a section 30821 "penalty" does not bear the hallmarks of a criminal or quasi-criminal sanction. It is fundamentally "civil" in nature, as the Legislature itself labeled it. The same is true of sections 30820 and 30822, neither of which even refers to the monetary liability they authorize as "penalties." Section 30820 authorizes a monetary "civil liability." Cal. Pub. Res. Code § 30820. Section 30822 authorizes "exemplary damages" and focuses on the objective of "deter[ring] further violations." *Id.* § 30822; *see also Ojavan*, 54 Cal. App. 4th at 383 (noting that the superior court denied "the Commission's request for exemplary damages under section 30822 on the ground such damages were unnecessary to deter further violations in light of the fines imposed" under section 30820).

In *People v. Toomey*, 157 Cal. App. 3d 1 (1984), both the Attorney General and the District Attorney (on behalf of "the People") prosecuted a business owner

for engaging in unfair business practices against his customers. *Id.* at 7. The People sought an injunction and substantial "civil penalties" under the California Business & Professions Code ("BPC"). The superior court ruled against the owner, entering a permanent injunction, ordering him to pay $300,000 in civil penalties, and requiring him to make refunds and restitution to former customers. *Id*. at 10. The owner appealed the judgment, including on the grounds that he was deprived of due process in what he characterized as a "quasi-criminal case" against him. *Id.* at 17.

The Court of Appeal disagreed with the owner's characterization of the proceedings. *Id.* "[T]he case against appellant was not criminal or quasi-criminal in nature." *Id.* As a result, the Court concluded that the constitutional safeguards required in criminal and quasi-criminal cases did not apply: "[I]t is now firmly established that an action brought pursuant to the unfair business practices act seeks only civil penalties, and accordingly the due process rights which apply in criminal actions, including the right to a jury trial, need not be provided." *Id.*; *see also In re Alva*, 33 Cal. 4th 254, 286 (2004).

Likewise, in *Humanitarian Law Project v. United States Treasury Dep't*, 578 F.3d 1133 (9th Cir. 2009), this Court considered whether certain "civil penalties" at issue there imposed "quasi-criminal" punishment. *Id.* at 1149. As the Court framed the inquiry, "[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty, we inquire further whether the statutory scheme was so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id.* (cleaned up). The

Court balanced the factors set forth in *Hudson v. United States*, 522 U.S. 93 (1997): "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may be rationally connected may be assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." *Humanitarian Law*, 578 F.3d at 1149 (quoting *Hudson*, 522 U.S. at 99-100). Observing that the penalties were legislatively labeled as "civil" versus "criminal," and weighing the *Hudson* factors, the Court concluded that the civil penalties did not rise to the level of quasi-criminal punishment:

> The *Hudson* factors do not indicate that the civil penalties are really criminal. IEEPA's civil penalties are monetary, with no other affirmative disability or restraint. Such monetary penalties have not historically been regarded as punishment. . . . [T]he civil penalty provision . . . has [no] *mens rea* requirement, weighing against finding that these are criminal penalties. While civil fines . . . have a deterrent effect, the mere presence of this purpose is insufficient to render a sanction criminal. Finally, the same conduct may be punished both civilly and criminally, but this alone does not render all the penalties criminally punitive.

Humanitarian Law, 578 F.3d at 1150.

Applying the same analysis to sections 30820 and 30822 yields the same conclusion. The provisions relied on by the Commission to pursue a monetary exaction against Mendocino Railway do contain a *mens rea* requirement. Pub. Res.

Code §§ 30820(b), 30822. But all the other *Hudson* factors weigh decisively against characterizing such liability as quasi-criminal punishment. Both provisions authorize what the Legislature specifically labeled as "civil"—not "criminal"—liability. Both provisions impose only monetary liability, not any other affirmative disability or restraint. And while both provisions may have a deterrent effect, they are employed primarily to secure an alleged violator's compliance with certain laws and regulations, not to punish him. *Ojavan*, 54 Cal. App. 4th at 393; *see also Humanitarian Law*, 578 F.3d at 1150 ("While civil fines . . . have a deterrent effect, the mere presence of this purpose is insufficient to render a sanction criminal." (cleaned up)). Where pursuit of monetary liability "serves an alternative function other than punishment"—such as compelling legal compliance—it cannot be deemed akin to a criminal prosecution. *Id.* Finally, the conduct complained of—alleged failure to obtain land-use permits—cannot be punished both civilly and criminally. *Humanitarian Law*, 578 F.3d at 1150 ("Finally, the same conduct may be punished both civilly and criminally, but this alone does not render all the penalties criminally punitive."). Sections 30820 and 30822 are not criminally punitive and do not convert the State Action into one of the narrow categories of state proceedings that can justify *Younger* abstention.

In sum, the chief purpose of the Commission's complaint is to establish permitting authority over Mendocino Railway's operations in Fort Bragg. Such an action cannot fairly be characterized as a criminal or quasi-criminal prosecution. It is not a claim in aid of or related to any criminal statute. Nor does it purport to

punish the Railway. *Applied Underwriters*, 37 F.4th at 588. Like the City's complaint, the Commission's complaint does not support *Younger* abstention.

VIII. CONCLUSION

Neither *Colorado River* nor *Younger* supports a stay or dismissal. Among other reasons, the State Action is insufficiently parallel to this case for *Colorado River* purposes, and the State Action is not a criminal or quasi-criminal proceeding justifying abstention under *Younger*. There are no exceptional circumstances warranting a departure from the federal court's virtually unflagging obligation to hear and decide the Railway's federal claims.

The Court should reverse the judgment, with instructions to reinstate the Federal Action.

Date: September 6, 2023

Respectfully submitted,

s/ Paul Beard II

Attorney for Appellant
MENDOCINO RAIWAY

CERTIFICATE OF COMPLIANCE

I am the attorney of record in this case. **This brief contains 13,515 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

Date: September 6, 2023

Respectfully submitted,

s/ Paul Beard II

____

Attorney for Appellant
MENDOCINO RAIWAY

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September 6, 2023 .

Signature s/ Paul Beard II **Date** September 8, 2023

(either manual signature or "s/[typed name]*" is acceptable)*