**No. 23-15857**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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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

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# REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE OF EXHIBIT 2

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*Attorney for Appellant* MENDOCINO RAILWAY

Appellant Mendocino Railway ("MRY") has sought judicial notice of Exhibit 2, a letter from Appellee California Coastal Commission to Mendocino Railway's counsel, the undersigned. The letter is offered, not for the truth contained in the letter, but to establish the fact that the Commission has asserted "review authority under the CZMA" (the Coastal Zone Management Act) with respect to "development activities" proposed and/or undertaken by MRY.

The letter is relevant to the eighth factor of the *Colorado River* analysis—i.e., whether resolution of the claims in the State Action will completely and promptly dispose of MRY's claim in the Federal Action. This requires, in relevant part, a comparison of (1) the *Commission's* claim in the State Action, which seeks only a declaration that its *permitting* authority over MRY is not federally preempted, and (2) *MRY's* claim in the Federal Action, which seeks a broader declaration that *all* the Commission's preclearance authority—permitting or otherwise—is federally preempted. The letter shows there has been an ongoing dispute between MRY and the Commission over the Commission's preclearance authority under the CZMA, thereby making resolution of the Federal Action necessary.

The Commission objects to Exhibit 2. It doesn't object that the letter cannot be judicially noticed under Federal Rule of Evidence 201(b), given that its authenticity as a government document can be accurately and readily determined from sources whose accuracy cannot reasonably be questions. Instead, it objects on two grounds: (1) the letter was not before the district court, and (2) the letter

purportedly does not stand for the proposition that MRY states. The Commission is wrong on both counts.

First, it is true the letter was not before the district court. But that's because the near-total focus of the briefing below was on *Younger* abstention, not *Colorado River*. Indeed, the Commission didn't argue *Colorado River* at all in its motion to dismiss below, let alone the eighth factor of *Colorado River*. So, there was no need or occasion for MRY to present the letter showing the ongoing dispute with the Commission over its CZMA authority. The district court dismissed this action based on a paragraph in the *City's* motion that didn't even apply the factors to the facts of this case.

Second, despite the Commission's claim, the letter does show an ongoing dispute over the Commission's CZMA authority. Repeatedly, the Commission ties past and future activities to the need for a permit and/or CZMA preclearance. The letter speaks for itself.

For these reasons, the Court should judicially notice Exhibit 2.

Date: January 26, 2024

Respectfully submitted,

s/ Paul Beard II

*Attorney for Appellant*
MENDOCINO RAIWAY