

23-15857

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**MENDOCINO RAILWAY, a California
corporation,**

Plaintiff-Appellant,

v.

**JACK AINSWORTH, in his official
capacity as Executive Director of the
California Coastal Commission, and CITY
OF FORT BRAGG, a California municipal
corporation,**

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

No. 22-cv-04597-JST
The Honorable Jon S. Tigar

**APPELLEE JACK AINSWORTH'S MOTION
FOR JUDICIAL NOTICE IN SUPPORT OF
ANSWERING BRIEF**

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MOTION FOR JUDICIAL NOTICE

Defendant-Appellee Jack Ainsworth moves under Federal Rule of Appellate Procedure 27, Circuit Rule 27-1, and Federal Rule of Evidence, Rule 201, for this Court to take judicial notice of certain documents.

Under Federal Rule of Evidence 201(b), a court may take judicial notice of facts that are “capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.” *See* Fed. R. Evid. 201(b)(2); *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc). It may do so at any point in the proceeding, including on appeal. *See* Fed R. Evid. 201(d); *United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996). And a “court must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2).

Judicially noticeable information includes a court’s own records in other cases, and the records of other courts. *See United States v. Wilson*, 631 F.2d 118, 119–20 (9th Cir. 1980). The Public Access to Court Electronic Records (PACER) system provides access to courts’ official records, which are proper subjects of judicial notice. *United States v. Raygoza-Garcia*, 902 F.3d 994, 1001 (9th Cir. 2018). Each of the following documents of are filed publicly and available on PACER, or the California Supreme Court’s website, and thus “not subject to reasonable dispute” because they are “capable of accurate and ready determination

by resort to resources whose accuracy cannot reasonably be questioned.”

Jespersen, 444 F.3d at 1110.

The documents are:

Exhibit A – A true and correct copy of the California Coastal Commission’s Complaint in Intervention, *City of Fort Bragg v. Mendocino Railway*, U.S. District Court for the Northern District of California, Case No. 3:22-CV-06317-TLT, Document 9, filed November 7, 2022.

Exhibit B – Court Docket of *Mendocino Railway v. Superior Court (City of Fort Bragg)*, California Supreme Court, Case No. S275132, retrieved October 30, 2023.

Exhibit C – A true and correct copy of the City of Fort Bragg’s Motion to Remand Action to State Court, *City of Fort Bragg v. Mendocino Railway*, U.S. District Court for the Northern District of California, Case No. 3:22-CV-06317-JST, Document 15, filed November 21, 2022.

Exhibit D – A true and correct copy of the California Coastal Commission’s Notice of Motion to Remand to State Court, *City of Fort Bragg v. Mendocino Railway*, U.S. District Court for the Northern District of California, Case No. 3:22-CV-06317-JST, Document 14, filed November 21, 2022.

Exhibit E – A true and correct copy of the Order Granting Motions to Remand, *City of Fort Bragg v. Mendocino Railway*, U.S. District Court for the

Northern District of California, Case No. 3:22-CV-06317-JST, Document 33, filed May 11, 2023.

Exhibits A, C, D, and E are documents that were filed in the related *City of Fort Bragg v. Mendocino Railway* (Case No. 3:22-CV-06317-JST) case in the District Court for the Northern District of California while that case was removed to federal court.

Exhibit B is a screen shot of the online docket of the California Supreme Court regarding Appellant Mendocino Railway's petition for review of the Mendocino County Superior Court's order overruling its demurrer.

These documents are relevant to the background, procedural history, and *Colorado River* factor analysis found in Mr. Ainsworth's Answering Brief at pages 4-10, 16-17, 25, 31, and 38.

//

//

For the foregoing reasons, Appellee Jack Ainsworth requests that this Court take judicial notice of Exhibits A through E, which are attached to this motion.

Dated: November 6, 2023

Respectfully submitted,

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Exhibit A

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

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

Case No. 3:22-cv-06317-TLT

CALIFORNIA COASTAL COMMISSION'S COMPLAINT IN INTERVENTION

Judge: The Hon. Trina L. Thompson
 Trial Date: None Set
 Action Filed: October 18, 2021

COMPLAINT IN INTERVENTION

22
 23 By leave of the Superior Court of the State of California for the County of Mendocino,
 24 the California Coastal Commission (“Commission”) files this complaint and intervenes in this
 25 action. In its complaint filed on October 28, 2021, Plaintiff City of Fort Bragg (“City”) seeks an
 26 injunction ordering that Defendant Mendocino Railway (“Railway”) must comply with the
 27 City’s ordinances, regulations, jurisdiction, and authority. The City also seeks a judicial
 28 declaration that the Railway is not a public utility exempt from those local laws and regulations.

1 As set forth below, the Commission joins with the City in the relief it seeks against the Railway
2 that is specific to the Commission’s interest in protecting the coast and in upholding laws
3 enacted to protect coastal resources.

4 The Commission alleges as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 **PRAYER FOR RELIEF**

18 Wherefore, the Commission prays for judgment as follows:

19 On the First Cause of Action:

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

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

Exhibit B

Appellate Courts Case Information

Supreme Court

Change court ▼

Docket (Register of Actions)

MENDOCINO RAILWAY v. S.C. (CITY OF FORT BRAGG)

Division SF

Case Number S275132

Date	Description	Notes
06/20/2022	Petition for review with request for stay filed	Petitioner: Mendocino Railway Attorney: Paul J. Beard, II
06/21/2022	Record requested	Court of Appeal record imported electronically.
06/23/2022	Petition for review & application for stay denied	
06/23/2022	Note:	(Copy of 6/23/2022 order also emailed to all parties; also faxed to Superior Court.)

Click here to request automatic e-mail notifications about this case.

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Exhibit C

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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 CITY OF FORT BRAGG,
15
16 Plaintiff,
17
18 v.

19 MENDOCINO RAILWAY,
20
21 Defendants.

Case No. 22-CV-06317-JST

*Assigned for all purposes to:
Hon. Jon S. Tigar, Ctrm. 6*

**CITY’S MOTION TO REMAND
ACTION TO STATE COURT**

DATE: February 2, 2023
TIME: 2:00 p.m.
CTRM: 6

22 TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS
23 OF RECORD:

24 PLEASE TAKE NOTICE that on February 2, 2023 at 2:00 p.m. or as soon thereafter
25 as the matter may be heard in Courtroom 6 – 2nd Floor, of the above-entitled Court, located
26 at Oakland Courthouse, 1301 Clay Street, Oakland, California 94612, although civil motion
27 hearings in this Courtroom are held by Zoom webinar, unless otherwise ordered, Plaintiff
28 CITY OF FORT BRAGG will and does hereby move to remand the action to the California
Superior Court, as having been improperly removed by Defendant MENDOCINO
RAILWAY, for lack of subject matter jurisdiction. 42 U.S.C. § 1447 (c). In particular,



1 there is no federal subject matter jurisdiction merely for a claimed federal preemption
2 defense. Also, there is no federal preemption as alleged by Plaintiff, because Defendant
3 Mendocino Railway is not subject to exclusive regulation by the Surface Transportation
4 Board as a matter of law.

5 This Motion is based on this Notice of Motion and Motion, the Memorandum of
6 Points and Authorities attached hereto, the Declaration of Krista MacNevin Jee, filed
7 concurrently herewith, the file and records in this case, and any further argument the Court
8 deems just and proper to hear at or before the hearing on this Motion.

9
10 Dated: November 21, 2022

JONES MAYER

11
12 By: /s/ Krista MacNevin Jee
13 Krista MacNevin Jee
14 Attorneys for Plaintiff,
15 CITY OF FORT BRAGG
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27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

MEMORANDUM OF POINTS AND AUTHORITIES 7

I. INTRODUCTION 7

II. STATEMENT OF FACTS AND CASE 8

III. LEGAL STANDARD 11

IV. ARGUMENT 13

 A. MR HAS WAIVED ANY RIGHT TO REMOVAL, HAVING FAILED TO
 TIMELY REMOVE THIS ACTION AT THE OUTSET, AND HAVING
 SHOWN ITS INTENT TO LITIGATE IN STATE COURT; THE COASTAL
 COMMISSION'S COMPLAINT IN INTERVENTION ALSO DID NOT RENEW
 THAT TIME, AND REMOVAL WAS THUS IMPROPER..... 13

 B. AN ACTION CANNOT BE REMANDED BASED ON A FEDERAL DEFENSE,
 AND THERE IS ALSO NO FEDERAL PREEMPTION IN ANY EVENT
 BECAUSE MR IS NOT AND HAS NOT BEEN ENGAGED IN ANY
 INTERSTATE COMMERCE, WHICH IS THE ONLY BASIS FOR STB
 JURISDICTION..... 15

V. CONCLUSION 22

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
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27
28

Page(s)

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Allied Erecting & Dismantling Co. v. Ohio Cent. R.R.,
2006 U.S. Dist. LEXIS 76542 (N.D. Ohio 2006) 18

Beatty Grp. v. Great W. Ry. of Colo., L.L.C.,
2020 U.S. Dist. LEXIS 54383 (D. Colo. 2020) 18

Bourdier v. Diamond M Odeco Drilling,
1994 U.S. Dist. LEXIS 804 (E.D. La. 1994) 13, 14

Caterpillar v. Williams,
482 U.S. 386 (1987)..... 11

Chicago Tribune Co. v. Board of Trs. of the Univ. of Ill.,
680 F.3d 1001 (7th Cir. 2012)..... 16

City Nat’l Bank v. Edmisten,
681 F.2d 942 (4th Cir. 1982)..... 16

Cook v. Union Pac. R.R.,
2011 U.S. Dist. LEXIS 133494 (D. Or. 2011)..... 18

Emerson v. Kan. City S. Ry. Co.,
503 F.3d 1126 (10th Cir. 2007)..... 18, 19

Fayard v. Ne. Vehicle Servs.,
533 F.3d 42 (1st Cir. 2008) 20

Fla. E. Coast Ry. v. City of W. Palm Beach,
110 F. Supp. 2d 1367 (S.D. Fla. 2000) 20

Foley v. Allied Interstate,
312 F. Supp. 2d 1279 (C.D. Cal. 2004)..... 13

Franchise Tax Board v. Construction Laborers Vacation Trust,
463 U.S. 1 (1983)..... 16

Franks Inv. Co. v. Union Pac. R.R.,
593 F.3d 404 (5th Cir. 2010)..... 17

Gaus v. Miles, Inc.,
980 F.2d 564 (9th Cir. 1992)..... 12

Heafitz v. Interfirst Bank,
711 F. Supp. 92 (S.D.N.Y. 1989)..... 13, 14



1 *Kanter v. Warner-Lambert Co.*,
 2 265 F.3d 853 (9th Cir. 2001)..... 12

3 *Libhart v. Santa Monica Dairy Co.*,
 4 592 F.2d 1062 (9th Cir. 1979)..... 12

5 *Louisville & Nashville R.R. v. Mottley*,
 6 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908) 12, 16

7 *Merrell Dow Pharmaceuticals, v. Thompson*,
 8 478 U.S. 804 (1986)..... 15, 16

9 *New York Susquehanna and W. Ry. Corp.*,
 10 STB Fin. Docket No. 33466, 6 (Sept. 9, 1999)..... 20

11 *New York Susquehanna and Western Railway Corp. v. Jackson*,
 12 500 F.3d 238 (3d Cir. 2007)..... 15

13 *Nishimoto v. Federman-Bachrach & Assocs.*,
 14 903 F.2d 709 (9th Cir. 1990)..... 12

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 16 493 U.S. 6 (1989)..... 11

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 18 167 F.3d 1261 (9th Cir. 1999)..... 12

19 *Rosenthal v. Coates*,
 20 148 U.S. 142 (1893)..... 14

21 *Rushing v. Kansas City Southern Railway Co.*,
 22 194 F. Supp. 2d 493 (S.D. Miss. 2001)..... 18

23 *Shupp v. Reading Blue Mt. & N. R.R.*,
 24 850 F. Supp. 2d 490 (M.D. Pa. 2012) 18

25 *Snow v. Ford Motor Co.*,
 26 561 F.2d 787 (9th Cir. 1977)..... 11

27 *St. Paul Mercury Indem. Co. v. Red Cab Co.*,
 28 303 U.S. 283 (1938)..... 12

Stillaguamish Tribe of Indians v. Washington,
 913 F.3d 1116 (9th Cir. 2019)..... 16

Towne v. Am. Family Mut. Ins. Co.,
 2010 U.S. Dist. LEXIS 16114 (S.D. Ind. 2010) 14

1 **State Cases**

2 *Friends of the Eel River v. N. Coast R.R. Auth.*,

3 230 Cal. App. 4th 85 (2014)..... 19

4 *In the Matter of the Application California Western Railroad, Inc.*,

5 1998 Cal. PUC LEXIS 189 8

6 **Federal Statutes**

7 28 U.S.C. § 13

8 28 U.S.C. § 1331 15

9 49 U.S.C. § 10501 18

10 **Regulations**

11 FRA Emergency Order No. 21..... 22

12 **Constitutional Provisions**

13 U.S. Const., Article III, § 2 15

14 **Other Authorities**

15 *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and*

16 *Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4

17 S.T.B. 380 (1999)..... 21

18 *Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory*

19 *Order*, STB Finance Docket 35496 (August 15, 2014) 21

20 *Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for*

21 *Declaratory Order*, STB Finance Docket 34354 (March 2, 2004)..... 19

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION.

3 Defendant Mendocino Railway’s (“MR’s”) action to remove the State court action
4 of the City of Fort Bragg (“City”) is but one part in a long line of MR’s repeated attempts
5 to avoid a State court ruling with which it is unhappy, and to engage in forum shopping in
6 order to avoid the decision of the State court judge in the City’s action that was issued
7 against MR. In fact, the State court denied MR’s demurrer in April 2022, and ever since,
8 MR has made every procedural attempt possible to avoid the judge assigned to the case,
9 who issued the ruling against MR. Despite no right to appeal the ruling on demurrer, MR
10 sought a writ of mandate in the California Court of Appeal, as well as the California
11 Supreme Court, both of which were denied. MR attempted to obtain a ruling that the
12 City’s case was related to an already-pending eminent domain case with a private property
13 owner, in an attempt to have the City’s matter transferred to another judge. When that
14 was also unsuccessful, MR attempted to have the judge disqualified, but an appointed
15 judge ruled that there were no grounds for disqualification. When all of these myriad
16 efforts proved useless, and facing a motion to dismiss in the federal action that MR filed
17 against the City -- some four months *after* the undesirable demurrer ruling in the City’s
18 State court action, MR improperly removed the City’s action.

19 Now, MR attempts now to take advantage of the intervention of a new party, the
20 California Coastal Commission, which has merely joined the City’s action – pending for
21 *more than one year*, to remove when MR failed to timely do so at the outset. MR cannot
22 use the addition of merely a new party to remove the action it never removed initially.
23 More importantly, MR cannot remove the City’s action to federal court based merely on
24 MR’s assertion of a federal *defense*. The assertion of a federal defense does *not* qualify
25 the matter for subject matter jurisdiction by this Court on any federal question. Finally,
26 MR does not validly assert a federal preemption claim in any event, since it is not
27 exclusively regulated by the Surface Transportation Board, since MR does not engage in
28 any interstate commerce.

1 **II. STATEMENT OF FACTS AND CASE.**

2 The City commenced an action against Plaintiff Mendocino Railway (“MR”) in
3 *City of Fort Bragg v. Mendocino Railway*, Mendocino County Superior Court Case No.
4 21CV00850 (“Mendocino County Action”) on October 28, 2021. This action is for
5 Declaratory Judgment as to the City’s regulatory authority of MR. Although the authority
6 at issue in that matter is stated broadly as “whether [Mendocino Railway] is subject to the
7 City’s ordinances, regulations, codes, local jurisdiction, local control, local police power,
8 and other City authority,” the City seeks “a stay, temporary restraining order, preliminary
9 injunction, and permanent injunction commanding the Mendocino Railway to comply
10 with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and
11 authority,” but *only* “as applicable.”

12 A related issue to the City’s regulatory authority is MR’s status as a public utility
13 under the authority of the California Public Utilities Commission (“CPUC”), which has
14 determined that Mendocino Railway does not function as a “public utility” pursuant to
15 State law. *See* Declaration of Krista MacNevin Jee, filed concurrently herewith (“Jee
16 Decl.”), at Exhibit C (*In the Matter of the Application California Western Railroad, Inc.*,
17 1998 Cal. PUC LEXIS 189, 78 CPUC2d 292, Decision 98-01-050 (January 21, 1998)).
18 This public utility status under state law is also at issue in the Coastal Commission’s
19 Complaint in Intervention. (Notice of Removal, Request for Judicial Notice (“RJN”),
20 Exhibit B, at .)

21 MR challenged the validity of the City’s Complaint by demurrer filed on or about
22 January 14, 2022. (Jee Decl., ¶ 2.) The demurrer was denied by The Honorable Clayton
23 L. Brennan on April 28, 2022. In the demurrer ruling, the State court confirmed that MR
24 is not a public utility according to the CPUC (citing *In the Matter of the Application*
25 *California Western Railroad, Inc.*, 1998 Cal. PUC LEXIS 189, 78 CPUC2d 292, Decision
26 98-01-050 (January 21, 1998)), and the CPUC has subsequently confirmed this by letter.
27 (Jee Decl., ¶ 2; ¶ 5 (Exhibit C).)

28 ///

1 Thereafter, MR proceeded to challenge the demurrer ruling to the Court of Appeal
2 and the Supreme Court. (Jee Decl., ¶ 2.) There is no right of appeal as to a denial of a
3 demurrer, so Mendocino Railway filed a Petition for Writ of Mandate in the California
4 Court of Appeal, which was denied, and then a Petition for Review with the California
5 Supreme Court, which was also denied. The trial court proceedings were briefly stayed
6 by the Court of Appeal pending decision, until June 9, 2022. (*Id.*)

7 Between MR’s filing of its Petition for Review with the California Supreme Court
8 on June 20, 2022, and the Supreme Court’s summary denial of the Petition on June 23,
9 2022, MR also filed a Notice of Related Case in another case pending in Mendocino
10 County Superior Court, in which Mendocino Railway had been participating as a party for
11 nearly two years, *Mendocino Railway v. John Meyer, et al.*, Mendocino County Superior
12 Court Case No. SCUJ-CVED-20-74939 (“Eminent Domain Action”). (Jee Decl., at ¶ 3.)

13 The Eminent Domain Action relates to MR’s attempt to take the private property of
14 an individual, Defendant John Meyer, in the City of Willits by eminent domain. *Id.*
15 Testimony before Judge Nadel has concluded as to a bifurcated trial in the Eminent
16 Domain Action on or about November 10, 2022.

17 Given its lack of success with the appellate courts and in order to avoid the
18 demurrer ruling issued the Mendocino County Action by Judge Brennan, MR sought to
19 avoid Judge Brennan by attempting to have the earlier Eminent Domain Action deemed
20 related to the Mendocino County Action, thereby necessitating the transfer of the latter
21 from Judge Brennan in the Ten Mile Courthouse in Mendocino County to the Honorable
22 Jeanine Nadel in the Ukiah Courthouse. (Jee Decl., at ¶¶ 2-3.) Transfer of the case to
23 another judge was denied on or about September 30, 2022. (Jee Decl., at ¶ 3.)

24 After a case management conference in the Mendocino County Action, Mendocino
25 Railway filed a Request for Disqualification of Judge Brennan, on September 12, 2022,
26 which was denied by another judge assigned for the purpose of reviewing the request, The
27 Honorable Gregory Elvine-Kreis, on September 29, 2022. (Jee Decl., at ¶ 4.)

28 ///

1 At the case management conference, the City had notified the Court and the parties
2 that the California Coastal Commission had expressed its intention to file a Motion to
3 Intervene in the Mendocino County Action. (Jee Decl., at ¶ 4.) The City had previously
4 notified the court and MR of the same in the City’s Case Management Statement filed on
5 August 25, 2022. (*Id.*) The California Coastal Commission thereafter filed its motion to
6 intervene on or about September 8, 2022, which was granted on October 20, 2022. (*Id.*)

7 MR’s federal action against the City and the Executive Director of the California
8 Coastal Commission was commenced on August 9, 2022 (Case No. 4:22-CV-04597-
9 JST). The sole cause of action is for Declaratory Judgment. MR’s complaint in that
10 action acknowledged, at the time of commencement of the action, that the City had a then-
11 pending “state-court action.” (MR’s Complaint, at ¶ 4.) MR claimed a very broad scope
12 of the City’s action in this matter – ignoring the entirety of the Complaint except the few
13 words supporting its mischaracterizations, in order to attempt to claim that the City’s
14 action was preempted, as it does here in its Notice of Removal (¶ 2). However, the actual
15 scope and nature of the City’s claims are not so broad, and the Superior Court’s actual
16 exercise of authority has yet to be determined, due to the delay of MR’s multiple attempts
17 to obtain a new judge and its appellate challenges of the demurrer ruling.

18 Like its Notice of Removal here, MR has asserted in its own federal action that it is
19 a “federally regulated railroad with preemption rights,” and it seeks “[t]o avoid the
20 unlawful enforcement of federally-preempted regulation, [and] the concomitant disruption
21 of its railroad operations and projects.” (MR’s Complaint, at ¶¶ 4-5.) Specifically, MR
22 has claimed that it is “subject to the STB’s jurisdiction,” that it “was and continues to be a
23 federally licensed railroad subject to the STB’s jurisdiction,” and that it is a “common-
24 carrier railroad subject to the STB’s jurisdiction.” (MR’s Complaint, at ¶¶ 9, 18.) MR’s
25 primary assertion in its Complaint is that it “is a federally regulated common carrier that is
26 part of the interstate rail network under the STB’s exclusive jurisdiction.” (MR’s
27 Complaint, at ¶ 30.) It “seeks a declaration that the actions of the Commission and the
28

1 City to regulate Mendocino Railway’s operations, practices and facilities are preempted . .
 2 . and that Mendocino Railway’s activities are subject to the STB’s exclusive jurisdiction.”

3 It makes similar claims in its notice of removal – that, purportedly as a “federally
 4 regulated railroad [it is] subject to the exclusive jurisdiction of the STB under ICCTA and
 5 the Supremacy Clause.” (Notice of Removal, at ¶ 5.) MR asserts that the City’s
 6 Complaint and the Commission’s Complaint in Intervention in this action supposedly seek
 7 “local land-use permitting and oversight of [MR’s] rail-related activities [which] are
 8 federally preempted.” These claims are wholesale, and MR seeks to simply be free of any
 9 regulatory authority whatsoever by the City and the Coastal Commission – and more
 10 importantly, to be free from *any state action whatsoever*. This is simply not the law and
 11 any preemption claim by MR does not operate in such a sweeping or comprehensive
 12 manner as to local jurisdiction. More importantly, MR’s claims are merely defenses,
 13 which do not present a federal question over which this Court has subject matter
 14 jurisdiction, and MR’s claims are false in any event, since MR does not operate in
 15 interstate commerce, and this is the measure of STB jurisdiction. Further, MR – despite
 16 having had, and long ago asserting, its federal preemption defense in this action in State
 17 court as part of its demurrer, failed to timely remove, and the Coastal Commission’s
 18 Complaint did not spontaneously renew any right to remove. Finally, MR has waived any
 19 removal right by its full and aggressive participation in State court, including seeking
 20 review and relief from the California Supreme Court. Thus, this Court must remand the
 21 matter to State court. MR simply cannot be permitted to so continually delay, obtain
 22 rulings with which it disagrees, and simply move on to another court in the vain hope of
 23 obtaining a new decision to its liking.

24
 25 **III. LEGAL STANDARD.**

26 A matter may be removed based on the federal court first having jurisdiction over
 27 the case originally filed. *Northbrook Nat’l Ins. Co. v. Brewer*, 493 U.S. 6, 12 (1989);
 28 *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987); *Snow v. Ford Motor Co.*, 561 F.2d

1 787, 789–790 (9th Cir. 1977). Removal itself is only statutory, whereas the underlying
2 requirement for federal question subject matter jurisdiction is constitutional. *Libhart v.*
3 *Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). In fact, there is strong
4 presumption *against* removal, so as to properly preserve the difference realms of authority
5 of federal and state courts. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).
6 Removal must be strictly construed, and doubts must be generally resolved in favor or
7 remand. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938); *Libhart*,
8 at 1064 (9th Cir. 1979). Further, it is the removing party’s burden to demonstrate federal
9 jurisdiction. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857–858 (9th Cir. 2001);
10 *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990). That
11 party also has the burden of showing that it has timely and properly complied with
12 removal requirements and procedures. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d
13 1261, 1265–1266 (9th Cir. 1999).

14 Further, a federal claim over which this Court has jurisdiction can only be found
15 “within ‘the plaintiff’s statement of his own cause of action.’” A federal question must be
16 presented in a complaint, *not* in an answer. *Louisville & Nashville R.R. v. Mottley*, 211
17 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126 (1908) (lack of federal question jurisdiction
18 when anticipated defense based on federal law).

19 MR has not and cannot meet its burden here. Removal was not timely made by it
20 more than a year ago when the City first brought its action. Indeed, MR improperly
21 awaited a ruling by the California Superior Court, and used every procedural maneuver
22 imaginable to attempt to obtain a new judge, before it finally resorted to its improper and
23 belated removal to this Court. Further, removal is not proper here, as MR’s mere asserted
24 federal preemption defense does not confer jurisdiction, there is no renewed right to
25 removal here, and MR has no such defense in any event, since MR is not, and has never
26 been, engaged in interstate commerce. Thus, this matter must be remanded to the State
27 court forthwith, having been improperly removed.

28 ///

1 *Towne v. Am. Family Mut. Ins. Co.*, 2010 U.S. Dist. LEXIS 16114, at *13-*14 (S.D. Ind.
2 2010) (removal waived because sought only after state court denial of motion to dismiss,
3 in order to “prevent defendants, unhappy with adverse state court rulings, from taking a
4 second bite at the apple in federal court”) (internal changes and quotations omitted);
5 *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893) (removal acts “do not contemplate that a
6 party may experiment on his case in the state court, and, upon an adverse decision, then
7 transfer it to the Federal court”).

8 In contrast to both *Heafitz* and *Bourdier*, MR filed not only a motion to dismiss in
9 state court (demurrer) on or about *January 14, 2022*, but it sought affirmative relief from
10 the Court of Appeal *and* the California Supreme Court in *June 2022*. (Jee Decl., ¶ 2.) It
11 also sought to transfer the City’s State case to another judge, and to have the assigned
12 judge disqualified. (*Id.*) Only after all these attempts failed, and MR realized it was again
13 before the judge who had denied MR’s demurrer, did MR seek to remove the City’s action
14 to federal court. Thus, MR has manifested its clear intent to litigate the matter in state
15 court. Further, it is abundantly clear that MR seeks to use the removal process to allow it
16 to re-litigate matters it submitted to the State court, and to give it a second opportunity to
17 forum shop, and obtain different results, or to have tested the water in State court first.

18 In addition, any federal preemption claim that MR asserts now that purportedly
19 serves as the basis for this Court’s jurisdiction was always present and known to MR. As
20 noted above, MR asserted in its demurrer, filed with the State court in January 2022, that
21 the City’s claims were preempted by federal law, that MR was subject to the exclusive
22 jurisdiction of the Surface Transportation Board, and that the City’s whole action and all
23 claims were subject to dismissal on this ground. This assertion is not new or different that
24 its basis for removal now. Instead, MR utilized every maneuver available to it to attack
25 the City’s complaint, and only when all of those efforts were exhausted – not to MR’s
26 advantage, did MR then seek to remove this matter to federal court. Its Notice to Remove
27 was purportedly based on the new filing by the Coastal Commission’s Complaint in
28 Intervention, which sought only a supportive complaint to the City’s, primarily “an

1 injunction ordering that Defendant Mendocino Railway . . . must comply with the City’s
 2 ordinances, regulations, jurisdiction, and authority.” (Request for Judicial Notice
 3 supporting MR’s Notice of Removal, Exhibit B, at p. 1, ll. 27-28.) The Coastal
 4 Commission – contrary to MR’s claims, did not seek to determine whether MR is a
 5 federally regulated railroad or subject to the jurisdiction of the STB.¹ (Notice of Removal,
 6 at ¶ 4.a.)

7 **AN ACTION CANNOT BE REMANDED BASED ON A FEDERAL**
 8 **DEFENSE, AND THERE IS ALSO NO FEDERAL PREEMPTION IN ANY**
 9 **EVENT BECAUSE MR IS NOT AND HAS NOT BEEN ENGAGED IN ANY**
 10 **INTERSTATE COMMERCE, WHICH IS THE ONLY BASIS FOR STB**
 11 **JURISDICTION.**

12 The United States Constitution establishes that federal courts have authority to hear
 13 cases “arising under [the] Constitution, the laws of the United States, and treaties.” U.S.
 14 Const., art. III, § 2. With respect to the original jurisdiction of the courts to hear matters
 15 based on a federal question, Congress has provided authority similar to the Constitution:
 16 “The district courts shall have original jurisdiction of all civil actions arising under the
 17 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Even though both
 18 of the above provisions refer broadly to matters “arising under” federal law, the Supreme
 19 Court has applied the language more narrowly. *See, e.g., Merrell Dow Pharmaceuticals,*
 20 *v. Thompson*, 478 U.S. 804, 813 (1986) (federal question jurisdiction requires a cause of
 21 action based on federal statute). The Complaint does not present a federal question that
 22 meets these standards, or which can be adjudicated by this Court.

23 Federal question jurisdiction under Title 28 United States Code section 1331 exists
 24 in two types of cases: (1) when it is apparent on the face of plaintiff’s complaint that the
 25 plaintiff’s cause of action was created by federal law; or (2) when the plaintiff’s cause of

26 _____
 27 ¹ Although the Coastal Commission’s *prayer* seeks a declaration that the application
 28 of the State’s Coastal Act and the City’s Local Coastal Program “are not preempted
 by any state or federal law,” this is merely the reverse of MR’s federal *defense*. This
 is not a *new* claim, or one which itself confers federal question jurisdiction on this
 Court.

1 action was created by state law, but resolution requires determination of a substantial
2 question of federal law and the implicated federal law provides the plaintiff with a cause
3 of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-
4 28 (1983) (there is a federal question if the law creates the cause of action); *Merrell Dow*,
5 478 U.S. at 817 (federal question exists if an element of the state cause of action is a
6 federal statute that creates a federal cause of action for plaintiff).

7 The Ninth Circuit in *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116,
8 1118 (9th Cir. 2019), concluded that “[n]either a defense based on federal law nor a
9 plaintiff’s anticipation of such a defense is a basis for federal jurisdiction.” *Id.* See also,
10 *Chicago Tribune Co. v. Board of Trs. of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir.
11 2012) (“it is blackletter law that a federal defense differs from a claim arising under
12 federal law”). There is no substantial question of federal law, when MR has merely
13 asserted a preemption defense. It is well-established that a federal defense does not
14 establish federal jurisdiction. See *Louisville & Nashville Rd. Co. v. Mottley*, 211 U.S. 149,
15 152 (1908); *City Nat’l Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982) (anticipation
16 of federal defense does not establish federal jurisdiction). Contrary to MR’s claims,
17 neither the City’s Complaint nor the Coastal Commission’s Complaint in Intervention
18 “clearly presents a federal question on the face of [the] complaint[s].” And, even
19 assuming *arguendo* that the Coastal Commission’s Complaint did so, it only did so to the
20 same extent that the City’s Complaint did so at the outset, and thus the removal was
21 untimely because it was not sought by MR within 30 days after the service of the City’s
22 Complaint on MR on or about November 23 and 30, 2021. (Jee Decl., ¶ 2.)

23 First, MR’s assertion about the nature of the Coastal Commission’s Complaint are
24 simply inaccurate. MR claims in its Notice of Removal that the Coastal Commission
25 seeks in its first cause of action for a declaration that MR is “is not a federally regulated
26 railroad subject to the federal Surface Transportation Board’s . . . exclusive jurisdiction.”
27 It does no such thig. Instead, it seeks a determination that “ongoing and proposed
28 activities by the Railway within the coastal zone of the City, including but not limited to,

1 alterations to structures, constitute ‘development’ under both the Coastal Act and the
2 City’s [Local Coastal Program].” (Coastal Commission Complaint, at ¶ 12.) Specifically,
3 the Coastal Commission seeks a declaration regarding “whether the Railway’s
4 development activities in the coastal zone are subject to the Coastal Act and the City’s
5 [Local Coastal Program].” (Coastal Commission Complaint, at ¶ 15.)

6 In the Answer MR filed to the Coastal Commission Complaint, on November 14,
7 2022 [Doc. 10], MR even admitted the limited nature of its asserted preemption claim,
8 which does *not* even apply to the whole of the Coastal Commission’s Complaint. MR
9 expressly “admit[ted] that it contends that its rail-related activities in the coastal zone are
10 not subject to state or local land-use regulations.” (Answer, at ¶ 1.) Repeatedly
11 throughout the Answer, MR claims only that some portion of its activities – its “rail-
12 related” activities or rail-related uses of property are purportedly preempted. Thus, MR
13 acknowledges that there is at least some portion of the Coastal Commission Complaint
14 that is *not* preempted. Moreover, MR does not explain how it is that a purportedly
15 applicable *partial* federal preemption *defense* provides it with federal subject matter
16 jurisdiction as a federal question.

17 Indeed, even assuming *arguendo* that federal preemption applied, it is not absolute
18 in this instance. As the Fifth Circuit found, discussing the same principle found in the
19 Eleventh Circuit, “Congress narrowly tailored the ICCTA pre-emption provision to
20 displace only regulation, i.e., those state laws that may reasonably be said to have the
21 effect of managing or governing rail transportation, while permitting the continued
22 application of laws having a more remote or incidental effect on rail transportation. . . .
23 The text of Section 10501(b), with its emphasis on the word regulation, establishes that
24 only laws that have the effect of managing or governing rail transportation will be
25 expressly preempted.” *Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 410 (5th Cir.
26 2010) (quotations and changes omitted) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm*
27 *Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). *See also, Maumee & Western Railroad*
28 *Corporation and RMW Ventures, LLC -- Petition For Declaratory Order*, STB Finance

1 berm does not directly relate to the manner in which the Defendant
 2 conducts its switching activities. The court also found that an order
 3 directing the railroad to compensate and correct drainage problems
 4 resulting from the construction of the berm would not implicate the type of
 5 economic regulation Congress was attempting to prescribe when it enacted
 6 the ICCTA.

7 In *Emerson*, the court found that “no ICCTA provision gives the STB authority to dictate
 8 how the Railroad should dispose of detritus or maintain drainage ditch vegetation,” so
 9 these specific matters were thus not preempted. *Emerson*, at 1132. Further, the *Emerson*
 10 Court noted the absurdity of the railway’s claims:

11 the Railroad’s argument has no obvious limit, and if adopted would lead to
 12 absurd results. If the ICCTA preempts a claim stemming from improperly
 13 dumped railroad ties, it is not a stretch to say that the Railroad could
 14 dispose of a dilapidated engine in the middle of Main Street--a cheap way
 15 to be rid of an unwanted rail car. After all, in this hypothetical, as in this
 16 case, the Railroad is merely disposing of unneeded railroad equipment in a
 17 cost-conscious fashion.

18 *Id.* (citing *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982)). In fact, “not all
 19 state and local regulations are preempted [by the ICCTA]; local bodies retain certain
 20 police powers which protect public health and safety.” *Emerson*, at 1133 (quotations
 21 omitted). *See also, Friends of the Eel River v. N. Coast R.R. Auth.*, 230 Cal. App. 4th 85,
 22 105 (2014):

23 The ICCTA “does not preempt state or local laws if they are laws of
 24 general applicability that do not unreasonably interfere with interstate
 25 commerce. [Citations.] For instance, the STB has recognized that [the]
 26 ICCTA likely would not preempt local laws that prohibit the dumping of
 27 harmful substances or wastes, because such a generally applicable
 28 regulation would not constitute an unreasonable burden on interstate
 commerce. [Citations.]” (*Association of American Railroads v. South Coast
 Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097.

Indeed, the *Emerson* court noted that a preemption claim as to a state regulation “requires
 a factual assessment,” and that it is the defendant asserting the defense that has the burden
 of proof of demonstrating that there is preemption. *Id.* at 1134. The STB has agreed that
 “state and local regulation is permissible where it does not interfere with interstate rail
 operations, and localities retain certain police powers to protect public health and safety.”
Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for

1 *Declaratory Order*, STB Finance Docket 34354 (March 2, 2004). *See also*, *New York*
2 *Susquehanna and W. Ry. Corp.*, STB Fin. Docket No. 33466, 6 (Sept. 9, 1999)
3 (STB has recognized that “not all state and local regulations that affect railroads are
4 preempted”), cited in *Fla. E. Coast Ry. v. City of W. Palm Beach*, 110 F. Supp. 2d 1367,
5 1377 (S.D. Fla. 2000)).

6 The First Circuit noted, for instance, that a regulation relating to railroad rates
7 might arguably be completely preempted, that would not mean that railroads would be
8 automatically immunized from state nuisance claims, concluding that they were not, and
9 that such claims would not “clearly provide a federal cause of action amounting to
10 nuisance.” *Fayard v. Ne. Vehicle Servs.*, 533 F.3d 42, 48 (1st Cir. 2008). Further, *Fayard*
11 expressly concluded that, since *defendant* had the burden of showing some “clear cut
12 federal cause of action,” its failure to do so meant that “there are good reasons, certainly
13 for a lower federal court, to refuse to extend complete preemption beyond its current
14 boundaries.” *Id.* Complete preemption is a “narrow exception” as found by the
15 Supreme Court, and is subject to “the usual rule against federal jurisdiction or removal
16 premised merely upon a prospective federal defense. Both jurisdiction and removal are
17 primarily creatures of Congress; and the balance Congress has struck should not lightly be
18 disregarded.” *Id.* (citing *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S.
19 308, 314 (2005)). As the *Fayard* Court further noted as to the important underlying
20 interests of preserving State court jurisdiction:

21 [A]bsent a clear cut federal cause of action, a danger exists of creating gaps
22 in protection by categorically supplanting state claims with non-existent
23 federal remedies. By contrast, where the state claim is left intact, federal
interests are still largely protected: nothing prevents a preemption defense
from being asserted, albeit in state courts.

24 *Fayard*, at 49. The *Fayard* Court found that remand should have been granted, based on
25 an absence of subject matter jurisdiction, finding that “preemption may well be a defense
26 to the Fayards’ nuisance claims, but the conditions have not been met to authorize
27 removal through the extreme and unusual outcome of complete preemption.” *Id.*

28 In addition, the STB does not have jurisdiction over excursion railroads like MR’s.

1 See, e.g., *Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory*
 2 *Order*, STB Finance Docket 35496 (August 15, 2014). It also does not have jurisdiction
 3 over rail lines that are not, and have never, operated in interstate commerce. See, e.g.,
 4 *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Wester*
 5 *Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999)
 6 (“Many rail construction projects are outside of the Board’s regulatory jurisdiction. For
 7 example, railroads do not require authority from the Board to build or expand facilities
 8 such as truck transfer facilities, weigh stations, or similar facilities ancillary to their
 9 railroad operations, or to upgrade an existing line or to construct unregulated spur or
 10 industrial team track.”); (“preemption does not apply to operations that are not part of the
 11 national rail network” or “to state or local actions under their retained police powers so
 12 long as they do not interfere with railroad operations or the Board’s regulatory programs”)
 13 (citing *Hi Tech Trans, LLC-- Petition for Declaratory Order--Hudson County, NJ*, STB
 14 Finance Docket No. 34192, 2003 STB LEXIS 475 at *10-11, 2003 WL 21952136 (2003),
 15 *aff’d Hi-Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) (“no preemption for
 16 activity that is not part of ‘rail transportation’”).

17 MR operates a sightseeing excursion service only, with no service connection to
 18 interstate commerce; its railway activities are limited, and not subject to federal
 19 preemption. Indeed, the federal Railroad Retirement Board has so held as to Mendocino
 20 Railway’s operations. See *Jee Decl.*, Exhibit A. The Board issued a decision in B.C.D.
 21 06-42 in 2006, finding that, even though the STB authorized Mendocino Railway’s
 22 acquisition in 2004 of the assets of California Western Railroad, Mendocino’s rail lines
 23 “between Fort Bragg and Willits . . . connects to another railway line over which there has
 24 been no service for approximately ten years,” and significant “problems on the line will
 25 prevent service for some time to come.” The line was, at that time, “unusable” – and it
 26 remains so today.² *Id.* The Board concluded that “Mendocino’s ability to perform

27 ² As alleged in the City’s Complaint, this line has had a collapsed tunnel since in or about
 28 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

1 not a year later – after MR has already manifested a clear intent to litigate this matter in
2 State court, having filed a motion to dismiss (demurrer), a notice of related case, a request
3 for disqualification, *and* a petition for writ of mandate to the Court of Appeal and a
4 petition for review to the California Supreme Court. In addition, the City must be
5 permitted the opportunity to have its action to proceed in the chosen forum, and for MR
6 not to be permitted to seek another forum for the clear purpose of obtaining a second
7 ruling, when the state court one was not to its liking. Finally, MR inaccurately asserts
8 federal preemption of the STB that does not even apply, since MR has already been found
9 not to be engaging in interstate commerce and *not* subject to STB jurisdiction, as well as it
10 operating merely an excursion, sightseeing train that is not subject to such jurisdiction.

11 Dated: November 21, 2022

JONES MAYER

12
13 By: /s/ Krista MacNevin Jee
14 Krista MacNevin Jee
15 Attorneys for Plaintiff,
16 CITY OF FORT BRAGG
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Exhibit D

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 8 *California Coastal Commission*

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

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

Case No. 4:22-cv-06317-JST

**CALIFORNIA COASTAL
 COMMISSION’S NOTICE OF MOTION
 AND MOTION TO REMAND ACTION
 TO STATE COURT**

Date: February 2, 2023
 Time: 2 p.m.
 Dept: Courtroom 6
 Judge: The Hon. Jon S. Tigar
 Trial Date: Not Set
 Action Filed: October 28, 2021

23 **TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:**

24 **PLEASE TAKE NOTICE** that, on Thursday, February 2, 2023, at 2:00 p.m., or as soon
 25 thereafter as the matter may be heard, at the United States District Court, Northern District of
 26 California, United States Courthouse, at 1301 Clay Street, in Oakland, California, the California
 27 Coastal Commission (“Coastal Commission”) will, and hereby does, move the Court for an order
 28

Exhibit E

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY OF FORT BRAGG,
Plaintiff,
CALIFORNIA COASTAL COMMISSION,
Intervenor-Plaintiff,
v.
MENDOCINO RAILWAY,
Defendant.

Case No. 22-cv-06317-JST

**ORDER GRANTING MOTIONS TO
REMAND**

Re: ECF Nos. 14 & 15

Before the Court are Plaintiff City of Fort Bragg’s (“City”) and Intervenor-Plaintiff California Coastal Commission’s (“Commission”) motions to remand. ECF Nos. 14 & 15. The Court will grant the motions.

I. BACKGROUND

This action concerns Defendant Mendocino Railway’s alleged noncompliance with state and local laws and regulations. The City and Commission primarily seek a declaratory judgment that Defendant Mendocino Railway is subject to such laws and regulations. ECF No. 1-1 at 1, 8; ECF No. 1-3 at 1-2, 5-6. The City also seeks an injunction requiring Mendocino Railway to comply with local law as it applies to dilapidating railroad infrastructure within City boundaries. ECF No. 1-1 at 5-7. In addition, the Commission seeks a declaration that the Railway is subject to the California Coastal Act of 1976 (“Coastal Act”), Cal. Pub. Res. Code § 30000 *et seq.*, and an injunction requiring Mendocino Railway to comply with the Act’s permitting requirements. ECF No. 1-3 at 6-7.

The City filed its complaint in the Superior Court of Mendocino County on October 28,

2021. ECF No. 1-1 at 9. 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. 14-2 at 18-20.¹ The court overruled the demurrer on April 28, 2022. ECF No. 14-2 at 22-33. 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 ICCTA. *Id.* at 32. Rather “the applicability of preemption” in this context “is necessarily a ‘fact bound’ question.” *Id.* at 33. 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 32. Mendocino Railway filed its answer to the City’s complaint on June 24, 2022, asserting federal preemption as an affirmative defense. *Id.* at 41. On September 8, 2022, the Commission moved to intervene and filed a proposed complaint-in-intervention. *Id.* at 59-82. The complaint notes that Mendocino Railway “contends that state and federal law preempts” the permitting requirements of the Coastal Act, *id.* at 72, 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 73.

Mendocino Railway removed the case to this Court on October 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 the Commission filed the instant motions on November 21, 2022. ECF Nos. 14 & 15. The Court took the motions under submission without a hearing on January 23, 2023. ECF No. 25.

II. LEGAL STANDARD

“A defendant may remove an action to federal court based on federal question jurisdiction or diversity jurisdiction.” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009)

¹ The Commission’s requests that the Court take judicial notice of filings from state and federal court dockets in this and related cases, ECF No. 14-2; ECF No. 18-1, are granted. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

1 (citing 28 U.S.C. § 1441). “Federal courts are courts of limited jurisdiction.” *Kokkonen v.*
 2 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). It is “presumed that a cause lies outside
 3 this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting
 4 jurisdiction.” *Id.* “[A]ny doubt about the right of removal requires resolution in favor of remand,”
 5 *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009); accord *Gaus v.*
 6 *Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam).

7 **III. DISCUSSION**

8 The City and the Commission argue that (1) Mendocino Railway’s removal of this case
 9 was untimely, (2) federal preemption is an insufficient basis for removal, and (3) principles of
 10 abstention under *Younger v. Harris*, 401 U.S. 37 (1971) require remand. The Court first considers
 11 the second argument and finds it dispositive

12 For purposes of federal question jurisdiction, “[t]he general rule, referred to as the well-
 13 pleaded complaint rule,’ is that a civil action arises under federal law for purposes of [28
 14 U.S.C.] § 1331 when a federal question appears on the face of the complaint.” *City of Oakland v.*
 15 *BP PLC*, 969 F.3d 895, 903 (9th Cir. 2020) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386,
 16 392 (1987)). “Because federal jurisdiction ‘depends solely on the plaintiff’s claims for relief and
 17 not on anticipated defenses to those claims,’ . . . ‘a case may *not* be removed to federal court on
 18 the basis of a federal defense, including the defense of preemption, even if the defense is
 19 anticipated in the plaintiff’s complaint, and even if both parties concede that the federal defense is
 20 the only question truly at issue” *Id.* at 903-904 (first quoting *ARCO Env’t Remediation, LLC*
 21 *v. Dep’t of Health & Env’t Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000); and then
 22 quoting *Caterpillar*, 482 U.S. at 393 (emphasis in original)).

23 There are two exceptions to the well-pleaded complaint rule, both of which are relevant
 24 here. First, the artful-pleading doctrine “‘allows removal when federal law completely preempts a
 25 plaintiff’s state-law claim,’ . . . meaning that ‘the pre-emptive force of the statute is so
 26 extraordinary that it converts an ordinary state common-law complaint into one stating a federal
 27 claim for purposes of the well-pleaded complaint rule.’” *Id.* at 905 (first quoting *Rivet v. Regions*
 28 *Bank of La.*, 522 U.S. 470, 475 (1998); and then quoting *Caterpillar*, 482 U.S. at 393). “To have

1 this effect, a federal statute must ‘provide[] the exclusive cause of action for the claim asserted and
2 also set forth procedures and remedies governing that cause of action.’” *Id.* (alteration in original)
3 (quoting *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003)). “The Supreme Court has
4 identified only three statutes that meet this criteria:” (1) Section 301 of the Labor Management
5 Relations Act, 9 U.S.C. § 185; (2) Section 502(a) of the Employee Retirement Income Security
6 Act of 1974, 29 U.S.C. § 1132(a); and (3) Sections 85 and 86 of the National Bank Act, 12 U.S.C.
7 §§ 85 & 86. *Id.* at 905-906.

8 Second, there is a “‘small category’ of state-law claims that arise under federal law for
9 purposes of [Section] 1331 ‘because federal law is a necessary element of the . . . claim for
10 relief.’” *Id.* at 904 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699
11 (2006)). This exception applies where “a federal issue is ‘(1) necessarily raised, (2) actually
12 disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the
13 federal-state balance approved by Congress.’” *Id.* (quoting *Gunn v. Minton*, 568 U.S. 251, 258
14 (2013)). “All four requirements must be met for federal jurisdiction to be proper.” *Id.* at 904-905.

15 Because Mendocino Railway’s notice of removal is grounded in the references to federal
16 preemption in the Commission’s complaint-in-intervention, federal question jurisdiction lies only
17 if either of the two exceptions to the well-pleaded complaint rule applies. Mendocino Railway
18 invokes both exceptions, arguing that the “ICCTA’s preemptive force is extraordinary” and citing
19 numerous cases in support. ECF No. 16 at 16.

20 The Court agrees that the scope of preemption under the ICCTA is broad. Indeed, the
21 Ninth Circuit has recognized that the ICCTA “expressly preempts ‘a wide range of state and local
22 regulation of rail activity,” and that “[i]t is difficult to imagine a broader statement of Congress’s
23 intent to preempt state regulatory authority over railroad operations.” *Swinomish Indian Tribal
24 Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1152 (9th Cir. 2020) (emphasis omitted) (first quoting
25 *Ass’n of Am. R.Rs. v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096-97 (9th Cir.
26 2010); and then quoting *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998)).
27 Notwithstanding these generalizations, however, the Ninth Circuit has held that “[t]he ICCTA
28 does not ‘preempt state or local laws if they are laws of general applicability that do not

1 unreasonably interfere with interstate commerce.” *BNSF Ry. Co. v. Cal. Dep’t of Tax and Fee*
 2 *Admin.*, 904 F.3d 755, 760 (quoting *Ass’n of Am. R.Rs.*, 622 F.3d 1094 at 1097). Instead, the
 3 statute “preempts all state laws that may reasonably be said to have the effect of managing or
 4 governing rail transportation, while permitting the continued application of laws having a more
 5 remote or incidental effect on rail transportation. What matters is the degree to which the
 6 challenged regulation burdens rail transportation[.]” *Id.* at 760-61 (alteration in original) (quoting
 7 *Ass’n of Am. R.Rs.*, 662 F.3d at 1097-98). As a result, this “system preserves,” for example, “a
 8 role for state and local agencies in the environmental regulation of railroads.” *Ass’n of Am. R.Rs.*,
 9 662 F.3d at 1098.

10 Neither exception to the well-pleaded complaint rule applies here. As to the artful-
 11 pleading doctrine, Mendocino Railway “do[es] not attempt to show that the ICCTA ‘provide[s]
 12 the exclusive cause of action for the claim[s] asserted.’” *Friends of Del Mar Bluffs v. North*
 13 *County Transit Dist.*, No. 3:22-CV-503-RSH-BGS, 2022 WL 17085607, at *7 (quoting *Beneficial*,
 14 539 U.S. at 8); accord *Californians for Alternatives to Toxics v. N. Coast R.R. Auth.*, No. C-11-
 15 4102, 2012 WL 1610756, at *9 (N.D. Cal. May 8, 2012). Because the ICCTA does not preempt
 16 state or local laws of general applicability that do not unreasonably interfere with interstate
 17 commerce, the Court cannot conclude that “Congress intended to preempt ‘every state law cause
 18 of action’ within the scope of the [ICCTA].” *City of Oakland*, 969 F.3d at 907 (quoting *In re NOS*
 19 *Commc’ns*, MDL No. 1357, 495 F.3d 1052, 1059 (9th Cir. 2017)). The Ninth Circuit’s
 20 delineation of the boundaries of ICCTA preemption demonstrates that such preemption is not “so
 21 extraordinary” as to be considered complete. *Id.* at 905 (quoting *Caterpillar*, 482 U.S. at 393).
 22 The artful-pleading doctrine thus does not apply.

23 As to the second exception, the Ninth Circuit has held that “a federal issue is not
 24 substantial if it is ‘fact-bound and situation-specific.’” *Id.* at 905 (quoting *Empire Healthchoice*,
 25 547 U.S. at 700). The Ninth Circuit’s ICCTA preemption inquiry is necessarily fact-bound and
 26 situation-specific because it requires courts to assess “the degree to which the challenged [law]
 27 burdens rail transportation” in a given case. *BNSF Ry. Co.*, 904 F.3d at 760. The assessment of
 28 that degree will invariably turn on the application of the challenged law to the facts of a specific

United States District Court
Northern District of California

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case. Equally fact-bound and situation-specific is the question of whether the ICCTA and its
preemption provision apply at all, which turns on whether Mendocino Railway is, in fact, engaged
in interstate commerce – an issue the parties dispute in their briefing on the instant motions. The
state court reached the same conclusion in overruling Mendocino Railway’s demurrer. *See* ECF
No. 14-2 at 22-33. The second exception thus does not apply.

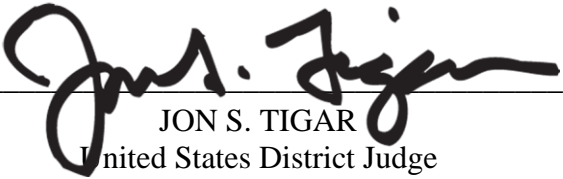
Because neither exception to the well-pleaded complaint rule applies, the Court lacks
federal question jurisdiction over the claims asserted in this case.

CONCLUSION

For the foregoing reasons, the City’s and Commission’s motions are granted. This case is
remanded to the Superior Court of Mendocino County.

IT IS SO ORDERED.

Dated: May 11, 2023



JON S. TIGAR
United States District Judge

CERTIFICATE OF SERVICE

Case Name: **Mendocino Railway v. Jack
Ainsworth, et al.**

No. **23-15857**

I hereby certify that on November 6, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE JACK AINSWORTH'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF ANSWERING BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 6, 2023, at Sacramento, California.

Bryn Barton
Declarant

/s/ Bryn Barton
Signature