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.

Case No.: 21CV00850

[Assigned to the Hon. Clayton Brennan]

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS;

Hearing Date: October 19, 2023
Hearing Time: ~~9:00 a.m.~~ 2:00 P.M.

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

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A LIMITED LIABILITY PARTNERSHIP

Pursuant to Evidence Code sections 451-452, Defendant Mendocino Railway hereby requests that the Court take judicial notice of the following exhibits, attached hereto and authenticated by the Declaration of Paul Beard II (filed as an attachment to the Notice of Motion and Motion or Stay).

Exhibit 1: A true and correct copy of Mendocino Railway's federal complaint in *Mendocino v. Railway v. Ainsworth* (No. 22-cv-06317-JST, N.D. Cal). Evid. Code § 452(d) (court records are judicially noticeable).

Exhibit 2: A true and correct copy of the federal district court's Order Granting Motions to Dismiss in *Mendocino v. Ainsworth*. Evid. Code § 452(d)(c) (official acts of courts are judicially noticeable).

Exhibit 3: A true and correct copy of the Mendocino County Superior Court's decision in *Mendocino Railway v. Meyer* (No. SCUK-CVED-2020-74939). Evid. Code § 452(d)(c) (official acts of courts are judicially noticeable).

The foregoing exhibits are relevant in that they help to establish the fact that the issues in this case are before the Court of Appeal in *Meyer* and the federal court in *Ainsworth*.

For these reasons, the Court should grant this request for judicial notice of all three exhibits.

DATED: September 5, 2023 /s/ Paul Beard II

Attorneys for Defendant MENDOCINO RAILWAY

FISHERBROYLES
A LIMITED LIABILITY PARTNERSHIP

EXHIBIT 1

PAUL J. BEARD II (State Bar No. 210563)
FISHERBROYLES LLP
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
Telephone: (818) 216-3988
Facsimile: (213) 402-5034
E-mail: paul.beard@fisherbroyles.com

Attorneys for Plaintiffs
MENDOCINO RAILWAY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

MENDOCINO RAILWAY, a California corporation,

Plaintiff

v.

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

Defendants.

Case No.: _____

COMPLAINT FOR DECLARATORY JUDGMENT

INTRODUCTION

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

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

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

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

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

Commission and the City to regulate Mendocino Railway's operations, practices and facilities are preempted under 49 U.S.C. §10501(b) and that Mendocino Railways activities are subject to the STB's exclusive jurisdiction. Therefore, Mendocino Railway has the 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.

JURISDICTION AND VENUE

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

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

DIVISIONAL ASSIGNMENT

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

PARTIES

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

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

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

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

GENERAL ALLEGATIONS

A. Legal Background

12. 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., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016).

13. The STB's exclusive jurisdiction over a railroad means that state and local permitting and preclearance regulation of a railroad's activities are broadly preempted. U.S. Const. art. VI, cl. 2 (Supreme Clause); 49 U.S.C. § 10501(b) (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) (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); *Padgett v. STB*, 804 F.3d 103, 105 (1st Cir. 2015) (ICCTA preempts state law governing "regulation of rail transportation"). "Under the ICCTA, the [STB] has jurisdiction over 'transportation by rail carrier," and "[w]here the [STB] has such jurisdiction, it is exclusive. Whether or not the [STB] is exercising its regulatory authority over the transportation, state and local laws governing such permitting are generally preempted." *Del Grosso v. STB*, 804 F.3d 110, 113-14 (1st Cir. 2015).

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

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

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

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

B. History and Operations of Mendocino Railway

17. The railroad at issue, which Mendocino Railway has owned and operated since 2004, has a long and storied history in California. The railroad was 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 and finished products to and from the mill, the railroad delivered mail on behalf of the U.S. Postal Service, provided transportation services to loggers and tourist passengers, and provided passenger transportation between Fort Bragg and the railroad's eastern terminus in Willits, California, to and from which passengers arrived and departed via coach.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PRAYER FOR RELIEF

WHEREFORE, Mendocino Railway requests relief as follows:

1. A declaratory judgment that the actions of the Commission and the City to regulate Mendocino Railway's operations, practices and facilities are preempted under 49 U.S.C. §10501(b) and that Mendocino Railway's activities are subject to the STB's exclusive jurisdiction. Therefore Mendocino Railway has the 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.

2. An 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 Mendocino Railway's property or facilities;

3. Costs of suit; and

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

DATED: August 9, 2022 **FISHERBROYLES LLP**

s/ Paul Beard II

Attorneys for Plaintiff MENDOCINO RAILWAY

EXHIBIT 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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).

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

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.'").

The third factor – the desire to avoid piecemeal litigation – is a "substantial factor in the *Colorado River* analysis." *Seneca Ins. Co.*, 862 F.3d at 835. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching inconsistent results." *Id.* (quoting *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988)). "[T]here must be exceptional circumstances present that demonstrate that piecemeal litigation would be particularly problematic." *Id.* Such exceptional circumstances are present here, as the issue of federal preemption under the ICCTA is squarely before the state court. As discussed above, in overruling Mendocino Railway's demurrer, the state court rejected Mendocino Railway's federal preemption argument as overbroad and deferred resolution of the issue to a later juncture. ECF No. 15-1 at 42-43. Federal preemption is the sole issue raised in Mendocino Railway's complaint in this action, and for the Court to adjudicate that claim would necessarily duplicate the state court's efforts and risk the possibility of this Court and the state court reaching different results. Because "[p]ermitting this suit to continue would undeniably result in piecemeal litigation," the third factors "weighs significantly against jurisdiction." *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989); *R.R. St.*, 656 F.3d at 966.

The fourth factor requires the Court to assess "'the order in which the forums gained jurisdiction,'" considering "'the realities of the case at hand' 'in a pragmatic, flexible manner.'" *Montanore Minerals Corp.*, 867 F.3d at 1168 (first quoting *Moses H. Cone*, 460 U.S. at 21; and then quoting *Am. Int'l Underwriters*, 843 F.2d at 1257). The Court "consider[s] not only the order, but also the relative progress of the state and federal proceedings." *Id.* Mendocino Railway filed its complaint in this case on August 9, 2022, which is nearly two years after the state court action commenced on October 28, 2021. Additionally, the state court action is largely past the pleading stage, as the Court overruled Mendocino Railway's demurrer to the City's complaint, Mendocino Railway filed its answer to the complaint on June 24, 2022, and trial was scheduled to begin on June 21, 2023. ECF No. 15-1 at 102. Because 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.

The fifth factor requires the Court to "consider 'whether federal law or state law provides

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.

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

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

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

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 3

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MENDOCINO

MENDOCINO RAILWAY **Plaintiff,** **v** **JOHN MEYER; MARYELLEN SHEPPARD; REDWOOD EMPIRE TITLE COMPANY OF MENDOCINO COUNTY; SHEPPARD INVESTMENTS; MENDOCINO COUNTY TREASURER-TAX COLLECTOR; all other persons unknown claiming and interest in the property; and DOES 1 through 100 inclusive.** **Defendants.**	**Case Nos.: SCUK-CVED-2020-74939** Decision After Trial Trial Dates: 8/23,24,24,29 and 11/10/22

This matter came on regularly for trial on August 23, 2022, and after a short delay concluded on 11/10/22. Plaintiff Mendocino Railway ("MR") was present through its President Robert Pinoli ("Pinoli") and represented by Glenn L. Block. Stephen Johnson appeared on behalf of John Meyer ("Meyer") who was also present. No other Defendant was required to appear. After trial, the parties were granted the opportunity to submit written closing briefs and reply briefs. The matter was submitted on February 8, 2022. In this case, Plaintiff seeks to acquire through eminent domain a 20-acre parcel owned by Meyer. The property is located west of the town of Willits and abuts Highway 20. It is known as 1401 West Highway 20 and Mendocino County Assessor Parcel Number 038-180-53. ("Property"). It is alleged by MR that it wants the property to construct and maintain a rail facility related to its ongoing and future freight and passenger rail operations.

Relevant Facts

Robert Pinoli, the President, and Chief Executive Officer of MR was the only witness who testified at trial. He testified that MR is a privately held corporation that owns and operates a railroad line commonly known as the "California Western Railroad" ("CWR") which is also most known as the "Skunk Train." In 2002, CWR filed a petition in Bankruptcy Court under Subchapter IV (Railroad Reorganization) of Chapter 11 of the Bankruptcy Code. Sierra Railroad Company (SRC), a holding company without carrier status was the successful bidder for the assets of CWR. SRC then formed Mendocino Railway, also a non-carrier, as a holding company to acquire the assets of CWR. The Articles of Incorporation for MR do not reflect the intent to operate as a

railroad. Rather, the Articles simply state that *"The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California…":* According to Pinoli, MR was a holding company and a "non-carrier" intending to initially operate CWR with the help of its affiliated entities, Sierra Northern Railway (a class III carrier) (SNR) , Midland Railroad Enterprises Corporation (a railroad construction and track maintenance company) (MREC) and Sierra Entertainment (a tourism entertainment and passenger operations company) (SE), all subsidiaries of SRC. MR certified that its projected revenues would not exceed revenue regulations that would render a designation other than a Class III rail carrier. A class III carrier is one that is a small or midsized railroad company that operates over a relatively short distance. (See Surface Transportation Board Notice of Exemption. (EX21). There was no designation of MR's status by the STB offered by MR. MR acquired CWR in 2004 when it purchased its assets through bankruptcy and operated it as a non-carrier.

The railroad line is approximately 40 miles in length and runs from its main station in the City of Fort Bragg to its eastern depot in the City of Willits. According to Pinoli the Fort Bragg Station is developed as a rail facility, with spur and siding tracks, a depot building, locomotives, passenger and freight cars, an engine house and storage facilities for its equipment. Presently, MR contends that it does not have adequate maintenance, repair and freight rail facilities to serve its ongoing operations at the Willits end of the line. MR contends that the acquisition of the Meyer property which is on the rail line will allow MR to fully operate its freight rail services with storage yards, maintenance, and repair shops, transload facilities, rail car storage capacity and a passenger depot.

In 2015, there was a landslide in "Tunnel No.1" that has prevented the trains from running the full length of the line since that date. No transportation between Fort Bragg and Willits has occurred since the tunnel was closed. It will take considerable funds to repair the tunnel so that it can function and there is no specified time frame for its completion.

MR concedes that currently its main function is the operation of a popular excursion train known as the Skunk Train for sightseeing purposes on the line through the redwoods. At present, the Skunk Train can leave the Willits station and travel west approximately 7.5 miles before turning around and traveling back to Willits. From Ft. Bragg, due to the tunnel collapse, the train can only travel east for 3.5 miles before it turns around and returns to Ft. Bragg. MR also operates motorized train bikes, and trail walks along the tracks. The excursion service generates ninety percent of MR's income. The other ten percent of MR's income is from leases and easement revenue.

In 1998, the California Public Utilities Commission made findings regarding MR's predecessor, CWRR regarding its status as a public entity. [1] The CPUC found that "[I]n providing its excursion service, CWRR is not functioning as a public utility, ….we conclude that CWRR's excursion service should not be regulated by

[1] The court takes judicial notice of the decision pursuant to Evidence Code Section 451(a)

the CPUC." (1988 Ca. PUC LEXIS 189 (1998). The CPUC through its counsel in 2022, concluded that MR is subject to inspections of railroad property as part of the Commission's obligation to ensure the safe operation of all railroads in California. (Pub. Util. Code §309.7) MR is designated as a Class III Commission regulated railroad. The Class III designation relates to the safety regulations and does not mean that it advances MR's status to public entity. MR does not dispute the 1998 findings and agrees that the term "transportation" for purposes of the public utility analysis excludes excursion services. Instead, according to Pinoli, MR is a public utility because it is a common carrier.

Analysis

1. Public Utility Status

Article 1, Section 19 of the California Constitution and CCP§1240.010 specify that private property can be taken by eminent domain for public use. The power of eminent domain by a public entity or utility is balanced with its constitutional obligation to pay "just compensation" to the owner of the property interest being acquired. This power is clearly defined and limited to certain circumstances by statute. The appropriate entity's right to take property must meet both constitutional and statutory limitations, to ensure the property owner of his or her right to be justly compensated for such taking. "The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use." (CCP§1240.020.)

MR claims that it is entitled to avail itself of the eminent domain statute because it is a railroad corporation, a common carrier and through its activities it qualifies as a public utility.

Eminent Domain proceedings in the utility sector are permitted so long as the utility is a corporation or person that is a public entity. Public Utilities Code §610. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad. Public Utility Code §611. A railroad corporation includes every corporation or person owning, controlling, operating, or managing any railroad for compensation with this state. (See §230). PUC §229 provides that a "railroad" includes every commercial, interurban, and other railway…. owned, controlled, operated, or managed for public use in the transportation of persons or property." By definition a "common carrier" means every person and corporation providing transportation for compensation to or for the public or any portion thereof, including every railroad corporation providing transportation for compensation. (See §211). The central issue in this case is whether MR can be deemed a public utility for purposes of this eminent domain proceeding.

As stated above, MR operates a popular excursion train for sightseeing purposes on the line through the redwoods. MR also operates motorized train bikes and trail walks along its tract. Courts have defined and the parties do not dispute that "transportation" in the public utility context means "the taking up of persons or property at some point and putting them down at another." *City of St. Helena v Public Utilities Com. (2004) 119 Cal. App. 4th 793,902 (Quoting Golden Gate Scenic S.S. Lines, Inc. v Public Utilities Com. (1962) 57 Cal. 2d*

373). Round trip excursions do not qualify as "transportation" under Section 211 of the Public Utilities Code. (*City of St. Helena, supra).* As stated above, MR does not dispute the 1998 findings of the CPUC and agrees that the term "transportation" for purposes of the public utility analysis excludes excursion services.

Counsel for MR argues that "transportation" is not the only qualifier, but that the court should also interpret the term "provide" as it is stated Public Utilities Code §211. MR contends that to "provide" a service is to offer it by making the service available. In other words, MR should not be penalized simply because it is not transporting freight or passengers, it is the availability of the services that matters. MR argues that the "volume of service actually accepted by the public or a portion thereof is not relevant to whether the provider is a common carrier or any other kind of public utility." Addressing the participation of the affiliate entities, MR alleges a further distinction between providing the service and performance of the service. MR argues that even though it was not a common carrier it made the service available and its affiliate entities which may have been recognized as common carriers performed the service until at least 2022 when MR took over the operations of SNR. Assuming the court accepts this distinction, the testimony demonstrates otherwise.

A common carrier is a private or public utility that transports goods or people from one place to another for a fee. Unlike a private carrier, a public utility carrier makes no distinction in its customers as it is available to anyone willing to pay its fee. Pinoli testified that in addition to the excursion service, MR operates commuter passenger and freight services between Ft. Bragg and Willits and has been doing so since it purchased CWR in 2004. This testimony was later amended by Pinoli to reflect it was the affiliate entities SNR, MREC and Sierra Entertainment that performed the services through its own employees. Except for the excursion services, freight and passenger were minimal. This clarification came after Meyer discovered a Decision of the Railroad Retirement Act (45 U.S.C.§231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C.§351 et seq.). MR had requested the Board to re-consider whether it, along with Sierra Entertainment, would be required to pay into the respective funds when they were not employers as defined under the act. (CWRR had been terminated as an employer effective September 30, 2003.) MR was merely a holding company and had no employees and Sierra Entertainment only provided excursion services. The Board found that MR was not a carrier performing freight and passenger services between the time of its acquisition in 2004 when it took over operations from Sierra Northern Railway in 2022 and to date. The Board further advised that their opinion could change upon proof of MR's carrier status. Pinoli agreed with this finding.

Pinoli clearly testified that 90% of the railroad revenue comes from the excursion train activities. The other 10% of its revenue comes from leases and revenue. When questioned, Pinoli finally clarified that MR did not actually perform common carrier services between the time it purchased the assets of California Western Railroad in 2004 through 2022 when it took over operations from Sierra Northern Railway. Those services were allegedly performed by the affiliate companies. No evidence was submitted to support this allegation. MR did not offer evidence in the form of contracts with the affiliated entities, operating agreements, ledgers, receipts, payments etc. The court can infer that such agreements would be appropriate to address at least compensation for services, liability, and indemnification, if in fact, the services were provided. MR is the

Plaintiff in this action and has the burden of proof to establish its legal status as a public utility. There is no dispute that the only evidence of railroad income during the relevant time was and is earned from the excursion services only. MR concedes that the excursion service does not fall under the category of "transportation" and does not qualify MR as a public utility.

Despite agreeing with the findings made by the Retirement Board, Pinoli testified that MR as the successor to CWR is doing today what CWR has been doing for 137 years of existence. Pinoli testified that besides hauling approximately 100 loads of aggregate and steel for two environmental restoration projects along the line, it hauls a very limited amount of freight at present. [2] He offered into evidence various letters from local businesses that have expressed an interest in obtaining freight services once they become available. Pinoli also acknowledged that any freight service from Ft. Bragg to Willits cannot happen until "Tunnel No. 1" is repaired. There was no specified time frame for completion of the repairs. In addition, it was not clear as to whether MR had the available funds to complete the necessary repairs anytime soon. The letters were purposely solicited by MR in connection with a grant application to obtain funds from the federal government to improve its line for freight services. The letters are no more than letters of a possible interest in services should they become available. The court gives little weight to the letters of support.

Pinoli also testified that over the years passenger service was provided to residents of the various cabins along the route between Fort Bragg and Willits. Despite the court's comments that Pinoli appeared to be a credible and knowledgeable witness, the best evidence would have been written documentation in the form of ticket receipts, ledgers evidencing income, contracts with Mendocino Transit Authority, and contracts for freight transportation. When given the opportunity by the court, MR was unable to provide any documentary evidence of MR's claim for the freight or passenger services it allegedly provided either through MR or its affiliates. The court therefore gives little weight to Pinoli's testimony regarding the abundant array of services provided. (CACI 203.) The court ultimately was not persuaded by Pinoli's testimony alone.

Pinoli testified that when MR assumed control of SNR services in 2022, it planned to expand freight and passenger services with equipment and new business opportunities. While the efforts were noted, the intention to provide services in the future is not sufficient to establish the railway as a public utility. (*See City of St. Helena v. Public Utilities Commission (2004) 119 Cal. App. 4th 793)* Through its enhanced efforts MR may be able to obtain public utility status in the future but court is not convinced that such status is appropriate at this time based on the evidence provided by MR at trial.

2. Eminent Domain

[2] No documents, including but not limited to contracts, invoices, receipts were produced regarding this alleged " freight transportation" with Trout Unlimited. The oral testimony reflected a contract with Trout Unlimited and all funding was from state or federal funds. The work appeared to this court to be a combined project to benefit the environment including the rail line.

Assuming for purposes of this opinion that MR has public utility status, it still needs to meet the statutory requirements of the eminent domain law. As stated above, a railroad company is entitled to condemn property that is necessary for the construction and maintenance of its railroad. (See Public Util. Code §611). "The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established: (a) the public interest and necessity require the project.; (b) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; (c) the property sought to be acquired is necessary for the project." CCP§1240.30. The power to take property under eminent domain is not unlimited. Such power "[M]ay be exercised to acquire property only for public use." *(CCP §1240.010; City of Oakland v. Oakland Raiders (1982) 32 Cal. 3d 60,69.)* "The statutory authorization to utilize the power of eminent domain for a given "use, purpose, object, or function' constitutes a legislative declaration that the exercise is a 'public use.'" (*City of Oakland.*)

Acquisition of the 20-acre site would enhance the operations of MR's excursion service that admittedly does not fall within the definition of transportation. MR cannot exercise the power of eminent domain to carry on its private business activities. In *City & County of San Francisco v. Ross (1955) 44 Cal 2d 52,54*, the City sought to acquire by eminent domain a site that would subsequently be leased to private individuals who were planning to build and operate a parking structure and other facilities including private commercial retail. The court stated, "[w]hile it might be argued in the present case that the percentage area to be used for other commercial activity is small enough to be merely an incident to the parking activity and not in itself enough to invalidate the whole plan, nevertheless it aids in characterizing the whole operation as a private one for private gain." "The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." *(Council of San Benito County Governments v. Hollister Inn, Inc. (2012) 209 Cal. App. 4th 473,494 (citations omitted.)* As stated previously, the income generated from the Skunk Train excursion service is 90% of MR's revenue. The court can easily find that MR's primary objective is to obtain the property to serve the excursion service. No explanation was offered to distinguish the private operations from the "proposed" freight and passenger enhancements.

Notwithstanding the above, MR's proposed use of the property conflicts with the statutory requirements of public use and least private injury. At trial, approximately seven months of internal MR emails were admitted into evidence. Pinoli conceded the emails revealed that the original conception of the MR project reflected a train station, campground, and RV park. He also testified that his boss was known to brainstorm ideas and concepts for the acquisition and use of property acquired by MR, but those ideas were not always fully vetted. The only conceptual drawing for the Meyer property prepared by MR at the time it filed its complaint however, depicted a station/store, campground, and long-term RV rental park. It wasn't until June 2022, approximately 18 months after the eminent domain action was filed that a preliminary site plan was prepared. The site plan offered at trial is one that generally depicts maintenance/repair facilities, a yard, vehicle parking, a rail transloading facility, dept offices, a platform and a natural habitat preserve. The site plan is considerably different from the original conceptual drawing.

Pinoli admitted that the use of the property for a private campground was not consistent with the operation of a railroad and could not be the basis for eminent domain. Instead, he said that the current purpose is to develop the necessary maintenance and depot facilities on the Willits side of the line and to create a transload facility. The transload facility would not be operational or even necessary until "Tunnel No. 1" was usable. In addition to the original drawing utilized at the time the case was filed, the site drawing was the only evidence offered to address the use of the property. There was no evidence of an actual plan for development or funding for the project. "[A]n adequate project description is essential to the three findings of necessity that are required to be made in all condemnation cases. Only by ascertaining what the project is can the governing body made those findings." *(City of Stockton v. Marina Towers LLC (2009)171 Cal. App. 4th 93,113.)* While the plan in the City of Stockton case was severely lacking in detail, which arguably differs from the instant case, the principle that a property owner is entitled to know what is being planned for the land remains the same. The court questions the credibility of the late hour evidence of a site drawing presented in the instant case. Particularly so, when a transload facility was added with MR's knowledge that freight transportation could not happen until "Tunnel No. 1" was available. No evidence was presented to establish whether or when the tunnel would be available for use.

The credibility of the testimony is also questionable when the initial plan prepared at the time the complaint was filed included a campground. Following the initial plan, in preparation for trial, MR develops a new site plan that eliminates the initial concept. This was done presumably to satisfy the requirements of the statute. Also lacking is an analysis from MR as to the impact the maintenance and transload facility would have on the residents (including Meyer) living directly adjacent to the proposed 20 acre site. The court finds that Pinoli's testimony that there would be no real impact on the residents is simply insufficient. Without such information the court is unable to determine if the project would impose a greater injury to the residents. The court finds that MR did not meet its burden to establish that the current site plan supports a project that is planned or located in the matter that will be most compatible with the greatest public good and least private injury which is required by statute and case law. *(See CCP §1240.030 and SFPP v. Burlington Northern & Santa Fe Ry. Co. (2004) 121 Cal. App. 4th 452.)*

The court concludes that MR has failed to meet its burden of establishing that its attempt to acquire Meyer's property through eminent domain is supported by constitutional and statutory powers. The court finds in favor of Meyer.

Dated: 4/19/2023

Hon. Jeanine B. Nadel
Judge of the Superior Court

Superior Court of California, County of Mendocino

PROOF OF SERVICE

Case: **SCUK-CVED-2020-74939** **MENDOCINO RAILWAY VS. MEYER, JOHN**

Document Served: Decision After Trial

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

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

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

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

Party Served	Ukiah US Mail	Ten Mile US Mail	Ukiah Attorney Box	Ten Mile Attorney Box	Inter Office Mail	Fax	E-mail
Gleen Block Christopher G. Washington Paul Beard II glb@caledlaw.com cgw@caledlaw.com paul.beard@sigherbroyles.com	☐	☐	☐	☐	☐	☐	☒
Stephen Johnson steve@mkjlex.com	☐	☐	☐	☐	☐	☐	☒
Mayellen Sheppard sheppard@mcn.org	☐	☐	☐	☐	☐	☐	☒
Christian Curtis Brina Blanton curtisc@mendocinocounty.org blantonb@mendocinocounty.org	☐	☐	☐	☐	☐	☐	☒
Krista MacNevin Jee kmj@jones-mayer.com	☐	☐	☐	☐	☐	☐	☒
	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed at:

☒ Ukiah, California ☐ Fort Bragg, California

Date: 04/19/2023

KIM TURNER, Clerk of the Court

By: Samuel Delgado, Deputy Clerk