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9 MENDOCINO RAILWAY

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Superior Court of California
County of Mendocino

By: 
D. Jess
Deputy Clerk

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

12 CITY OF FORT BRAGG, a California
13 municipal corporation

14 Plaintiff,

15 v.

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

18 Defendants.

Case No.: 21CV00850

[Assigned to the Hon. Clayton Brennan]

**DECLARATION OF PAUL BEARD II IN
SUPPORT OF DEFENDANT'S
DEMURRER AND MOTION TO STRIKE**

Hearing Date: February 10, 2022

Hearing Time: 2:00 p.m.

Complaint Filed: October 28, 2021

1 I, Paul Beard II, declare as follows:

2 1. I am an attorney at law, duly licensed to practice before all of the courts in the State of
3 California. I am a Partner with the law firm of FisherBroyles LLP, attorneys of record for Defendant
4 MENDOCINO RAILWAY. I have personal knowledge of the matters set forth herein, except those
5 matters stated on information and belief, and would so testify.

6 2. The parties have complied with the meet and confer requirements contained in section
7 430.41 of the California Code of Civil Procedure with respect to the filing of Defendant’s Demurrer and
8 Motion to Strike. On December 29, 2021, I conferred with Plaintiff’s counsel, by telephone, regarding
9 the grounds for demurrer and a motion to strike. Plaintiff’s counsel emailed me a response to those
10 grounds on January 4. The parties’ counsel continued to exchange emails concerning points and
11 authorities related to Defendant’s grounds for demurrer and motion to strike. The last email was from
12 Plaintiff’s counsel dated January 10, in which she continued to defend the viability of Plaintiff’s claim.
13 The parties were unable to resolve their differences, so Defendant filed a Demurrer and Motion to Strike.

14 3. A true and correct copy of a page from the official site of the California Public Utilities
15 Commission (“CPUC”), in which the CPUC lists the railroads that it regulates, is attached hereto as
16 Exhibit A.

17 4. A true and correct copy of the January 21, 1998, decision of the CPUC (Decision 98-01-
18 050) is attached hereto as Exhibit B.

19 5. As corroborated by paragraph 2 of the Declaration of Mike Hart filed herewith, a true and
20 correct copy of a January 17, 2019, letter from the City of Fort Bragg to the California Coastal
21 Commission, a state agency, is attached hereto as Exhibit C.

22 6. As corroborated by paragraph 2 of the Hart Declaration, a true and correct copy of
23 a document dated August 1, 2019, and entitled, “Coastal Consistency Certification” (with cover letter)
24 is attached hereto as Exhibit D.

25 7. A true and correct copy of the May 21, 1998, decision of the CPUC (Decision 98-04-054)
26 is attached hereto as Exhibit E.

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct to the best of my knowledge, and that this Declaration was executed on January 14,
3 2022.

4 DATED: January 14, 2022

/s/ Paul Beard II

5 _____
Attorney for Defendant MENDOCINO RAILWAY

EXHIBIT A



SEARCH

[Home](#) > [Industries and Topics](#) > [Rail Safety](#) > [Railroad Operations and Safety](#) > [Regulated California Railroads](#)

Regulated California Railroads

Class I

[Union Pacific \(UP\)](#)

[BNSF](#)

Class III

- California Northern Railroad (CFNR)
- Central Oregon & Pacific Railroad (CORP)
- San Diego & Arizona Eastern Railway (SDAE)
- San Diego & Imperial Valley Railroad (SDIY)
- Central California Traction (CCT)
- Los Angeles Junction Railway (LAJ)
- Mendocino Railway
- Modesto & Empire Traction (MET)
- Oakland Terminal Railway (OTR)
- Pacific Harbor Line (PHL)
- Pacific Sun Railroad (PSRR)
- Quincy Railroad (QRR)
- Richmond Pacific Railroad (RPRC)
- Sacramento Valley Railroad (SAV)
- Santa Cruz, Big Trees & Pacific Railway (SCBG)
- Santa Maria Valley Railroad (SMV)
- San Joaquin Valley Railroad (SJVR)
- Sierra Northern Railway (SERA)
- Stockton Terminal & Eastern Railroad (STE)
- Trona Railway (TRC)
- Tulare Valley Railroad (TVRR)
- Ventura County Railroad (VCRR)
- West Isle Line (WFS)
- Yreka Western Railroad (YW)

Commuter Rail

- Altamont Commuter Express (ACEX)
- Amtrak (ATK)
- Caltrain (PCJX)
- Metrolink (SCAX)
- North County Transit District Coaster (NCTD)

California High-Speed Rail

California HSR Authority

CPUC regulates all railroads in California. The above list does not limit the jurisdiction of CPUC regulation.

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EXHIBIT B

1998 Cal. PUC LEXIS 189; 78 CPUC2d 292

California Public Utilities Commission

January 21, 1998

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

CA Public Utilities Commission *Decisions*

Reporter

1998 Cal. PUC LEXIS 189 *; 78 CPUC2d 292

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

Core Terms

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

Counsel

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

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

Opinion

INTERIM OPINION

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

Background

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

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

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

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

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

Hearings

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

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

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

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

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

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

Commission Regulation of Railroads

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

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

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

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

Discussion

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

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

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

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

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

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

"Aside from the legal analysis of the statutory scheme, concluding tour or sightseeing service is not passenger stage corporation service, we note that sightseeing or tour service is essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service. In those cases members of the public may be in a situation where they have no other mode for essential travel. And, there it is in the public interest to regulate rates, schedules, and service for what may very well be captive patrons.

"We recognize that today's decision is a departure from past Commission precedent. We are sure those companies who are already in business and doing well under regulation will take vocal exception with this decision. However, we believe our analysis of the statutory scheme for bus regulation in California is sound. Aside from the legal analysis requiring us to find sightseeing-tour service is not common carriage, we believe this change in our regulation will allow us to engage in better entry and rate regulation over point-to-point common [*7] carriers, and ultimately enable us to provide better regulation for the user of regular route, point-to-point bus service." (7 CPUC2d at 135-136.)

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

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

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

Next, we will consider whether CWRR, in providing its excursion service, functions as a public utility. The primary purpose of CWRR's excursion [*8] service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing. In D.82-09-087, the Commission stated the following about sightseeing:

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

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

While the excursion service provided by CWRR may be beneficial to the economy of Mendocino County and may even be considered essential by the tourist industry, it is not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility.

Based on the above, we conclude that CWRR's excursion service should not be regulated by the Commission.

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

Consideration of Safety of CWRR's Operations

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

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

Findings of Fact

1. CWRR seeks relief from regulation by the Commission of its excursion passenger service.
2. CWRR's excursion service does not constitute "transportation" under the provisions of PU Code § 1007.
3. The primary purpose of CWRR's excursion service is to provide its passengers an opportunity for sightseeing.
4. The Commission has concluded that sightseeing is not a public utility function.
5. The Commission currently regulates the safety of the operation of all services provided by CWRR.
6. While the Commission ceased to regulate the schedules and fares of sightseeing service provided by bus operators, the safety of the operations remained subject to regulation by state agencies.

Conclusions of Law

1. In providing excursion passenger service, CWRR does not function as a public utility.
2. The Commission should not regulate the schedules and fares for the excursion passenger service provided by CWRR.
3. The Commission should continue to regulate the safety of the operation all services provided by CWRR.
4. This order should be made effective today to provide CWRR an opportunity [*11] to publish its schedules and fares for the expected tourist season in 1998.

INTERIM ORDER

IT IS ORDERED that:

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

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

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

This order is effective today.

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

CA Public Utilities Commission

Decisions

End of Document

EXHIBIT C


JONES & MAYER

ATTORNEYS AT LAW

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January 17, 2019

California Coastal Commission
Attn: Cristin Kenyon
1385 Eighth Street, Suite 130
Arcata, CA 95521-5967

RE: City of Fort Bragg Coastal Development Permit jurisdiction over a sale of land to a public entity on the former Georgia-Pacific Mill Site

Dear Ms. Kenyon:

I am writing in response to your letter dated December 21, 2018 requesting more information regarding the sale of Georgia-Pacific land to the Mendocino Railway. I'd like to first clear up a fundamental misunderstanding of the basis of this transaction. It is not a lot line adjustment, but rather the sale of land to a public utility which sale is and transfer is exempt from the requirements of the California Subdivision Map Act. I will explain further why that is the case.

After my review of various legal opinions from prior Fort Bragg legal counsel, there is a recurring theme in their analysis and my initial analysis as well. There has been an ongoing legal debate as to whether or not the Mendocino Railway is recognized as a California Public Utility. Because of some legal actions taken by the Skunk Train related to the California Public Utilities Commission's (PUC) ability to regulate the excursion rates set by the Skunk Train, (a related subsidiary to the Mendocino Railway) it appeared they were not a regulated public utility. Case law related to the ongoing litigation between the City of Napa and the Napa Valley Wine Train

City of Fort Bragg Coastal Development Permit jurisdiction over a sale of land to a public entity
on the former Georgia-Pacific Mill Site
January 17, 2019

seemed to support that point. As an established railroad, the question of whether or not the Mendocino Railway is federally regulated has not been in question.

Rather than continue the debate between conflicting legal opinions, I asked the Mendocino Railway owners to provide the City with a status letter directly from the PUC clarifying whether or not the Mendocino Railway was in fact recognized by the PUC as a regulated railroad and public utility. That confirmation letter from David Stewart with the PUC dated December 7, 2018 was provided to the City.

Having now established that the PUC recognized the Mendocino Railway as a regulated public utility, they have the right to the exemption from the Subdivision Map Act set forth in Government Code Section 66428, subdivision a.2. which states:

*Land conveyed to or from a governmental agency, public entity, **public utility**, or for land conveyed to a subsidiary of a public utility for conveyance to that public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license. [emphasis added]*

Therefore, under these circumstances, we are not evaluating a lot line adjustment, but rather the purchase of a surveyed portion of land by a public utility which is exempt from the requirements of the Subdivision Map Act. This land purchase by a public utility is not subject to the jurisdiction of the City, as it is a land conveyance only, and does not involve any application for development of the property at this time. Nor does the statutory language “unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map” supersede the general exemption in these circumstances. There is no evidence that a land transaction, which involves no development in the coastal zone, could create an impact to coastal resources. The scope of the City’s consideration is simply our ability to require a permit related

City of Fort Bragg Coastal Development Permit jurisdiction over a sale of land to a public entity
on the former Georgia-Pacific Mill Site
January 17, 2019

to a purchase of land by a public utility, and does not extend to future development, which will be independently analyzed when and if a development proposal comes forward.

Further bolstering the right of the Mendocino Railway to proceed without permit requirements from the City is the California Supreme Court Case of *Friends of the Eel River v. North Coast Rail Authority* (2017) 3 Cal. 5th 677, 690-691, 702-713, 716-720 (Eel River) the California Supreme Court addressed the issue of federal pre-emption and held that a private railroad corporation with the legal status of a federally regulated railroad is not subject to the California Environmental Quality Act. In that case the court actually found that CEQA applied because the State of California had an ownership interest in the railroad but made it clear that a privately-owned railroad would not be held to the same standard. The court's reasoning was based on the uncertainty of delays and potential denial of the railroad's activities if subject to CEQA. The court stated in its opinion, "For the foregoing reasons, we acknowledge 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. In the ordinary regulatory setting in which a state seeks to govern private economic conduct, requiring CEQA compliance as a condition of state permission to go forward with railroad operations would be preempted." By clear analogy, the requirements of the City to process a Coastal Development Permit for a land transaction that is exempt from the Subdivision Map Act would similarly subject the Mendocino Railway to delay and potential denial, thereby restricting the business of the railroad.

For the foregoing reasons, the City has determined that this land purchase transaction is exempt from the requirement of obtaining a Coastal Development Permit. It is not the City's position that any or all future development by the Mendocino Railway would be exempt from the requirements for a Coastal Development Permit. Please contact me by email at rah@jones-mayer.com if you have further questions or need any more information.

Sincerely,



Russell Hildebrand
City of Fort Bragg City Attorney

EXHIBIT D



CITY OF FORT BRAGG

Incorporated August 5, 1889
416 N. Franklin Street
Fort Bragg, CA 95437
Phone: (707) 961-2823
Fax: (707) 961-2802

August 1, 2019

Mark Delaplaine,
Supervisor Consistency Determinations
California Coastal Commission
45 Fremont Street
San Francisco, California 94105

Dear Mr. Delaplaine:

As we recently discussed by phone, I have prepared and attached a consistency analysis for the required consistency certification of the proposed Mendocino Railway's (aka the Skunk Train) Department of Transportation's 2019 BUILD funded project. To assist you in your review I have enclosed:

1. A Project Description, and
2. A Draft Consistency Analysis.

We look forward to working with you as you complete this review. If you need additional information, please don't hesitate to contact me at (707) 961-1807.

Sincerely,

Marie Jones
Community Development Director
City of Fort Bragg

cc Mike Hart, Chris Hart, Robert Jason Pinoli, Skunk Train
Tabatha Miller, City Manager

Coastal Consistency Certification
Mendocino Railway's 2019 BUILD Project
Fort Bragg, California

1. AUTHORITY

This Coastal Consistency Certification is submitted in compliance with 15 CFR Section 930.57 *et seq* of the National Oceanic and Atmospheric Administration (NOAA) Federal Consistency Regulations (15 CFR 930).

2. CERTIFICATION

The Mendocino Railway BUILD Project is located partially in the Coastal Zone, more specifically, on the former Georgia Pacific Mill Site and on portions of Mendocino Railway's lands west of the western most road in Fort Bragg (see map on page 2). The City of Fort Bragg has evaluated activities described in the 2019 BUILD grant application for consistency with the California Coastal Management Program (CCMP). As required by 15 CFR § 930.57(b), we have concluded that the proposed project complies with the enforceable policies of California's approved management program and will be conducted in a manner consistent with such program. We request that the California Coastal Commission (CCC) concur with our certification of consistency.

3. PROJECT PURPOSE AND DESCRIPTION

The Mendocino Railway, in cooperation with the City of Fort Bragg and the Department of Transportation, proposes to repair a collapsed tunnel; replace 30,000 chromated copper arsenate railroad ties and some worn rail; renew an access trail and establish eight fire suppression staging areas to benefit operations and public safety; install fencing, two gates, and security cameras to improve security; restore an engine house; and add an extension to connect the existing car shed to the engine house (the "Project") in order to restore freight and passenger operations over Mendocino Railway's entire 40-mile rail line (referred to herein as "Line"), which extends from Fort Bragg, CA to Willits, CA.

The components of the project that are located within the coastal zone include:

- 1) restore an engine house; and
- 2) add a 300 foot extension to connect the existing car shed to the engine house.

The proposed costs for these repair activities is as follows:

Engine House Restoration	\$550,000
Car Shed Addition	\$800,000

Purpose of the Proposed Project.

The Project would renew freight services, increase passenger offerings, and improve railroad safety and operations.



Image 1: Project Location: Repair and Expansion of the Engine House.

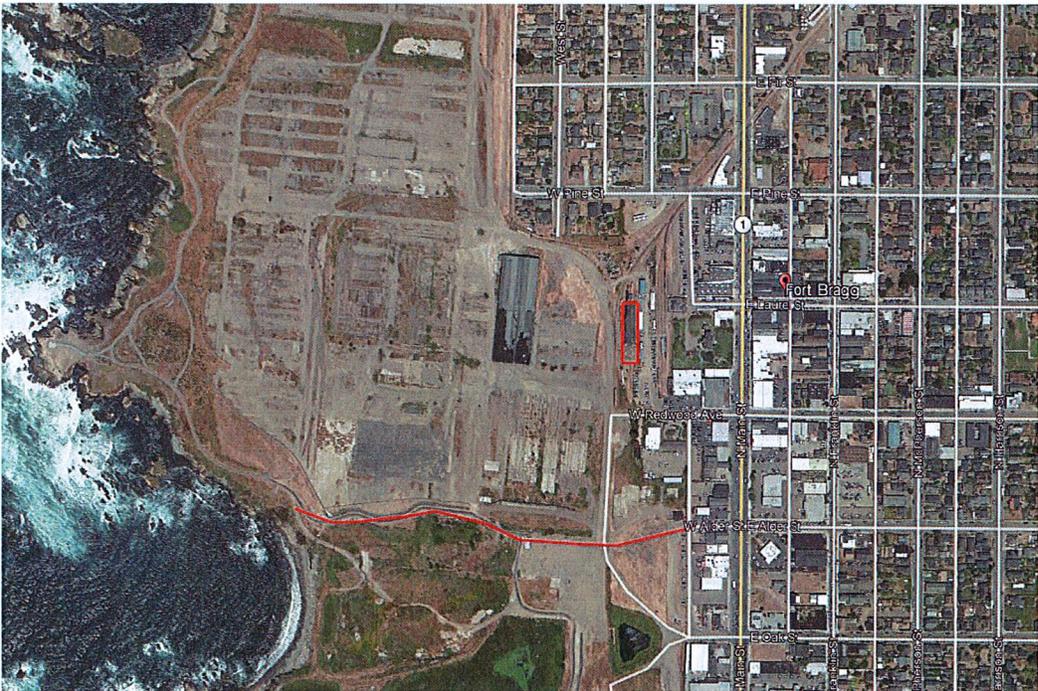


Image 2: Project Location Relative to the Ocean and Public Access at Alder Street.

Need for the Proposed Project.

Mendocino Railway will restore an engine house to bring the structure into a state of good repair and build an extension from the engine house to a car shed to shelter locomotives from adverse weather.

Mendocino Railway has a storied legacy of transporting freight and passengers and being the economic engine for the rural areas of Fort Bragg and greater Mendocino County. Various industries are eagerly awaiting reopening of Mendocino Railway’s Line for freight services. The former GP Lumber Mill site (“GP Site”), a 400-acre parcel between the ocean and downtown Fort Bragg, CA is currently in the process of being rezoned for industrial, commercial, and residential use purposes. Some of the entities planning to establish/locate operations in Mill Site have expressed an interest in freight railroad service. Additionally, it is anticipated that the reopening of the approximately 40-mile rail Line for passenger services should generate 25,000 or more passenger trips to be taken over the Line. Restoration of a fully functioning Line will attract millions of additional passengers for the Skunk Train; and, the increase in passenger traffic will benefit the region’s economy greatly because those visitors will contribute about \$10,986,889.00 to the economy resulting in the creation of approximately 120 additional jobs.

Overall the proposed project would serve a primary purpose of the Coastal Act, namely tourism serving facilities.

4. CONSISTENCY WITH PROVISIONS OF THE CALIFORNIA COASTAL ACT ARTICLE 2, PUBLIC ACCESS

Public access to the coast is facilitated by the City’s Noyo Headlands Park and the extension of the California Coastal Trail through and along Noyo Headlands Park. Currently access to the Noyo Headlands Park facility is available from Alder Street in downtown Fort Bragg which is approximately 790 feet from the proposed project location in the Coastal Zone. The proposed project will not impact current public access to the coast. Additionally as the project intends to consist of repair of existing facilities and the construction of a short piece of connecting track in an area that is currently closed to access, the project will not result in any new development that will impact public access to the shore. Nor will it result in an increased use of existing access facilities that impacts public access to the coast.

ARTICLE 3, RECREATION

The City’s Noyo Headlands Park currently provides 97 acres of coastal recreational facilities. This is virtually all of the ocean fronting land located within the former Mill Site property. This article does not apply to the proposed Project as the portion that is located in the Coastal Zone consists of repair and expansion of an existing structure and laying a short portion of track. This area does not currently provide any recreational facilities.

ARTICLE 4, MARINE ENVIRONMENT

This article does not apply to the proposed Project as the portion that is located in the Coastal Zone consists of repair and expansion of an existing structure and laying a short portion of track, both of these activities are 1,600 feet from the ocean and thus will not have an impact on the biological productivity or water quality of the Marine Environment. Additionally the project will not result in any dredging, filling or diking. Nor will it impact or effect commercial fishing or recreational boating facilities.

ARTICLE 5, LAND RESOURCES

This article does not apply to the proposed Project as the portion that is located in the Coastal Zone consists of repair and expansion of an existing structure and laying a short portion of track, both of these activities are highly unlikely to have an impact on land resources as the area is extensively paved and little or no vegetation will be impacted by the proposed project.

There are no known Environmentally Sensitive Habitat Areas in and around the building proposed for repair and expansion. Nor is the area used for agricultural purposes. Additionally, there are no known cultural resources at this location. However per consultation with the Sherwood Valley Band of Pomo, Native American monitoring should be required for all ground disturbing activities. Because the structure is more than 50 years old and thus may qualify as a historic structure, the addition will be designed to maintain consistency with the architectural character of the existing building to the greatest extent possible.

ARTICLE 6, DEVELOPMENT

The proposed Project is located in close proximity to the existing downtown. Additionally the proposed project will serve existing visitor serving facilities (the Skunk Train) and as such comply with section 30250. While the engine house is a very large structure, its an existing fairly dilapidated structure that is proposed for repair and expansion and as such it could result in an improvement to the scenic and visual resources of the area. , As it is such a large structure the proposed project will be painted to maintain consistency with the architectural character of the existing building to the greatest extent possible; and will likewise to the greatest extent possible be painted or surfaced in earth tone colors to maintain consistency with Coastal Act requirements. The proposed project will not impact public access to the coast.

ARTICLE 7, INDUSTRIAL DEVELOPMENT

This article does not apply to the proposed Project as it is not Coastal Dependent industrial development.

EXHIBIT E

1998 Cal. PUC LEXIS 384

California Public Utilities Commission

May 21, 1998

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

CA Public Utilities Commission

Decisions

Reporter

1998 Cal. PUC LEXIS 384 *

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

Core Terms

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

Counsel

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

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

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

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

Opinion

FINAL OPINION

Summary of Decision

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

Background

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

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

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

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

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

Hearings

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

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

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

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

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

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

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

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

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

Discussion

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

Comments on ALJ's Proposed Decision

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

Findings of Fact

1. CWRR requests to withdraw its request to reduce its commuter service and to dismiss the remainder of the application without prejudice.
2. Granting of CWRR's motion would be in the best interest of the passengers which use CWRR's service.

Conclusions of Law

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

FINAL ORDER

IT IS ORDERED that:

1. California Western Railroad's motion to withdraw its request to reduce its commuter service and to dismiss [*5] the remainder of the application without prejudice is granted.
2. Since there are no issues remaining to be considered in this proceeding, this proceeding is closed.

This order is effective 30 days from today.

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

CA Public Utilities Commission

Decisions

End of Document