

23-15857

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**MENDOCINO RAILWAY, a California  
corporation,**

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

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

**APPELLEE JACK AINSWORTH'S  
OPPOSITION TO APPELLANT'S MOTION  
FOR JUDICIAL NOTICE IN SUPPORT OF  
OPENING BRIEF**

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## TABLE OF CONTENTS

	<b>Page</b>
Introduction .....	1
Argument.....	1
Conclusion.....	3

## TABLE OF AUTHORITIES

Page

### CASES

<i>Kirshner v. Uniden Corp. of Am.</i> 842 F.2d 1074 (9th Cir. 1988).....	1, 2
<i>Martinez v. Newsom</i> 46 F.4th 965 (9th Cir. 2022).....	1

### COURT RULES

#### Federal Rules of Appellate Procedure

Rule 10(a)(1) .....	1
Rule 27 .....	1

#### Federal Rules of Evidence

Rule 201 .....	1
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## INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27, Defendant-Appellee Jack Ainsworth (“Mr. Ainsworth”) hereby files this Opposition to the Motion for Judicial Notice in Support of Appellant’s Opening Brief (“Motion”) filed by Plaintiff-Appellant Mendocino Railway (“Railway”). The Railway’s Motion should be denied as to Exhibit 2, because the document in question was not filed and considered by the district court, and does not stand for the proposition the Railway purports makes it judicially noticeable.

## ARGUMENT

Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of a fact that is “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” *Id.* Pursuant to Federal Rule of Appellate Procedure 10(a)(1), this Court’s review “is limited to ‘the original papers and exhibits filed in the district court.’” *Martinez v. Newsom*, 46 F.4th 965, 975 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1782, 215 L. Ed. 2d 670 (2023). “Papers not filed with the district court or admitted into evidence by that court are not part of the clerk’s record and cannot be part of the record on appeal.” *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988).

The Railway requests that this Court take judicial notice of a two-page letter from nearly four years ago, well before this litigation commenced, from a staff attorney at the California Coastal Commission (“Commission”) to counsel for the Railway, Paul Beard. *See* Exhibit 2 to Railway’s Motion. Appellee Mr. Ainsworth did not write this letter, was not copied on this letter, and is not referenced at any point in the letter. The district court never received or considered this letter, and the Railway had not raised any issues related to the Coastal Zone Management Act (CZMA) until this appeal. Yet the Railway requests judicial notice of this letter for the purpose of “establish[ing] the fact that the Commission has asserted its ‘review authority under the CZMA’” regarding the Railway’s development activities. Motion, at 3.

For two reasons, the Railway’s Motion as to Exhibit 2 should be denied. First, this letter was not presented to or considered by the district court. Thus, it “cannot be part of the record on appeal.” *Kirshner*, 842 F.2d at 1077.

Second, the Railway offers Exhibit 2 for the proposition that the Commission has asserted its CZMA review authority with respect to the Railway’s “development activities.” Motion, at 3. The letter, however, does not stand for this proposition. The letter follows up on a request for information from six months before to which the Railway did not respond. As to the CZMA, the letter states the Commission’s general position that the ICCTA does not preempt the

Commission’s jurisdiction under the CZMA, and seeks “information regarding any development activities that might trigger Coastal Act permitting requirements and/or Commission review authority under the CZMA.” Motion, Exh. 2, at 20. The Commission does not assert its CZMA review authority as to any specific project, and in fact, the letter requests information from the Railway regarding any projects that *might* trigger CZMA review. The letter is therefore not relevant to issues on appeal and is not properly subject to judicial notice.

### CONCLUSION

Based on the foregoing arguments and authorities, this Court should deny the Railway’s Motion for Judicial Notice as to Exhibit 2 of that Motion.

Dated: November 6, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

No. **23-15857**

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

**APPELLEE JACK AINSWORTH'S OPPOSITION TO APPELLANT'S  
MOTION FOR JUDICIAL NOTICE IN SUPPORT OF OPENING BRIEF**

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

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

\_\_\_\_\_  
Bryn Barton  
Declarant

\_\_\_\_\_  
*/s/ Bryn Barton*  
Signature