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December 1, 2022
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36433

NORTH COUNTY TRANSIT DISTRICT –

PETITION FOR DECLARATORY ORDER

**CALIFORNIA COASTAL COMMISSION’S RENEWED REQUEST FOR ABEYANCE
PENDING STATE COURT LITIGATION AND FOURTH UPDATE**

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The California Coastal Commission (Commission) provides this fourth update and renews its request to hold in abeyance North County Transit District's (NCTD) Petition for Declaratory Order before the Surface Transportation Board (STB) until the currently active state court litigation concludes.

I. State court litigation is now pending.

Litigation is currently pending before the state court. See Exhibit A. As NCTD has conceded in its update, the case filed by the Commission against NCTD in state court has been remanded by the U.S. District Court for the Southern District of California to the California Superior Court for the County of San Diego. The federal court order remanding the *California Coastal Commission v. North County Transit District, et al.* case to state court is attached to this update as Exhibit B. The federal court order in a separate case against NCTD mentioned in its November 30, 2022 update to the STB is attached as Exhibit C.

II. The Bluff Stabilization issue is now moot.

As mentioned in the Commission's third update to the STB filed on August 19, 2022, the Commission's approval of the San Diego Association of Government's (SANDAG) federal consistency certification for the Del Mar Bluffs Stabilization Project V (Project) is now final and binding.

III. The Commission requests an abeyance of the proceedings before the STB.

Based on the federal court's rationale for remand, the fact that litigation is now pending in state court, state court rulings could narrow the scope of STB's inquiry and that the bluff stabilization is no longer in active controversy, the Commission hereby renews its request to hold this matter in abeyance until the state court litigation concludes.

Dated: December 1, 2022

Respectfully submitted,

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SD2020303489

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA
County of SAN DIEGO

Register of Actions Notice

Case Number:	37-2022-00014504-CU-MC-CTL	Filing Date:	04/19/2022
Case Title:	California Coastal Commission vs North County Transit District [IMAGED]	Case Age:	226 days
Case Status:	Pending	Location:	Central
Case Category:	Civil - Unlimited	Judicial Officer:	John S. Meyer
Case Type:	Misc Complaints - Other	Department:	C-64

Future Events

Date	Time	Department	Event
No future events			

Participants

Name	Role	Representation
California Coastal Commission	Plaintiff	Carter, Roxanne J
EXBON DEVELOPMENT INC	Defendant	
North County Transit District	Defendant	Nelson, L John IV

Representation

Name	Address	Phone Number
CARTER, ROXANNE J	600 West Broadway 1800 San Diego CA 92101	(619) 738-9416
NELSONIV, L J	PROCOPIO CORY HARGREAVES & SAVITCH LLP 525 B Street 2200 San Diego CA 92101	(619) 238-1900

ROA#	Entry Date	Short/Long Entry	Filed By
1	04/19/2022	[A document for ROA# 1]	
1	04/19/2022	Complaint filed by California Coastal Commission. Refers to: North County Transit District; EXBON DEVELOPMENT INC	California Coastal Commission (Plaintiff)
2	04/19/2022	Civil Case Cover Sheet filed by California Coastal Commission. Refers to: North County Transit District; EXBON DEVELOPMENT INC	California Coastal Commission (Plaintiff)
3	04/19/2022	Original Summons filed by California Coastal Commission. Refers to: North County Transit District; EXBON DEVELOPMENT INC	California Coastal Commission (Plaintiff)
4	04/20/2022	Summons issued.	
5	04/19/2022	Case assigned to Judicial Officer Meyer, John.	
6	04/20/2022	Civil Case Management Conference scheduled for 09/30/2022 at 09:30:00 AM at Central in C-64 John S. Meyer.	
7	04/20/2022	Case initiation form printed.	
8	04/26/2022	Notice of Removal to Federal Court filed by North County Transit District.	North County Transit District (Defendant)
9	04/26/2022	Proof of Service filed by North County Transit District.	North County Transit District (Defendant)
10	04/27/2022	Proof of Service of 30-day Summons & Complaint - Personal filed by California Coastal Commission. Refers to: North County Transit District	California Coastal Commission (Plaintiff)
11	04/27/2022	Proof of Service of 30-day Summons & Complaint - Personal filed by California Coastal Commission. Refers to: EXBON DEVELOPMENT INC	California Coastal Commission (Plaintiff)

- 12 09/07/2022 Civil Case Management Conference scheduled for 09/30/2022 at 09:30:00 AM at Central in C-64 John S. Meyer was vacated.
- 13 11/21/2022 Order Remanding Case to Originating Court filed by The Superior Court of San Diego.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA COASTAL
COMMISSION,

Plaintiff,

v.

NORTH COUNTY TRANSIT
DISTRICT, et al.,

Defendants.

Case No.: 3:22-CV-587-RSH-BGS

**ORDER GRANTING MOTION TO
REMAND**

[ECF Nos. 9, 12]

Before the Court is a Motion to Remand filed by Plaintiff California Coastal Commission (“CCC” or “Plaintiff”). ECF No. 9. Defendants North County Transit District (the “NCTD”) and Exbon Development, Inc. (“Exbon”) (collectively “Defendants”) oppose. ECF No. 22. The Motion to Remand has been fully briefed. *See* ECF No. 24 (Reply). Pursuant to Civil Local Rule 7.1(d), the Court finds the matter suitable for disposition without oral argument. As explained below, the Court grants the Motion to Remand.

1 The instant case (the “CCC Action”) is related to an earlier-filed and earlier-removed
2 action pending in this Court, *Friends of Del Mar Bluffs v. North County Transit Dist.*, Case
3 No. 22-CV-503 (S.D. Cal.) (the “Friends Action”). Each of these actions was initially filed
4 in California Superior Court and subsequently removed to federal court by the NCTD. On
5 May 27, 2022, the respective plaintiffs in the Friends Action and in the CCC Action filed
6 motions to remand. Earlier today, the Court entered an Order in the Friends Action granting
7 the motion to remand in that case (the “Friends Remand Order”). *See* Case No. 22-CV-
8 503, Order (Nov. 18, 2022).

9 The Friends Remand Order describes the claims and procedural history associated
10 with both the Friends Action and the CCC Action, as well as an administrative proceeding
11 before the Surface Transportation Board (“STB”) that precedes both lawsuits and remains
12 pending.

13 The Friends Remand Order also sets forth the legal standards applicable to
14 determining whether there is subject matter jurisdiction in either the Friends Action or the
15 CCC Action. The Defendants’ theory of jurisdiction—relying on 28 U.S.C. §§ 1441(a)
16 (removal jurisdiction) and 1331 (federal question jurisdiction), based on the arguments that
17 the state-law claims in each lawsuit are “completely preempted” by the Interstate
18 Commerce Commission Termination Act (“ICCTA”), or alternatively that an ICCTA
19 preemption defense is a necessary element of the claim for relief and presents a “substantial
20 federal question”—is substantially similar in both lawsuits. The Court’s conclusion—that
21 Defendants have not carried their burden to establish removal jurisdiction—is likewise the
22 same.¹ The Court’s reasoning as set forth in the Friends Remand Order is also applicable
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24
25 ¹ “The removal statute is strictly construed against removal jurisdiction, and the
26 burden of establishing federal jurisdiction falls to the party invoking the statute.” *California*
27 *ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citing *Ethridge v.*
28 *Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988)). “Federal jurisdiction must be
rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles,*
Inc., 980 F.2d 564, 566 (9th Cir. 1992).

1 here.

2 Defendants begin the argument in their opposition brief by stating that “[t]his Court
3 and the STB have already determined that the Coastal Act’s preclearance permitting
4 requirements on NCTD’s Line are completely preempted by the ICCTA.” ECF No. 21 at
5 5. As explained in the Friends Removal Order, this statement is wrong; in fact, in the case
6 cited by Defendants, the district court ruled that it did not have subject matter jurisdiction.
7 *See City of Encinitas v. North San Diego County Transit Development Board*, No., 01-CV-
8 1734, 2002 WL 34681621, at *5 (Jan. 14, 2002). Defendants cite authority holding that
9 ICCTA preemption applies as a *defense*, yet other than their incorrect statement above,
10 their brief does not purport to identify any authority holding that the ICCTA effects
11 “complete preemption” as a basis for federal subject matter jurisdiction.

12 Defendants also do not attempt to show that the ICCTA provides “a substitute cause
13 of action” for Plaintiff’s claims here, a requirement for complete preemption. *See San*
14 *Mateo v. Chevron Corp.*, 32 F.4th 733, 748 (9th Cir. 2022); *City of Oakland v. BP PLC*,
15 969 F.3d 895, 903 (9th Cir. 2020); *Californians for Alternatives to Toxics v. N. Coast R.R.*
16 *Auth.*, No. C-11-4102, 2012 WL 1610756, at *10 (N.D. Cal. May 8, 2012).

17 Nor have Defendants established that this case falls within the “special and small
18 category” of state-law claims where federal law is a necessary element of the claim for
19 relief. *See City of Oakland*, 969 F.3d at 904. Their arguments in this regard are in substance
20 a conclusory incorporation of their “complete preemption” arguments, amounting to a
21 contention that they have a valid preemption defense, creating a substantial federal
22 question. But as the Supreme Court has held, absent an applicable exception, “a case may
23 *not* be removed to federal court on the basis of a federal defense, including the defense of
24 pre-emption, even if the defense is anticipated in the plaintiff’s complaint, and even if both
25 parties concede that the federal defense is the only question truly at issue.” *Caterpillar Inc.*
26 *v. Williams*, 482 U.S. 386, 393 (1987).

27 Finally, even Defendants’ lead argument—that the ICCTA conclusively preempts
28 Plaintiff’s state-law claims—is at odds with the California Supreme Court’s decision in

1 *Friends of the Eel River v. North Coast R.R. Auth.*, 3 Cal. 5th 677 (2017). In that case, the
2 California Supreme Court held that although the ICCTA generally preempts state
3 regulation of rail transportation, this did not prevent the application of the California
4 Environmental Quality Act (“CEQA”)—the basis of one of Plaintiff’s claims here—to a
5 railroad authority. *See id.* at 740 (“In this case, the application of CEQA to [the defendant
6 railroad authority] would not be inconsistent with the ICCTA and its preemption clause.
7 This is both because we presume Congress did not intent to disrupt state self-governance
8 without clear language to this effect, and because the ICCTA leaves a relevant zone of
9 freedom of action for owners that the state, as owner, can elect to act in through CEQA.”).
10 Defendants argue that *Friends of Eel River* is distinguishable on the facts, because the rail
11 line at issue in that case was inoperable at the time the defendant railroad authority was
12 purchased, whereas the NCTD’s rail line has been in use for decades by two rail carriers.
13 ECF No. 21 at 12. Defendants also contend that the California Supreme Court’s decision
14 was inconsistent with an earlier ruling of the STB. *Id.* at 11. Whether these arguments may
15 ultimately sustain a preemption defense to Plaintiff’s claims, Defendants have not carried
16 their burden to establish removal jurisdiction in this case.²

17 Additionally, as explained in the Friends Remand Order, there is no STB order here
18 that supports subject matter jurisdiction under 28 U.S.C. § 1336(a), and absent jurisdiction,
19 there is no basis for “retaining” jurisdiction and referring the case to the STB pursuant to
20 28 U.S.C. § 1336(b).

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27 ² Concluding that remand is proper for the reasons stated above, the Court declines to
28 address Plaintiff’s argument that removal jurisdiction would be barred by the Eleventh
Amendment. *See* ECF No. 9 at 6–7.

1 For the foregoing reasons, Plaintiff's Motion to Remand (ECF No. 9) is
2 **GRANTED**. The case is hereby **REMANDED** to the Superior Court for the State of
3 California, County of San Diego. Plaintiff's Motion to Vacate Stay (ECF No. 12) is
4 **DENIED** as moot. The Clerk of Court is **DIRECTED** to close the case.

5 **IT SO ORDERED.**

6 Dated: November 18, 2022

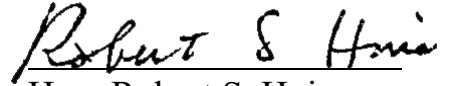

Hon. Robert S. Huie
United States District Judge

EXHIBIT C

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 FRIENDS OF DEL MAR BLUFFS, et
12 al.,

13 Plaintiffs,

14 v.

15
16 NORTH COUNTY TRANSIT
17 DISTRICT, et al.,

18 Defendants.
19

Case No.: 3:22-CV-503-RSH-BGS

**ORDER GRANTING MOTION TO
REMAND**

[ECF Nos. 7, 8, 12, 15]

20 Before the Court is a Motion to Remand filed by Plaintiffs Friends of Del Mar Bluffs
21 (“Friends”) and its President, Laura DeMarco (collectively “Plaintiffs”). ECF No. 12.
22 Defendants North County Transit District (the “NCTD”) and its Executive Director
23 Matthew Tucker (collectively “Defendants”) oppose. ECF No. 23 (Opposition Br.). The
24 Motion to Remand has been fully briefed. *See* ECF No. 24 (Reply Br.). Pursuant to Civil
25 Local Rule 7.1(d), the Court finds the matter suitable for disposition without oral argument.
26 As explained below, the Motion for Remand is granted.

27 ///
28

I. Background

This lawsuit challenges a proposal to construct 6-foot-high safety fences along a railroad right-of-way operated by the NCTD on the coastal bluffs in the City of Del Mar, California, without obtaining a coastal development permit. Plaintiffs allege that the project would violate California law, put the stability of the Del Mar bluffs at risk, and interfere with the public’s use of those bluffs. ECF No. 1-3, Ex. A ¶¶ 1–2. This lawsuit is related to two other proceedings: An administrative proceeding before the Surface Transportation Board (“STB”) in Washington, D.C., and a second lawsuit filed in this Court after the present lawsuit was filed.

Common to all of these proceedings is an issue raised about preemption—namely, whether a provision of the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10501(b) (“Section 10501(b)”), preempts state coastal permitting regimes and state-law causes of action, in the context of the safety fencing project to be constructed on the Del Mar bluffs. For background, each of the three proceedings is described below.

A. The STB Action

On August 28, 2020, the NCTD filed a Petition with the STB, the federal independent regulatory agency charged with the economic regulation of the national railroad system. *See North County Transit Dist. – Petition for Declaratory Order*, STB Finance Docket No. 36433 (the “STB Action”).¹ *See* STB Action, Verified Petition (Aug. 28, 2020). In its Petition, the NCTD seeks a declaration that Section 10501(b) preempts any state and local coastal permitting regime to regulate the NCTD’s rail line, including the California Environmental Quality Act (“CEQA”), California Public Resources Code

¹ Filings and orders in the STB Action are available on the STB’s website at <https://www.stb.gov/proceedings-actions/dockets-and-service-lists/>, where they are organized by date. In referring to particular filings, this Order identifies them by title and date.

§§ 21000 *et seq.*, and the California Coastal Act of 1976 (the “Coastal Act”), Cal. Pub. Res. Code §§ 30000 *et seq.*, with respect to any current or future projects that the NCTD undertakes in the railroad right-of-way in the City of Del Mar, including the safety fencing project that is the subject of the present action.

On November 6, 2020, the NCTD filed a motion to hold the STB Action in abeyance while the parties attempted to reach a resolution. *See* STB Action, Decision (Nov. 30, 2020). The STB granted the request, staying the case until March 30, 2021. *Id.* On March 29, 2021, the NCTD filed a status update advising that the parties were still attempting to reach a resolution and requested a further abeyance until December 31, 2021, which the STB granted. *See* STB Action, Decision (Apr. 7, 2021).

On December 30, 2021, the NCTD filed its next required status update, which (1) advised that despite significant efforts, the parties had been unable to reach a resolution, and (2) asked the STB to proceed with the STB Action in an expedited manner to resolve the disputes at issue. *See* STB Action, Status Update (Dec. 30, 2021).

The STB Action remains pending. In the most recent Status Report, the NCTD “respectfully urge[d] the STB to rule on the preemption issues set forth in its petition, so that it may commence construction on [its] safety fencing project and have greater clarity on its responsibilities.” STB Action, Status Update (Oct. 20, 2022). The STB has not yet issued a ruling.

B. The Friends Action

On March 21, 2022, Plaintiffs brought this lawsuit in San Diego Superior Court by filing a Verified Petition for Writ of Mandate and Complaint (the “Complaint,” or the “Friends Complaint”). *See Friends of Del Mar Bluffs v. North County Transit Dist.*, No. 37-2022-00011260-CU-WM-CTL (the “Friends Action”). ECF No. 1-3, Ex. A.

The Complaint alleged that on January 20, 2022, the NCTD approved a contract with Exbon Development, Inc. (“Exbon”) to construct 6-foot-high fences along the railroad right-of-way on the Del Mar bluffs, without obtaining a coastal development permit as required by the Coastal Act. *Id.* ¶ 1. The Complaint alleges that the NCTD’s approval of

1 the Exbon contract, and the proposed implementation of the safety fencing project, are in
2 breach of an agreement, referred to as the “Grant Agreement,” that the NCTD had entered
3 into with the California State Transportation Agency (“CalSTA”). *Id.* ¶ 2. In the Grant
4 Agreement, the NCTD agreed to comply with California law, which includes CEQA and
5 the Coastal Act. *Id.* ¶ 42. The Complaint alleged that the project would not only adversely
6 impact scenic views and impede the use of trails and beach access in violation of the
7 Coastal Act, *id.* ¶¶ 34–36, but also damage the environment, permanently alter the bluffs,
8 accelerate erosion, and increase the risk of bluff collapse, *id.* ¶¶ 33, 37.

9 The Complaint pleaded four causes of action under California state law: (1)
10 declaratory relief regarding breach of the Grant Agreement between the NCTD and
11 CalSTA; (2) declaratory relief regarding breach of the covenant of good faith and fair
12 dealing arising from the Grant Agreement; (3) quiet title as to the public easement to use
13 trails; and (4) invalidity and illegality of the NCTD’s actions. *See id.* The Complaint
14 described the STB Action and characterized it as a breach of the implied covenant of good
15 faith and fair dealing contained in the Grant Agreement, *id.* ¶ 79, but specified that
16 “Plaintiffs do not seek a ruling regarding the issue of preemption pending in the STB
17 Action,” *id.* ¶ 5. The Complaint sought, among other relief, “an order and judgment
18 declaring that NCTD is required to comply with California law as a result of the obligations
19 it undertook and those imposed by law under the Grant Agreement,” as well as an
20 injunction “preventing NCTD from erecting a fence on the Upper Bluff in Del Mar.” *Id.* at
21 p. 23.

22 On April 12, 2022, Defendants filed a notice of removal pursuant to 28 U.S.C.
23 § 1441(a). ECF No. 1. The notice bases removal jurisdiction on 28 U.S.C. § 1331 and
24 federal question jurisdiction, and states that Plaintiffs’ state-law claims are completely
25 preempted by Section 10501(b). *Id.* ¶¶ 13–15. The notice states that, in the alternative,
26 “even if Plaintiffs’ claims are not completely preempted by the ICCTA, removal is still
27 required because Plaintiffs’ claims are necessarily federal in character, and the resolution
28 of these claims depends upon the resolution of substantial federal questions.” *Id.* ¶ 18. The

1 notice also states that removal of the action is proper under 28 U.S.C. § 1336, “which
2 provides that the district court has jurisdiction to enforce an order of the STB under the
3 circumstances provided herein.” *Id.* ¶ 14. The removed case was docketed in this Court as
4 *Friends of Del Mar Bluffs et al. v. North County Transit District et al.*, Case No. 22-cv-
5 503 (S.D. Cal.).

6 On May 3, 2022, Defendants filed a motion to dismiss for failure to state a claim.
7 ECF No. 7. Defendants contend, in addition to making other arguments, that each of
8 Plaintiffs’ four causes of action is preempted by the ICCTA. ECF No. 7-1 at 3–4.

9 On May 10, 2022, Defendants filed a Motion to Stay the case, arguing that judicial
10 efficiency would best be served by staying this case until the STB determines the
11 preemption issues. *See* ECF No. 8-1.

12 On May 23, 2022, Plaintiffs filed a Verified First Amended Petition for Writ of
13 Mandate and Complaint. ECF No. 10 (the “Amended Complaint”). The Amended
14 Complaint includes a fifth and additional claim (styled as “First Claim for Relief”), seeking
15 declaratory and injunctive relief pursuant to California Public Resources Code § 30803. *Id.*
16 ¶¶ 30–56.

17 On May 27, 2022, Plaintiffs filed their Motion to Remand. ECF No. 12.

18 On June 2, 2022, in the related case discussed below—referred to as the “CCC
19 Action”—the Court entered an order staying proceedings in both the CCC Action and the
20 Friends Action “until the STB decides the preemption issues.” Case No. 22-CV-587, ECF
21 No. 11 at 9.

22 On June 9, 2022, Plaintiffs moved to vacate the stay and resume briefing on
23 Plaintiffs’ Motion to Remand. ECF No. 15.

24 This case and the CCC Action were transferred to the undersigned on September 7,
25 2022. ECF No. 19. On October 13, 2022, the Court directed the Parties to complete their
26 briefing on Plaintiffs’ Motion to Remand. ECF No. 20. The Parties have done so. *See* ECF
27 Nos. 23–24.

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1 **C. The CCC Action**

2 On April 19, 2022, approximately a month after the Friends Action was filed, the
3 California Coastal Commission (the “CCC”) filed its own Petition for Writ of Mandate and
4 Complaint (the “CCC Complaint”) in San Diego Superior Court, Case No. 37-2022-
5 00014504-CU-MC-CTL (the “CCC Action”). ECF No. 1-2, Ex A at p. 7.² The CCC
6 Complaint named as defendants the NCTD as well as Exbon. *Id.*

7 Like the Friends Complaint, the CCC Complaint challenges the NCTD’s safety
8 fencing project at the Del Mar bluffs. *Id.* The CCC Complaint alleges three state-law causes
9 of action based on (1) violation of CEQA, (2) violation of the Coastal Act, and (3) violation
10 of a Cease and Desist Order issued by the CCC. *Id.* Among other relief, the CCC Complaint
11 seeks a writ of mandate directing the NCTD to (i) set aside and withdraw its approval of
12 construction of the fencing along the coastal bluff in Del Mar; (ii) cancel its contract with
13 Exbon for construction of the fencing; and (iii) refrain from taking on any other activities
14 in furtherance of construction of the fencing until it complies with CEQA. *Id.* at pp. 18–
15 19. The CCC Complaint also seeks damages, and an injunction requiring Defendants to
16 cease and desist the undertaking of its development and to comply with the Coastal Act.
17 *Id.* at pp. 19–20.

18 On April 26, 2022, the NCTD filed a notice of removal. ECF No. 1. The NCTD’s
19 notice of removal in the CCC Action invokes the same statutory bases of removal as its
20 notice in the Friends Action. *Id.* ¶¶ 12–13. As in the Friends Action, the notice of removal
21 in the CCC Action invokes jurisdictional theories of “complete preemption” and
22 “substantial federal question.” *Id.* ¶¶ 14, 17. On May 20, 2022, Exbon consented to
23 removal. ECF No. 7.

24 On May 27, 2022, the CCC moved to remand the case. ECF No. 9. The same day,
25 the parties in the CCC Action jointly moved to stay the proceedings “until such time as the
26

27
28 ² All references to the Court’s docket in this section relate to *California Coastal Commission v. North County Transit District*, Case No. 22-CV-587 (S.D. Cal.).

1 [STB] has issued a ruling on” the STB Action. ECF No. 10 at 2.

2 On June 2, 2022, as discussed in the previous section, the Court issued an order
3 staying the case pending the STB’s ruling on preemption issues in the STB Action. ECF
4 No. 11 at 9.

5 On June 7, 2022, the CCC filed a motion to vacate the stay and resume briefing on
6 the CCC’s motion to remand. ECF No. 12.

7 **III. Legal Standard**

8 “Except as otherwise expressly provided by Act of Congress, any civil action
9 brought in a State court of which the district courts of the United States have original
10 jurisdiction, may be removed by the defendant or the defendants, to the district court of the
11 United States for the district and division embracing the place where such action is
12 pending.” 28 U.S.C. § 1441(a). “The removal statute is strictly construed against removal
13 jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking
14 the statute.” *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004)
15 (citing *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir.1988)). “Federal
16 jurisdiction must be rejected if there is any doubt as to the right of removal in the first
17 instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

18 Here, NCTD contends that the Court has original jurisdiction pursuant to 28 U.S.C.
19 § 1331, which provides for federal jurisdiction “of all civil actions arising under the
20 Constitution, laws, or treaties of the United States,” also known as federal question
21 jurisdiction. Removal jurisdiction based on a federal question is determined from the
22 complaint as it existed at the time of removal, rather than as subsequently amended. *Libhart*
23 *v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979) (“In determining the
24 existence of removal jurisdiction based upon a federal question, we must look to the
25 complaint as of the time the removal petition was filed.”).³

26
27
28 ³ Although Plaintiffs’ Amended Complaint is the operative pleading for purposes of
the Friends Action generally, in assessing subject matter jurisdiction, the Court focuses on

1 “The general rule, referred to as the ‘well-pleaded complaint rule,’ is that a civil
2 action arises under federal law for purposes of section 1331 when a federal question
3 appears on the face of the complaint.” *City of Oakland v. BP PLC*, 969 F.3d 895, 903 (9th
4 Cir. 2020) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). “[A] case may
5 *not* be removed to federal court on the basis of a federal defense, including the defense of
6 pre-emption, even if the defense is anticipated in the plaintiff’s complaint, and even if both
7 parties concede that the federal defense is the only question truly at issue.” *Caterpillar*, 482
8 U.S. at 393. As the “master of the claim,” the plaintiff can generally “avoid federal
9 jurisdiction by exclusive reliance on state law.” *Id.* at 392.

10 One exception to the well-pleaded complaint rule is the doctrine of “complete pre-
11 emption.” *Id.* at 393. “On occasion, the [Supreme] Court has concluded that the pre-
12 emptive force of a statute is so ‘extraordinary’ that it ‘converts an ordinary state common-
13 law complaint into one stating a federal claim for purposes of the well-pleaded complaint
14 rule.’” *Id.* (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). “To have
15 this effect, a federal statute must ‘provide[] the exclusive cause of action for the claim
16 asserted and also set forth procedures and remedies governing that cause of action.’” *City*
17 *of Oakland*, 969 F.3d at 905 (quoting *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8
18 (2003)).

19 The Ninth Circuit has noted that the Supreme Court has identified only three statutes
20 that meet the criteria for complete preemption: (1) section 301 of the Labor Management
21 Relations Act, (2) section 502(a) of the Employee Retirement Income Security Act of 1974,
22 and (3) sections 85 and 86 of the National Bank Act. *See id.* at 905–06; *accord County of*
23 *San Mateo v. Chevron Corp.*, 32 F.4th 733, 748 (9th Cir. 2022). In light of the Supreme
24 Court case law, the Ninth Circuit held that “complete preemption under § 1331 exists when
25

26
27 Plaintiffs’ original Complaint, on the basis of which Defendants removed the Friends
28 Action to federal court. *See Libhart*, 592 F.2d at 1065 (holding that a claim filed in federal
court after removal cannot confer removal jurisdiction).

1 Congress: (1) intended to displace a state-law cause of action, and (2) provided a substitute
2 cause of action.” *City of Oakland*, 969 F.3d at 906; *accord County of San Mateo*, 32 F.4th
3 at 748.

4 A second exception to the well-pleaded complaint rule exists where “the Supreme
5 Court has recognized a ‘special and small category’ of state-law claims that arise under
6 federal law for purposes of § 1331 ‘because federal law is a necessary element of the . . .
7 claim for relief.’” *City of Oakland*, 969 F.3d at 904 (quoting *Empire Healthchoice Assur.,*
8 *Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)). The Ninth Circuit has explained that “[o]nly
9 a few cases have fallen into this slim category, including (1) a series of quiet-title actions
10 from the early 1900s that involved disputes as to the interpretation and application of
11 federal law; (2) a shareholder action seeking to enjoin a Missouri corporation from
12 investing in federal bonds on the ground that the federal act pursuant to which the bonds
13 were issued was unconstitutional; and (3) a state-quiet title action claiming that property
14 had been unlawfully seized by the Internal Revenue Service (IRS) because the notice of
15 seizure did not comply with the Internal Revenue Code.” *Id.* at 904 (citations and internal
16 quotation marks omitted). For federal jurisdiction to be proper under this second exception,
17 the federal issues must be “(1) necessarily raised, (2) actually disputed, (3) substantial, and
18 (4) capable of resolution in federal court without disrupting the federal-state balance
19 approved by Congress.” *Id.* at 904 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

20 The inquiry as to the third requirement above—that the federal issue be
21 “substantial”—focuses on the importance of a federal issue “to the federal system as a
22 whole.” *Gunn*, 568 U.S. at 260. “An issue has such importance when it raises substantial
23 questions as to the interpretation or validity of a federal statute, or when it challenges the
24 functioning of a federal agency or program.” *City of Oakland*, 969 F.3d at 905 (citations
25 omitted). A federal issue may qualify as “substantial” when it is a pure issue of law that
26 draws into question the constitutional validity of an act of Congress. *Id.* In contrast, a
27 federal issue is not substantial if it is “fact-bound and situation-specific,” or raises “only a
28 hypothetical question unlikely to affect interpretations of federal law in the future.” *Id.*

(citations omitted). “A federal issue is not substantial merely because of its novelty or because it will further a uniform interpretation of a federal statute.” *Id.*

IV. Analysis

The four claims in the Complaint arise under state law rather than federal law. The NCTD argues that each of these claims is completely preempted by Section 10501(b), which provides for exclusive jurisdiction of the STB in certain areas of “transportation” and “construction,” and further provides that remedies under the ICCTA are exclusive and preempt other federal or state remedies:

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such 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,

is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and pre-empt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added).

At the outset, the NCTD contends that “[t]his Court and the STB have already determined that the Coastal Act’s preclearance permitting requirements on NCTD’s Line are completely preempted by the ICCTA, and that decision was later confirmed by the STB.” ECF No. 23 at 6. NCTD cites the district court ruling in *City of Encinitas v. North San Diego County Transit Development Board*, No., 01-CV-1734, 2002 WL 34681621 (Jan. 14, 2002), and an STB decision, Finance Docket No. 34111, 2002 WL 1924265 (Aug. 19, 2002). However, the NCTD’s description is wrong. Neither this Court nor the STB has

1 made such a determination.

2 The dispute to which the NCTD refers involved a municipality's claims that the
3 NCTD's proposed construction of a railroad passing track violated CEQA and the Coastal
4 Act. The district court, and thereafter the STB, indeed ruled that the claims were preempted
5 by the ICCTA's Section 10501(b). However, in agreeing with NCTD that preemption
6 applied as a defense in that case, neither decision addressed the doctrine of "complete
7 preemption," or held that preemption in that case was sufficient to support original federal
8 jurisdiction. Indeed, the district court in that case—disagreeing with the very position the
9 NCTD asserts here—held that it did *not* have subject matter jurisdiction. Citing the
10 preemption clause in Section 10501(b), the court stated that "Congress abrogated district
11 court jurisdiction under § 1331 when it placed exclusive jurisdiction of railroad
12 transportation under the STB." *City of Encinitas*, 2002 WL 34681621, at *5. The court
13 explained: "Neither the state court nor the district court has jurisdiction over these claims.
14 Rather, Plaintiff should bring its claims before the STB and, if necessary, appeal a decision
15 by the STB to the Court of Appeals." *Id.*

16 The STB decision that the NCTD cites mentioned the district court's dismissal for
17 lack of subject matter jurisdiction but did not revisit the question. *See* 2002 WL 1924265,
18 at *2. Although this STB decision supports a preemption defense, it does not support a
19 finding of subject matter jurisdiction based on complete preemption.

20 Arguing in favor of subject matter jurisdiction, the NCTD also relies heavily on the
21 Ninth Circuit's decision in *City of Auburn v. U.S. Government*, 154 F.3d 1025 (9th Cir.
22 1998). That case arose from the STB's decision to approve a private railroad company's
23 proposal to acquire, repair, and improve a rail line in Washington state, over the objection
24 of municipalities invoking state and local environmental review laws. *See id.* at 1027–29.
25 Citing the "broad language of Section 10501(b)(2)," the Ninth Circuit agreed with the STB
26 that the ICCTA preempted the state and local laws. *Id.* at 1031. The Ninth Circuit
27 concluded that "[b]ecause congressional intent is clear, and the preemption of rail activity
28 is a valid exercise of congressional power under the Commerce Clause, we affirm the

1 STB’s finding of federal preemption.” *Id.*

2 Once again, there is a distinction between ruling that preemption is a valid *defense*
3 in a particular case and ruling that there a sufficient basis for federal *subject matter*
4 *jurisdiction* under 28 U.S.C. § 1331. The Supreme Court has unequivocally held that even
5 where both parties concede that a “defense of preemption” is “the only question truly at
6 issue in a case,” such a defense does not constitute a basis for removal unless an exception
7 to the well-pleaded complaint rule applies. *Caterpillar*, 482 U.S. at 393. A preemption
8 defense is thus insufficient, without more, to establish federal subject matter jurisdiction.

9 Defendants’ opposition brief does not purport to identify a single case from any court
10 in any jurisdiction holding that a preemption defense based on the ICCTA provides a basis
11 for federal question jurisdiction under 28 U.S.C. § 1331 or for removal jurisdiction under
12 28 U.S.C. § 1441(a). *See* ECF No. 23. In contrast, Plaintiffs’ moving papers identified
13 several cases remanding claims to state court despite an assertion of preemption under the
14 ICCTA. *See* ECF No. 12-1 at 24. Defendants failed to address any of these.

15 In one illustrative case, a district court held that a preemption defense based on the
16 ICCTA did not provide a basis for removal jurisdiction for the plaintiffs’ CEQA claims.
17 *See Californians for Alternatives to Toxics v. N. Coast R.R. Auth.*, No. C-11-4102, 2012
18 WL 1610756 (N.D. Cal. May 8, 2012). In that case, procedurally similar to this one, the
19 plaintiffs were environmental groups who brought an action in California Superior Court
20 against a railroad authority and its board, alleging that the defendants failed to conduct an
21 adequate environmental review before approving the reopening of a railroad line. *See id.*
22 at *1. The state lawsuit alleged two causes of action under CEQA. *Id.* The defendants
23 removed the lawsuit to federal court pursuant to section 1441(a), and the plaintiffs sought
24 to remand the lawsuit for lack of subject matter jurisdiction. *Id.*

25 The defendants in that case argued that the ICCTA preempted the plaintiffs’ state-
26 law claims, and that the federal court had subject matter jurisdiction based on “complete
27 preemption,” as well as based on a “substantial federal question” that was a necessary
28 element of the claim for relief. *Id.* With regard to complete preemption, that district court

1 addressed the Supreme Court’s requirement in *Beneficial* that the federal statute at issue
2 “provide[] the exclusive cause of action for the claim asserted.” *Id.* at *8 (quoting
3 *Beneficial*, 539 U.S. at 8). The district court concluded that this requirement was not met
4 in the case before it because “the ICCTA does not provide *any* cause of action for Plaintiffs’
5 claims.” *Id.* (emphasis added). The district court stated that the defendants “must point to
6 some provision of the ICCTA that supplies a federal cause of action amounting to
7 Plaintiffs’ CEQA claims,” but that the defendants “fail[ed] to meet this basic requirement
8 necessary to establish removal based on complete preemption.” *Id.* at *9. The court rejected
9 arguments made by the defendants in that case that such a cause of action was provided by
10 the National Environmental Policy Act (“NEPA”) or the STB’s implementing regulations.
11 *Id.*

12 Here, Defendants not only fail to address relevant albeit non-binding authority, but
13 also fail to address the binding authority that was found to be dispositive in *Californians*
14 *for Alternatives*. Although Defendants argue that the ICCTA precludes each of Plaintiffs’
15 claims, Defendants do not attempt to show that the ICCTA “provide[s] the exclusive cause
16 of action for the claim asserted,” a separate requirement for complete preemption. *See*
17 *Beneficial*, 539 U.S. at 8; *City of Oakland*, 969 F.3d at 905. Put another way, although
18 Defendants contend that the ICCTA was “intended to displace a state-law cause of action”
19 (the first requirement for complete preemption in *City of Oakland*, 969 F.3d at 906), they
20 do not endeavor to show that the statute “provide[s] a substitute cause of action” (the
21 second requirement). *See Californians for Alternatives*, 2012 WL 1610756, at *9
22 (“Defendants have failed to show that NEPA or the STB’s implementing regulations
23 provide private redress for Plaintiffs’ CEQA claims.”).

24 Here, with the removal statute strictly construed against removal jurisdiction, the
25 Defendants bear the burden of establishing that there is no doubt as to federal jurisdiction.
26 *See California ex rel. Lockyer*, 375 F.3d at 838; *Gaus v. Miles, Inc.*, 980 F.2d at 566.
27 Defendants have not carried that burden as to their theory of complete preemption.

28 Nor have Defendants carried their burden to establish the second exception to the

1 well-pleaded complaint rule, applicable where federal law is a necessary element of the
2 claim for relief. Defendants’ argument in this regard consists of three conclusory sentences,
3 arguing that even if there is no complete preemption, their preemption defense still means
4 that that resolution of the Plaintiffs’ state-law claims depends upon the resolution of
5 substantial federal questions. *See* ECF No. 23 at 25. This is the same approach that was
6 rejected in *Californians for Alternatives*, where the district court described the defendants’
7 arguments as “either rehashings of their complete preemption contentions or arguments
8 related to defense preemption.” *Californians for Alternatives*, 2012 WL 1610756, at *11.
9 As the court also noted in that case, according to the Supreme Court, “it is now settled law
10 that a case may *not* be removed to federal court on the basis of a federal defense, including
11 the defense of pre-emption, even if the defense is anticipated in the plaintiff’s complaint,
12 and even if both parties concede that the federal defense is the only question truly at issue.”
13 *Caterpillar*, 482 U.S. at 392. In the absence of persuasive authority or argument, this Court
14 declines Defendants’ invitation to expand the “slim category” of claims to which this
15 second exception applies. *See City of Oakland*, 969 F.3d at 904.

16 In ruling that Defendants have failed to meet their burden to establish removal
17 jurisdiction, this Court does not rule on the merits of Defendants’ preemption defense.⁴
18 Nor does the Court rule on the argument made by Plaintiffs that the federal statutory regime
19 applicable to preemption analysis is not the ICCTA at all, but instead the Federal Rail
20 Safety Act (“FRSA”), 49 U.S.C. §§ 10101 *et seq.*

21
22
23 ⁴ The California Supreme Court has held that although the ICCTA generally preempts
24 state regulation of rail transportation, preemption did not prevent the application of
25 California’s environmental preclearance requirements to a railroad authority. *Friends of*
26 *the Eel River v. North Coast R.R. Auth.*, 3 Cal. 5th 677, 740 (2017) (“In this case, the
27 application of CEQA to [the defendant railroad authority] would not be inconsistent with
28 the ICCTA and its preemption clause. This is both because we presume Congress did not
intent to disrupt state self-governance without clear language to this effect, and because the
ICCTA leaves a relevant zone of freedom of action for owners that the state, as owner, can
elect to act in through CEQA.”).

1 Finally, Defendants’ notice of removal asserts, as a separate basis for removal
2 jurisdiction 28 U.S.C. § 1336, “which provides that the district court has jurisdiction to
3 enforce an order of the STB under the circumstances provided herein.” ECF No. 1 ¶ 14.⁵
4 In their opposition brief, Defendants do not argue that there is any existing STB order
5 which this Court has jurisdiction to enforce. Instead, Defendants maintain that if the Court
6 does not dismiss Plaintiffs’ claims as completely preempted, “a referral to the STB of the
7 specific preemption issues as articulated [in] this Action, pursuant to 28 U.S.C. § 1336,
8 would be appropriate.” ECF No. 23 at 7. Defendants also state that, “unless dismissal is
9 warranted in comity with the Court’s prior ruling in *City of Encinitas*, then the district court
10 should consider a referral under 28 U.S.C. § 1336, leave the stay of these matters in place,
11 and retain jurisdiction.” *Id.* at 7–8. Defendants do not appear to argue that referral of a case
12 under 28 U.S.C. § 1336(b) creates an independent basis for federal subject matter
13 jurisdiction—that by referring a case, a district court obtains jurisdiction to hear the case.
14 Here, the Court sees no basis for an STB referral and notes that the question of preemption
15 has been pending in the STB Action since August 2020 without any need for a referral
16 from this Court.

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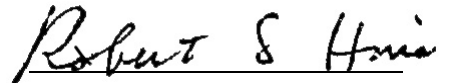
21
22 ⁵ Section 1336(a) confers subject matter jurisdiction, providing that “the district courts
23 shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the
24 Surface Transportation Board, and to enjoin or suspend, in whole or in part, any order of
25 the Surface Transportation Board for the payment of money or the collection of fines,
26 penalties, and forfeitures.” 28 U.S.C. § 1336(a). Section 1336(b) addresses referral of an
27 issue to the STB: “When a district court or the United States Court of Federal Claims refers
28 a question or issue to the Surface Transportation Board for determination, the court which
referred the question or issue shall have exclusive jurisdiction of a civil action to enforce,
enjoin, set aside, annul, or suspend, in whole or in part, any order of the Surface
Transportation Board arising out of such referral.” *Id.* § 1336(b).

1 **IV. Conclusion**

2 For the foregoing reasons, Plaintiffs' Motion to Remand (ECF No. 12) is
3 **GRANTED**. The case is hereby **REMANDED** to the Superior Court for the State of
4 California, County of San Diego. All other pending motions, including Defendants' Motion
5 to Dismiss (ECF No. 7), Defendants' Motion to Stay (ECF No. 8), and Plaintiffs' Motion
6 to Vacate Stay (ECF No. 15) are **DENIED** as moot. The Clerk of Court is **DIRECTED** to
7 close the case.

8 **IT SO ORDERED.**

9 Dated: November 18, 2022


Hon. Robert S. Huie
United States District Judge

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on **December 1, 2022**, I served a copy of this **CALIFORNIA COASTAL COMMISSION'S RENEWED REQUEST FOR ABEYANCE PENDING STATE COURT LITIGATION AND FOURTH UPDATE** on all parties of record by first-class mail and email as follows:

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