

## 9th Circ. Revives San Diego's Huge Kinder Morgan Spill Suit

By **Brandon Lowrey**

*Law360, New York (May 21, 2015, 9:29 PM ET)* -- The Ninth Circuit on Thursday revived the city of San Diego's nine-figure lawsuit against Kinder Morgan Energy Partners LP over leaking fuel tanks that polluted soil and groundwater for decades, including an aquifer beneath Qualcomm Stadium, saying a lower court erred finding the city couldn't support its damage claims.

The appellate judges found that the district judge erred in tossing the potentially \$300 million suit finding the city could not support its restoration damages theory by using a hypothetical, saying damages can be proved through estimates of a property's rental value based on hypothetical assumptions. In addition, the court overturned the judge's finding that the city failed to show the aquifer could support a drinking water project.

"Prior to World War II, the aquifer was in fact used as a source of drinking water," the appellate court found. "Summary judgment was therefore improper because a rational jury could reasonably conclude that a drinking water project on the property is viable."

If such a project were delayed, it could also support the city's nuisance and trespass claims, the court ruled.

San Diego filed suit in August 2007, accusing Kinder Morgan of deliberately and recklessly delaying cleanup of the fuel plume beginning in 1998, when it acquired a company that owned a property next to the stadium.

Some 300,000 gallons of petroleum products from that property, formerly owned by Santa Fe Pipeline Partners LP, leaked into the soil beneath the stadium over several decades, and the city says Kinder Morgan's attempts to remediate have been sporadic and ineffective, resulting in drinking water sources being rendered unusable and threatening public health.

The city initially indicated it was seeking more than \$160 million in damages during discovery in 2009, but in 2011 responded to Kinder Morgan interrogatories with new damages calculations that totaled more than \$300 million, according to the company's appeal response brief.

In November 2012, Judge Anello issued a tentative ruling finding that because San Diego lacks a viable water project, it cannot claim it was damaged if the company didn't clean up the fuel plume.

In January 2013, Judge Anello issued his final order, granting Kinder Morgan summary judgment on all claims in the first amended complaint, which also included claims of real estate and restoration damages,

trespass, private nuisance, public nuisance, unfair competition, negligence and punitive damages.

Judge Anello rejected the city's bid to obtain nearly \$120 million in remediation damages after determining the expert testimony on which those damages relied was inadmissible, calling expert witness Ray Forrester's testimony "personal, subjective opinion that the city should have its expectations met, not [based] on any legal authority or scientific principle."

The city and state appealed, arguing in February before a three-judge appellate panel.

Thursday's ruling also overturned the decision to exclude Forrester, saying problems with Forrester's testimony may go to weight, but not admissibility. The city did not appeal the lower court's decisions to toss its damages theory that it is entitled to damages for resources extracted without compensation and the city's nuisance per se theory, according to the opinion.

The appellate court also affirmed sanctions against the city for disobeying court orders "by repeatedly asserting that it could withhold non-expert, non-privileged factual information in its possession until the exchange of expert reports," the opinion said. It also affirmed the lower court's ruling to toss the city's Prop. 65 claim, saying that the aquifer is not a present source of drinking water.

The city of San Diego praised the decision in a statement issued Thursday afternoon.

"We had to fight for it, but this decision now ensures that the City will get its day in court," San Diego City Attorney Jan Goldsmith said in a statement Thursday. "The jury will hear that a substantial amount of pollution was dumped on City property through no fault of its own and that the adjoining property owner—not taxpayers—should bear the costs."

Kinder Morgan told Law360 it was reviewing the decision, but that it believes the plaintiffs have suffered "no harm whatsoever as a result of the former contamination." The company also said all of the requirements of the California Regional Water Quality Control Board were met.

"To date, Kinder Morgan has spent in excess of \$75 million remediating the contamination, which resulted from spills occurring prior to Kinder Morgan's ownership and operation of the Mission Valley Terminal," a Kinder Morgan spokesperson said in an emailed statement.

Circuit Judges Harry Pregerson and Jacqueline Nguyen and U.S. District Judge Robert H. Whaley sat on the panel that heard Tuesday's arguments.

The plaintiffs are represented by Jan I. Goldsmith and Daniel F. Bamberg of the Office of the San Diego City Attorney and Rene P. Tatro and Steven R. Tekosky of Tatro Tekosky Sadwick LLP.

Kinder Morgan is represented by Steven M. Strauss, M. Ray Hartman III and Summer J. Wynn of Cooley LLP and Michael S. Tracy of DLA Piper.

The case is People of the State of California et al. v. Kinder Morgan Energy Partners LP et al., case number 13-55297, in the U.S. Court of Appeals for the Ninth Circuit.

-- Additional reporting by Daniel Siegal. Editing by Ben Guilfoy.

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