

9th Circ. Urged To Revive \$300M Kinder Morgan Spill Suit

By **Daniel Siegal**

Law360, Los Angeles (February 3, 2015, 10:30 PM ET) -- The state of California and city of San Diego on Tuesday urged the Ninth Circuit to revive their suit seeking at least \$300 million from Kinder Morgan Energy Partners LP over a fuel spill, arguing that permanent contamination renders the aquifer under Qualcomm Stadium unusable.

During oral arguments in Pasadena, California, the state and city urged a three-judge panel to overturn U.S. District Judge Michael M. Anello's 2013 order granting Kinder Morgan summary judgment and holding that the plaintiffs cannot recover damages for the company's alleged failure to clean up the fuel plume that contaminated 166 acres of soil and groundwater, including the plot on which the San Diego Chargers' stadium sits.

Rene Tatro of Tatro Tekosky Sadwick LLP, representing the state and city, urged the court to revive the case and send the matter to a jury to decide whether Kinder Morgan had undertaken reasonable measures to abate the impacts of the contamination and whether it owes restoration and other damages.

"I think we have enough evidence to get to the jury on all of these subjects," he said. "Kinder Morgan admits ... we are abating. That's textbook, is this a continuing tort if it's abatable?"

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 over \$160 million in damages during discovery in 2009, but in 2011 responded to Kinder Morgan interrogatories with new damages calculations that totaled over \$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."

On Tuesday, Steven Strauss of Cooley LLP, representing Kinder Morgan, told the appeals court that city's claimed damages are speculative as a matter of law and were not proved as a matter of certainty, owing in large part to the unreliability of Forrester's testimony, which failed to ascertain the actual prespill condition of the affected area.

"Mr. Forrester didn't attempt to study [the original condition]," he said. "That was one of the methodological failures that the district court relied on in finding [the testimony] was inadmissible."

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 Gavin Broady. Editing by Brian Baresch.