

Kinder Morgan Says Railroad Can't Appeal Land Rights Ruling

By Stan Parker

Law360, New York (July 5, 2016, 6:21 PM ET) -- Kinder Morgan on Friday accused Union Pacific Railroad Company of trying to rehash issues from prior pipeline-rent litigation in a request to appeal an order defining its land use rights, as the two companies both fight off a proposed class action brought by landowners challenging the use of railroad rights of way to lay pipelines.

The pipeline company asked U.S. District Court Judge James V. Selna to reject Union Pacific's bid for an interlocutory appeal of his June 7 order determining that 19th-century congressional land grants to the railroad only provided land use rights for furthering railroad purposes, and that granting an easement for a pipeline and charging rent for it doesn't qualify as a railroad purpose.

Judge Selna had ruled that the California Court of Appeals "squarely addressed" that issue in 2014 when it ruled that renting the subsurface to a pipeline company was not a railroad purpose, a big setback to Union Pacific in its bid to collect rent fees from Kinder Mogan.

Judge Selna's June order partially dismissed Union Pacific's counterclaims in the landowners' suit, in which the company sought a declaratory judgment that allowing pipeline easements along its tracks was within its railroad right-of-way rights.

Kinder Morgan said Friday that Union Pacific's attempt to have Judge Selna certify questions to the Ninth Circuit about that order was just an attempt to get a second crack at issues it lost in 2014.

"This is not an 'exceptional' case warranting interlocutory review; it is merely another attempt by Union Pacific to rehash and resuscitate theories that it lost in the California courts, and that were the subject of extensive briefing by the parties and an exhaustive review by this court," Kinder Morgan wrote.

Likewise, the landowners suing both companies voiced their opposition to the railroad's motion for interlocutory appeal on Friday.

"The railroad's opinion — that every court it has run up against is flat wrong — undoubtedly is sincere and strongly held. Yet this subjective belief is insufficient to satisfy the requirement that there is a substantial ground for difference of opinion supporting an [interlocutory] appeal," the landowners wrote.

Judge Selna's June order, while determining the rights of the railroad on lands provided by 19th-century congressional land grants, did not extend to those lands given to the railroad by private conveyance.

The suits are among several nationwide claiming Union Pacific unlawfully used landowners' subsurface rights in the 1950s to construct underground oil and gas pipelines within the railroad's right of way. They say the congressional easement to Union Pacific's corporate predecessor, Southern Pacific Transportation Co., allowed the railroad to use the subsurface only to support railway operations, and the landowners should have been paid to let the pipeline go through.

Separately, Kinder Morgan on March 4 asked the California federal court for a declaratory judgment that it owns the easement rights for the subsurface properties in San Bernadino County and Riverside County in California.

Counsel for the parties did not respond to requests for comment Tuesday.

Kinder Morgan is represented by Steven M. Strauss, M. Ray Hartman III, Summer J. Wynn and Catherine J. O'Connor of Cooley LLP.

Union Pacific is represented by Joseph Rebein, Tammy B. Webb and John K. Sherk III of Shook Hardy & Bacon LLP.

The plaintiffs are represented by Norman E. Siegel, Barrett J. Vahle, Ethan M. Lange and Jason S. Hartley of Stueve Siegel Hanson LLP, Thomas S. Stewart, Elizabeth G. McCulley and Steven M. Wald of Stewart Wald & McCulley LLC, John W. Cowden, Angela M. Higgins and J. Robert Sears of Baker Sterchie Cowden & Rice LLC, Andrew G. Giacomini and John T. Cu of Hanson Brudgett LLP, Robert Ahdoot, Tina Wolfson, Theodore W. Maya and Bradley K. King of Ahdoot & Wolfson PC, and Francis A. Bottini Jr., Albert Y. Chang and Yury A. Kolesnikov of Bottini & Bottini Inc.

The consolidated case is In re: SFPP Right-of-Way Claims, case number 8:15-cv-00718, in the U.S. District Court for the Central District of California.

--Additional reporting by Joyce Hanson, Patrick Boyle and Dani Kass. Editing by Philip Shea.