

## Landowners Press Union Pacific On Docs In Land Rights Fight

By **Linda Chiem**

*Law360, New York (July 20, 2016, 6:10 PM ET)* -- Landowners challenging the use of railroad rights of way to lay pipelines told a California federal judge Tuesday that Union Pacific can't dodge its discovery obligations in a proposed class action by claiming it would be burdensome and inconvenient to unearth a trove of paper documents.

The landowners maintained that their document requests — specifically for decades-old records they contend cast doubt on Union Pacific's subsurface property rights — are relevant to the proposed class action, according to a reply brief they filed over the discovery dispute. They also asked U.S. District Judge James V. Selna to reject Union Pacific's request that the plaintiffs pay for the document requests, saying Union Pacific cannot shift the responsibility for its dysfunctional storage of documents onto the plaintiffs.

"Under the guise of 'proportionality,' Union Pacific claims essentially that it is immune from any discovery of its stored paper documents in any case," the plaintiffs said. "Why? Because it will take 25 years for it to review lots of disorganized boxes. That position has absolutely no support in law or common sense."

Union Pacific argued in its own reply brief Tuesday that the enormous burden presented by the plaintiffs' discovery requests — which it says were overly broad — vastly outweighs any possible benefits. And if the court forces Union Pacific to respond to those requests, the railroad again urged the court to make the plaintiffs pay for the costs of the discovery, court records show.

"Plaintiffs suggest that because Union Pacific is a 'multibillion-dollar Fortune 200 company,' it can 'comply with plaintiffs' discovery requests, if it chooses (or is compelled) to do so,'" the railroad said. "But Union Pacific's financial wherewithal does not give plaintiffs a free pass to seek any kind of discovery they want, regardless of the burden or expense imposed."

Meanwhile, the landowners blasted Union Pacific for trying to wriggle out of covering the cost of fulfilling the discovery requests.

"Instead of searching for responsive documents, Union Pacific is searching for a free ride, by requesting cost-sharing," they said. "But 'a responding party ordinarily bears the costs of responding.' More importantly, cost-sharing is not proper in light of plaintiffs' offer to inspect the documents at Union Pacific's off-site storage facilities."

The requested documents are related to railroad crossings, engineering projects, pipeline relocations, the cleanup of environmental incidents and the transportation of fuel, according to court records.

The discovery dispute comes after Union Pacific asked the court to let it immediately appeal an order defining its land use rights, as the railroad company and Kinder Morgan fight the proposed class action.

This month, Union Pacific doubled down on its bid for an interlocutory appeal of Judge Selna's 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.

Kinder Morgan and the landowners suing both companies asked Judge Selna to reject Union Pacific's request. But the railroad blasted their contention that the issues it seeks to certify for interlocutory review are not controlling questions of law whose resolution would materially advance the lawsuit.

The consolidated suit is among several launched 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.

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 Bridgett 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.

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, Andrew Carpenter, Tammy B. Webb and John K. Sherk III of Shook Hardy & Bacon LLP.

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 Christine Powell. Editing by Aaron Pelc.

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