

Union Pacific Urges Immediate Appeal Of Land Rights Ruling

By **Christine Powell**

Law360, New York (July 12, 2016, 5:41 PM ET) -- Union Pacific Railroad Co. continued Monday to urge a California federal court to let it immediately appeal an order defining its land use rights, as the railroad company and Kinder Morgan fight a proposed class action brought by landowners challenging the use of railroad rights of way to lay pipelines.

Union Pacific doubled down on its bid for an interlocutory appeal of U.S. District Court Judge James V. 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.

Earlier this month, 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 the lawsuit.

"On the contrary — as both plaintiffs and Kinder Morgan previously have conceded — resolution of these issues in Union Pacific's favor would terminate nearly all claims in this litigation," the reply said.

Judge Selna had determined that the California Court of Appeals "squarely addressed" the issues 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 Morgan.

The judge'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.

Judge Selna's 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.

Kinder Morgan on July 1 said that Union Pacific's attempt to have Judge Selna certify questions to the Ninth Circuit about that order was just a bit 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.

In a separate filing, the landowners suing both companies likewise voiced their opposition to the railroad's motion for interlocutory appeal that same day.

"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.

Both Kinder Morgan and the landowners claimed resolving the issues in Union Pacific's favor would not terminate the litigation because Judge Selna's order concerned only Union Pacific's counterclaims, not the landowners' claims, according to Union Pacific.

But the railroad shot back Monday that Kinder Morgan and the landowners had previously acknowledged the issues were dispositive and that its counterclaims for declaratory judgment and quiet title are "mirror images" of the same claims in the complaint.

The consolidated suit is 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.

Representatives for the parties did not respond immediately 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, Andrew Carpenter, 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 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.

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 Stan Parker, Joyce Hanson, Patrick Boyle and Dani Kass. Editing by Emily Kokoll.