

Union Pacific Wants Land-Use Questions Sent To 9th Circ.

By Joyce Hanson

Law360, New York (June 21, 2016, 1:53 PM ET) -- Union Pacific Railroad Co. has asked a California federal court to allow it to bring before the Ninth Circuit two questions of law concerning its rights under 19th-century railroad land grant statutes as it fights a group of consolidated lawsuits against the railroad and petroleum pipeline company Kinder Morgan.

The railroad on Friday asked for an interlocutory appeal to the circuit court after it was dissatisfied with a June 7 ruling on the two questions by U.S. District Court Judge James V. Selna. His order acknowledged that the relevant precedents are "in some tension," and that its conclusions are inconsistent with longstanding views of the U.S. Department of the Interior, Union Pacific said in its motion requesting both an interlocutory appeal and an invitation for the views of the United States.

"A decision from the Ninth Circuit in Union Pacific's favor would materially affect the outcome in this putative class action, which otherwise threatens to consume the resources of the parties and the court for several years before a final judgment on the merits," Union Pacific said.

Union Pacific asked the court to amend its June 7 order to include certification language addressing the questions of: whether a railroad may authorize non-extractive uses of the subsurface of rights of way granted under pre-1871 congressional acts without showing that such uses further a railroad purpose, and whether a petroleum pipeline may serve a railroad purpose when it annually transports millions of gallons of fuel owned by the railroad to private terminals in order to power the railroad's own locomotives, thus reducing railroad operating costs.

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.

Union Pacific in its request for an interlocutory appeal said the district court's order suggests that pipeline operators such as Kinder Morgan may lack the authority to manage the subsurface infrastructure, that "obtaining approval for critical future infrastructure projects may be impossible, and that the United States and individual landowners may have responsibility ... for railroad property, which they did not expect and may have little practical ability to avoid."

The railroad therefore urged the court to allow the interlocutory appeal in order to avoid such an

unintended outcome.

Separately, Kinder Morgan on March 4 asked the California federal court to declare that it owns the easement rights to run its pipeline underground in a community where residents contend they own the land and should be paid for its subsurface use. Kinder Morgan said that it has subsurface rights for pieces of property in San Bernardino County that are claimed by two sets of plaintiffs: Martin and Susan Wells and Sandra L. Hinshaw, who represent the estates of family members.

The company, which transports natural gas, refined petroleum products, crude oil and carbon dioxide through pipelines around the country, said the families should have known for many years that Kinder Morgan claimed the rights to run its pipes under the properties. It said it operates a public awareness campaign that includes targeted mailings to households and businesses along the pipeline, including information about how to find the precise location of a pipeline and how to contact the company. It said it sent those mailings in 2006, 2008, 2010, 2012 and 2014.

The company asked the court to rule that Wells and Hinshaw have no rights to the land below the surface along the right of way, that it has the right to use the easement for its pipeline, and that it doesn't have to pay the families for doing so.

In December, Union Pacific asked the court to dismiss the suits filed by several families, saying their claim for compensation "hinges on several faulty theories." Union Pacific had said the landowners can't show where their lines of ownership fall within the right of way that Congress gave the railroad in the 1800s, and can't show they lost any money by the construction of a petroleum pipeline under that right of way.

Attorneys for Union Pacific and the Wells family did not immediately respond to requests for comment.

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 Wells family is represented by Norman E. Siegel, Barrett J. Vahle, Ethan M. Lange and Jason S. Hartley of Stueve Siegel Hanson LLP, Steven M. Wald, and Thomas S. Stewart of Stewart Walk and McCulley LLC. Hinshaw is represented by Norman E. Siegel.

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 Patrick Boyle, Dani Kass and Jacob Batchelor. Editing by Emily Kokoll.