

No. 16-80101

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE SFPP RIGHTS-OF-WAY CLAIMS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
JAMES V. SELNA, DISTRICT JUDGE • CASE No. SACV 8:15-00718 JVS (DFMx)

**AMICUS CURIAE BRIEF OF
CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF
UNION PACIFIC'S PETITION FOR
PERMISSION TO APPEAL**

HORVITZ & LEVY LLP
JEREMY B. ROSEN
ERIC S. BOORSTIN
BUSINESS ARTS PLAZA
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800

**U.S. CHAMBER
LITIGATION CENTER, INC.**
KATE COMERFORD TODD
SHELDON GILBERT
1615 H STREET, NW
WASHINGTON, D.C. 20062
(202) 463-5337

**ATTORNEYS FOR AMICUS CURIAE
CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amicus curiae Chamber of Commerce of the United States of America of the following corporate interests:

- a. Parent companies of the corporation or entity:

None.

- b. Any publicly held company that owns ten percent or more of the corporation or entity:

None.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community.

The U.S. Chamber's membership includes railroad companies that lease subsurface rights of way as well as businesses that lease and sublease such rights, including utilities, pipeline companies and telecommunications companies. The U.S. Chamber believes that the decision below will generate significant uncertainty for businesses that both grant and use railroad rights of way. These business relationships contribute to the economic wellbeing of the country by facilitating the intra and interstate delivery of fuel and transmission of information. The uncertainty generated by the lower court's decision threatens to disrupt longstanding energy and telecommunications investments, and to undermine the viability of in-progress and future projects.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For over sixty years, Union Pacific Railroad Company has granted subsurface easements on its rights of way for pipelines conveying oil, gas, and other petroleum products across the western United States. Although there have been numerous lawsuits and appeals involving the easement agreements between Union Pacific and the pipeline companies, there was never any suggestion that Union Pacific could not permit its rights of way to be used in such a manner until the California Court of Appeal addressed the issue sua sponte in *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc. (SFPP)*, 231 Cal. App. 4th 134, 144 (2014). Indeed, the relevant guidelines published by the United States Department of Interior

and Bureau of Land Management confirm that Union Pacific has been well within its rights to lease its subsurface rights of way for pipelines under the General Railroad Right-of-Way Act of March 3, 1875 (1875 Act) and Congress's earlier land grant statutes (the pre-1871 Acts). Union Pacific's Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) (Pet.) 13-14, 17, 19. But contrary to the federal agency view, the California Court of Appeal held Union Pacific may not grant easements for pipelines on its rights of way by virtue of the federal government's initial conveyance of those rights of way to Union Pacific. *SFPP*, 231 Cal. App. 4th at 177-78.

Here, the district court similarly discounted the persuasive views of the federal agency charged with overseeing public land and dismissed Union Pacific's counterclaim that the federal land grants permitted it to lease the subsurface of its Congressionally-granted rights of way for a pipeline. As we explain in greater detail below, interlocutory review by this Court is essential to ensure the predictable recognition of property rights and enforcement of contracts governing the use of railroad subsurface rights of way by pipeline and fiber optic cable companies that provide essential services for our economy.

ARGUMENT

- A. **An immediate appeal should be permitted because the district court’s decision will disrupt the predictability of contractual and property rights involving railroad rights of way.**

It is widely acknowledged that “contractual or property rights” are “matters in which predictability and stability are of prime importance.” *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994); *see Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 98 (1995) (acknowledging “the importance of predictability in assuring commercial stability in contractual dealings”). “Legal certainty and predictability . . . serve the instrumentalist goal of promoting market transactions—in a capitalistic society, the primary means of allocating resources from less to more valuable uses.” David Frisch, *Commercial Law’s Complexity*, 18 Geo. Mason L. Rev. 245, 262 (2011).

The United States Supreme Court recently emphasized “the special need for certainty and predictability where land titles are concerned” in a case construing the rights granted to a railroad in its rights of way. *Marvin M. Brandt Revocable Tr. v. United States*, 134 S. Ct. 1257, 1268 (2014); *see also Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979)

(the Supreme Court has “traditionally recognized the special need for certainty and predictability where land titles are concerned.”).

Until recently, there was no serious dispute that railroad companies could grant subsurface easements along their Congressionally-granted rights of way. “[F]or over a century, the railroads have been granting rights to utility companies to string cables and run pipelines in their corridors. Ever since the telegraph was invented, rails and wires have moved together across the country, the railroad dependant on the telegraph for communication to upcoming stations and switches, and the telegraph dependant on the railroad’s corridor for placement of its poles and wires.” Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351, 359 (2000). “For the most part, utility lines, sewer lines, oil and gas pipelines, and drainage systems have all coexisted peacefully in railroad corridors with remarkably little litigation over property rights.” *Id.* at 363. In recent years, fiber optic cables have also been installed in railroad rights of way. See James W. Ely & John W. Bruce, *The Law of Easements and Licenses in Land* § 8:5 (2014).

The district court's decision here, combined with the California Court of Appeal's decision in *SFPP* which the district court endorsed, upsets these settled expectations regarding the title to railroad rights of way by holding that railroads cannot enter into contracts for the use of their rights of way, in direct conflict with the longstanding views of the United States Department of the Interior that railroads enjoy exclusive rights to both the surface and subsurface of the rights of way. *See* Office of the Solicitor, Decisions of the U.S. Dep't of the Interior: Memorandum M-36964, 96 I.D. 439, 446 n.7, 450 (1989); Memorandum M-37025, U.S. Dep't of Interior, at 12 n.26 (Nov. 4, 2011), <http://goo.gl/uZ7P0f>; U.S. Dep't of Interior, Bureau of Land Mgmt., Instruction Memorandum No. 2014-122, § E (Aug. 11, 2014), <http://goo.gl/M0GrGR>; *see also* Pet. 13-14, 17, 19. American businesses depend on the predictable enforcement of contracts and property rights, especially those relating to title to land. Immediate review of the district court's decision is necessary to ensure that railroad rights of way are subject to uniform interpretation.

B. An immediate appeal should be permitted to protect the multitude of benefits derived from infrastructure within the railroad rights of way.

1. Railroad rights of way are the only practical location for many pipelines and other infrastructure.

The contractual and property rights at issue here are uniquely important to the local, state, and national economy because railroad rights of way are vital to the country's network of oil and natural gas pipelines, as well as to the telecommunications industry. The district court's decision threatens to undermine the multitude of benefits that pipeline and telecommunication easements along railroad rights of way have historically provided and promise to deliver in the future.

Railroad rights of way often provide the ideal location, and sometimes the only suitable location, for petroleum products pipelines or telecommunications cable because they offer already existing linear routes over great distances and varying topography. See Jane Tanner, *New Life for Old Railroads; What Better Place to Lay Miles of Fiber Optic Cable*, N. Y. Times (May 6, 2000), <http://goo.gl/1yCK1O> (Railroad rights of way are particularly "good paths for telecommunications cable because they offer cleared, linear routes").

Using existing railroad rights of way also provide a practical solution to securing the right to lay the pipelines or telecommunications cable because the company making the massive infrastructure investment is only required to negotiate with one landowner (the railroad) as opposed to potentially thousands of small adjoining landowners. Jeffery M. Heftman, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. Ill. L. Rev. 1401, 1401 (2002) (“The use of existing corridors avoided the expense of high transaction costs which would accompany negotiation with countless individual landowners.”). Negotiating with individual landowners is not a viable option to assemble the many-miles-long, uninterrupted rights required for this infrastructure because a single holdout anywhere along the route might render the investment worthless. See Thomas W. Merrill, *Private property and public rights*, in Research Handbook on the Economics of Property Law (Kenneth Ayotte & Henry E. Smith eds., 2011) 75, 93-94 (assembly problems explain why projects requiring “a long corridor of access rights, such as the right of way for a railroad, pipeline, or highway” often use preexisting corridors). Eminent domain is also not sufficient because it depends on the will of various governments along the route, and imposes substantial

administrative costs including locating the owner of each parcel and litigating against them. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 77 (1986).

Because of the physical and legal advantages of locating critical infrastructure within railroad rights of way, “[f]or many years the railroad [corridor] has played a vital role in many areas including: transportation, communication, gas and electric and many other public needs.” *Hynek v. MCI World Commc’ns, Inc.*, 202 F. Supp. 2d 831, 838 (N.D. Ind. 2002). The myriad of benefits that the public enjoys from these services “lend further weight to an expansive definition” of a railroad’s rights to convey easements within its rights of way. *Id.*

2. Pipelines provide significant economic benefits to the country, and continued growth requires additional pipeline capacity.

Pipelines in railroad rights of way have benefitted and will benefit the economy in much the same way that railroads themselves benefit the economy. Both railroads and pipelines serve the public by efficiently transporting materials to where they are needed. Thus, the third parties who lease pipeline rights of way from railroads “satisfy[] similar purposes to those which the railroad typically serves, albeit in a different manner.”

Kayla L. Thayer, *The 1875 General Railway Right of Way Act and Marvin M. Brandt Revocable Trust v. United States: Is This the End of the Line?*, 47 U. Pac. L. Rev. 75, 100 (2015).

While railroads and pipelines can be viewed as alternative means to move materials, they have enjoyed a mutually beneficial relationship. Indeed, the development of oil pipelines improved the operation of railroads because the pipelines “increased the quantities of crude oil that could reach railroads, which would then carry the oil longer distances.” Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 Iowa L. Rev. 947, 955 n.22 (2014) (citing George S. Wolbert, Jr., U.S. Oil Pipe Lines 3 (1979)).

“Although rail served an important role in transporting petroleum in the early and middle parts of the 20th century, pipelines have dominated petroleum and [natural gas liquids] transport in recent decades.” Klass & Meinhardt, *supra*, at 969. “In 2013, pipelines carried nearly 15 billion barrels of crude oil, petroleum products and natural gas liquids to their destinations reliably and safely more than 99.999 percent of the time.” Am. Petroleum Inst., *Infrastructure—The Essential Link to a Secure Energy Future*, Energy Tomorrow 25 (2015), <http://goo.gl/eIGcDO>.

It is especially important to protect the viability of the existing pipeline infrastructure along railroad rights of way, and the ability to efficiently build additional infrastructure along railroad rights of way, because economic growth requires a substantial increase in pipeline capacity. “With production soaring and refineries and consumers located far from producing wells in North Dakota and new shale plays in Texas, the location of existing infrastructure is insufficient to move projected volumes of crude oil and petroleum products without also flaring and wasting natural gas and associated hydrocarbons produced with the crude oil.” Klass & Meinhardt, *supra*, at 969-70. “Though nearly 12,000 miles of new crude oil and 11,000 miles of new natural gas liquids pipelines have been constructed during the last 10 years, much more is needed to transport the high volumes of crude oil, natural gas and natural gas liquids being produced to refineries and chemicals plants where they can be made into the fuels and raw materials consumers rely on each day.” *Energy Tomorrow*, *supra*, at 25 (2015) (citation omitted).

3. The use of railroad rights of way for fiber optic cables is also essential to the economy.

Just as it is important to avoid jeopardizing the pipelines underlying the railroad rights of way, it is also important to avoid jeopardizing the telecommunications cables. *See Wright & Hester, supra*, at 353 (“One quick and easy solution [to minimize societal disruptions from installing cable] has been to locate fiber-optic cables in railroad corridors where disruptions and licensing costs are minimal”).

“Reliable high-speed transmission of telecommunications is more than a convenience to our modern society—it is essential to the transaction of public and private business including national defense.” *Williams Telecomm. Co. v. Gragg*, 242 Kan. 675, 682, 750 P.2d 398, 403 (1988). “The invention of fiber-optic cable has resulted in a myriad of benefits for consumers. In addition to improving the quality of long-distance and cellular communication, fiber-optic technology has provided more efficient Internet access and is leading to significant advances in the visual entertainment industry.” Jill K. Pearson, Note, *Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology*, 84 Minn. L. Rev. 1769, 1769 (2000) (citations omitted). Schools, fire departments, police

departments, and numerous small businesses across the country also benefit from the expanded use of railroad rights of way for broadband telecommunications and Internet connectivity. Nels Ackerson, *Right-of-way Rights, Wrongs and Remedies: Status Report, Emerging Issues, and Opportunities*, 8 Drake J. Agric. L. 177, 194 (2003).

“Historically, railway and telegraph companies often formed symbiotic alliances because of the numerous benefits the arrangement afforded to both industries. Many of the same benefits enjoyed by the telegraph companies by association with the railroads, including availability of the rights of way, routing considerations, relative ease of acquisition, security, accessibility, and safety, were found to be of equal or greater value to modern long distance companies, and it was determined that fiber-optic cables would be placed within railroad rights of way. As one study concluded, ‘Railroad rights of way provided the foundation for the earliest nation-wide telecommunications service, the telegraph; so why not the latest?’ ” *Int’l Paper Co. v. MCI Worldcom Network Servs., Inc.*, 202 F. Supp. 2d 895, 898 (W.D. Ark. 2002); *see also* Wright & Hester, *supra*, at 463 [“If a horse and buggy trail can be converted into a road for

automobile traffic, then a fiber-optic cable ought to be permitted in a rail corridor where the mail was originally carried from town to town”].)

* * *

In sum, the district court’s decision narrowly construing railroad rights of way threatens their continuing use for pipelines and telecommunications, each of which deliver tremendous economic and social benefits consistent with the original rationale for Congress to grant the rights. An immediate appeal therefore should be permitted to help protect the present and future development of the local, state, and national economy.

CONCLUSION

For the reasons set forth in Union Pacific's petition and this amicus curiae brief, this Court should certify this case for immediate appeal pursuant to 28 U.S.C. § 1292(b).

August 15, 2016

HORVITZ & LEVY LLP
JEREMY B. ROSEN
ERIC S. BOORSTIN
U.S. CHAMBER
LITIGATION CENTER, INC.
KATE COMERFORD TODD
SHELDON GILBERT

By: s/*Eric S. Boorstin*
Eric S. Boorstin

Attorneys for Amicus Curiae
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

**CERTIFICATION OF COMPLIANCE WITH
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August 15, 2016
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, I electronically filed the foregoing **AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF UNION PACIFIC'S PETITION FOR PERMISSION TO APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Victoria Beebe