CASE NO. [ ]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re SFPP Rights-of-Way Claims

On Appeal from the United States District Court for the
Central District of California
Civil Case No. 8:15-cv-00718-JVS-DFMx

UNION PACIFIC'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner-Defendant Union Pacific Railroad Company states that it is a wholly owned subsidiary of Union Pacific Corporation.

Respectfully submitted,

Dated: August 8, 2016

By: /s/ J. Scott Ballenger
James Scott Ballenger
Counsel for Petitioner-Defendant
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Petitioner-Defendant Union Pacific Railroad Company ("Union Pacific") respectfully seeks leave to file an interlocutory appeal from an Order of the District Court, originally dated June 7, 2016 (Doc. 175, attached at A1-15), which was amended by the District Court on July 28, 2016 to certify such Order for interlocutory review pursuant to 28 U.S.C. § 1292(b) (Doc. 198, attached at A16-23). This petition is timely filed within 10 days of entry of that certification.

I. INTRODUCTION

The district court certified for appeal "two pure questions of law" that raise "novel questions of first impression" on issues of national importance. A18, 21. These questions turn on the proper interpretation of the 19th century Congressional Acts that granted rights of way and land for the construction of the transcontinental railroads. Congress passed these Acts to encourage settlement and development of the West. Consistent with that purpose, these rights of way from the beginning have been a common location for "utility lines, sewer lines, oil and gas pipelines, and drainage systems," which occupy the subsurface of "nearly every railroad corridor in the country."[1] Today, these historic rights of way are often the *only* practical location for economically critical long-distance infrastructure projects.

That critical infrastructure is now at risk. Two years ago, a California

[1] 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, 362-63, 411 & n.267 (2000) ("Wright").

appellate court destabilized settled property rights by suggesting, *sua sponte*, that much existing infrastructure in Congressional Acts rights of way may be unlawful. *See Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*, 180 Cal. Rptr. 3d 173 (Ct. App. 2014) ("*SFPP*"). This putative class action and several others quickly followed. The plaintiffs below seek damages stretching back six decades related to a petroleum products pipeline that runs for hundreds of miles in Union Pacific's rights of way in six Western states. In dismissing Union Pacific's principal counterclaims, the district court held, as a matter of law, that Union Pacific was not authorized to lease the subsurface of its Congressional Act rights of way for the pipeline—regardless whether the land was granted in fee or as an easement, and even if Union Pacific uses the pipeline to supply fuel for its locomotives.

In certifying this appeal, the district court recognized that there are "substantial grounds for difference of opinion" as to its interpretation of the property rights granted under Congress's earlier land grant statutes, often categorized as the "pre-1871 Acts," and its limitation on what may constitute a "railroad purpose" under those same statutes or the later 1875 General Railroad Right-of-Way Act. A18-21. The district court agreed that "[a] reasonable judge could conclude" that its holdings are inconsistent with Supreme Court precedent stretching from *Grand Trunk Railroad Co. v. Richardson*, 91 U.S. 454 (1876), to *Brandt Trust v. United States*, 134 S. Ct. 1257 (2014), as well as with recent

decisions of federal courts that have permitted fiber optic cables within the rights of way when part of the cable's capacity is used for railroad operations. A20-21. The district court also acknowledged that its holdings are contrary to the considered views of the Department of the Interior ("DOI"), the expert federal agency charged with managing public lands. A8-9.

In addition, the district court recognized that the case below "is at an early stage of litigation and resolution of the issues on which Union Pacific seeks appeal would largely resolve the case." A21. The same can be said for similar putative class actions pending in Arizona, Nevada, and New Mexico.[2] Section 1292(b) was designed for exactly these circumstances, and the Supreme Court repeatedly has emphasized the "special need for certainty and predictability" as to property rights in railroad rights of way. *Brandt Trust*, 134 S. Ct. at 1268 (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979)). This Court's review is urgently needed to bring stability to this economically sensitive area of the law and to head off years of expensive and unproductive class action litigation.

II. QUESTIONS ON APPEAL

The district court certified two "pure questions of law" for review: (1) whether Union Pacific "cannot authorize a use of the subsurface underneath the

[2] *Valenzuela et al. v. Union Pac. R.R. Co. et al.*, No. 2:15-cv-01092-DGC (D. Ariz.); *N.M. Smelter & Refining, Inc. et al. v. Union Pac. R.R. Co. et al.*, No. 2:15-cv-00514-JCH-GJF (D.N.M.); *Tinder-Howell v. Union Pac. R.R. Co. et al.*, No. 3:15-cv-00317-LRH-VPC (D. Nev.).

railroad right of way," including in pre-1871 Acts right of way, "unless the use serves a 'railroad purpose'"; and (2) whether Union Pacific "as a matter of law, could not demonstrate a 'railroad purpose' in granting a subsurface easement to a third party to operate a commercial petroleum pipeline through the subsurface of the rights of way." A18.

III. HISTORICAL BACKGROUND

In the 1950s, the then-parent of the Southern Pacific railroad created a subsidiary to construct and operate a petroleum products pipeline in the railroad's rights of way. Using easements from the railroad, that subsidiary ultimately installed some 1,800 miles of pipeline in operating rights of way across Arizona, California, Nevada, New Mexico, Oregon, and Texas. The railroad and the pipeline remained affiliated for the next three decades.

In the 1980s, when the Southern Pacific's parent proposed to merge with the owner of the Santa Fe railroad, the Interstate Commerce Commission required that the Southern Pacific railroad assets be held apart while the Commission reviewed the transaction, which it ultimately disapproved. The pipeline subsidiary was not subject to Commission jurisdiction, however, and was immediately acquired by the Santa Fe's parent. After the merger failed, the railroad assets were sold to a third-party, and the railroad and pipeline ceased to be corporate affiliates. They later signed an amended and restated agreement under which the pipeline agreed to pay

rent for its easements, to be adjusted every 10 years via a judicial proceeding. In the most recent such proceeding, the California Court of Appeal held *sua sponte* that the Congressional Acts, by themselves, did not give Union Pacific (as successor to the Southern Pacific's rights, after their 1996 merger) sufficient rights to collect rent from the pipeline. *See SFPP*, 180 Cal. Rptr. 3d at 208.

This class action was filed on behalf of a putative class of landowners who claim, among other things, that the *SFPP* decision implies that UP does not own the subsurface under much of its rights of way where the pipeline is located and that the pipeline is trespassing on subsurface property that the class members now claim to own. Union Pacific counterclaimed for a declaratory judgment and quiet title asserting that it has the right, under both the pre-1871 Acts and the 1875 Act, to authorize the pipeline.

The district court granted a motion to dismiss those counterclaims, holding (1) that Union Pacific cannot authorize use of the subsurface underneath pre-1871 Act and 1875 Act railroad right of way, unless the use serves a "railroad purpose;" and (2) that Union Pacific, as a matter of law, could not demonstrate a "railroad purpose" in granting easements to a third-party to operate a petroleum pipeline in the Congressional Act rights of way. A9-14. Union Pacific asked for leave to amend its counterclaim to allege with more specificity that the pipeline originally was constructed by a railroad affiliate and that part of its capacity always has been

used to transport millions of gallons of diesel fuel a year, purchased by the railroad from distant refineries, to dedicated railroad facilities along the rights of way for use in its locomotives, saving the railroad millions of dollars a year in operating expenses. *See* A22. The district court denied leave to amend as futile, holding that those facts would not alter its conclusion that the pipeline cannot serve a railroad purpose as a matter of law. A13, 22.

IV. RELIEF SOUGHT

If this petition is granted, Union Pacific will ask the Court to hold that the pre-1871 Congressional Acts granted the railroad property in fee and permit the railroad to authorize any compatible use in the right of way, without requiring that Union Pacific show that the use serves a "railroad purpose," so long as the right of way is used to operate a railroad. Union Pacific also will ask the Court to hold that Union Pacific's allegations about the pipeline's specific use to transport fuel for the railroad's operation, if proved, could establish a "railroad purpose" for the pipeline easements under the pre-1871 Acts (if required) and/or the 1875 Act, regardless whether the pipeline is operated by a commercial third-party.

V. REASONS WHY THE APPEAL SHOULD BE ALLOWED

After certification by the district court, § 1292(b) permits this Court to grant an interlocutory appeal concerning (1) controlling questions of law that (2) offer substantial grounds for a difference of opinion, when (3) an immediate appeal may

materially advance the ultimate termination of the litigation. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687-88 (9th Cir. 2011). Those criteria are amply satisfied here, and the national significance of the issues strongly supports review.

A. Both Certified Issues Present Controlling Questions Of Law

As the district court determined, both certified questions present "pure questions of law" concerning the interpretation of federal statutes. A18. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996).

As the district court recognized, if this Court reversed the district court on the first question of law and held that pre-1871 Act right of way was granted in fee and does not require a "railroad purpose," then "that would almost certainly defeat most of the Plaintiffs' case because their case is based on the theory expressed in [*SFPP*]." A18. Likewise, if this Court reversed the district court on the second question, then Union Pacific would have the opportunity to present evidence as to

the "railroad purpose" of the pipeline easements in the rights of way. *Id.*

B. There Are Substantial Grounds For Difference Of Opinion As To Both Certified Questions

Substantial grounds for difference of opinion exist "where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." *Reese*, 643 F.3d at 688. The district court correctly recognized that "reasonable judges may differ with this Court's conclusions" on the "novel questions of first impression" certified for review. A20-21.

1. Substantial Grounds Exist To Conclude That No "Railroad Purpose" Is Necessary In Pre-1871 Right of Way

The district court interpreted Congress' grant of the pre-1871 right of way "for the construction of [the] railroad and telegraph line" as imposing a present use restriction, analogous to the restrictions on an easement. A9 n.4 (alteration in original) (quoting Act of July 1, 1862 ch. 120 § 2, 12 Stat. 489, 491). That reading is inconsistent with more than a century of precedent holding instead that that those Acts granted the land in fee, subject only to a reversionary interest in the United States if the land is no longer used to operate a railroad. It is also inconsistent with the Supreme Court's decision in *Brandt Trust* just two years ago, and with the long-settled views of DOI.

Prior to 1871, Congress granted the railroads public lands for the right of way itself, and half of the public lands on either side in a checkerboard pattern—

which the railroads could sell to finance their construction and operation. *See Brandt Trust*, 134 S. Ct. at 1261; *Leo Sheep*, 440 U.S. at 672-73. Very early on, the Supreme Court explained that a "right of way" granted by statute may refer either to a "right of passage" or to "the land itself," and that the pre-1871 Acts conveyed a "corporeal" interest in "the land itself." *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 181-82 (1898). The Court held that these Acts granted a fee "just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271-72 (1903). "In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Id.* at 271. The Court later explained that "[w]hen Congress made outright grants to a railroad of alternate sections of public lands along the right of way," as it did in the pre-1871 Acts, "there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." *Great N. Ry. Co. v. United States*, 315 U.S. 262, 278 (1942).

The district court reasoned that the railroad's rights in pre-1871 right of way were limited in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), which held that pre-1871 Acts grants did not convey the right to extract oil and minerals from beneath the right of way. The *Union Pacific* Court stated that "whatever may be the nature of [the railroad]'s interest in the right of way, drilling

for oil on or under it is not a railroad purpose within the meaning of § 2 of [the Pacific Railway Act of 1862].” *Id.* at 114. The district court interpreted that language to mean that *every* use of the right of way must serve a railroad purpose. A7-8. In addition to *SFPP*, the court relied on older 8th and 10th Circuit decisions in agreeing that *Union Pacific* “severely cut back” on the *Townsend* holding. *See Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 697-98 (8th Cir. 1980); *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 606 F.2d 934, 936 (10th Cir. 1979) (the “*ETSI”* decisions); *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967). Those cases reasoned that *Townsend* employed “‘[t]he concept of “limited fee”’” only because courts at that time thought that an easement could not confer exclusive possession, but that it now made sense instead to think of *all* railroad right of way as a single, unique form of possessory “‘easement’” that “did not convey title to the servient estate.” *ETSI*, 606 F.2d at 937 (citation omitted).

There are, however, substantial reasons to conclude that *Union Pacific* should not be read so broadly. *First*, the 1862 Act at issue in *Union Pacific* expressly reserved mineral rights to the United States, *see* 353 U.S. at 119, and the Court went out of its way to disclaim any broader holding. Since the railroad could not drill for oil “whatever may be the nature of [its] interest in the right of way,” *id.* at 114, the Court explained that it would “not stop to examine” the many prior cases describing that interest as a fee, *id.* at 118-19. Like the *ETSI* decisions and

SFPP, the district court concluded that the Supreme Court's reasoning in *Union Pacific* nonetheless undermined or impliedly overruled the "limited fee" cases. But that sort of speculation is prohibited by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), in which the Supreme Court held (a decade *after* the *ETSI* decisions) that the lower courts always must "leav[e] to this Court the prerogative of overruling its own decisions," even when they "appear[] to rest on reasons rejected in some other line of decisions." The district court reasoned that "[l]easing use of the subsurface easement of the right of way to a third party for operation of a pipeline is not so dissimilar from drilling for oil and gas" as to fall outside the *Union Pacific* holding. A13. However, ordinary property law principles reject that leap. Even when mineral rights are reserved, the "surface estate" includes all non-extractive *uses* of the property—including the subsurface—and even ownership of shallow minerals.[3]

*Second***,** the Supreme Court squarely rejected the basic premise of the *ETSI* decisions two years ago. In *Brandt Trust*, the Supreme Court held that the 1875

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[3] *See, e.g.*, Richard R. Powell, *Powell on Real Property* § 63.06[2] (online ed. 2016) (The "'[s]urface' is defined as the entire estate, including the subterranean estate, other than the severed minerals."); *Surface Interest*, Black's Law Dictionary (10th ed. 2014) (defining "surface interest" as "[e]very right in real property other than the mineral interest"); *Clinchfield Coal Corp. v. Comptom*, 139 S.E. 308, 312 (Va. 1927) ("[s]urface" estate includes "whatever of earth, soil, land, or waters which lies above" a mineral deposit); *Reed v. Wylie*, 597 S.W.2d 743, 748 (Tex. 1980) (mineral deposit "within 200 feet of the surface" is a part of the surface estate "as a matter of law").

Act granted only easements. But the entire foundation of the Court's reasoning was that the 1875 Act reflected a profound "shift in congressional policy" and "granted a fundamentally different interest in the rights of way than did the predecessor statutes." 134 S. Ct. at 1264-66. The Court squarely relied on *Townsend*'s holding that the pre-1871 Acts granted a "limited fee," and recognized the distinction between those fees and the "easements" granted after 1875 as the "very premise" of its earlier holding in *Great Northern*, which the Court refused to reconsider. *Id.* at 1266. Nothing in *Brandt Trust* supports the *ETSI* view that the "limited fee" holding of *Townsend* was undermined by *Union Pacific*, or that all railroad right of way is basically the same. To the contrary, the continued vitality of *Townsend*, and the Court's conclusion that rights granted by the pre-1871 Acts and the 1875 Act are "fundamentally different," were at the heart of the Court's holding. *Id.* The Court cited *Union Pacific* only once, and only for the point "that, in the period *after* 1871, 'only an easement for railroad purposes was granted.'" *Id.* at 1265 (emphasis added) (citation omitted). The district court's holding that Union Pacific's rights "are the same in this case regardless of which act(s) granted … its railroad right of way," A4, is flatly inconsistent with *Brandt Trust*.

The district court also reasoned that "fee" ownership does not necessarily establish that Union Pacific has rights to use the subsurface. A8. But Congress legislates against the backdrop of the common law, and "[t]he normal rule of

statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986) (citations omitted). *Brandt Trust* illustrates that principle vividly. After deciding that the 1875 Act granted only easements, the Court held that "[t]he essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law" and that "[t]hose basic common law principles resolve this case." 134 S. Ct. at 1265-66. The essential features of a fee interest are similarly well-settled. A fee conveys *all* rights not clearly reserved by the grantor. Powell, *supra,* § 81A.05[3][b][ii]. The Supreme Court explained in *Railroad Co. v. Baldwin* that the pre-1871 Acts give "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed." 103 U.S. 426, 429 (1881).

*Third***,** the district court's reasoning is inconsistent with the considered views of the United States. DOI concluded in 1899 that the pre-1871 Acts conveyed a "qualified fee," vesting the railroad with "complete title" for as long as it operates a railroad. *Melder v. White*, 28 Pub. Lands Dec. 412, 418-19 (DOI 1899). In 1989, DOI issued a formal Opinion confirming that those "fee interest[s] inherently encompass[] surface *and* subsurface rights," and entitle the railroad to "authorize

third parties to utilize its right-[of]-way for activities and structures not inconsistent with the grantee's operation of a railroad." M-36964, 96 Interior Dec. 439 (DOI 1989), 1989 WL 43834) at 446 n.7, 450 (collecting cases). DOI reached these conclusions after considering a large body of federal case law, including *Union Pacific* and the *ETSI* decisions.

In a 2011 Opinion[4] DOI withdrew the 1989 Opinion's conclusion that the 1875 Act *also* granted fee interests—accurately anticipating *Brandt Trust*. But it left the other conclusions of the 1989 Opinion intact. Notably, the 2011 Opinion directed the Bureau of Land Management to establish a process to review current and proposed activities "within 1875 Act ROWs" to ensure that they "derive from or further a railroad purpose." 2011 Opinion at 13. No such review was required for pre-1871 Acts right of way, which DOI does not even regard as "public lands" subject to its jurisdiction. *Id.* at 4-6. The district court's suggestion that there is any ambiguity in DOI's views on this issue is therefore incorrect. A9 n.5.

DOI is charged with managing "the use, occupancy, and development of the public lands," 43 U.S.C. § 1732(b), and its views are entitled to significant weight. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Great N.*, 315 U.S. at 275-76 (deferring to DOI's view that 1875 Act grants are easements). The district court declared the views of the expert federal agency to be "unpersuasive." A9. It

[4] https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37025.pdf.

also agreed, however, that there are substantial grounds for difference of opinion.

2. Substantial Grounds Exist To Conclude That The Pipeline Easement Can Serve A "Railroad Purpose"

The district court held that Union Pacific, as a matter of law, cannot show that the pipeline easements serve a "railroad purpose." A12, 22. As the district court also recognized, there are substantial grounds for disagreement concerning this holding, too.

Indeed, it is hard to understand what *would* serve a "railroad purpose" if a pipeline constructed by a railroad affiliate that transports millions of gallons of fuel owned by the railroad to private terminals specifically for use in its locomotives does not. A13, 20. The railroad runs on diesel fuel. Union Pacific is the second-largest consumer of diesel fuel in the United States, second only to the U.S. Navy. That was not always the case. The district court quoted the language of the 1862 Act granting railroads the right to build ancillary structures specifically including "water stations." A9 n.4. Water stations were then essential along railroad lines because steam engines burned coal to turn water into steam. Coal and water together were the equivalent of diesel fuel now. Water pipelines plainly served a railroad purpose in 1862 and were specifically authorized by the Acts; a diesel fuel pipeline serves exactly the same function and railroad purpose today.

The district court concluded that the lease of the subsurface to a third party for private gain cannot serve a railroad purpose, "even if the pipeline … supplies

fuel for the railroad." A14. The district court noted that one of the oil wells at issue in the *Great Northern* case also supplied fuel to the railroad. But the holding of *Great Northern* (and *Union Pacific*) is that the oil and minerals under the right of way were reserved. Of course Union Pacific cannot take oil belonging to the United States; that does not imply that transporting fuel is not a railroad purpose.

As the district court also acknowledged, its conclusions are inconsistent with more than a century of precedent permitting third-party uses of rail corridors under the "incidental use" doctrine. A20-21. In *Grand Trunk Railroad*, for example, the Supreme Court approved of a railroad leasing its property for a sawmill and lumber shed. The Court recognized that the buildings served "the convenience of others" as well as the railroad's own purposes, and reasoned that since the railroad "might have put up the buildings, why might it not license others to do the same thing?" 91 U.S. at 468-49. More recently, a series of federal cases have approved leases for underground telecommunications cables, particularly when the railroad retained the right to use part of the cable's capacity. *See, e.g., Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226, 229-31 (W.D. Tex. 1990); *Int'l Paper v. MCI Worldcom Network*, 202 F. Supp. 2d 895, 903 (W.D. Ark. 2002).[5]

[5] Plaintiffs have pointed to one contrary decision, *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999 (S.D. Ind. 2005). But there the railroad was not using the cable at all, and "no argument has been made and nothing in the record before the court suggests that AT&T's cables in any way further a purpose of the railroad itself." *Id*. at 1021.

The district court dismissed this precedent as irrelevant because those cases interpreted traditional easements "for railroad purposes" granted under state law or by private conveyance, rather rights of way granted by federal statute. A21. Again, however, when Congress legislates against a common law backdrop, the usual presumption is that it *incorporates* traditional common law concepts. *Brandt Trust* holds forcefully that 1875 Act grants should be understood as ordinary easements to which the precedent cited applies.

DOI has explained that 1875 Act easements "allow[] a railroad to undertake, or authorize others to undertake, activities that have both railroad and commercial purposes," such as third-party communications lines, "commercial warehouses," power lines, and "bulk and retail oil facilities." 2011 Opinion at 2, 10-11 (collecting case law). DOI specifically endorsed the *MCI* holding, noting that although "MCI's line was primarily a commercial trunk line," the railroad's use of some telecommunications capacity would further a railroad purpose "in part." *Id.* at 6 n.11, 12. BLM's administrative process is built around those principles.

C. Immediate Appeal Will Materially Advance Termination Of The Litigation

As the district court recognized, "the case is at an early stage of litigation and resolution of the issues on which Union Pacific seeks appeal would largely

resolve the case." A21; *see also* A18.[6] Absent review, the district court and the parties face years of discovery and litigation over class certification and potentially other merits issues—to be followed by multiple appeals arising out of the various pending actions. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (recognizing that the Court may take into account "the impact that an appeal will have on other cases" in deciding whether to accept a certified appeal). Review now will substantially lighten, not burden, this Court's docket over time.

D. Significant Public Policy Interests Favor Review

In exercising its discretion, this Court should take account of the national public policy significance of these issues, and the importance of a timely and definitive resolution. The rights of way granted by the Congressional Acts cover tens of thousands of miles, crisscrossing the West and Midwest. "Multiple use of these corridors was the rule, not the exception, regardless of whether the railroads owned their corridor land in fee simple or possessed only an easement over the land," and "[f]or 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." Wright, *supra*, at 362-63. The

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[6] "Although technically the question of whether there is a controlling issue of law is distinct from the question of whether certification would materially advance the ultimate termination of the litigation, in practice the two questions are closely connected." *SEC v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000).

district court's decision suggests that pipelines, telecommunications providers, and utilities that own and rely on that critical infrastructure may be trespassing, upsetting settled expectations and fomenting unproductive litigation.

Looking ahead, the district court's decision could permanently impair the usefulness of rail corridors for new infrastructure projects. At a minimum, the transaction costs and strategic problems associated with negotiating easements from thousands of landowners would vastly complicate these projects. *See id.* at 420. Eminent domain is no solution—because of differences in local politics across thousands of miles, and because it cannot be used against government landowners or against the railroad itself, if the use would interfere with railroad operations. *See Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011). And since the United States will not be bound by these decisions, and has made clear that it disagrees, there will be no mechanism to obtain its approval for future projects on the pre-1871 rights of way that the government believes the railroads own in fee. BLM's administrative approval process is limited to the 1875 Act corridors that the United States believes it has an obligation to supervise, and the agency has made clear that it has no desire to assume broader responsibilities. [7] But

[7] *See* BLM Instruction Mem. No. 2014-122 (Aug. 11, 2014), http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2014/IM_2014-122.html. The entire point of the 1989 DOI Opinion was to reject the prior conclusion by an Assistant Solicitor of DOI, based on the *ETSI* decisions, that DOI must begin treating the subsoil on pre-1871 Act

no sensible private developer would proceed with a massive infrastructure project on land that the courts say may belong to the United States without the government's approval.

That would be a major loss because legacy rail corridors from the 19th century are often the most practical and inexpensive place to locate long-distance infrastructure. "[P]ipe and wire uses both bisect and run longitudinally along nearly every railroad corridor in the country." Wright, *supra*, at 411 n.267. The alternative is digging up fields, streets, and residential neighborhoods. The district court's decision fragments the rights to these corridors in a manner that will make them far less useful. It also raises the specter that adjacent landowners may bear unexpected legal responsibility under environmental, tax, or other laws.

If review is not granted, the law will remain in the present unsettled state for years as these cases wind their way through discovery and trial—and potentially much longer, if these cases are ultimately resolved on non-merits grounds such as a denial of class-certification. That uncertainty does not serve sound public policy.

VI. CONCLUSION

Union Pacific respectfully requests that the Court grant this petition.

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rights of way as "public land[]" that "come[s] within the operation of Title V of FLPMA." 1989 Opinion, 96 Inter. Dec. at 440. The 1989 Opinion disagreed, concluding that "while title is vested in the railroad, the land within the right-of-way, being privately owned, except for reserved minerals, is" not "public land[]" and is "not subject to the administrative jurisdiction of this Department." *Id.*

Respectfully submitted,

Dated: August 8, 2016

By: /s/ J. Scott Ballenger
James Scott Ballenger
Counsel for Petitioner-Defendant
Union Pacific Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 8, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on August 8, 2016, I served the foregoing on the interested parties in this action by sending true and correct copies via U.S. Mail pursuant to Fed. R. App. P. 25(c)(1) as follows:

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/s/ J. Scott Ballenger
James Scott Ballenger