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November 23, 2015

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**By Hand-Delivery**

Cynthia T. Brown  
 Chief, Section of Administration  
 Office of Proceedings  
 Surface Transportation Board  
 395 E Street, S.W.  
 Washington, D.C. 20423

ENTERED  
 Office of Proceedings  
 November 23, 2015  
 Part of  
 Public Record

Re: Petition of Union Pacific Railroad Company for Declaratory Order  
 Finance Docket No. 35960

Dear Ms. Brown:

Union Pacific Railroad Company (“Union Pacific”) respectfully submits this letter to correct the record in the above-referenced proceeding. The Reply in Opposition to Petition for Declaratory Order filed by SFPP, L.P. on November 13, 2015 (“SFPP Reply”) misstates several facts that may be important to the Board’s analysis, and correcting the record as to those facts will aid the Board’s resolution of a Petition that many stakeholders have urged it to grant.<sup>1</sup>

First, SFPP asserts that “there is no reason to believe that SFPP would refuse to relocate” its pipeline to accommodate rail construction and that it is “speculative” to assume otherwise. SFPP Reply at 2. This claim cannot be squared

<sup>1</sup> The Board has accepted similar filings when additional information is necessary to complete the record. See, e.g., *Tongue River R.R. Co., Inc. – Construction and Operation – Western Alignment*, STB Fin. Docket No. 30186 (Sub-No. 3), at 4 (served June 15, 2011) (“In the interest of compiling a more complete record in this case, we will accept into the record the surreplies.”); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co. in Aroostook Cty., ME*, STB Docket No. AB-124 (Sub-No. 2), at 3 (served May 6, 2003) (accepting a reply “when additional information is necessary to develop a more complete record”). Union Pacific is limiting the scope of this letter to correcting certain misstatements that may be important to the Board’s analysis, and Union Pacific does not concede that any other allegations in SFPP’s Reply are accurate.

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with SFPP's own Rescission Complaint at the heart of this proceeding. In that complaint, SFPP expressly asks a California state court to vacate the "relocation provisions of the [1994 Agreement]" on the theory that "SFPP cannot be forced to relocate its pipeline on property that is not property of the railroad" while at the same time ordering that SFPP may remain indefinitely on Union Pacific's operating right of way.<sup>2</sup> SFPP is thus pursuing a civil action directly aimed at removing the 1994 Agreement's Railroad Right of Way Protections<sup>3</sup> and Union Pacific's right to require pipeline relocation when necessary. There is nothing speculative about concluding that SFPP would not voluntarily comply with those Railroad Right-Of-Way Protections if it is successful in that action.

The facts also refute SFPP's remarkable claim repeated throughout its Reply that it "has always agreed to relocate its pipeline to accommodate UP's development plans" and "has not delayed UP's projects." SFPP Reply at 28. On the contrary, SFPP just last year refused Union Pacific's request under the 1994 Agreement to relocate its pipeline to accommodate construction of a second main line track on the Alhambra Subdivision by demanding that "Union Pacific demonstrate, for any affected segment of pipeline, that it is the full fee owner of the right-of-way *before* SFPP will go forward with any relocation plans." Exhibit A at 1 (emphasis added). Similarly, Exhibit B to this letter is a statement of "undisputed" material facts that SFPP previously submitted in litigation related to the Beaumont Hill project, in which SFPP itself took the position that "[f]rom 2001 to 2005, SFPP never complied, or agreed to comply, with Union Pacific's demand to relocate at the Beaumont Hill location at SFPP's expense." Exhibit B at ¶ 7. In the same submission, SFPP also stated that in 2001, SFPP responded to Union Pacific's demand that it relocate at Beaumont Hill "by refusing to relocate." *Id.* at ¶ 6.<sup>4</sup>

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<sup>2</sup> Petition Exhibit 5 at ¶¶ 14, 23, 30 (Rescission Complaint).

<sup>3</sup> The Railroad Right-of-Way Protections are described in the Petition at 11-12, and include the right to require SFPP to relocate its pipeline when necessary to accommodate rail transportation.

<sup>4</sup> The decision of the California Superior Court, which presided over the trial of the Beaumont Hill relocation dispute and entered final judgment in favor of Union Pacific, recognized that the parties spent "years" discussing pipeline relocation after "SFPP's refusal of the early demands from UPRR [to relocate its pipeline]." Exhibit C at 7. The settlement referenced in SFPP's Reply (at 7) coincided with SFPP's dismissal of its appeal of that adverse judgment.

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Page 3

Second, SFPP's claim that its Rescission Action "seeks only to rescind a contract and recover restitution" directly mischaracterizes its own complaint. SFPP Reply at 3. The Rescission Complaint explicitly claims that "SFPP cannot be forced to relocate its pipeline on property that is not property of the railroad" and asks the California state court to order that SFPP may maintain its pipeline in place beneath Union Pacific's right-of-way even if the Railroad Right-Of-Way Protections are rescinded. Pet. Ex. 5 at ¶¶ 23, 30 (Rescission Complaint).

Third, SFPP's claim that Union Pacific has not "raised preemption to the state court as a defense" is also incorrect. Exhibit D to this letter is the Motion to Stay Proceedings that Union Pacific filed with the California Superior Court on September 25, 2015, in which Union Pacific argued that ICCTA preempts SFPP's cause of action and that the Superior Court should stay proceedings pending the Board's resolution of Union Pacific's Petition for Declaratory Order. SFPP thus speaks in half-truths, attaching the Demurrer but not the Motion to Stay Proceedings filed *simultaneously* with the state court.<sup>5</sup>

Fourth, SFPP is incorrect to claim that "[t]he Board has repeatedly found that its involvement is not warranted in actions pertaining to rescission of a contract." SFPP Reply at 14. On the contrary, SFPP does not cite a single case holding that the Board lacks jurisdiction over a state cause of action to rescind a contract with a railroad. Instead, SFPP exclusively cites cases in which the Board declined to *interpret* a contract.<sup>6</sup> The Rescission Action is not an action to interpret the 1994 Agreement; it is rather a state law action to rescind the 1994 Agreement while allowing SFPP to remain on Union Pacific's right of way without the negotiated Railroad Right-Of-Way Protections. Such an action is categorically

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<sup>5</sup> SFPP's argument that Union Pacific did not argue ICCTA preemption in prior relocation disputes is a red herring. Prior disputes about the 1994 Agreement were not brought to the Board because they were disputes about how to interpret a contract. The Rescission Action is categorically different, because it is seeking to use state law to cancel the 1994 Agreement and its Railroad Right-Of-Way Protections and at the same time remain under Union Pacific's right-of-way under authority of state law.

<sup>6</sup> See, e.g., *Fillmore & W. Freight Serv., LLC – Emergency Pet. for Decl. Order*, Fin. Docket No. 35813, at 2 (Mar. 12, 2015) (declining to address "Complaint for Breach of Contract"); *PCI Transp. Inc. v. Fort Worth & W. R.R. Co.*, STB Docket No. 42094 (Sub-No. 1) (Apr. 25, 2008) (declining to address issues regarding whether contract was breached or canceled by the parties); *Gen. Ry. Co.—Exemption for Acquisition of R.R. Line*, Fin. Docket No. 34867, at 4 (June 15, 2007) (declining to rule on "contract interpretation issues").

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different from a breach of contract action or other action in which a decision-maker is required to interpret a contract, and the Board plainly has authority to determine whether using such a state cause of action to rescind the protective conditions of an agreement to allow the use of a railroad's right-of-way while remaining in place on the railroad's operating property unreasonably interferes with rail transportation.

Fifth, SFPP's assertion that "UP has filed a counterclaim [in the Alhambra action] asserting that it can require SFPP to relocate regardless of the AREA" is simply false. On its face, Union Pacific's counterclaim seeks a judicial determination that Union Pacific has sufficient rights under congressional grants to enforce the contractual relocation provisions of the 1994 Agreement.<sup>7</sup>

Finally, SFPP's assertion that the "Petition also raises [a] potential conflict between two federal regulatory schemes" is wrong and without support. SFPP Reply at 20. Oil pipelines like SFPP's are common carriers subject to rate regulation by the Federal Energy Regulatory Commission. But the FERC has no jurisdiction to regulate the construction, relocation, or abandonment of SFPP's oil pipeline.<sup>8</sup> SFPP has not identified any conflicting federal law or regulation that the Board would need to reconcile with ICCTA's preemption provisions to grant the relief Union Pacific has requested, and there is none. The only laws in conflict here are the express federal preemption clause in ICCTA and California's statutory rescission remedy as SFPP seeks to have it applied to the Railroad Right-Of-Way Protections of the 1994 Agreement. In such a conflict between federal and state law, there is nothing to harmonize—federal law is supreme.

\* \* \*

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<sup>7</sup> See SFPP Reply Ex. 2 at ¶ 25 (Alhambra Counterclaim) ("Union Pacific desires a judicial determination of its rights under the Congressional Acts and the parties' respective rights and duties under the Amended Easement" (emphasis added)).

<sup>8</sup> *Farmers Union Cent. Exchange v. FERC*, 584 F.2d 408, 413 (D.C. Cir. 1978) ("pipeline companies have none of the special obligations imposed upon the vehicular regulatees under the [ICA] concerning acquisitions [or] mergers . . . [indicating] a congressional intent to allow a freer play of competitive forces among oil pipeline companies than in other common carrier industries"); *Western Ref. Southwest, Inc. v. FERC*, 636 F.3d 719, 724 (5th Cir. 2011) ("Pipeline companies are not subject to all of the provisions [of the ICA] applicable to rail carriers. In particular, they are not subject to the regulation of market entry and exit under sections 1(18) and 1a, or acquisitions of control.").

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Page 5

Once the misstatements in SFPP's Reply have been corrected, the posture of this matter is clear. A pipeline that uses a railroad's right-of-way pursuant to agreed protections designed to ensure that the pipeline does not interfere with rail transportation has filed a state law action seeking to remove those protections and to remain on the railroad's right-of-way without its consent or control. For the reasons set forth in the Petition, ICCTA prohibits such use of state regulation to interfere with rail transportation.

This is a dispute of broad public interest that merits the Board's guidance and expertise. Comments filed in this proceeding show that it is a matter of serious concern to other stakeholders, from the Ports of Los Angeles and Long Beach who depend upon Union Pacific's ability to enhance and expand rail capacity, to public entities like the Alameda Corridor East Construction Authority charged with improving transportation infrastructure,<sup>9</sup> to other railroads concerned with the implications of SFPP's claims on the safeguards that they have negotiated with other users of railroad rights-of-way,<sup>10</sup> to Hub Group, a leading intermodal shipper. The Board should heed the call of these stakeholders and grant the Petition.

Sincerely,



Raymond A. Atkins

RAA:aat

Enclosures

cc: Parties of Record

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<sup>9</sup> See Alameda Corridor-East Construction Authority Comments (filed Nov. 9, 2015) ("We have experienced delays and increased costs to some of our past and current projects as a direct consequence of underground utilities' failure to relocate in a timely manner or at times refusing to move at all.").

<sup>10</sup> See American Short Line and Regional Railroad Association Comments (filed Nov. 13, 2015) (noting that "ASLRRRA members have thousands of agreements [with right-of-way users] containing safety and operational requirements" and that such agreements are critical to ensure that third parties comply with railroad construction and maintenance standards).

# **EXHIBIT A**



December 3, 2014

John Hovanec  
Assistant Vice President – Engineering Design & Construction  
Union Pacific Railroad Company  
1400 Douglas Street, MS 0910  
Omaha, Nebraska 68179

**Re: Union Pacific Installation at the Alhambra Subdivision in Los Angeles  
Amended and Restated Easement Agreement dated July 29, 2014 (“AREA”)**

Dear Mr. Hovanec:

SFPP is in receipt of your letter dated August 19, 2014, in which you request that SFPP relocate segments of its pipeline to accommodate your planned construction of a second main line track at the Alhambra Subdivision. Exhibit A to your letter shows a requested relocation of SFPP pipeline segments totaling 50,441 feet. This is an unexplained and unjustified increase of 30,988 feet over the pipeline relocation previously discussed by the parties at this location.

As you know, Union Pacific and SFPP have been discussing the design for the relocation of SFPP’s pipeline at the Alhambra Subdivision for two years. Design relocation drawings exchanged between the parties have always depicted relocation of 19,453 total feet of pipeline. Union Pacific never previously requested that an additional 30,988 feet of pipeline be relocated in response to SFPP’s proposed design drawings. Further, on numerous occasions, Union Pacific engineers have told SFPP that only 19,453 feet of pipeline need to be relocated. There is no justification for this abrupt change in plans for this project.

Additionally, the California Court of Appeal recently ruled that Union Pacific must prove that it has sufficient ownership interests in its railroad right-of-way to collect rent from SFPP for subsurface pipeline easements pursuant to the AREA. Union Pacific’s demand that SFPP relocate its pipeline at the Alhambra Subdivision is entirely predicated on the AREA and Union Pacific’s grant of subsurface pipeline easements to SFPP pursuant to the AREA. Accordingly, in light of this recent court ruling, **SFPP requests that Union Pacific demonstrate, for any affected segment of pipeline, that it is the full fee owner of the right-of-way before SFPP will go forward with any relocation plans.**

Please contact me with any questions you may have.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard Sanders", is written over a blue circular stamp or watermark.

Richard Sanders  
Assistant General Counsel

## **EXHIBIT B**

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8 Attorneys for Defendant  
SFPP, L.P.  
9

10 **SUPERIOR COURT OF CALIFORNIA**  
11 **COUNTY OF RIVERSIDE, INDIO BRANCH**

12  
13 UNION PACIFIC RAILROAD COMPANY,  
14 Plaintiff,  
15 vs.  
16 SFPP, L.P.,  
17 Defendant.

Case No. INC 055339

**SEPARATE STATEMENT OF  
UNDISPUTED MATERIAL FACTS IN  
SUPPORT OF SFPP, L.P.'S MOTION  
FOR SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, SUMMARY  
ADJUDICATION**

Date: June 17, 2011  
Time: 8:30 a.m.  
Dept.: 2G

Honorable Harold W. Hopp

Complaint filed: December 8, 2005  
Trial Date: September 12, 2011

[Notice of Motion and Motion,  
Memorandum of Points and Authorities,  
Declarations of Michael F. Kerr, Don Quinn,  
and Neil M. Soltman, and Request for  
Judicial Notice filed concurrently herewith]

1 TO PLAINTIFF UNION PACIFIC RAILROAD COMPANY AND ITS ATTORNEYS  
2 OF RECORD:

3 Defendant SFPP, L.P. ("SFPP") hereby submits its Separate Statement of Undisputed  
4 Material Facts in support of SFPP's Motion for Summary Judgment or, in the Alternative,  
5 Summary Adjudication.

6 In support of its Motion, SFPP relies on the following Undisputed Material Facts and  
7 Supporting Evidence.

8 **I. ISSUE NO. 1: UNION PACIFIC'S COMPLAINT IS BARRED BY THE STATUTE OF**  
9 **LIMITATIONS**

<u>Defendant SFPP's Undisputed Material Facts and Supporting Evidence:</u>	<u>Plaintiff Union Pacific's Response and Supporting Evidence</u>
13 1. In connection with its plan to construct a 14 second mainline track in its right of way, 15 Union Pacific had notified SFPP in 2000 16 that it would require relocation of ten miles 17 of SFPP's pipeline in an area known as 18 Beaumont Hill, near Thousand Palms, 19 California (the "Beaumont Hill 20 Relocation"). Declaration of Gary Bates in 21 Support of Union Pacific's Motion for 22 Summary Judgment ("Bates Decl.") 23 (attached as Ex. D to Declaration of 24 Michael F. Kerr ("Kerr Decl.") ¶ 7, Exs. B- 25 C; Declaration of Don Quinn ("Quinn 26 Decl.") Ex. D; Kerr Decl. Ex. E.	
27 2. SFPP's review of Union Pacific's	

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<p>relocation demand revealed that compliance with the governing U.S. Department of Transportation standards governing the placement of a pipeline in a railroad right-of-way did not require ten miles of pipeline to be relocated in order to make way for Union Pacific's new track. Kerr Decl. Ex. D (Bates Decl.) ¶ 11 and Ex. E.</p>	
<p>3. In an April 17, 2001 letter, UP refused SFPP's request "that the Railroad consider a 'design change' of the plans the Railroad provided to [SFPP]" for the Beaumont Hill Relocation, citing the guidelines recommended by the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). UP further stated that all SFPP facilities needed to be relocated by August 16, 2001. Kerr Decl. Ex. E (Wimmer Tr. Ex. 34).</p>	
<p>4. In August of 2001 Union Pacific wrote to SFPP and said that the ten mile relocation was necessary in order to "conform" to the standards set by AREMA, which set forth different parameters for pipeline distance and depth than the U.S. Department of Transportation regulations (the Code of</p>	

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<p>Federal Regulations (49 C.F.R. Part 195, §§ 195.248, 195.250) generally requires only a three-foot depth and twelve inches of clearance between the pipe and other underground structures). Kerr Decl. Ex. D (Bates Decl.) ¶ 13 and Ex. F.</p>	
<p>5. SFPP did not relocate at Beaumont Hill by August 16, 2001. Quinn Decl. ¶ 11.</p>	
<p>6. On September 6, 2001, SFPP responded to Union Pacific's demand that it relocate at its own expense in compliance with AREMA standards at Beaumont Hill by refusing to relocate: "[W]e are not required to, nor will we, relocate . . . pursuant to [the AREMA standards]. . . . UP's attempts to impose on SFPP the cost of complying with different requirements [than the U.S. Department of Transportation standards] has no basis in the contract between the parties." Kerr Decl. Ex. F (Wimmer Tr. Ex. 35).</p>	
<p>7. From 2001 through 2005, SFPP never complied, or agreed to comply, with Union Pacific's demand to relocate at the Beaumont Hill location at SFPP's expense. Quinn Decl. ¶ 11.</p>	
<p>8. Union Pacific filed this case against SFPP</p>	

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<p>on December 8, 2005. UP's Compl.</p>	
<p>9. Union Pacific filed a First Amended Complaint ("FAC") on April 25, 2007. The second cause of action in the FAC seeks damages for SFPP's alleged breach of the AREA in connection with the Beaumont Hill relocation. FAC ¶¶21-24.</p>	

**II. ISSUE NO. 2: UNION PACIFIC'S COMPLAINT IS BARRED UNDER THE DOCTRINE OF RES JUDICATA.**

<p><b><u>Defendant SFPP's Undisputed Material Facts and Supporting Evidence:</u></b></p>	<p><b><u>Plaintiff Union Pacific's Response and Supporting Evidence</u></b></p>
<p>10. Section 3 of the Amended and Restated Easement Agreement (the "AREA"), states: "In the event that Railroad shall at any time deem it necessary, the [Pipeline] shall, upon written receipt of notice so to do, at [Pipeline's] sole cost and expense, change the location of said pipeline, its adjuncts or appurtenances, on railroad property to such point or points thereon as Railroad shall designate and reconstruct or reinforce the same." Kerr Deel. Ex. A at 5, § 3 [AREA].</p>	
<p>11. Union Pacific filed both the Relocation Case and the instant case against SFPP.</p>	

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<p>RJN Ex. A; UP's Compl. and FAC; UP's 2009 SUF ¶ 1.</p>	
<p>12. The Relocation Complaint, filed on September 14, 2000, alleged three causes of action: breach of contract, declaratory relief, and book account. RJN Ex. A (Relocation Compl.).</p>	
<p>13. The declaratory relief claim sought "a declaration as to the duties of the parties under the Amcnded and Restated Easement Agreement as it relates to the cost of relocating pipeline." <i>Id.</i> ¶ 25.</p>	
<p>14. The breach of contract and book account claims as litigated sought SFPP's reimbursement of Union Pacific for the cost of relocating SFPP's pipelines in Danville, Martinez, and Pomona, California. <i>Id.</i> ¶14.</p>	
<p>15. Two relocations—Pomona and Martinez—were either entirely or in part on operating right of way and thus would have involved the issue of AREMA compliance, had UP required such compliance. Quinn Decl. ¶ 2.</p>	
<p>16. SFPP did not relocate to a minimum depth of 6 feet and did not relocate to a minimum distance of 25 feet from the centerline of</p>	

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<p>the track at Martinez or Pomona. Quinn Decl. ¶ 4 and Ex. C.</p>	
<p>17. None of the costs claimed by Union Pacific in the Relocation Case related to compliance with AREMA standards. Quinn Decl. ¶ 8; Kerr Decl. Ex. C (UP interrogatory response and documents).</p>	
<p>18. In April 2002, the trial court in the Relocation Case granted Union Pacific summary adjudication on its breach of contract and declaratory relief claims and then entered judgment against SFPP on the contract claims (for the relocations in Pomona, Martinez, and Danville) in the amount of \$740,361.88. RJN Ex. B.</p>	
<p>19. The trial court issued the final Statement of Decision in the Relocation Case in March of 2007. <i>Id.</i> at Ex. D.</p>	
<p>20. The trial court in the Relocation Case examined evidence and heard argument regarding whether the parties intended to include remediation costs under the Relocation Provision, and decided when such costs would be appropriate (i.e., only when the Railroad was unaware that the new location would require remediation). <i>Id.</i></p>	

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<p>21. The trial court in the Relocation Case never received evidence of who was responsible for the portion of relocation costs caused by compliance with AREMA guidelines. <i>Id.</i>; Kerr Decl. ¶ 10; Declaration of Neil M. Soltman (“Soltman Decl.”) ¶ 2.</p>	
<p>22. The Statement of Decision does not mention or decide who was responsible for any portion of relocation costs caused by compliance with AREMA guidelines. RJN Ex. D (SOD).</p>	
<p>23. The judgment in the Relocation Case became final when the Court of Appeal issued its remittitur on April 17, 2009. <i>Id.</i> Exs. E-H; <i>see also</i> UP’s 2009 Mot. 10; UP’s 2009 SUF ¶ 6.</p>	
<p>24. In connection with its plan to construct a second mainline track in certain areas, Union Pacific notified SFPP in 2000 that it would require relocation of SFPP’s pipeline near Beaumont Hill, in the vicinity of Thousand Palms, California. Kerr Decl. Ex. D (Bates Decl.) ¶ 7; Quinn Decl. Ex. D.</p>	
<p>25. Union Pacific filed this case against SFPP on December 8, 2005. The operative First Amended Complaint seeks a “judicial</p>	

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<p>determination of [UP's] rights and SFPP's duties under the Easement Agreement with respect to SFPP's obligations to relocate the Pipeline at SFPP's expense." FAC ¶ 11.</p>	
<p>26. At least through 2001, the applicable provision of the AREMA standards, Section 5.1.6.7, had been substantively identical since at least 1993. Kerr Decl. Exs. G and H (UPBH-07-0002959 (5.1.6.7. as it existed in 2002) and UPBH-07-0003911 (5.1.5.7 [corresponding section to 5.1.6.7] as of 1996, indicating that it was last modified in 1993).</p>	
<p>27. Union Pacific had adopted an internal "oral policy" requiring adherence to AREMA standards when relocating pipelines containing flammable liquids before Dennis Duffy was appointed as Executive Vice President of Operations in 1998. Kerr Decl. Ex. B (Duffy Tr.) at 57:6-61:19, 145:17-147:20.</p>	

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1 **III. SFPP IS ENTITLED TO SUMMARY JUDGMENT ON THE ENTIRE**  
2 **COMPLAINT.**

3 SFPP incorporates herein Undisputed Facts Nos. 1-27 set forth above.

4 Dated: April 22, 2011

MAYER BROWN LLP  
NEIL M. SOLTMAN  
MICHAEL F. KERR  
GERMAIN D. LABAT  
MATTHEW H. MARMOLEJO

8 By: Michael F. Kerr  
9 Michael F. Kerr  
10 Attorneys for Defendant SFPP, L.P.

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# **EXHIBIT C**

Received in dept 53  
June 30, 2014

Received  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

JUN 30 2014

FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

JUL 15 2014

*C. Zuniga*

ERP

AUG 15 2014

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 16 Attorneys for Plaintiff  
 17 UNION PACIFIC RAILROAD COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF RIVERSIDE – RIVERSIDE BRANCH  
UNLIMITED JURISDICTION

21 UNION PACIFIC RAILROAD COMPANY,

22 Plaintiff,

23 vs.

24 SFPP, L.P., and DOES 1-10,

25 Defendants.

Case No. INC055339

Assigned to the Honorable Harold W. Hopp

~~PROPOSED~~ JUDGMENT

Complaint Filed: December 8, 2005

Trial Date: October 29, 2012

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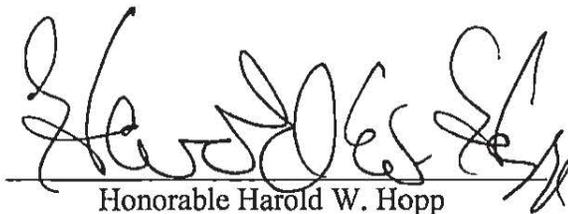
[PROPOSED] JUDGMENT

This action was tried commencing September 22, 2011 (Phases I and II) and October 29, 2012 (Phases III and IV), in Department 2G of the Superior Court, the Honorable Harold W. Hopp presiding. Meryl Macklin, Steven J. Perfremment, and Andres L. Carrillo appeared for Plaintiff Union Pacific Railroad Company ("Union Pacific") and Neil M. Soltman, Michael F. Kerr, Germain D. Labat, and Matthew H. Marmolejo appeared for Defendant SFPP, L.P. ("SFPP").

A jury in Phases I and II and the Court in Phases III and IV heard and considered the testimony, the documentary evidence, and the argument of counsel. The matter having been submitted, and GOOD CAUSE appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that judgment is entered in favor of Union Pacific and against SFPP in accordance with the jury verdict and Statement of Decision attached hereto. SFPP shall take nothing from Union Pacific. Union Pacific is awarded damages pursuant to the jury's verdict of November 3, 2011 in the amount of \$22,619,000.00. Union Pacific is awarded pre-judgment interest in the amount of \$14,867,590.33, through June 30, 2014. Union Pacific is awarded attorney's fees and costs pursuant to the parties' stipulation in the amount of \$5,000,000.00.

2/15  
Dated: June 30, 2014

  
Honorable Harold W. Hopp  
Judge of the Superior Court

BRYAN CAVE LLP  
560 MISSION STREET, 25<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94105-2994

# **EXHIBIT A**

FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

JUN 13 2014



SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: Union Pacific Railroad Co. v. SFPP, LP	DATE & DEPT. June 13, 2014, 53	NUMBER INC055339
COUNSEL None	None	REPORTER None
PROCEEDING Ruling on Submitted Matter—Request for Statement of Decision		

The Court having considered the submitted matter, rules as follows:

Pursuant to *California Rules of Court*, Rule 3.1590(c), on March 10, 2014, the Court served a tentative statement of decision and informed the parties that it would become the statement of decision unless, a party made a timely request for a further statement of decision or a proposal for a statement of decision under that rule.

On March 26, 2014, defendant and cross-complainant SFPP filed and request for a statement of decision, asking the Court to address 13 issues which it contended were principal, controverted issues. (The request was timely because the Court's tentative statement of decision was served on March 11.) Plaintiff and cross-defendant Union Pacific Railroad Company filed a response, asserting that the tentative statement of decision addressed all controverted issues and requesting that the Court enter the proposed judgment it had presented.

The Court is not required to discuss each of the questions or requests set forth in a party's request for a statement of decision. Nor is the Court required to set forth evidentiary facts. Instead, the Court is required to provide a narrative explanation of its reasoning and to state its findings as to the principal issues, that is, those which are "relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case." *Kuffel v. Seaside Oil Co.* (1977) 69 Cal. App. 3d 555, 565.

The Court believes that, with certain additions or changes included in the revised statement of decision as set forth herein, that the statement of decision addresses all of the principal controverted issues in the court trial portion of this case. It notes that, in light of its reformulation of the issue in the declaratory relief portion of the trial, as set forth in footnotes one and eight, some of the issues in the request for statement of decision are irrelevant (for example, issues 8, 9, 10, and 11).

This trial was conducted in four phases. The first two were tried to a jury, which rendered a verdict on

both, finding that defendant SFPP, L.P. had breached the parties' agreement, the Amended and Restated Easement Agreement (the "AREA"), that plaintiff and cross-defendant Union Pacific Railroad Company's (UPRR) claim for breach of contract was not barred by the statute of limitations, and awarding UPRR damages for breach of contract. The second two phases were tried to the Court. One of the phases of the court trial was of SFPP's affirmative defense of claim preclusion. The other was of SFPP's cross-complaint for declaratory relief, which sought a declaration concerning whether, under the AREA, UPRR's right to designate where SFPP's pipeline must be located within the railroad's right of way was limited to requiring compliance with the standards set by the United States Department of Transportation (DOT) or other state or federal law.<sup>1</sup>

Phase Three: Claim Preclusion. SFPP contends that UPRR lost the right to litigate its breach of contract claim because that claim existed when UPRR answered SFPP's cross-complaint in the Los Angeles litigation<sup>2</sup> and could have been litigated in that case.<sup>3</sup> UPRR argues that the Court has already addressed this issue when it denied SFPP's motion summary adjudication, finding that the breach of contract cause of action on which UPRR sues here had not yet arisen when the Los Angeles litigation was filed or when UPRR filed its answer to SFPP's cross-complaint. Moreover, UPRR argues, the jury found that the breach of contract cause of action did not arise until years later,<sup>4</sup> less than four years before this action was filed on December 8, 2005.

The issue concerning the effect of the denial of the summary judgment motion is simply resolved: apart from possibly barring a second motion for summary adjudication or barring a future action for malicious prosecution, denial of a motion for summary adjudication has no effect on the litigation.

The order denying summary judgment simply establishes the existence of a triable issue of fact when the order was made. No comment may be made at trial . . . upon the fact summary adjudication was granted or denied, or that a party failed to seek summary adjudication. *Cal. Civ. Proc. Code* §437c(n)(3).

But it does *not* establish the merits or legal sufficiency of either party's case. Thus, the judge at trial may direct a verdict in favor of the moving party despite the earlier denial of summary judgment. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1283.

3 R. Weil and I. Brown, *California Practice Guide Civil Procedure Before Trial* (2013 ed.) ¶10:364 (emphasis in the original).

<sup>1</sup> This issue is not stated as SFPP alleged it in the cross-complaint, but as the Court reformulated it. The Court found that it would be difficult to make a declaration of the issue as stated in the cross-complaint because of the considerable variation in the specific conditions of a particular project. Quite simply, it would be impossible to anticipate all of the possible considerations for a particular project and to make a sweeping decision that UPRR could always require SFPP to comply with the UPRR's standards or those recommended by the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). See Cross-Complaint filed September 28, 2011 at 9, 11-12.

<sup>2</sup> *The Union Pacific Railroad Co. v. SFPP, LP*, Los Angeles Superior Court Case No. BC236582, Second District Court of Appeal Case No. B199403.

<sup>3</sup> *California Code of Civil Procedure* section 426.30(a) provides that if a party against whom a complaint (which section 426.10(a) defines to include a cross-complaint) has been filed and served fails to allege in a cross-complaint any related cause of action which the party has at the time it answers the complaint, it may not later assert such a cause of action against the plaintiff/cross-complainant. At one point, UPRR argued that there can be no cross-complaint to a cross-complaint, but this seems plainly incorrect and the Court understands that UPRR no longer asserts that argument. R. Weil and I. Brown *California Practice Guide Civil Procedure Before Trial* (2013 ed.) ¶6:581.

<sup>4</sup> UPRR filed the Los Angeles case on September 14, 2000. On July 2, 2001, UPRR filed its answer to SFPP's cross-complaint.

Therefore, the Court's denial of SFPP's summary adjudication motion on its affirmative defense does not bar SFPP from proving that defense at trial.

Nor does the jury's verdict finding that the action was not barred by the statute of limitations require a decision that the breach of contract claim on which UPRR now sues had not arisen and thus need not have been asserted in the Los Angeles litigation. UPRR is certainly correct that where, as here, the legal issues are tried first, any findings of fact by the jury bind the Court. *Hughes v. Dunlap* (1891) 91 Cal. 385, 388, *Hoopes v. Dolan* (2008) 168 Cal. App. 4th 146. This rule does not apply where, as here, the jury's verdict and the Court's decision are not based on the same evidence. The court of appeal in *Hoopes* stated:

We conclude that the trial court erred in disregarding the jury's verdict when fashioning equitable relief *founded on the same evidence and the same operative facts as the verdict*. However, we also conclude that the defense of equitable estoppel was a matter within the exclusive province of the trial judge *and that it raised legal and factual issues undecided by the jury*. While the trial judge should have considered the equitable defense first,<sup>5</sup> and thus avoided an unnecessary jury trial, the order of trial was within the court's discretion and did not divest the judge of his duty to determine applicability of equitable estoppel.

168 Cal. App. 4th at 160 (emphasis added).

When, as in this case, additional evidence is presented during the equitable portion of the trial and that evidence might cast doubt on the jury's findings, the Court must exercise its own, independent judgment. The failure to do so, at least where the Court indicates that it disagrees with the jury, requires the matter to be remanded so that the trial court may exercise its independent judgment. *Saks v. Charity Mission Baptist Church* (2001) 90 Cal. App. 4th 1116, 1147.

Here, there was a significant amount of additional evidence presented during the trial of the equitable issues, at least some of which amplified or explained the basic conflict between the parties as to whether there was a claim for breach of contract concerning the relocation of SFPP's pipeline in the right of way at Beaumont Hill such that it must have been asserted in the Los Angeles litigation. The evidence also included the order from the Los Angeles trial court concerning SFPP's motion for leave to bring its cross-complaint, stating that the SFPP cross-complaint was related to UPRR's complaint and was compulsory.

Nevertheless, the Court agrees with the jury's finding that the cause of action on which UPRR sues in this case arose long after July 2, 2001. Certainly, there is evidence that prior to that date the parties had corresponded and had discussed plans for the Beaumont Hill project, including the relocation of the SFPP pipeline, and that UPRR had rejected SFPP's request that UPRR use the DOT regulations as the only criteria for the placement of the pipeline, instead requiring that SFPP conform to UPRR's standards and to those promulgated by the AREMA. See Exs. 34 and 135. Although this seems definitive—UPRR stated that SFPP must follow UPRR and AREMA standards and SFPP refused—if this was a breach of contract, it was an anticipatory breach, which might have given UPRR the ability to sue SFPP for breach of contract, but did not require it to do so. Indeed, it was not clear exactly where the relocation would occur

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<sup>5</sup> Here, the Court decided to try the legal issues first for two separate reasons. First, the Court believed there was a significant possibility that the jury would find the statute of limitations defense meritorious and if it did, the trial might be shorter if that defense were tried before the claim preclusion affirmative defense. Second, the equitable issues included SFPP's cross-complaint, which the Court believed should be tried after the legal issues. The Court believed that trifurcation, trial of the res judicata defense, then the legal issues, then the cross-complaint, made less sense than bifurcation and trying the legal issues first. With the benefit of hindsight, it might have been more efficient to conduct the trial of the equitable issues first.

or how much it would cost for quite some time. The parties continued discussions and correspondence about the project and the pipeline relocation for years. Ultimately the time for the relocation of the pipeline did not arrive until 2007. See, e.g., Exs. 1009, 1013, 1019, 1020 and 1021.

To be sure, as SFPP argued in the first phase of the trial, UPRR could not restart the statute of limitations running by sending repeated demands for SFPP to do the same work, work it had previously refused to do, then claim that only the last demand counted for purposes of when SFPP was actually obligated to perform the work. However, the Court agrees with the jury's finding that SFPP's refusal of the early demands from UPRR was an anticipatory breach (if it was a breach at all). Put another way, at worst, SFPP told UPRR that when the time came, it would not comply with the requirement that it relocate its pipeline using anything other than DOT standards. But that does not mean that UPRR's breach of contract claim had ripened to the point where it could realistically be expected to sue on it. Requiring UPRR to bring this action in 2001 would have meant that even though the project was far from ready for the relocation of the pipeline, UPRR would have to prove where the pipeline must be relocated and what the cost of relocation would be. This would have been difficult, if not impossible before the project had progressed to the point where relocation of the pipeline was ready to occur.<sup>6</sup>

Besides whatever dispute existed concerning the Beaumont Hill project, there was no ongoing dispute concerning relocation of SFPP pipeline, including depth of the pipeline and distance from UPRR's tracks as of September, 2000, when UPRR filed the Los Angeles action. The same appears to be true for July, 2001. To be clear, the Court finds that there was no actual controversy between the parties that was appropriate for declaratory relief when the Los Angeles action was filed or when UPRR filed its answer to the cross-complaint in that action.

SFPP is correct that, years before the Beaumont Hill project, it had informed UPRR that it would not comply with AREMA depth or distance standards for pipeline relocation and never changed this general position. However, the evidence showed that, until the dispute concerning the Beaumont Hill project arose, the parties reached accommodations concerning pipeline relocations, often using depths and distances greater than that required by DOT standards. Moreover, in light of the Court's rephrasing of the issue as to declaratory relief (see footnotes one and eight), this is of little, if any, relevance.

Therefore, the Court agrees with the jury's factual finding that the breach of contract claim did not arise before December, 2001 and thus UPRR did not "have" it within the meaning of *California Code of Civil Procedure* section 426.30 when it answered the SFPP cross-complaint in the Los Angeles litigation.

SFPP seems to argue that UPRR could have litigated its breach of contract claim in 2001 because other issues about the interpretation of the AREA were being litigated. Indeed, the Los Angeles County Superior Court found that SFPP must assert the causes of action in its cross-complaint in that litigation "even though different portions of the contract have allegedly been breached in different ways in different locations . . ." Ex. 417. But the critical difference between the claims alleged in the SFPP cross-complaint and the breach of contract cause of action UPRR alleges here is that the former breaches had already occurred while the latter had yet to occur--and would not occur until years later--when, as discussed above, the Beaumont Hill project had reached the point where it was clear where the relocation of the pipeline was to occur and how much it would cost. To put it differently, in 2001, SFPP's claims that UPRR had unreasonably interfered with various fiber optic easements had already matured while UPRR's claim for breach of contract concerning the relocation of the pipeline at Beaumont Hill had not.

<sup>6</sup> Indeed, the pleadings in this case indicate that the dispute may not have been ripe enough for UPRR to sue for breach of contract even in 2005, when it filed this action. Its initial complaint sought only declaratory relief. It was not until 2007 that it amended its complaint to seek damages.

Therefore, the Court finds in favor of UPRR and against SFPP on the claim preclusion affirmative defense.

Phase Four: Declaratory Relief. The final phase of this trial concerns SFPP's cross-complaint for declaratory relief.<sup>7</sup> As rephrased by the Court after a discussion with the parties, this cause of action seeks a declaration that the AREA does not require SFPP to comply with standards other than those set by the DOT (or other state or federal laws) when it must relocate its pipeline at UPRR's request.

As with phase three, the jury's verdict that SFPP breached the AREA when it refused to pay to relocate the pipeline to the position required by UPRR does not bind the Court to a particular interpretation of the contract. There was additional evidence presented during the trial of the equitable issues that might cast doubt on the jury's verdict. Therefore, the Court must make its own independent assessment of the evidence. The Court finds that the evidence supports the jury's verdict to the extent that the jury implicitly found that the AREA required SFPP to relocate the pipeline to a point beyond that required by the DOT or other state or federal laws. Put another way, the AREA gives UPRR the authority to require SFPP to relocate the pipeline in accordance with standards that are more stringent than those set by the DOT or other state or federal laws.<sup>8</sup>

First, the language of the agreement is clear, giving UPRR discretion to designate the "point or points" on UPRR's property to which the pipeline must be relocated whenever UPRR "shall at any time deem it necessary." AREA, Ex. 1000, at 6, ¶ 3. Where the language of a contract is clear, the language governs its interpretation. *Cal. Civ. Code* § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.")

Of course, contractual language that appears clear on its face may not be so in the light of extrinsic evidence. Thus, the first step in analyzing the meaning of the contract is to decide if the contractual language is "reasonably susceptible" to the meaning proposed by the party offering the extrinsic evidence.

*Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1342, 1350. SFPP would have the Court find that section 3 of the AREA is reasonably susceptible to an interpretation that UPRR has the discretion to designate the place to which the pipeline must be relocated so long as UPRR does not seek to apply standards more stringent than the requirements of DOT regulations or other state or federal law. The language of the AREA is broad and does not appear to limit UPRR's discretion in any way. First, the AREA gives to UPRR the power to decide if it is necessary to relocate the pipeline ("In the event that [UPRR] shall . . . deem it necessary . . ."). Next, the only limit as to where the pipeline must be relocated is "on railroad property" and "to such point or points thereon as [UPRR] shall designate . . ." There is no reference to a standard that UPRR must or may not apply in choosing what point or points to designate. Moreover, the parties were obviously aware that there might be state or federal laws regulating the pipeline for they included in the section that seems to give UPRR such broad discretion as to where and when a relocation must occur a specific reference to compliance with "all laws and regulations" in the construction, reconstruction, maintenance, and operation of the pipeline. If they had intended to restrict the broad language giving UPRR discretion about relocation of the pipeline to the standards set by DOT regulations

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<sup>7</sup> The cross-complaint was filed shortly before the trial began. However, until then, UPRR had maintained its own cause of action for declaratory relief, which it dismissed on August 9, 2009, only weeks before the start of the trial. Three days later, SFPP moved for leave to file a cross-complaint alleging its own declaratory relief cause of action relating to the same issue that had been alleged by UPRR in its initial complaint.

<sup>8</sup> The Court was reluctant to grant declaratory relief as to whether UPRR had the authority to require compliance with any particular standard under all circumstances; there are too many unknown variables to grant such a broad declaration; thus the Court reformulated the issue for declaratory relief, limiting it to whether UPRR may ever require SFPP to relocate the pipeline applying standards that are more stringent than those imposed by DOT regulations or other state or federal law.

or by other state or federal laws, they certainly could have included a reference to such laws or regulations in the AREA. To the extent that section 3 references such laws and regulations, they clearly are a floor, not a ceiling, on SFPP's duties and do not limit UPRR's discretion concerning where the pipeline must be relocated.

Even assuming that the parties' course of dealing is as SFPP argues<sup>9</sup>, that UPRR sometimes requested that SFPP relocate the pipeline in accordance with standards that it or AREMA developed that are stricter than DOT regulations, that SFPP refused, and that UPRR chose not to press the point or agreed to a relocation to a point different than that which it had requested, this does not make the AREA reasonably susceptible to an interpretation that UPRR could never require that SFPP do more than comply with DOT regulations or other state or federal laws. The evidence showed that the practical realities of relocating a pipeline in myriad circumstances, involving a wide variety of limitations including those relating to soil, other utilities, and nearby improvements, meant that UPRR might not insist on exactly where the pipeline must be relocated. Further, the pipeline and railroad companies were part of the same corporate organization for decades, making it more likely that they would resolve their differences rather than UPRR forcing its demands on SFPP.

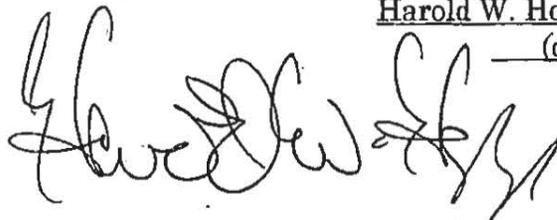
Thus, the Court finds that the agreement is not reasonably susceptible to the interpretation that SFPP places on it, that the agreement cannot be construed to limit UPRR's discretion as to where the pipeline must be relocated to those locations required by DOT regulations or other state or federal laws. Accordingly, the declaration sought by SFPP is denied.

UPRR to recover its costs of suit.

UPRR to prepare a proposed judgment.

Clerk to give notice.

Harold W. Hopp, Judge  
(dmr), Clerk

A handwritten signature in black ink, appearing to read "Harold W. Hopp", written over a horizontal line.

<sup>9</sup> SFPP asks in its request for a statement of decision whether the prior affiliation between the parties is relevant to contract interpretation, including consideration of course of performance and/or course of dealing evidence. That the initial pipeline agreement was made between and that over the following years the contract was performed between parent and a subsidiary or otherwise related corporate entities is a factor to be considered in evaluating extrinsic evidence—it provides a context for why there might be little if any conflict in how the contract was performed.

**MINUTES OF THE COURT**

**CLERK'S CERTIFICATE OF MAILING**

(Original copy, duly executed, must be attached to  
original document at time of filing)  
(Unsigned copy must accompany document being mailed)

I, Samuel Hamrick, Clerk, Superior Court of California, for the County of Riverside, do hereby certify that I am not a party to the within action or proceeding; that on the 16<sup>th</sup> day June 2014, I served a copy of the paper to which this certificate is attached, to wit:

Case No: INC055339

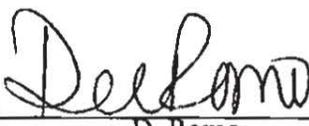
Ruling on Submitted Matter-Request for Statement of Decision

Accompanied by an unsigned copy of the certificate, by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at the City of Riverside, California, addressed as follows:

Bryan Cave LLP  
560 Mission Street, 25th Floor  
San Francisco, CA 94105-2994

Ray Hartman, Esq.  
Cooley LLP  
4401 Eastgate Mall  
San Diego, CA 92121-1909

Dated: June 16, 2014

By: , Deputy  
D. Romo

**CLERK'S CERTIFICATE OF MAILING**

## **EXHIBIT D**

CONFORMED COPY  
ORIGINAL FILED  
Superior Court Of California  
County Of Los Angeles

SEP 25 2015

Sherri R. Carter, Executive Officer/Clerk  
By: Kristina Vargas, Deputy

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16 SUPERIOR COURT OF CALIFORNIA

17 COUNTY OF LOS ANGELES

18 SFPP, L.P.,

19 Plaintiff,

20 vs.

21 UNION PACIFIC RAILROAD  
22 COMPANY, and DOES 1-100, inclusive,  
23 Defendants.

Case No. BC584518

Judge: Hon. Rafael Ongkeko  
Dept.: 73

UNION PACIFIC'S MOTION TO STAY  
PROCEEDINGS PENDING DECISION  
ON PETITION OF UNION PACIFIC  
RAILROAD COMPANY FOR  
DECLARATORY ORDER TO THE  
SURFACE TRANSPORTATION BOARD

Date: December 2, 2015  
Time: 8:30 a.m.  
Dept.: 73

RES ID: 150925072640

[Filed concurrently with Request for Judicial  
Notice, and [Proposed] Order]

Complaint filed: June 8, 2015: June 8, 2015

24 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that on December 2, 2015, at 8:30 a.m., or as soon  
26 thereafter as the matter may be heard by the Honorable Rafael Ongkeko, in Department 73 of  
27 the Los Angeles County Superior Court, 111 N. Hill Street, Los Angeles, California,  
28

UNION PACIFIC'S MOTION TO STAY PROCEEDINGS

1 defendant Union Pacific Railroad (“Union Pacific”) will move the Court to stay all  
2 proceedings in this matter pending a decision on the Petition of Union Pacific Railroad  
3 Company for Declaratory Order filed with the Surface Transportation Board (“STB”) on  
4 September 24, 2015.

5 Union Pacific moves the Court to stay all proceedings and activity this case on the  
6 basis of the primary jurisdiction doctrine, to allow the Surface Transportation Board an  
7 opportunity to rule on Union Pacific’s petition with that agency asking it to decide whether  
8 SFPP, L.P.’s causes of action for rescission and declaratory relief are preempted by the  
9 Interstate Commerce Commission Termination Act (“ICCTA”), and to allow the Court to  
10 benefit from the STB’s expert evaluation of the interference with rail transportation that  
11 would result from the requested remedies.

12 This motion is based on the this notice, the attached memorandum of points and  
13 authorities, the attached Petition of Union Pacific Railroad Company for Declaratory Order,  
14 all pleadings and documents on file in this matter, and such oral or written evidence and  
15 argument as may be introduced at, or prior to, the hearing on this motion.

16  
17 Dated: September 25, 2015

SHOOK, HARDY & BACON L.L.P.

18  
19 By: 

Douglas W. Robinson

Brian P. Ziska

Attorneys for Defendant

Union Pacific Railroad Company

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 SFPP, L.P. (“SFPP”) seeks to use this case to ensure that its pipeline will remain  
4 indefinitely under hundreds of miles of Union Pacific railroad, without Union Pacific’s  
5 consent, and to remove conditions imposed on SFPP to prevent its pipeline from interfering  
6 with rail transportation. This attempted use of state law to unreasonably interfere with rail  
7 transportation is precisely what Congress intended to preempt under the Interstate Commerce  
8 Commission Termination Act (“ICCTA”). Union Pacific has filed its “Petition”<sup>1</sup> with the  
9 STB, asking it to declare ICCTA preempts SFPP’s causes of action for rescission and  
10 declaratory relief. The California Court of Appeal has recognized that a request like Union  
11 Pacific’s Petition with the STB is the appropriate mechanism to determine whether SFPP’s  
12 causes of action are preempted, because “as the agency authorized by Congress to administer  
13 the ICCTA” it is “uniquely qualified” to evaluate the issue. (*Town of Atherton v. Cal. High-*  
14 *Speed Rail Authority* (2014) 228 Cal.App.4th 314, 332, fn. 4.)

15 Pending resolution of Union Pacific’s Petition with the STB, the Court should stay all  
16 proceedings and activity this case on the basis of the primary jurisdiction doctrine. The STB  
17 is the expert agency in this field, and its resolution of the issues in Union Pacific’s Petition  
18 will promote efficiency, inform the Court’s decisions, and assure uniform application of  
19 railroad regulation while protecting against undue interference with rail transportation.  
20 While dismissal of this case may be appropriate if the STB finds SFPP’s causes of action are  
21 preempted, issuing the requested stay would not foreclose the Court’s ability to act. It will  
22 simply give the STB the opportunity to evaluate the potential effect on rail transportation.  
23 Even if the STB were ultimately to rule that the ICCTA does not preempt SFPP’s causes of  
24 action, STB’s evaluation and disposition of Union Pacific’s Petition is essential to the  
25 appropriate adjudication of this case.

26 \_\_\_\_\_  
27 <sup>1</sup> Petition of Union Pacific Railroad Company for Declaratory Order, Finance Docket  
28 No. 35960 (“Petition”) before the Surface Transportation Board (attached hereto as “Exhibit  
A”). (Request for Judicial Notice, Exhibit A.)

1 **II. SFPP'S CLAIMS AND UNION PACIFIC'S PETITION WITH THE STB**

2 SFPP seeks to rescind a contract entered in 1994 known as the Amended and Restated  
3 Easement Agreement ("AREA"). (Compl. ¶ 1.) The AREA expressly provides that the  
4 pipeline's right to locate on Union Pacific's operating right-of-way is subordinate Union  
5 Pacific's common carrier obligations and the railroad's right and authority to operate on the  
6 right-of-way. (Compl., Ex. A [AREA], ¶ 1(f)). Among other things, the AREA expressly  
7 requires SFPP to obtain Union Pacific's approval of the location and plans for the pipeline  
8 and requires SFPP to relocate its pipeline when Union Pacific deems it is necessary for  
9 railroad operations. (Compl. ¶¶ 10–13, Ex. A [AREA], ¶ 3). By these and other express  
10 terms, the AREA ensures Union Pacific maintains control over its operating right-of-way,  
11 where the pipeline also is located, and ensures that the location of SFPP's pipelines on the  
12 railroad right-of-way will be subordinate to and cannot interfere with rail transportation.

13 SFPP's causes of action for rescission and declaratory relief attempt to use state law  
14 to dispose of the voluntary agreement under which the railroad allowed SFPP onto its  
15 operating property – and all the conditions imposed to grant that access. SFPP alleges that it  
16 cannot and will not remove its pipeline from the railroad's right-of-way (Compl. ¶¶ 22, 30),  
17 and asks this Court to declare SFPP is not required to perform any of its obligations under  
18 the AREA. (Compl. ¶ 46.) The remedies SFPP seeks would permit it to maintain its  
19 pipeline indefinitely on property used for rail transportation, without Union Pacific's consent  
20 or control, and would unduly interfere with Union Pacific's rail operations. Union Pacific's  
21 Petition asks the STB to declare that SFPP's attempted use of state law to regulate and  
22 interfere with Union Pacific's rail transportation is preempted by the ICCTA. (See  
23 generally, attached Ex. A [Petition].)

1 **III. ARGUMENT**

2 **A. The ICCTA Preempts State Regulation of Rail Transportation.**

3 In ICCTA Congress expressly preempted all state regulation of rail transportation:  
4 “the remedies provided under this part with respect to regulation of rail transportation are  
5 exclusive and preempt the remedies provided under Federal or State law.” (49 U.S.C. §  
6 10501(b).) Courts recognize this language as a clear and broad intent to preempt state law  
7 regulation of railroads. (See *CSX Transportation, Inc. v. Georgia PSC* (N.D. Ga. 1996) 944  
8 F.Supp. 1573, 1581 [“It is difficult to imagine a broader statement of Congress’s intent to  
9 preempt state regulatory authority over railroad operations.”]; *Wis. Central Ltd. v. City of*  
10 *Marshfield* (W.D. Wis. 2000) 160 F.Supp.2d 1009, 1013 [“Courts that have considered the  
11 ICCTA preemption clause have found its language to be clear and broad . . . .”].)

12 ICCTA preempts codified “[s]tate and local permitting laws regarding railroad  
13 operations” (*City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1033), as well as  
14 causes of action arising under state law that seek to regulate railroad operations. (See, e.g.,  
15 *Pace v. CSX Transportation, Inc.* (11th Cir. 2010) 613 F.3d 1066, 1069 [ICCTA preempted  
16 nuisance claim based on railroad’s operation and use of side track]; *Kiser v. CSX Real*  
17 *Property, Inc.* (No. 8:07-cv-1266-T-24, M.D. Fla. Nov. 7, 2008) 2008 U.S. Dist. LEXIS  
18 90676, at \*8-12 [holding state nuisance action seeking relocation of planned intermodal  
19 facility was preempted by the ICCTA and that “[a]ll state-born attacks aimed at the target, no  
20 matter the weapon used, are rebuffed by the shield of federal supremacy”]; *Maynard v. CSX*  
21 *Transportation, Inc.* (E.D. Ky. 2004) 360 F.Supp.2d 836, 842 [ICCTA preempts state  
22 common law claims for nuisance based on allegations that railroad operated side track in a  
23 way that unreasonably blocked access to plaintiffs’ property]; *Thomas Tubbs—Petition for*  
24 *Declaratory Order* (STB Fin. Docket No. 35792, Oct. 31, 2014) 2014 STB LEXIS 265, at  
25 \*6–18 [finding that Missouri state law claims of trespass, nuisance, negligence, and inverse  
26 condemnation for damages from flooding and property damage allegedly caused by  
27 railroad’s improper design, maintenance, and construction of rail line were preempted].) In  
28

1 the end, the “all-encompassing language of the ICCTA’s preemption clause” does not  
2 “permit the federal statute to be circumvented by allowing liability to accrue under state  
3 common law.” (*Friberg v. Kansas City Southern Ry. Co.* (5th Cir. 2001) 267 F.3d 439, 443.)  
4 As set forth in Union Pacific’s Petition, SFPP’s state law causes of action are an attempt to  
5 regulate rail transportation in a way that is preempted by ICCTA.

6 Similar to SFPP’s attempted use of state law here, the Chicago Transit Authority  
7 attempted to use a state law condemnation action to secure the right to operate over Union  
8 Pacific’s lines because it was “dissatisfied with the monthly rent arrangement that it agreed  
9 to when it first entered the lease.” (*Union Pacific Railroad Co. v. Chicago Transit Authority*  
10 (7th Cir. 2011) 647 F.3d 675, 682.) But ICCTA preempted the condemnation action because  
11 it unduly interfered with rail operations:

12 The CTA’s use of the Right of Way [through condemnation] has a  
13 significant impact on railroad transportation: it prevents Union  
14 Pacific from using the property itself for additional tracks; and it  
15 affects Union Pacific’s current railroad operations, including  
16 requiring Union Pacific to use nonstandard procedures to maintain  
17 the Right of Way. . . . [T]he CTA is seeking, by regulation and not  
18 by agreement, to use Union Pacific’s property in a way that has a  
significant impact on railroad transportation. And a regulation  
(instead of an agreement or contract) that prevents or unreasonably  
interferes with railroad transportation is preempted by the Act.

19 (*Id.* at p. 682.)

20 The same principles apply here, and ICCTA preempts SFPP’s attempt to use its state  
21 law causes of action to secure its pipeline at its present location on Union Pacific’s right-of-  
22 way, and to extinguish the AREA along with the conditions it imposes on SFPP for the  
23 pipeline’s presence on the right-of-way. The remedies SFPP seeks are no different than if  
24 SFPP brought an eminent domain action seeking to force its way onto Union Pacific’s right-  
25 of-way without providing any protections against pipeline interference. SFPP’s causes of  
26 action for rescission and declaratory relief thus fall squarely into the kind of state action and  
27 remedies that ICCTA preempts.

1                   **B. The STB is the Appropriate Forum to Determine Whether SFPP's**  
2                   **State Law Causes of Action are Preempted.**

3                   Under the ICCTA, the STB is the federal agency charged with “ensur[ing] the  
4 development and continuation of a sound rail transportation system.” (49 U.S.C. §  
5 10101(4).) The STB routinely analyzes whether state actions are preempted by the ICCTA,  
6 and issues declaratory orders to address the issue. (See *Pinelawn Cemetery—Petition for*  
7 *Declaratory Order* (Docket No. FD 35485, Apr. 21, 2015) 2015 STB LEXIS 126, at \*14–15  
8 [“The Board has, on many occasions, used the declaratory order process to address issues  
9 involving the federal preemption provision contained in 49 U.S.C. § 10501(b).”].) The  
10 California Court of Appeal recognizes the STB as the appropriate forum to adjudicate  
11 preemption under the ICCTA. Indeed, “as the agency authorized by Congress to administer  
12 the ICCTA,” [the STB] is “uniquely qualified to determine if state law is preempted.” (*Town*  
13 *of Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 332, fn. 4;  
14 accord *Emerson v. Kansas City Southern Ry. Co.* (10th Cir. 2007) 503 F.3d 1126, 1130;  
15 *Green Mountain Railroad Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 642.) Thus, “[a]  
16 request to the STB for a declaratory order of preemption would be the remedy for [a party’s]  
17 claim of federal preemption . . . .” (*Town of Atherton, supra*, 228 Cal.App.4th at p. 332, fn.  
18 4.)

19                   **C. The Court Should Stay This Case Under the Primary Jurisdiction**  
20                   **Doctrine to Allow the STB Time to Determine the Preemption Issue.**

21                   “The doctrine of primary jurisdiction applies where a claim is originally cognizable in  
22 the courts, and comes into play whenever enforcement of the claim requires the resolution of  
23 issues which, under a regulatory scheme, have been placed within the special competence of  
24 an administrative body; in such a case the judicial process is suspended pending referral of  
25 such issues to the administrative body for its views.” (*Wise v. Pacific Gas & Electric Co.*  
26 (1999) 77 Cal.App.4th 287, 295–296 (internal citation omitted).) The doctrine advances two  
27 important policies: “it enhances court decisionmaking and efficiency by allowing courts to  
28

1 take advantage of administrative expertise, and it helps assure uniform application of  
2 regulatory laws.” (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390.)  
3 “The doctrine does not permanently foreclose judicial action, but provides the appropriate  
4 administrative agency with an opportunity to act if it chooses to do so.” (*Wise, supra*, 77  
5 Cal.App.4th at p. 296.) Application of the doctrine is a matter within the Court’s discretion.  
6 *Farmers Ins. Exchange, supra*, 2 Cal.4th at p. 394.)

7 Like the *Farmers* case, SFPP’s rescission action demonstrates a “paramount need for  
8 specialized agency fact-finding expertise.” (*Id.* at p. 398.) In *Farmers*, the alleged unfair  
9 practices required resolution of a various questions concerning specific sections of the  
10 Insurance Code, which mandated the commissioner’s expertise and posed a risk of  
11 inconsistent application of regulatory statutes if the court was forced to rule on matters  
12 without the benefit of the views of the regulatory agency. (*Id.*; see *Jonathan Neil & Assoc.,*  
13 *Inc. v. Jones* (2004) 33 Cal.4th 917, 933–935 [court abused discretion in not staying the  
14 proceeding and referring issues to Department of Insurance].)

15 Courts in other jurisdictions have recognized the STB’s primary jurisdiction and the  
16 virtue of staying actions involving state law while issues are resolved by the STB. For  
17 example, in *Pinelawn Cemetery v. Coastal Distribution, LLC* (N.Y. App. Div. 2nd Dep’t  
18 2010) 74 A.D.3d 938, a landlord cemetery brought a state law action to evict a tenant  
19 railroad from cemetery property for failure to properly renew its lease. (*Id.* at pp. 939–940.)  
20 During the lease’s term, the railroad had subleased the property to a company which used the  
21 site load construction debris onto railroad cars. (*Id.* at p. 939.) The court held the STB had  
22 primary jurisdiction over issues of abandonment or discontinuance of rail service under the  
23 ICCTA, and those issues had to be determined before the court could entertain the plaintiff’s  
24 state law eviction action. (*Id.* at p. 941.) A stay was necessary for “all proceedings in the  
25 action pending a determination by the STB of the issue of abandonment.” (*Id.*)

26 Similarly, a New Jersey court held a plaintiff city was required to submit its state law  
27 nuisance claim against a railroad “to the STB in the first instance under the doctrine of  
28

1 federal preemption and primary jurisdiction.” (*Vill. of Ridgfield Park v. N.Y., Susquehanna*  
2 *and Western Ry. Corp.* (N.J. App. Div. 1998) 318 N.J. Super. 385, 405.) The Court noted  
3 that the STB might conclusively decide the matter or it might “choose to spell out the precise  
4 contours of the residual state police powers which it finds survive the broadly-phrased  
5 federal preemption statute and are compatible with the national policy of railroad  
6 deregulation and federal primacy.” (*Id.* at p. 407.) If the STB did not consider the complaint  
7 on the merits, the Court would reinstate the case—dismissed by the trial court on federal  
8 preemption grounds—on plaintiff’s application. (*Id.*) But, in any event, the STB’s input was  
9 a necessary first step to decide the preemption issue. (*Id.* at pp. 405–407.)

10         These cases are consistent with the California Court of Appeal’s view. State law  
11 claims, which pose a preemption question, should be referred to the STB. (*Town of*  
12 *Atherton, supra*, 228 Cal.App.4th at p. 332, fn.4.) The STB may decide the preemption  
13 issue, or it may provide a regulatory context in which the Court may determine issues with  
14 its understanding informed by the STB’s expertise.

15         In the AREA, the parties agreed to express conditions that prohibit SFPP from  
16 interfering with Union Pacific’s railroad operations. Union Pacific maintains that SFPP’s  
17 causes of action to rescind the AREA, keep its pipeline structures in place beneath the  
18 railroad indefinitely, and extinguish Union Pacific’s control over the rail corridor would  
19 impermissibly interfere with Union Pacific’s rail transportation. This attempted interference  
20 directly implicates the preemption provision in 49 U.S.C. § 10501(b). Construction and  
21 operation of railroad facilities fall expressly within the STB’s regulatory authority. (*Id.*)  
22 Determining the questions presented and unifying them with the STB’s comprehensive  
23 regulatory framework falls squarely within the STB’s expertise. Thus, the Court should stay  
24 this case to await the STB’s preemption ruling, or at the very least, to acquire the benefits of  
25 the STB’s experience and expertise in this complex area of federal regulation. By so doing  
26 the Court will economize judicial resources and advance the primary jurisdiction doctrine’s

1 policy objectives of enhanced court decisionmaking and uniform application of regulatory  
2 laws. (*Farmers Ins. Exch.*, *supra*, 2 Cal.4th at p. 390.)

3 And a stay here poses no downside. There is no alleged urgency to upset the status  
4 quo. To the contrary, this case would be most efficiently resolved by awaiting the STB's  
5 ruling on Union Pacific's Petition. Even if the STB were to deny Union Pacific's Petition,  
6 "that does not mean that the courts must therefore deny themselves the enlightenment which  
7 may be had from a consideration of the relevant economic and other facts which the  
8 administrative agency charged with regulation of the transaction here involved is peculiarly  
9 well equipped to marshal and initially to evaluate." (*E.B. Ackerman Importing Co. v. Los*  
10 *Angeles* (1964) 61 Cal.2d 595, 600.) Staying this case as requested would thus ensure the  
11 Court will have adequate information to efficiently adjudicate the action.

12  
13 **IV. CONCLUSION**

14 For the reasons discussed above, and those included in the Petition, Union Pacific  
15 respectfully requests that the Court stay all proceedings and activity this case until the STB  
16 issues the requested declaratory order.

17  
18 Dated: September 25, 2015

SHOOK, HARDY & BACON L.L.P.

19  
20 By: 

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