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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DIRK REGAN, CAROL REGAN,
JACQUELYN SHELDRIK, STEPHEN
PHILLIP RUTHERFORD, DONALD M.
FISK, AND GLENN L. BOOM, for
themselves and behalf of all
others similarly situated, et
al.,

NO. CIV. 2:01-766 WBS KJM

MEMORANDUM AND ORDER RE:
MOTION FOR CLASS CERTIFICATION

Plaintiffs,

v.

QWEST COMMUNICATIONS
INTERNATIONAL, INC., et al.,

Defendants.

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Named plaintiffs Glenn Boom and Stephen Phillip
Rutherford bring this putative class action against defendants
Qwest Communications International, Inc., Qwest Communications
Corporation, Qwest Transmission Inc., Qwest USLD Communications
Corporation, and Qwest Network Construction Services

1 (collectively, "Qwest"). Before the court is plaintiffs' motion
2 for class certification.

3 I. Factual and Procedural Background

4 The facts of this action have already been recounted by
5 this court in its previous orders, and do not all bear repeating
6 here. See Regan v. Williams Commc'ns Int'l, Inc., Nos. 01-779,
7 01-766, slip op. (E.D. Cal. June 17, 2005) (Order denying motion
8 to reconsider); Regan v. Williams Commc'ns Int'l, Inc., Nos. 01-
9 779, 01-766, slip op. (E.D. Cal. May 16, 2003) (Order denying
10 motion for class certification). Glen Boom owns, in trust with
11 his wife Sally Streeter Boom ("the Booms"), a 10.77 acre parcel
12 of land in fee simple in Yuba County, California that is
13 encumbered by a Union Pacific Railroad right-of-way. (Mot. for
14 Class Cert (Docket No. 179) at 3-4.) Union Pacific Railroad's
15 predecessor-in-title, Yuba County Rail, obtained the encumbrance
16 pursuant to an 1877 condemnation order granting it an easement
17 for railroad purposes. (Id. at 4.) Stephen Phillip Rutherford
18 owns, in trust with his wife Maxine Rutherford and two children,
19 approximately 3,000 acres of land in Imperial County, California.
20 Two parcels of the Rutherford's property consisting of 12.86 and
21 45.35 acres located in Imperial County are crossed by Union
22 Pacific Railroad's right of way. (Id. at 4.) Union Pacific
23 Railroad's predecessor-in-title, Southern Pacific Company,
24 purchased by deed a right-of-way easement in 1907 for railroad
25 purposes. (Id.)

26 In short, plaintiffs allege that defendants trespassed
27 on their lands and installed fiber optic telecommunications
28 cables along railroad rights-of-way without their consent. (See

1 Second Am. Class Action Compl. ("SAC") (Docket No. 136).)
2 Plaintiffs contend that the rights-of-way granted to the railroad
3 companies are easements for railroad purposes only and that
4 defendants could not obtain occupancy rights in the right-of-way
5 land without plaintiffs' consent. Plaintiffs seek declaratory
6 relief and damages for trespass and unjust enrichment.

7 The court previously denied plaintiffs' motion for
8 class certification on the ground that the then-putative class
9 representatives did not satisfy the "typicality" requirement of
10 Federal Rule of Civil Procedure 23(a). Regan v. Williams
11 Commc'ns Int'l, Inc., Nos. 01-779, 01-766, slip op. (E.D. Cal.
12 May 16, 2003). In that Order, the court found that defendants
13 had presented a standing defense against class representatives
14 Dirk and Carol Regan and Victor and Jacquelyn Sheldrick unique to
15 them that could threaten to become a focus of the litigation to
16 the detriment of the class members. Id. at 5-6. Specifically,
17 defendants argued that plaintiffs did not hold any interest in
18 the right-of-way land on which defendants laid their fiber optic
19 cables because that strip of land was excepted from the property
20 conveyed to plaintiffs' predecessors-in-interest. Id. at 5.
21 Plaintiffs thereafter filed a motion for reconsideration, arguing
22 in part that the "centerline presumption"--the presumption that
23 an owner of land bounded by a road or street is presumed to own
24 the center of the way--is a common issue that governs all deeds
25 in California and that the language defendants challenged in the
26 named plaintiffs' deeds was typical of class members. (Docket
27 No. 124); see Cal. Civil Code §§ 831, 1112 (codifying the
28 centerline presumption).

1 In denying plaintiffs' motion for reconsideration, the
2 court expressed doubts about plaintiffs' case management plan,
3 which would have had the court certify the class, provide a forum
4 in which common issues could be litigated, and then hold
5 individual trials to determine whether individual class members
6 actually owned the right-of-way land. Regan v. Williams Commc'ns
7 Int'l, Inc., Nos. 01-779, 01-766, slip op. at 13 (E.D. Cal. June
8 17, 2005). The court was concerned that plaintiffs wanted the
9 court to apply the centerline presumption class-wide on a motion
10 for summary judgment after class certification and "somehow
11 dispose of the issue of the differing language of all class
12 members' deed histories by ruling that all plaintiffs in the
13 class own the relevant land." Id. at 12-13 (rejecting
14 plaintiffs' reliance on In re U.S. Financial Securities
15 Litigation, 69 F.R.D. 24 (S.D. Cal. 1975) as inapposite). The
16 court made clear that "standing is a [] fundamental requirement
17 for bringing suit" such that "the court will not permit standing
18 to be determined after other issues are adjudicated." Id. at 14.

19 Plaintiffs amended their Complaint on August 15, 2005
20 to add Boom and Rutherford as putative class representatives.
21 (See SAC). Plaintiffs again seek certification of the class.
22 Plaintiffs define the class as "all owners of land in California
23 that underlies or is adjacent to a railroad right-of-way within
24 which Qwest owns, operates, or uses fiber optic cable
25 ("Landowners")." (SAC ¶ 18.)

26 II. Discussion

27 A class action will be certified only if it meets the
28 four prerequisites identified in Federal Rule of Civil Procedure

1 23(a) and additionally fits within one of the three subdivisions
2 of Rule 23(b). Although a district court has discretion in
3 determining whether the moving party has satisfied each Rule 23
4 requirement, Califano v. Yamasaki, 442 U.S. 682, 701 (1979);
5 Montgomery v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978), the
6 court must conduct a rigorous inquiry before certifying a class.
7 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982); E.
8 Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403-05
9 (1977).

10 A. Class Definition

11 Implicit in Rule 23 is the requirement that the class
12 must be adequately defined and clearly ascertainable.
13 DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970); see
14 also Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718 (9th Cir.
15 2007). "The requirement that there be a class will not be deemed
16 satisfied unless the description of it is sufficiently definite
17 so that it is administratively feasible for the court to
18 determine whether a particular individual is a member." Aiken v.
19 Obledo, 442 F. Supp. 628, at 658 (E.D. Cal. 1977). A class
20 definition must be "precise, objective, and presently
21 ascertainable." O'Connor v. Boeing North Am., Inc., 197 F.R.D.
22 404, 416 (C.D. Cal. 2000) (quotation marks omitted). "An
23 adequate class definition specifies 'a distinct group of
24 plaintiffs whose members [can] be identified with
25 particularity.'" Campbell v. PricewaterhouseCoopers, LLP, 253
26 F.R.D. 586, 593 (E.D. Cal. 2008) (quoting Lerwill v. Inflight
27 Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978)).

28 Plaintiffs' class definition consists of a defined

1 group of individuals--those who own land in California subject to
2 or adjacent to a railroad right-of-way under which Qwest owns,
3 operates, or uses fiber optic cables. Class members can be
4 determined by reference to maps detailing railroad tracks and
5 property boundaries, defendants' records regarding the location
6 of Qwest's fiber optic cables, and class members' deeds to land.
7 While an individualized evaluation of a potential class member's
8 deed would be required, this does not preclude the class
9 definition from being ascertainable. See Mazur v. Ebay, Inc.,
10 257 F.R.D. 563, 566 (N.D. Cal. 2009) ("[T]he class need not be so
11 ascertainable that every potential member can be identified at
12 the commencement of the action.") Plaintiffs have provided a
13 precise, objective, and ascertainable class definition.

14 Defendants argue that plaintiff's class definition is
15 defective because the trespass alleged is a permanent trespass
16 rather than a continuing trespass. According to defendants, it
17 follows that only those property owners who owned the property at
18 the time the trespass originally occurred have standing to sue
19 for trespass and plaintiff's definition of current property
20 owners is therefore inappropriate. The Supreme Court has
21 counseled that there is "nothing in either the language or
22 history of Rule 23 that gives a court any authority to conduct a
23 preliminary inquiry into the merits of a suit in order to
24 determine whether it may be maintained as a class action." Eisen
25 v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974); see United
26 Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. &
27 Servs. Workers Int'l Union v. ConocoPhillips Co., 593 F.3d 802,
28 809 (9th Cir. 2010) ("[A] court can never be assured that a

1 plaintiff will prevail on a given legal theory prior to a
2 dispositive ruling on the merits, and a full inquiry into the
3 merits of a putative class's legal claims is precisely what both
4 the Supreme Court and we have cautioned is not appropriate for a
5 Rule 23 certification inquiry.") (citing Eisen). Defendants ask
6 the court to do precisely what is prohibited on a Rule 23
7 certification motion and rule that plaintiffs' legal theory
8 regarding the nature of the trespass is wrong.¹

9 B. Rule 23(a)

10 Rule 23(a) restricts class actions to cases where:

11 (1) the class is so numerous that joinder of all members
12 is impracticable; (2) there are questions of law or fact
13 common to the class; (3) the claims or defenses of the
14 representative parties are typical of the claims or
15 defenses of the class; and (4) the representative parties
16 will fairly and adequately protect the interests of the
17 class.

18 Fed. R. Civ. P. 23(a). These requirements are more commonly
19 referred to as numerosity, commonality, typicality, and adequacy
20 of representation, respectively. Hanlon v. Chrysler Corp., 150
21 F.3d 1011, 1019 (9th Cir. 1998). Defendants do not challenge
22 numerosity, and it is satisfied as the class consists of
23 thousands of putative plaintiffs. Nor do defendants challenge
24 commonality, apparently on the belief that there is at least one
25 common question of law or fact that could apply to the class as a
26

27 ¹ As Boom and Rutherford have owned their property since
28 before defendants installed fiber optic cables underneath the
adjacent railroad rights-of-way, defendants' argument is also
irrelevant to any Rule 23(a) standing challenge.

1 whole.²

2 Defendants again, however, challenge the typicality of
3 the putative class representatives. Rule 23(a) requires that the
4 "claims or defenses of the representative parties [be] typical of
5 the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).
6 Typicality requires that named plaintiffs have claims "reasonably
7 coextensive with those of absent class members," but their claims
8 do not have to be "substantially identical." Hanlon, 150 F.3d at
9 1020. The test for typicality "is whether other members have
10 the same or similar injury, whether the action is based on
11 conduct which is not unique to the named plaintiffs, and whether
12 other class members have been injured by the same course of
13 conduct.'" Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th
14 Cir. 1992) (citation omitted). Class certification is
15 inappropriate "where a putative class representative is subject
16 to unique defenses which threaten to become the focus of the
17 litigation." Hanon, 976 F.2d at 508 (quoting Gary Plastic
18 Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
19 903 F.2d 176, 180 (2d Cir. 1990), cert. denied, 498 U.S. 1025
20 (1991)).

21 Plaintiffs allege that defendants acted toward the
22 putative class representatives in the same way they acted toward
23 the putative class: the trespass injuries allegedly suffered by
24 Boom and Rutherford are the same injuries allegedly suffered by

26 ² As explained in the context of Rule 23(b)(3)
27 certification infra, the court is skeptical that there are any
28 issues of fact or law common to the class as a whole such that
plaintiffs could satisfy the "commonality" requirement of Rule
23(a).

1 the putative class, defendants' conduct toward Boom and
2 Rutherford in laying fiber optic cable along their alleged right-
3 of-way is not unique to them, and other members of the putative
4 class have allegedly been injured by the same conduct. Indeed,
5 plaintiffs intend to file motions for partial summary judgment to
6 decide on a class-wide basis the scope of railroad easements and
7 ownership of the right-of-way land. Under plaintiffs' case
8 management plan, motions for partial summary judgment are the
9 primary way plaintiffs seek to establish defendants' liability
10 for trespass and unjust enrichment.

11 However, plaintiffs lose sight of the fact that the
12 class's claims are inextricably tied to the instruments that
13 conveyed the rights-of-way and cannot be decided in a vacuum.
14 Right-of-way land has been conveyed by--at a minimum--five
15 federal land grant statutes, five condemnation statutes, and
16 thousands of private conveyances. The class's trespass claims
17 therefore depend on how the court construes the applicable
18 statutes, conveyances, and deeds. Approximately ninety percent
19 of the class owns land where the right-of-way was conveyed by a
20 federal land statute. The rights-of-way in Boom's and
21 Rutherford's cases were conveyed by condemnation and private
22 deed, respectively. While Boom's deed could be typical of those
23 putative plaintiffs whose rights-of-way were conveyed by
24 condemnation statutes, plaintiffs have provided no evidence to
25 support this inference. Furthermore, there is no class
26 representative whose right-of-way was conveyed by one of the five
27 federal land grant statutes that affects ninety percent of the
28 putative class. Boom's and Rutherford's claims, therefore, are

1 not "typical" of the class, and class certification must be
2 denied for that reason.

3 Even if Boom's and Rutherford's claims could be
4 considered typical of the class, defendants also raise the
5 possibility of unique defenses against Boom and Rutherford that
6 could become the focus of the litigation. While defendants do
7 not raise any specific challenge to Boom's or Rutherford's
8 ownership of the right-of-way land at this juncture as they did
9 to the Regans and Sheldricks on plaintiffs' prior motion for
10 class certification, they argue that a unique "standing problem"
11 which Boom and Rutherford face is the ability to prove that they
12 own the land in fee subject to a railroad right-of-way easement
13 such that they are proper plaintiffs. The 1866 condemnation
14 decree--and its corresponding condemnation statute--and 1909
15 private deed that conveyed the rights-of-way in Boom's and
16 Rutherford's cases, respectively, are admittedly not common to
17 the overwhelming majority of putative plaintiffs, appear to be
18 significantly or almost entirely illegible,³ and, in Rutherford's
19 case, is argued to be highly idiosyncratic. Because there are
20 likely so many issues to be adjudicated that any one issue is
21 unlikely to become the "focus" of the litigation, the class would
22 undoubtedly suffer harm if Boom and Rutherford become preoccupied
23 with these standing challenges. See Hanon, 976 F.2d at 508.

24 C. Rule 23(b)

25 Even assuming plaintiffs met the requirements of Rule
26 23(a), their motion for class certification must be denied

27
28 ³ See (Aff. of Dan Millea ("Millea Aff.") (Docket No.
180) Ex. 4, 7.)

1 because they fail to meet the requirements of Rule 23(b). An
2 action that meets all the prerequisites of Rule 23(a) may be
3 maintained as a class action only if it also meets the
4 requirements of one of the three subdivisions of Rule 23(b).
5 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163 (1974). In this
6 case, plaintiff seeks certification under both Rule 23(b)(2) and
7 23(b)(3).

8 1. 23(b)(2) Certification

9 A class action may be maintained under Rule 23(b)(2) if
10 "the party opposing the class has acted or refused to act on
11 grounds that apply generally to the class, so that final
12 injunctive relief or corresponding declaratory relief is
13 appropriate respecting the class as a whole." Fed. R. Civ. P.
14 23(b)(2). To the extent that Rule 23(b)(2) certification is
15 available where plaintiffs seek monetary damages, it is only
16 available where "the primary relief sought is declaratory or
17 injunctive." Zinser v. Accufix Res. Institute, Inc., 253 F.3d
18 1180, 1195 (9th Cir. 2001).

19 To determine the whether the primary relief sought is
20 declaratory or injunctive or whether monetary damages are the
21 predominant form of relief sought, court should consider
22 "[f]actors such as whether the monetary relief sought determines
23 the key procedures that will be used, whether it introduces new
24 and significant legal and factual issues, whether it requires
25 individualized hearings, and whether its size and nature--as
26 measured by recovery per class member--raise particular due
27 process and manageability concerns." Dukes v. Wal-Mart Stores,
28 Inc., 603 F.3d 571 (9th Cir. 2010).

1 Plaintiffs do not seek to have the fiber optic cables
2 removed from their property; rather, they seek only declarations
3 that the railroad rights-of-way provided only easements and that
4 defendants had no right to install fiber optic cables on their
5 property. Yet even plaintiffs concede that they cannot obtain
6 the declaratory relief that they seek with respect to every
7 putative class member. Many putative plaintiffs likely do not
8 own the railroad right-of-way adjoining their property, as
9 railroads have obtained title to some rights-of-way over time
10 through private deed, adverse possession, or possibly land grant
11 or condemnation statutes, and as predecessors-in-title have
12 withheld the rights-of-way from conveyances. The declaratory
13 relief that plaintiffs seek, therefore, will necessarily be
14 individualized and cannot apply to "the class as a whole."

15 Furthermore, according to plaintiffs' case management
16 plan, the court would decide "common" questions of law with
17 respect to the entire class on motions for partial summary
18 judgment, then hold a jury trial on damages, and thereafter
19 undergo a claims administration process whereby individual class
20 members would come forward to establish their eligibility for
21 class benefits. While the court will not speculate as to what
22 the proper measure of damages might be, plaintiffs' request for
23 damages would necessitate a ruling on whether a common measure or
24 an individualized determination of damages would be appropriate,
25 raising new legal issues and the possibility of even more
26 individualized hearings. Even according to plaintiffs the
27 introduction of class-wide damages creates the necessity for
28 individualized hearings in the form of a "claims administration"

1 stage such that individual class members can collect. The court
2 must conclude that under any procedure the issues pertaining to
3 monetary damages would predominate the proceedings. Accordingly,
4 certification under Rule 23(b)(2) would be inappropriate.

5 2. 23(b)(3) Certification

6 A class action may be maintained under Rule 23(b)(3) if
7 (1) "the court finds that questions of law or fact common to
8 class members predominate over any questions affecting only
9 individual members," and (2) "that a class action is superior to
10 other available methods for fairly and efficiently adjudicating
11 the controversy." Fed. R. Civ. P. 23(b)(3); see Amchem Prod.,
12 Inc. v. Windsor, 521 U.S. 591, 623 (1997) ("The Rule 23(b)(3)
13 predominance inquiry tests whether proposed classes are
14 sufficiently cohesive to warrant adjudication by
15 representation."). Almost every one of plaintiffs' supposed
16 "common questions of fact" are predicated on the legal
17 conclusions that plaintiffs own the right-of-way land, that the
18 railroad only had an easement in the right-of-way, and that
19 defendants' actions were outside the scope of those easements.
20 (See SAC ¶ 22.) These legal issues must, therefore, be decided
21 in plaintiffs' favor for plaintiffs' "common questions of fact"
22 to be potentially valid and relevant to the case. Whether these
23 legal issues are "common" or individualized, therefore, will
24 determine whether common issues predominate over individual
25 issues as a whole in this litigation.

26 Plaintiffs portray these legal issues as common
27 questions of law properly subject to successive motions for
28 summary judgment that would apply to whole swaths of putative

1 class members. Yet it is clear that these issues are not
2 "common" to the class at all. The "question" of the scope of
3 railroad interests in right-of-way land itself, for example,
4 involves a minimum of ten land grant and condemnation statutes.
5 The court would have to construe all of the statutes--each of
6 which affects only a small minority of the class--to determine
7 the fee versus easement issue and, in cases where the statute
8 provided for a railroad easement, examine the individual
9 conveying documents to determine the scope of any easement
10 granted. Determining the railroad interest in right-of-way land
11 conveyed by land grant or condemnation statutes, therefore, is
12 not a single "common" question of law applicable to the class as
13 a whole. Rather, it is a fractured and individualized inquiry
14 that cannot sustain a finding of "predominance" necessary to
15 satisfy Rule 23(b)(3) certification.

16 With regard to the miles of right-of-way subject to
17 private conveyances, plaintiffs argue the individual deeds can be
18 placed in groups based on common conveyance language and the
19 court can decide motions for partial summary judgment with
20 respect to each group on the fee versus easement issue. While
21 plaintiffs have submitted a handful of such conveyances from the
22 same railroad route in Kings County, California in order to show
23 that these conveyances can use identical or similar language,
24 (Ex. to Supp. Millea Aff. (Docket No. 193) Ex. B), the court has
25 no evidence that there is a limited range of granting language or
26 that there will be a limited number of potential deed "groups."
27 See Kirkman v. N.C. R. Co., 220 F.R.D. 40 (M.D.N.C. 2004). When
28 the private conveyances number somewhere between five hundred and

1 two thousand, spanning hundreds of miles and multiple railroad
2 routes, plaintiffs' offering is no assurance that interpretation
3 of private deeds is a "common" issue at all.

4 Yet this is at most only half of the equation. A class
5 member can only bring a cause of action for trespass--and the
6 corresponding claims for unjust enrichment and declaratory
7 judgment--if he shows that he owns the land allegedly trespassed
8 upon. This inquiry is necessarily an individual one that also
9 implicates the plaintiff's standing to bring suit. The court
10 previously warned plaintiffs that it would not allow standing to
11 be determined after other issues had been decided. Regan v.
12 Williams Commc'ns Int'l, Inc., Nos. 01-779, 01-766, slip op. at
13 13 (E.D. Cal. June 17, 2005). Yet plaintiffs again argue--and
14 their case management plan so proposes--that the court can rule
15 on a motion for partial summary judgment regarding the
16 "centerline presumption" and in effect decide that each plaintiff
17 owns the land in question without looking at a single title. It
18 is only in the "claims administration stage" at the conclusion of
19 the litigation that plaintiffs propose the magistrate judge
20 investigate whether there are any "defenses" to liability--that
21 is, whether a particular plaintiff owns the land.

22 Standing to bring suit is not a "defense" to liability
23 fit to be determined after every other issue in the case has been
24 litigated. Rather, it is an "essential and unchanging part of
25 the case-or-controversy requirement of Article III" without which
26 a federal court lacks subject matter jurisdiction to hear a case.
27 Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-560 (1992); see
28 Fed. R. Civ. P. 12(b)(1). While plaintiffs point out that to

1 require an individualized determination of standing before moving
2 on to common questions of law effectively defeats class
3 certification, the court believes that this only illustrates why
4 it this suit is not appropriate for class action certification
5 nor superior to other methods for adjudicating plaintiffs'
6 claims.

7 When properly addressed at the beginning of the
8 litigation, it is clear that the exercise of examining each
9 putative plaintiff's deed and documents in chain of title to
10 determine that they own the right-of-way land would overwhelm the
11 proceedings. While Koyle v. Leval 3 Communications, Inc., No.
12 01-286 slip op. (D. Idaho Dec. 1, 2005), is the only federal
13 fiber optic right-of-way case either party has proffered as
14 having decided the issue of class certification in the Ninth
15 Circuit,⁴ the court finds its opinion granting class
16 certification distinguishable for several reasons. (Millea Aff.
17 Ex. 21.) In that case almost all of the right-of-way land was
18 obtained under one federal land grant statute and the amount of
19 right-of-way land was only a fraction of the land at issue here.
20 Koyle, No. 01-286, slip. op. at 6. Even in Koyle, the court

21
22 ⁴ Plaintiffs have additionally provided the court with
23 four "rails to trails" cases that granted certification of class
24 actions where property owners argued the government abandoned its
25 railroad easement and that subsequent conversion of the railroad
26 into a park constituted an unconstitutional "taking," see, e.g.,
27 Hash v. United States, No. 99-324, 2000 U.S. Dist. LEXIS 20061
28 (D. Idaho July 7, 2000) (one federal statute applied to
approximately 200 class members along one railroad line spanning
two counties), and one case from the Eastern District of Virginia
certifying a two-state fiber optic right-of-way class. Fisher v.
Va. Elec. & Power Co., 217 F.R.D. 201 (E.D. Va. 2003).
Defendants provide a list of twenty-one federal cases that have
denied class certification of these types of cases. (Opp'n to
Mot. for Class Cert. (Docket No. 191) at 10-11.)

1 found that, after weighing the common and individual issues,
2 predominance "was not an easy call" and only conditionally
3 certified the class pursuant to Rule 23(c). This case, on the
4 other hand, will be significantly more complex than as was the
5 case in Koyle. At issue are at least ten statutes and admittedly
6 thousands of private grants, across over one thousand miles of
7 land spanning over thirty counties and involving approximately
8 fifteen thousand putative class members. Given the inherently
9 individual issues relating to plaintiffs' titles and the many
10 types and forms of conveyances, it seems clear to the court that
11 individual issues can only predominate over what common questions
12 of law that might exist.

13 IT IS THEREFORE ORDERED that plaintiff's motion for
14 class certification be, and the same hereby is, DENIED.

15 DATED: October 5, 2010

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18 WILLIAM B. SHUBB
19 UNITED STATES DISTRICT JUDGE
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