Dear Mr. Peery and Mr. Slater:

As you are aware, the Bureau of Land Management (BLM) issued Instruction Memorandum (IM) No. 2014-122, Evaluation and Approval of Uses within Railroad Rights-of-Way Granted under the General Railroad Right-of-Way Act of March 3, 1875, on August 20, 2014 in response to the Solicitor for the Department of the Interior’s legal interpretation of rights-of-way (ROWs) granted to railroads under the 1875 Act.¹ BLM utilized the IM and the 2011 M-Opinion to evaluate activities presented in the Cadiz Valley Water Conservation, Recovery & Storage Project (Project) and make an administrative determination as to whether the Project is within the scope of Arizona and California Railroad’s (ARZC) 1875 Act ROWs.² BLM evaluation of the Project also relied on information provided by ARZC, Cadiz, Inc., and others to assist in determining whether the proposed activities for the Project on public land are within the scope of ARZC’s 1875 Act ROWs. BLM also included publically available information, meetings with the parties involved, and details on the proposed activities provided by ARZC, Cadiz, Inc., and others.

Based on all this information, BLM has reached an administrative determination that the Project as described cannot be authorized by ARZC because it is outside the scope of ARZC’s

---

² The four railroad rights-of-way granted to the ARZC that are part of this proposal are serialized as follows:
   - CALA 0 010895 (granted 4/3/1911)
   - CALA 0 011098 (granted 11/8/1905)
   - CALA 0 011099 (granted 4/3/1911)
   - CALA 0 011100 (granted 4/3/1911)
ROW grants held under the 1875 Act. As shown in the enclosed summary, BLM has determined that the Project does not derive from or further a railroad purpose. By determining the primary objective of the Project and how the railroad purpose interrelates, BLM examined “the nature and extent of the non-railroad benefits of an activity relative to the railroad purpose of the same activity” to provide for an overall evaluation of the Project.\(^3\)

In order to proceed with the proposed Project, Cadiz, Inc., ARZC, or other parties involved will require BLM authorization for a right-of-way for the Project under the regulations set forth in 43 C.F.R. Part 2800. An SF-299 application is enclosed for your convenience. However, if additional information becomes available regarding the Project or if the information relating to the Project changes, an evaluation based on new information could result in a different determination by the BLM. Where the BLM has already completed the evaluation process, additional evaluations may be undertaken where appropriate and in the public interest given available BLM resources.

ARZC has a continuing obligation to notify the BLM of existing and new activities undertaken within their ROWs held under the Act. Any determination made with respect to any particular activity is limited to the facts before the BLM at the time of such determination.

This administrative determination is not a final agency decision and therefore not subject to appeal under 43 C.F.R. Part 4 (BLM Manual Sections 1841.1.D. and 1841.15) because it does not determine any final rights or obligations, does not constitute authorization or disapproval of any particular activity, nor do legal consequences for the activity in question flow from this administrative determination. Note that proceeding with new activities or continued activities found not to be within the scope of the ROWs without authorization from the BLM could result in the BLM instituting trespass proceedings.

If you have any questions regarding this request, please contact Erik Pignata, Realty Specialist, at (916) 978-4655 or epignata@blm.gov.

Sincerely,

James Kenna,
State Director

Enclosures (2)

\(^3\) IM 2014-122 at Section E.
Summary Evaluation

Purpose of the Document

The purpose of this document is to summarize a case-specific evaluation that has been conducted of whether activities that have been proposed by a third-party, Cadiz, Inc., and a railroad company, the Arizona and California Railroad (ARZC), to be located within 1875 railroad rights-of-way (ROWs) across public land, derive from or further a railroad purpose. These ROWs were granted under the authority of the General Railroad Right-of-Way Act of March 3, 1875 (the Act). The evaluation of activities was done under the guidance received under BLM WO IM 2014-122 (the IM).

The 1875 Act

The Act reads, in part:

"Sec 1: That the right of way through the public lands of the United States is hereby granted to any RR company duly organized under the laws of any State or Territory, ... or by the Congress..., which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turnouts, and water-stations, not to exceed in amount twenty acres for each stations, to the extent of one station for each ten miles of its road.

Sec 4: That any railroad company desiring to secure the benefits of this act, shall...file with the register of the land office...a profile of its road; and upon approval ...the same shall be noted upon the plats...; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

Background Discussion

The IM provides guidance in response to Solicitor’s Opinion M-37025 (2011 M-Opinion), which expressly withdrew portions of a 1989 Solicitor’s Opinion (1989 M-Opinion) relating to the Solicitor’s formal legal interpretation of the scope of a railroad’s authority to undertake or authorize activities within an 1875 Act ROW grant across BLM-managed lands. It establishes a number of factors for BLM to consider in the evaluation, including:

- The specific purpose of the 1875 Act, which was to give railroads the exclusive right to use and occupy the granted ROW for railroad purposes.
• The concept that, even though railroad ROW grants are generally broadly construed, any doubts about the scope of such grant are still to be resolved in the Government’s favor. As a practical matter, this means that a railroad ROW holder and/or the party arguing that a particular activity is within the scope of an 1875 Act ROW must provide sufficient evidence to overcome any doubts as to whether a particular activity is within the scope of the ROW.

• The relationship between the activity and the railroad – e.g., does the activity in question originate or issue from, help promote, and/or advance the railroad purposes?
  o Whether the railroad purpose or the non-railroad purpose drives the activity or drives the design of the activity in question.
  o The primary objective of the activity in question and how interrelated it is with the identified railroad purpose.

• Historical industry practice with respect to the activity in question – e.g., is the proposed activity one that has been used by railroads previously in furtherance of a railroad purpose?

IM 2014-122 directs the BLM to consider, among other things, the following factors:

1. The specific purpose of the 1875 Act was to provide railroads the exclusive use and occupancy of the area within the ROW for railroad purposes;
2. The purpose of the activity being evaluated, with specific consideration given to how it related to railroad purposes, including how it promotes them and any inconsistency the activity may have with railroad operations;
3. That doubts as to whether a particular activity is within the scope are resolved for the government;
4. Information provided by the activity’s proponent or the railroad ROW holder demonstrating why the specific activity is within the scope of an 1875 railroad ROW grant;
5. Information practicably available to the BLM about the relationship between the proposed activity and railroad purposes;
6. Any articles of incorporation, corporate charter, legal filings, or publicly noted information that explains the purpose of the railroad company’s operations;
7. Applicable BLM Resource Management Plans or activity plans for the public lands in questions, and information from government records; and
8. Any relevant case law or other legal guidance provided by the Solicitor’s Office.
SUMMARY OF THE FACTORS AS APPLIED TO EACH PROPOSED PROJECT COMPONENT

Since late 2011, there has been much correspondence and numerous meetings between BLM, Cadiz, Inc., the Railroad, and Santa Margarita Water District (SMWD) in an effort to fully understand all the component parts of the project and reconcile variations of the project components. BLM originally intended to utilize Cadiz, Inc.’s Executive Summary of January 9, 2015, to evaluate the project’s components, but that document left out some details, and it was necessary to gather additional information from other documents in an attempt to more fully describe the component parts.

The following documents were used for project descriptions:
- LLA: Longitudinal Lease Agreement between Cadiz, Inc. and the Railroad (September 2008) and the amendment to that lease (Amendment)(December 2011);
- FEIR (July 2012);
- 2013 Railroad Letter: Railroad letter to the BLM describing railroad benefits of the Project (January 2013);
- 2013 Binder: Supplemental binder to a meeting between the BLM and Project Participants (February 2013);
- 2014 Cadiz, Inc. Letter: Letter from Cadiz, Inc. to the BLM and supplemental binder (October 2014); and
- 2015 Executive Summary: Executive Summary from Cadiz, Inc. to the BLM, including cover letter and supplemental binder (January 2015).

Based on this correspondence and these documents, the main proposed project components for fact specific evaluation are a water conveyance pipeline including in-line turbines for power generation and other water uses, an access road for the pipeline, a water-based fire suppression system utilizing fiber optic, a power distribution line and facilities it would support, and a tourist-based steam-powered excursion train with appurtenant facilities.

Water Conveyance Pipeline

Conveyance of water for public consumption is not a railroad purpose because the activity itself is not necessary for the construction or operation of a railroad, and the origin of the activity itself is a non-railroad purpose. Production of electricity via in-line turbines located in such a pipeline likewise is not within the scope of the ROW granted by the Act, as it remains unclear as presented how power-generation activity issues from railroad purposes, especially given that these turbines would use water for the purpose of commercial distribution and not railroad purposes.
Fire Suppression System

Use of water for fire suppression on creosote-treated timber is an uncommon industry practice, with dry sand being the preferred method, and thus the water-based hydrants and sprinklers, and fiber optic telemetry used to operate them, do not derive from or further a railroad purpose. Groundwater capture and use, not fire suppression, drives the design of the activity. A BLM authorization is needed for use of fire suppression facilities along the 43 mile stretch of the ROWs that runs across BLM administered public land.

Access Road

An access road may serve railroad purposes. However, here the origin of the access road is to support the non-railroad purpose of water conveyance for public consumption unrelated to railroad activities. Moreover, the location and description of access road activities changes over time, possibly exceeding the footprint of the ROW, and thus its location and design remain unclear. On this basis, permission for the construction of a new access road or improvements to an existing access road within the ROWs by Cadiz, Inc. is not within the authority of the Railroad to grant under their ROWs. More information, and presentation of this supporting component in relation to a project that does further railroad purposes, may change this recommendation.

Power Line and Facilities Supported

Power lines, expanding transload facilities and improving them with access to power, and supplying the railroad with a switchboard to tap into power for railroad uses may serve railroad purposes. However, the origin of the power for these activities is generated by the in-line turbines, which as discussed above is not within the scope of the ROW granted by the Act. As long as the power line is bound to and a component of the in-line turbines, authorization from BLM is required.

Excursion Train

A steam-based excursion train may derive from or further a railroad purpose. As presented, however, it remains unclear if it is a reasonably foreseeable activity or merely speculative. The excursion train’s prospective use of a small portion of the pipeline’s water does not convert the excursion train, the pipeline, or the water that runs through the pipeline into a legitimate railroad purpose. If the excursion train proposal by Cadiz, Inc. remains bound to and a component of the water conveyance pipeline, authorization from the BLM is required for operation of the excursion train. The responsibility is on the party presenting the activity to overcome uncertainty for the government, and doubts are to be resolved in the government’s
favor. Presentation of the excursion train with appurtenant facilities on its own merits can be reconsidered, separate and apart from the primary water conveyance purpose proposal.

CONCLUSION

The water conveyance pipeline with in-line turbines and the fire suppression system including the fiber optic sub-component, do not derive from or further a railroad purpose under the standard set in the 2011 M-Opinion for 1875 Act ROWs and the BLM policy found in IM 2014-122. To be conducted on public land, these activities would require approval from the BLM. The access road, the power line and facilities it supports, and the excursion train including appurtenant facilities, likewise do not derive from or further a railroad purpose as presented, due to their reliance on the pipeline. However, an evaluation can be conducted on them on their own merits, apart from the conveyance pipeline activity, if more detailed information is presented.