



October 5, 2015

Hon. Neil Kornze
Director
U.S. Bureau of Land Management
1849 C. St. NW, Room 5665
Washington, DC 20240

Re: BLM's Determination that Proposed Cadiz Water Pipeline Does Not Further Railroad Purposes

Dear Director Kornze,

On October 2, 2015, outgoing California State Director of the BLM James Kenna informed members of Congress (but not Cadiz, Inc.) that BLM determined that "the water conveyance pipeline" Cadiz has proposed to install in a 43 mile long section of an 1875 Act right-of-way ("ROW") held by the Arizona and California Railroad ("ARZC") does "not derive from or further a railroad purpose." Based on the Executive Summary provided to members of Congress, and indirectly made available to Cadiz, this letter explains why BLM's determination is contrary to law and fact and must be rescinded.

Background

The proposed pipeline would convey water that would otherwise evaporate from private property owned in fee by Cadiz in eastern San Bernardino County to multiple water providers throughout Southern California, ultimately serving the needs of 400,000 people in the region each year. Cadiz and ARZC explained to BLM in meetings and correspondence that the pipeline and its associated facilities would also further several railroad purposes important to the operation and maintenance of ARZC's railroad, including providing: a) water for an automated fire suppression system to protect remote railroad trestles; b) electric power, generated through in-line turbines, that would be used to operate remote transloading facilities; c) an access road to facilitate railroad maintenance; d) information and safety systems derived from the Project's fiber-optic cable; and d) water to fuel a steam-powered excursion train.

Governing Law

In 2011, the Solicitor of the Department of the Interior issued a formal legal opinion addressing "the scope of a railroad's authority to authorize activities within a right-of-way granted pursuant to the [1875] General Railroad Right-of-Way Act." BLM, as a bureau within the Department of the Interior, is bound to follow the Solicitor's opinion.

The Solicitor concluded that:

1) “railroads have the right to undertake a range of activities within their [1875 Act] ROWs, including commercial activities, so long as the activity derives from or furthers [at least in part] a railroad purpose;”

2) “[a] railroad’s right to undertake activities within an 1875 Act ROW includes the right to authorize other parties to undertake those same activities.”

This means that when a commercial activity—i.e., a non-railroad activity—furthers a railroad purpose, a railroad may authorize the use of its ROW for the activity without approval from BLM.

BLM’s Misapplication of the Governing Law

BLM’s determination about the Cadiz Water Project pipeline is inconsistent with the Solicitor’s opinion for several reasons, and we therefore request that it be reconsidered.

Error No. 1 – BLM determined that “[c]onveyance 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.” Of course, Cadiz never suggested that “the conveyance of water for public consumption” was a railroad purpose. Under the Solicitor’s opinion, the issue is not whether a commercial activity like “the conveyance of water for public consumption” is a railroad purpose, but whether, along with whatever commercial purpose the activity may serve, it also furthers a railroad purpose—i.e., whether it furthers the construction, operation or maintenance of a railroad. BLM’s suggestion that unless the proposed activity itself is a railroad purpose it cannot be authorized by ARZC without BLM’s approval completely disregards the Solicitor’s opinion.

Error No. 2 – BLM determined that “[p]roduction of electricity via in-line turbines located in [the water] pipeline is not within the scope of the ROW ..., as it remains unclear ... how power-generation activity issues from railroad purposes.” Under the Solicitor’s opinion, the test is not whether power generation issues from a railroad purpose (although in this case it does, as the electricity that is generated will be used exclusively in the operation of essential railroad facilities), but whether, along with whatever commercial purpose it serves, it also furthers a railroad purpose.

Error No. 3 – BLM determined that “[u]se of water for fire suppression” on railroad trestles does not “further a railroad purpose.” It made this determination, not because keeping railroad operations and property safe through fire suppression is not a railroad purpose, but because, according to BLM, the use of water to suppress fires “on creosote-treated timber” “is an uncommon industry practice, with dry sand being the preferred method.” While the Solicitor’s opinion establishes no industry-practice standard, even if this were true, it is incongruous for BLM to take the position that “water-based hydrants and sprinklers, heat sensors and fiber optic telemetry” to operate them automatically and remotely would not further the railroad purpose of providing for the safe operation of trains and the protection of railroad property. Taken a step further, BLM is indicating that it would prefer that the ARZC let their trestles burn until crews can arrive and throw dry sand on a fire rather than access a fire suppression system made available by the water conveyance pipeline. We believe that not only the rail industry would disagree with this policy recommendation but given the history of trestle

fires and associated damage, the suggestion is actually socially irresponsible.

Error No. 4 - BLM determined that while “[a]n access road may serve railroad purposes,” the one proposed by Cadiz does not because the “origin of the access road is to support the non-railroad purpose of water conveyance.” This, of course, is irrelevant. Under the Solicitor’s opinion, it is not the “origin” of the road that is determinative; it is whether the road furthers a railroad purpose. As the Solicitor stated, “railroads have the right to undertake a range of activities within their [1875 Act] ROWs, including commercial activities [i.e., activities that serve non-railroad purposes], as long as the activity ... furthers [at least in part] a railroad purpose.” And even BLM admits that an access road can “serve railroad purposes.”

Error No. 5 - BLM determined that “[p]ower 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, according to BLM, because “the origin of the power for [the] activities [proposed by Cadiz] is generated by the in-line turbines,” the generation of the power does not further a railroad purpose. As noted in No. 4 above, under the Solicitor’s opinion, it is not the “origin” of the power that is determinative, but whether the power that is generated will be used to further a railroad purpose. And even BLM admits that it will.

Error No. 6 – BLM determined that “[a] steam-based excursion train may ... further a railroad purpose,” but then states that “the prospective use of a small portion of the pipeline’s water [for the excursion train planned by Cadiz] does not convert the excursion train, the pipeline, or the water that runs through the pipeline into a legitimate railroad purpose.” This, of course, is irrelevant. Under the Solicitor’s opinion, it is not whether the use of some of the water from the pipeline to power the excursion train converts the pipeline “into a legitimate railroad purpose,” but whether the use of some of the water from the pipeline to power an excursion train furthers a railroad purpose. And even BLM has to admit that the operation of a steam train would.

Error No. 7 – BLM’s assertion that the “origin” of the activity under review—i.e., whether the activity’s primary purpose is to serve a commercial purpose or a railroad purpose—is determinative of whether the activity is within the scope of the ROW is expressly rejected by the Solicitor’s opinion. In her opinion, the Solicitor reviewed and cited with approval the conclusion of one of her predecessors that installation of a “fiber optic line” by MCI in an 1875 Act ROW was within the scope of the ROW, even though “MCI’s line was primarily a commercial trunk line,” because a small “portion of [the line’s] capacity was dedicated to the railroad and would be used by the railroad “to improve the efficiency of its own communications systems, and thereby the safety of its operations.” The Solicitor’s decision to approve MCI’s installation of a commercial fiber optic line within an 1875 Act ROW because it also furthered, “at least in part,” the operation of the railroad cannot be squared with BLM’s determination that Cadiz’s installation of a commercial water pipeline in an 1875 Act ROW, which will improve the operation and maintenance of ARZC’s railroad in several substantial ways, does not further a railroad purpose.

As BLM’s determination is contrary to the law by which it is bound, we believe it must be rescinded and replaced. I welcome the opportunity to discuss the Cadiz Water Project and its proposed use of the ARZC right-of-way with you and the new California State Director as soon as possible.

Sincerely,

Scott Slater
President & Chief Executive Officer

CC:

Hilary Tompkins, Solicitor, U.S. Department of the Interior

Representative Rob Bishop (UT-1), Chairman House Committee on Natural Resources

Representative Tom McClintock (CA-4), Chairman, Subcommittee on Federal Lands, House Committee on Natural Resources

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