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Desert water fight isn't over just yet

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On May 10, a panel of the California Court of Appeal issued opinions in six appellate cases that involved state law challenges to governmental approvals of the Cadiz Water Project proposed for Southern California. *Center for Biological Diversity et al. v. County of San Bernardino et al. (Cadiz Inc. et al.)*, 2016 DJDAR 4448 (Cal. App. 4th Dist.).

In all six, the court affirmed lower court rulings holding that the governmental agencies that had approved the project - which proposes to use a railroad right of way for a pipeline to transport water from the Mojave Desert to the nearby Colorado aqueduct for use elsewhere in Southern California - acted within the law. Although the appellants may yet petition the California Supreme Court for review, absent such a petition and its grant, the rulings end the debate about whether the governmental approvals of the project complied with California's tough environmental laws and procedural requirements.

This is good news for both the project's proponents and all those who hope that its completion will add a water supply capable of providing enough water to meet the household needs of as many as 400,000 Southern California individuals. But it does not mean that the project enjoys clear sailing right ahead, or that it will proceed. Instead, the appellate opinions underscore the importance of a remaining legal hurdle - one that arose on Oct. 2, 2015, when the federal Bureau of Land Management (BLM) issued an "administrative determination" letter that threatens to further delay or derail the project.

In the letter, BLM's staff stated that the project's proponents may not locate a water pipeline and related infrastructure alongside a willing railroad's right of way through federal lands, unless the project proponent first applies to the BLM asking for a federal study and BLM's permission. This author penned an article in the Daily Journal last year, "Water and railroads and rights of way" (Oct. 15. 2015), which was critical of BLM's newly stated position, and explained how BLM's staff had mishandled the legal standards that apply to the project's proposed use of the railroad right of way.

To recap that article: Under federal law, any activity may be undertaken within a railroad right of way without federal blessing as long as the activity either "derives from or furthers" the railroad's operations. *Home on the Range v. AT&T Corp.*, 386 F.Supp.2d 999, 1024 (D. Ind. 2005). Thus, to determine whether an activity qualifies, two distinct inquiries (derives from or furthers) must be undertaken. *See Azure v. Morton*, 514 F.2d 897, 900 (9th Cir.1975). When considering the question, BLM must apply the "incidental use doctrine."

On Nov. 4, 2011, the solicitor for the Department of Interior exhaustively explained the incidental use doctrine in Opinion M-37025. The 2011 opinion makes it clear that BLM's permission for a proposed activity within a railroad right of way is needed only if there is no beneficial use whatsoever inuring to railroad operations from the undertaken activity (citing *Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226, 230 (W.D. Tex. 1990). *See* 2011 opinion at 8 and 11 n.21 (right of way easement does not include right to install infrastructure "unconnected with the operation of the railroad"). The opinion's conclusion is this: "Within an 1875 [Act railroad right of way], a railroad's authority ... does not permit a railroad to authorize activities that bear no relationship to the construction or operation of a railroad."

Faithful application of the 2011 opinion's legal reasoning would allow the project to go forward without pause or federal review. The project includes elements that will benefit the railroad operations directly and substantially, including new, remote, automated fire suppression and electrical power generating functions specifically benefiting the railroad operations (each owing to moving Cadiz water along the right of way), plus the construction and maintenance of a co-beneficial access road alongside the rails.

Why, then, does the October 2015 letter misstate the law? To answer this, one must travel upstream to find the source of the pollution, which is identifiable. It is a 2014 internal BLM memorandum, labeled as IM No. 2014-122, which was the second of two internal BLM memoranda that each purport to explain the 2011 opinion in layman's terms.

First, in 2012, BLM's staff issued IM-2012-038, which correctly explained the 2011 opinion. It reads in part: "As [the 2011] Opinion ... explains, railroad companies ... [may] authorize activities ... *if those activities derive from or further a railroad purpose*, while the BLM is responsible for authorizing activities *that do not serve any railroad purpose*."

But in IM 2014-122, BLM's staff restated its explanation of the 2011 opinion, and changed the conclusion of the legal background discussion to read: "As [the 2011] Opinion ... explains, railroad companies ... [may] authorize activities ... i*f those activities derive from or further a railroad purpose*, while the BLM retains jurisdiction over activities ... *that do not derive from or further a railroad purpose*."

The latter, in IM 2014-122, intentionally omits the 2011 opinion's straightforward reasoning, and puts in its place a tautology of the type that courts typically recognize as unhelpful, meaningless and pretentious. *E.g.*, *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 494 (1985) ("Nor is clarity furnished by a negative statement of its rule"); *U.S. v. Best Foods*, 524 U.S. 51, 56 (1998) ("The phrase ... is defined only by tautology ... and it is this bit of circularity that prompts our review."); *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW) v. NLRB*, 459 F.2d 1329, 1342 (D.C. Cir. 1972) ("Such tautologies may be quite effective when dealing with a stubborn two-year-old, but they are hardly the type of argument conducive to persuading a court of law.").

IM 2014-122 did not compel BLM's staff to ignore the 2011 opinion; but, viewed in hindsight, it invited the October 2015 letter and its errors. If the project's proponents are forced to proceed to federal court against BLM, they should have no difficulty showing how cynically BLM staff has acted concerning the 2011 opinion, and why BLM's stance reflected in the 2015 letter must be set aside.

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