Cadiz Water Project and US BLM Guidance– Background and Analysis

What is the Cadiz Project?

The Cadiz Water Project is a public–private partnership between Cadiz Inc. and the Santa Margarita Water District (SMWD) and other public water suppliers. Phase 1, which has successfully undergone environmental review, would conserve, recover and convey to Southern California native groundwater that is wasted to evaporation under natural conditions. There is no storage of imported water that has been evaluated or permitted at the present time.. Pending further environmental review and permitting, Phase 2 would rely upon the well-field constructed during Phase I to safely store imported water from the Colorado River and Northern California in wet years for use in dry years.

To construct Phase 1, Cadiz would expand the existing well-field on its private property in eastern San Bernardino County and convey 50,000 acre-feet of conserved water a year (enough for 400,000 people's annual needs) through a pipeline built completely within a 43-mile private railroad right-of-way to the Colorado River Aqueduct (CRA). Once in the CRA, the Metropolitan Water District of Southern California (MWD) would distribute the conserved water to SMWD and other water providers in Los Angeles, Orange, Ventura, San Bernardino, Riverside and San Diego counties that are also participating in the project. The terms and conditions for conveyance and distribution of the conserved water would be established by MWD.

Is Cadiz's proposed use within the scope of the ARZC's 1875 land grant from the United States?

The Arizona and California Railroad (ARZC), along whose tracks we propose to build the pipeline, received land for its right-of-ways through land grants from the federal government. The Solicitor (lead attorney) for the Department of Interior issued an opinion on the scope of third party activities in these federal rights-of-way in 2011, establishing how to determine whether they are within the scope of the 1875 Act establishing the grants. Her conclusion and guidance, which is binding on the government, states:

> "Within an 1875 Act ROW, a railroad's authority to undertake or authorize activities is limited to those activities that ***derive from or further*** a railroad purpose, which allows a railroad to undertake, or others to undertake, activities that have ***both railroad and commercial purposes***, but does not permit a railroad to authorize activities that bear no relationship to the construction and operation of a railroad." (Emphasis added, M-37025)

Based upon the Solicitor's guidance, a railroad is precluded from authorizing third-party activity only where it bears no relationship to the construction and operation

of a railroad. Conversely, activities that have both railroad and commercial purposes are appropriate.

Why does Cadiz want to place its pipeline in a railroad right-of-way?

We want to build the Project's conveyance pipeline within the ARZC's existing, active railroad route because this placement would avoid the environmental disturbances that a more direct route across undisturbed Mojave Desert lands would cause. Locating the pipeline within the ARZC right-of-way also is consistent with state and federal policy to consolidate utilities within common corridors. The railroad right-of-way route was the Preferred Alternative in the Project's EIR, even though the more impactful cross-desert route was *previously approved* by BLM in 2002 following a review under the provisions of the National Environmental Policy Act (NEPA) and over the objections of Senator Feinstein.

In addition, the BLM was *legislatively precluded* from reviewing a right-of-way application for a "proposal to store water underground for the purpose of export…" because of a rider added to the annual Appropriations Bill at the request of Senator Feinstein. (Section 112: Prohibition on Use of Funds) This means that only Phase 1 of the Project for the conveyance of conserved water for public consumption could be the subject of a right-of-way application.

In summary, federal review of a larger more impactful pipeline was previously reviewed and approved by the BLM in 2002. Federal review of Phase 2 is not available under applicable law unless the Feinstein rider expires and is not renewed.

Why did the BLM issue a guidance on the Project?

Current federal policy provides that all existing and proposed uses of railroad rights-of-way must be reviewed by BLM and certified as to whether they derive from or further a railroad purpose.

Does the Cadiz pipeline "derive from" OR "further" railroad purposes?

There is no sliding scale or primary purpose requirement to ARZC's authorization to permit third party activities that further both commercial and railroad purposes. According to the Department of Interior Solicitor, ARZC is only precluded from authorizing uses that bear no relationship to the operation and maintenance of the railroad. The following elements, valued at a capital cost of $12 million, have been incorporated into the Project design under the lease agreement between ARZC and Cadiz in furtherance of railroad purposes:

- A new access road along the entire pipeline route to enable maintenance, emergency access and shorten routes for crew-changes,

- Remotely operated fire-suppression systems at each of the existing creosote-treated wooden trestles,
- Inline power generation for crossing operations and lighting, heating and cooling for existing railroad transloading operations,
- Fiber optic information transmission to convey track-speed and cameras in aid of emergency and to discourage vandalism; and
- The distribution of water for the operation of a steam powered locomotive, fire-suppression and other miscellaneous uses.

What does the BLM determination letter say?

On October 2, 2015, his very last day and upon retiring, California BLM Director James Kenna signed a letter that would be sent to to ARZC and Cadiz on October 5, 2015 summarizing that, in his opinion, the Project is outside the scope of the ARZC right-of-way because it would also provide water for public consumption. He thus ignored that the project would substantially further railroad purposes, as detailed in the previous response, in contradiction to the Solicitor's Opinion. However, Kenna also clarified that his guidance was not a final agency action and is subject to reconsideration upon the presentation of new information and in the public interest.

Is BLM being transparent in suggesting that Cadiz file a new permit application?

Mr. Kenna's intention is unclear as he was not available to comment, having retired before the letter was actually sent to ARZC and Cadiz. The BLM October 2 guidance letter articulates that the pipeline is for public consumption and thereby was not a proposal for the storage of imported water. Therefore, Mr. Kenna may have recommended that the Project submit a right-of-way permit application, subject to NEPA environmental review, even though he was fully aware that the second Phase of the Project could not be evaluated because of the Feinstein Rider (see above).

As noted above, every year since 2008, Senator Feinstein has used her political influence to attach a rider to the Interior Department's appropriations bill that prohibits BLM from reviewing a right-of-way for a groundwater storage project. Via the rider effective in 2015 we believe a right-of-way application can be filed for the conveyance of conserved water but the groundwater storage element cannot be pursued.

The transparent result of the BLM guidance determination issued October 2, 2015 is that BLM: (a) deems a pipeline for public consumption to be outside the scope of the 1875 ROW held by ARZC; (b) requires that a right-of-way application be filed for the pipeline to deliver water for public consumption; and (c) the BLM's review of the right-of-way for the storage and recovery of imported water is prohibited.

Why do Cadiz and the ARZC disagree with the BLM determination?

As mentioned above, the 2011 legal opinion of the Solicitor of the U.S. Department of the Interior concluded that:

> "[A] railroad's authority to undertake or authorize activities is limited to those activities that derive from *or further* a railroad purpose, which allows a railroad to undertake or authorize others to undertake, *activities that have both railroad and commercial purposes* …." [Emphasis added]

BLM has elected to ignore the common usage of the word "or" by focusing solely on whether the third-party activity derived from a railroad purpose. The United States Supreme Court clarified the legal meaning of "or" as follows:

> To read the next clause, following the word [”]or[“], as somehow repeating that [first] requirement, even while using different words, is to disregard what [“]or[“] customarily means. As we have recognized, that term's ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings. United States v. Woods, 571 U.S. ___, ___, 134 S.Ct. 557, 567, 187 L.Ed.2d 472 (2013).

Mr. Kenna's guidance also fails to account for the example of a fiber optic cable that provided a few of its strands for railroad purposes which was used by the Solicitor to explain permissible third-party uses that serve both commercial and railroad purposes. Only those activities that bear "no relationship" to operation and maintenance of the railroad are impermissible.[1]

Is the BLM decision final?

No. The BLM letter states, "This administrative determination is not a final agency decision," and that "an evaluation based on new information could result in a different determination by BLM." Moreover, federal courts have exclusive jurisdiction to determine questions of title, including the scope of railroad rights-of-way. The scope of the ARZC right-of-way has not been modified by the BLM's action and a federal court can properly declare title and bind BLM regardless of the guidance memorandum. There are likely other remedies that are available to redress the BLM's ultra-vires actions. In our opinion, the BLM determination represents a blatant political over-reach to disrupt the progress of an approved water project that has no adverse environmental impacts attributable to operations.

[1] In law "no" means "not any." (United Food and Commercial Workers Union, Local 1119, AFL-CIO v. United Markets, Inc. (9th Cir. 1986), 784 F.2d 1413, 1415 (quoting Webster's Third International Dictionary 1532 (16th ed. 1971))

What is Cadiz doing about the decision?

Cadiz and its partners are first pursuing a reconsideration of the BLM decision. Congressional supporters have expressed concern about this decision and have already requested BLM's background materials so that the true reasoning for the guidance may be brought to light. Meanwhile, Cadiz has written a letter to BLM Director Neil Kornze pointing out the errors in the determination and requesting that he overturn it.

If legislative and administrative remedies are unable to overturn the decision, then Cadiz will consider applying for a new federal right-of-way permit for the conveyance of water for public consumption on: (i) the ARZC route, (ii) the route approved in 2002 for the earlier iteration of the Project and/or (iii) the existing northern 96-mile route. The 2002 route and the 96 mile-route were both analyzed as an alternative in the Project's final EIR. However, in all cases, the right-of-way application would be limited to the conveyance of conserved water for public consumption and not include a proposal for groundwater storage because BLM review of such an application is precluded by the Feinstein rider.

In addition, the Company can pursue federal litigation in court because, as described above, federal courts have exclusive jurisdiction to determine questions of title, including the scope of railroad rights-of-way, so a federal court can properly declare title and bind BLM regardless of the guidance memorandum. We are advised that there may also be other administrative and judicial remedies to resolve whether the pipeline may be placed within the ARZC right-of-way.

These approaches could result in a delay for the Project, but we believe they will ultimately result in final clearance for the Project. It is important to remember that the Project, including the pipeline and its route, were fully analyzed in accordance with the California Environmental Quality Act (CEQA), the nation's most stringent environmental law, and the CEQA approvals have been upheld in Court. An earlier more impactful iteration of the Project underwent federal environmental review and BLM granted a federal right-of-way for a larger pipeline than is presently being proposed.

What impact would a federal environmental review have on the Project?

Given the extensive environmental review that has already occurred on the ARZC route, we do not expect many changes to the Project as a result of the federal review other than the delay that will be incurred in accommodating BLM's review and NEPA compliance. The evaluation of any future proposal to convey water to and from a groundwater storage bank would be deferred.

Likewise, the selection of the 2002 route, examined under CEQA in the 2012 FEIR would be limited to the conveyance of conserved water and could not include

groundwater banking. Moreover, some additional CEQA compliance may be necessary for SMWD to select a new alternative. The timing of this additional evaluation is uncertain. However, we are advised that the BLM review should be timely. The route was previously been approved by BLM in 2002, so a new review would be measured against that baseline.

Senator Dianne Feinstein and other Project opponents have stated that they have longed for an "open and transparent" federal environmental review of the Project. This is false. The Feinstein rider suggested for the 2016 Department of Interior Appropriations Bills would change existing law and deny funding for any federal review of a right-of-way application for any *water pipeline* that would export of water for municipal use. Thus, her newly proposed language would further broaden the scope of the prohibition on BLM review. However, this rider will require the consent of both houses of Congress, currently controlled by the Republican party.

Has the BLM's action changed the timeline for the Project?

We have not changed the timeline for the delivery of conserved water to Southern California in 2017. We remain optimistic that by using all the resources we have at our disposal – strong science, established case law and broad public and political support – we will be able to correct this politically motivated and erroneous determination in time to begin delivering water to Southern California in 2017. We will continue to update our guidance as we learn more in the 4th Quarter of this year

What can I do to help?

If you haven't done so already, log onto Water4SoCal.com and click the "Show Your Support" button in the upper right corner. Once you've provided your contact information, we'll alert you when your support is needed. If you've already signed up through Water4SoCal.com, all you have to do is watch your inbox.

More Detailed Questions on Railroad Rights-of-Way Follow

Did the ARZC give Cadiz access to its ROW?

Yes. As a condition of its 2008 lease agreement with the ARZC, Cadiz Inc. agreed that the Project pipeline would be constructed in a manner that would further several railroad purposes.

Are there other examples of these uses on other railroads?

According to the BLM, "thousands of miles of 1875 Act ROWs are estimated to exist on public land in the western United States" that may have third party uses. For example, it is not uncommon in the railroad industry for fiber optic lines, water

lines, and natural gas and petroleum lines to be co-located within 1875 Act Rights-of-Way. Cell towers, solar panels, electric lines and other buildings are also not uncommon.

If the decision is not overturned, will it set precedent for railroad right-of-ways?

The BLM determination is unprecedented. It calls into question EVERY third-party right-of-way use currently in existence on and under current 1875 Act Railroad Right of Ways that have never been required to be separately permitted in the past. Ultimately, if this decision stands, every existing and new right-of-way use would have to be permitted individually by BLM. The agency lacks the funding and staffing to review its existing caseload, let alone the thousands of right-of-way reviews that this proposed decision would mandate.