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September 24, 2013

Jim Ventura, Director Division 2
Mojave Water Agency
P.O. Box 578
Joshua Tree, CA 92252-3202

Congressman Paul Cook, 8th District of California
222 Longworth House Office Building
Washington, DC 20515

Re: Cadiz Valley Water Conservation, Recovery, and Storage Project

Dear Congressman Cook

Thank you for your June 13th letter requesting a federal review and a USGS water analysis of the Cadiz project directed to the Secretary of Interior.

As a 38 year resident of the Eastern Mojave Desert Region, I have served on various water boards through the years, notably the Joshua Basin Water District, Morongo Basin Joint Powers Pipleline Authority and the Morongo Basin Pipeline Commission. Currently as a member of the Board of Directors of the Mojave Water Agency with a mission to manage the region's water resources for the common benefit to assure stability in the sustained use by the citizens we serve in this Desert Region for today and in the future. I represent 3800 square miles of the Eastern Mojave Desert Region with a population of some 65,000 residence. Because of the work on these boards, I have become very aware and informed about the vital need of protecting and conserving groundwater in the desert.

I am alarmed and opposed to the notion of mining desert water from a region facing a future of extended drought and exporting that precious resource to a coastal region to restart their water-starved development. I have observed that the state environmental review process neither addressed the concerns of the public nor reasonably or fairly assessed the feasibility of the project. The wealth of public comments from citizens, grassroots organizations, other non-profits, and the National Park Service repeatedly debunked the overly aggressive extraction rates yet these concerns were dismissed rather than incorporated.

As a result, the work of respected water scientists from nearby universities and the US Geological Survey was blatantly ignored because their hydrologic data seriously challenges the Cadiz project. The final environmental document has been artificially forced to one alternative.

Now, federal review is the only way that the dangers of this unsustainable project will be analyzed and revealed in hopes that the future of the desert is protected. Please continue your leadership in opposing Cadiz.

Sincerely,

Jim Ventura

cc:
Senator Dianne Feinstein
Secretary of Interior, Sall Jewell

PAGE 03/08

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Congress of the United States
House of Representatives
Washington, DC 20515–0508

June 12, 2013

Secretary of the Interior Sally Jewell
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

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Dear Secretary Jewell:

I am writing to request a reevaluation of the impact the Cadiz Valley Water Conservation, Recovery, and Storage Project (Cadiz Project) will have on my constituents in the 8th District of California. The Cadiz Project, as it currently stands, is likely to impact San Bernardino County's water resources, harming ranchers, rural communities, East Mojave landowners, and the National Chloride Company of America's brine mining operation on Bristol Dry Lake. Moreover, the aggressive project pumping could harm the springs of the Mojave National Preserve and regional air quality, while exporting precious water resources out of San Bernardino County to ratepayers in Los Angeles and Orange counties.

In order to ensure this project won't adversely affect my district, I respectfully request the Cadiz Project be subject to a National Environmental Policy Act review. This may be achieved by the Department of the Interior requiring the project to obtain permission to use a railroad right-of-way contingent on federal analysis of its impacts to adjacent public lands. Additionally, I request that the United States Geologic Survey (USGS) conduct an updated analysis of the hydrologic features of the project area and that any new or revised Cadiz Project proposals adhere to the principle of sustainable yield, meaning no more water would be pumped out of the aquifer than would be replaced through natural recharge as determined by USGS data. This is intended to protect sustainable water supplies for East Mojave communities and businesses.

Currently, no federal environmental reviews or approvals have been conducted, despite numerous requests from the Bureau of Land Management that Cadiz Inc. supply them with specific project information relating to the construction of a 43-mile water conveyance pipeline along the Arizona and California Railroad Right-of-Way. While Cadiz Inc. claims it is furthering a railroad purpose by installing fire hydrants and building redundant emergency access roads along the rail line, railroad experts have reported that these actions are not industry standard.

This project must be examined thoroughly before it moves forward. There are serious doubts about the validity of previous environmental studies, specifically the Draft Environmental Impact Statement. Professional independent reviews have called into question the 32,500 acre feet per year recharge rate Cadiz Inc. claims will naturally occur. These independent scientists concluded that the actual recharge rate is between 2,000 and 10,000 acre feet per year.

As you can see, there are many concerns about the Cadiz Project. My constituents who live near Cadiz deserve a more thorough investigation into how this project will affect their communities. Fortunately, your agency has the ability to provide my constituents with concrete answers regarding many of the uncertainties concerning this project.

Thank you for allowing me an opportunity to express my feelings about the Cadiz Project. I look forward to discussing this matter further with you or your staff. Please feel free to contact my office at (202) 225-5861 if you have any questions concerning this matter.

Respectfully,

Col. Paul Cook (Ret.)
Congressman, 8th District of California

Howarth, Robert <robert_howarth@ios.doi.gov>

Re: Cook Letter

Rachel Jacobson <rachel_jacobson@ios.doi.gov> Tue, Oct 22, 2013 at 2:25 PM
To: robert_howarth@ios.doi.gov

Probably a BLM response would be good.

From: Howarth, Robert [mailto:robert_howarth@ios.doi.gov]
Sent: Tuesday, October 22, 2013 10:06 AM
To: Rachel Jacobson <Rachel_Jacobson@ios.doi.gov>
Subject: Cook Letter

Hi Rachel...unfortunately, it appears that it never reached us???

Anyway, it is now is the system and assigned to BOR.

Rob

–
Robert Howarth
Deputy Director for Correspondence and FOIA Management
Office of the Executive Secretariat and Regulatory Affairs
Department of the Interior
1849 C Street, NW
Washington, DC 20240

202-208-3181
202-208-4451 (direct)
202-549-8961 (cell)

Howarth, Robert <robert_howarth@ios.doi.gov>

Re: Cook Letter

message

Howarth, Robert <robert_howarth@ios.doi.gov> Tue, Oct 22, 2013 at 2:16 PM
To: Rachel Jacobson <Rachel_Jacobson@ios.doi.gov>

Sorry Rachel...correction, now being tasked to BLM with BOR as a surname.

With apologies.

Rob

On Tue, Oct 22, 2013 at 1:06 PM, Howarth, Robert <robert_howarth@ios.doi.gov> wrote:

> Hi Rachel...unfortunately, it appears that it never reached us???
>
> Anyway, it is now is the system and assigned to BOR.
>
> Rob
>
> –
> Robert Howarth
> Deputy Director for Correspondence and FOIA Management
> Office of the Executive Secretariat and Regulatory Affairs
> Department of the Interior
> 1849 C Street, NW
> Washington, DC 20240
>
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–
Robert Howarth
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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN - 8 2014

The Honorable Paul Cook
House of Representatives
Washington, DC 20515

Dear Representative Cook:

Thank you for your letter dated June 12, 2013, to Secretary of the Interior Sally Jewell regarding the Cadiz Valley Water Conservation, Recovery, and Storage Project. Secretary Jewell asked me to respond to your letter.

You requested a reevaluation of the impact of the Cadiz Project, and suggested that the Department conduct a National Environmental Policy Act (NEPA) review to evaluate the Cadiz Project's proposed use of an 1875 Act railroad right-of-way (ROW) for a pipeline. Under the 1875 Act authorizing the railroad grant, the ROW holder may authorize third-party uses within the right-of-way to the extent those uses derive from or further a railroad purpose.

The Bureau of Land Management (BLM) is currently evaluating information related to the Project provided by the railroad and Cadiz at the BLM's request to help inform the BLM's determination as to whether the pipeline requires BLM authorization. At this time, the evaluation is on-going.

I have asked the BLM to let your office know when it makes any determinations with respect to the proposed use of this 1875 Act ROW. If the BLM ultimately determines that the proposed use is not within the scope of the railroad ROW and that therefore Federal review and approval are required, the Department would be prohibited by Section 118 of the Consolidated Appropriations Act of 2012, H.R. 2055, from expending funds to process any ROW application, including NEPA review, for this particular proposed action.

Please feel free to contact the BLM's Principal Deputy Director, Neil Kornze, at 202-208-3801 if you have further questions about this issue. Thank you again for your sharing your concerns.

Sincerely,

Tommy P. Beaudreau
Principal Deputy Assistant Secretary
Land and Minerals Management

Desert Tortoise Preserve Committee, Inc.
4067 Mission Inn Avenue, Riverside, CA 92504
Telephone: (951) 683 – 5872 / Email: dtpc@pacbell.net
Web site: www.tortoise-tracks.org

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April 18, 2014

Secretary Sally Jewell
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240
Email: feedback@ios.doi.gov

RE: Cadiz Valley Water Conservation, Recovery, and Storage Project

Dear Secretary Jewell:

The Desert Tortoise Preserve Committee, Inc. (DTPC) is a non-profit organization formed in 1974 and dedicated to protecting the welfare of the threatened desert tortoise and other species that share its habitat through land acquisition and management, scientific research, and educational outreach. Working with the Bureau of Land Management (BLM) and other agencies and partners, the DTPC helped establish the Desert Tortoise Research Natural Area in Kern County, California, and currently works with the BLM under a cooperative agreement to manage the area. The DTPC also owns and manages substantial habitat for the desert tortoise in San Bernardino County, California, including 180 acres within the boundaries of Mojave National Preserve and 160 acres within Piute Mountains Wilderness. Our organization has a strong focus on science to inform management of natural resources, and our staff, working Board of Directors, and membership includes many biologists, professors, and resource managers with advanced degrees. We are very concerned about the Cadiz Valley Water Conservation, Recovery, and Storage Project (Project) proposed in this region of the Mojave Desert, and the inadequate and fundamentally flawed review of its environmental impacts, which are likely to be severe, far-reaching, and long-term.

Our objections to the Project are three-fold: 1) the inadequate review of impacts to native groundwater and biological resources, 2) the improper lead agency for review of environmental impacts under the California Environmental Quality Act (CEQA), and 3) the attempt to by-pass the necessary National Environmental Policy Act (NEPA) review and BLM authorization for the proposed water conveyance pipeline crossing approximately 40 miles of public lands.

Impacts to Groundwater and Biological Resources

The Project would extract an average of 50,000 acre-feet and up to 75,000 acre-feet of water a year from an aquifer largely replenished by groundwater flows beneath public lands near the Project site, including Mojave National Preserve. While project proponents promote this as a sustainable operation that will conserve water otherwise lost to surface evaporation, detailed comments submitted by the National Park Service and others indicated that rates of groundwater recharge and evapotranspiration are overestimated in the EIR compared to estimates from multiple, independent scientific studies. Thus the analysis of both impacts and supposed 'water conservation' benefits of the Project presented in the EIR is fundamentally flawed. Extracting groundwater at a rate greater than the rate of recharge will deplete native groundwater and may cause subsidence, changes in vegetation, declines in wildlife relying on affected vegetation communities, and decreased water quality and quantity for local residents. Additionally, the increased drying of the affected dry lakes may produce more dust. Furthermore, natural seeps and springs found in Mojave National Preserve and other surrounding areas may be tied to the aquifer the Project proposes to drain, a possibility that is rejected without any scientific support in the EIR. These seeps and springs are important water sources for wildlife, such as bighorn sheep, in an arid environment where rainfall is limited and variable. A thorough review of the environmental impacts related to extracting 2.5 million acre-feet of water over a 50 year period, using more realistic estimates of groundwater recharge and evapotranspiration is necessary to weigh the potential and likely irreversible impacts of the Project to sensitive natural resources in San Bernardino County against the benefits of increased water delivery to consumers primarily in southern coastal communities.

Improper Lead Agency for CEQA Review

The Final EIR for the Project has been approved by Santa Margarita Water District (SMWD), acting as Lead Agency under CEQA, but this process was also fundamentally flawed. Logically and legally, San Bernardino County should be the Lead Agency determining the adequacy of the EIR to evaluate the impacts of the Project, as the heart of the Project itself and most of its direct impacts would occur in San Bernardino County. Furthermore, San Bernardino County would be the agency responsible for permitting most of the Project activities, such as groundwater extraction. SMWD of Orange County, one of the project proponents standing to benefit most from the Project and many miles removed from its major environmental impacts was not an appropriate Lead Agency, and their approval of the EIR should not be accepted. The Project should not be considered further until its environmental impacts have been accurately reviewed by the proper Lead Agency, San Bernardino County.

Need for NEPA review and BLM Authorization

Additionally, impacts of the Project to federal public lands must be reviewed under NEPA. Extraction of native groundwater from the aquifer below the Cadiz properties will impact the water table, availability of seeps and springs, native vegetation, and wildlife on surrounding public lands, including Wilderness Areas, desert tortoise critical habitat, and portions of Mojave National Preserve. The Project will further impact federal public lands through the installation of a 43-mile long pipeline to convey water from the proposed pump sites on the Cadiz properties to the Colorado River Aqueduct, a pipeline that crosses BLM-managed public lands adjacent to desert tortoise critical habitat within the Chemehuevi Desert Wildlife Management Area. The Project proponents claim that authorization from the BLM and related NEPA review are not necessary, as they have entered into an agreement to build the pipeline within a railroad right of way granted to Arizona & California Railroad Company (ARZC). However, the most recent Solicitor's Opinion on the subject (M-37025) states that, "A railroad's authority to authorize other activities within an 1875 Act Right-of-Way is limited to those activities that derive from or further a railroad purpose." While the EIR claims that some of the water extracted and transported through the pipeline will be used by ARZC, it does not provide substantial evidence that the Project derives from or furthers a railroad purpose. The BLM will need to determine, through a NEPA review, if the construction of the pipeline and related Project activities will be authorized on public lands.

The DTPC concludes, like many land managers, local residents, and environmental agencies that have spoken or commented on this Project already, that this Project should not proceed without accurate and proper review of environmental impacts under both CEQA and NEPA. The natural resources at stake are crucial for species conservation, connectivity, and climate resiliency—all high priorities for the current administration. The Project would affect public resources and its severe and potentially irreversible impacts should be fully explored within a public process as they were in the Project's previous iteration.

Sincerely,

Ron Berger, President
Board of Directors
Desert Tortoise Preserve Committee, Inc.

CC: Ray Allard, Chair, San Bernardino County Planning Commission
Janice Rutherford, Chair, San Bernardino County Board of Supervisors
Senator Barbara Boxer
Senator Dianne Feinstein

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October 2, 2013

VIA U.S. MAIL AND E-MAIL

Secretary of the Interior Sally Jewell
Department of the Interior
1849 C Street, N.W.
Washington DC 20240
feedback@ios.doi.gov

Re: Request for NEPA review of Cadiz Water Pipeline Project in California's Mojave Desert

Dear Secretary Jewell:

Please accept these comments from Residents for Sustainable Mojave Development[1] regarding the Department of Interior's ("DOI") federal jurisdiction to conduct environmental review of the proposed Cadiz Valley Water Conservation, Recovery and Storage Project ("Cadiz Project" or "Project"). The Cadiz Project would pump over 16 billion gallons of groundwater each year from the Mojave Desert in San Bernardino County, California, and transport it in a 7 foot in diameter pipeline for 43 miles, through land owned by the federal Bureau of Land Management ("BLM") but within a railroad right-of-way ("ROW") held by Arizona & California Railroad Company ("Railroad Company").

Despite numerous requests for federal environmental review of the Cadiz Project under the National Environmental Policy Act ("NEPA"), including requests by U.S. Senator Diane Feinstein, U.S. Representative Paul Cook, the National

[1] Residents for Sustainable Mojave Development is an unincorporated association that includes the Southern California Pipe Trades District Council 16, its members, their families, and other individuals who live, work, and recreate in and around the Mojave Desert.

Parks Conservation Association, and others, the DOI has not yet decided to require NEPA review of the Project. Meanwhile, the Project applicant has made nearly farcical attempts to avoid federal review, the most recent of which is the execution of a contract with the Railroad Company to provide water for a "steam train" along the Railroad Company's ROW.[2]

The Project will impose an additional servitude upon BLM land, and the DOI can and must exercise federal approval authority. The Railroad Company does not have authority, through its federal grant of a railroad ROW under the 1875 Act (18 Stat. 482), to allow construction and operation of a 7-foot-diameter water export pipeline across 43 miles of federal land. To conclude otherwise would be to improperly condone an absurd abuse of a federal railroad ROW for a profitable purpose that is not incidental to a railroad use, at the expense of the public, federal lands, and the environment. The Cadiz Project crosses far over the line of reasonableness with respect to the allowable scope of a federal railroad ROW.

Under federal law, "nothing passes" to a federal ROW holder "but what is conveyed in clear and explicit language" by the federal grant, and "if there are doubts" they are resolved in favor of the federal government.[3] Federal railroad ROW's are "acquired upon the implied condition that they be used for railroad purposes, and the rights conferred are limited to such use."[4] The 1875 Act conveyed easements across federal land for railroad purposes, including the right to take natural materials "necessary for the construction of said railroad," and to construct stations and turn-outs at intervals no closer than 10 miles apart.[5]

The U.S. Supreme Court has concluded that a railroad ROW granted under the 1875 Act is only "a right of passage" for railroad purposes, i.e. for the purpose of laying "track" across public land, and DOI has long held that the grantee has "only the right to use the land for the purposes for which it was granted and for no other purpose."[6] The most recent opinion issued by DOI's Solicitor on this topic, Opinion

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[2] http://cadizinc.com/2013/09/19/press-release-cadiz-inc-announces-agreement-to-operate-steam-powered-excusion-train-on-the-arizona-california-railroad/

[3] *Great Northern Ry. Co. v. U.S.*, 315 U.S. 262, 273 (1942); *U.S. v. Union Pacific*, 353 U.S. 112, 116 (1957).

[4] *H.A. & L.D. Holland Co. v. N. Pac. Ry. Co.*, 214 F. 920, 923 (9th Cir. 1914).

[5] 18 Stat. 482-483, Section 1 (1875); California has a similar grant of railroad right-of-ways over public lands, for "necessary" railroad works (Cal. Public Utilities Code §§ 7551-7552).

[6] *Great Northern Ry. Co., id.* at 274-275; DOI Regulations adopted May 21, 1909, 37 L.D. 787, 788.

M-37025, concludes that the use of a railroad ROW is limited to activities that "derive from or further a railroad purpose."[7] Referred to as the "incidental use" doctrine, this rule stems from court cases, treatises, and Solicitor's opinions.

Under the incidental use doctrine, courts have allowed communication systems (telephone and telegraph lines), electric power lines, and receiving and shipping facilities within a railroad ROW, because such uses are customarily and historically found along railroad lines and are designed to serve the railroad, even if they "also" serve a separate commercial purpose. Courts have disallowed uses that are not customary and are not intended to serve a legitimate railroad purpose, but instead are designed to further private gain unrelated to the operation of a railroad. The Cadiz Project falls squarely within the second category.

The Project involves a highly profitable private water delivery pipeline approximately 7 feet in diameter (only slightly smaller than a freight train boxcar), located more than 50 feet away from the Railroad Company's railroad tracks and buried up to 15 feet below ground.[8] The Project will also involve an access road and electric power lines, but these are appurtenant to the water pipeline and will not be constructed without the water pipeline. The relevant question, therefore, is whether the water pipeline itself is incidental to a railroad purpose.

Under the lease between the Railroad Company and the Project applicant, there are only three potential ways in which the Project may interact with the railroad: (1) an unspecified number of fire hydrants will be installed along the pipeline; (2) up to 10,000 gallons of water per day will be made available for "future needs" of the railroad, though no improvements are planned at this time;

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[7] Solicitor's Opinion M-37025 (Nov. 4, 2011), available at: http://www.cadizwaterproject.com/eir/downloads/V7_Appx%20M1%20NEW%20-%20Opinion%20M-37025.pdf

[8] *See* December 2011 Amendment to Longitudinal Lease Agreement between the Railroad Company and the Project applicant, Cadiz Real Estate, L.L.C., *available at*: http://www.cadizwaterproject.com/eir/downloads/V7_Appx%20M3%20NEW%20-%20ARZC%20Lease.pdf

and (3) water may be used for "future operations" of a steam-powered excursion train.[9] The water pipeline is not incidental to a railroad purpose and is not a permissible exercise of the Railroad Company's ROW.

1. The water pipeline will not serve a "legitimate" railroad purpose

The U.S. Supreme Court has long held that the purpose of a federal railroad ROW "is not fulfilled when the right of way is used for other purposes."[10] This includes the use of a portion of a ROW, because the entire ROW is presumed by law to be necessary for the purposes of the railroad.[11] The Supreme Court has ruled that the use of a federal railroad ROW must be for "*legitimate* purposes of the railroad."[12] The holder of a railroad ROW cannot justify a clearly unrelated use based on far-fetched arguments that the project may also serve a railroad purpose.[13] The "railroad purposes" alleged by the Cadiz Project applicant are specious and are obviously advanced only to avoid federal review of the Project.

First, the promise to provide a few fire hydrants, in unknown locations, is not a legitimate railroad use that supports the installation of a 7-foot-wide buried water pipeline along 43 miles of track. The Mojave Desert is not fire prone. There are no major roads, only one known resident, and only one known commercial facility along the entire 43-mile stretch of the proposed pipeline.[14] This area has been aptly described as "the middle of nowhere," a place where nothing appears to have changed "for over 10,000 years."[15] Locating a few fire hydrants in the middle of

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[9] *Ibid.* The pipeline plans also denote three large areas that extend beyond the 200-foot railroad ROW. Presumably these areas would be developed under the guise of Section 1 of the 1875 Act, which allows railroads to use land adjacent to a ROW "for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations," up to 20 acres in size and 10 miles apart. The potential use of land adjacent to the ROW for water-pipeline purposes does not fall within the scope of this legislative grant, and should be closely scrutinized due to potentially significant effects on surrounding undeveloped federal land. The pipeline plans are available at: http://www.cadizwaterproject.com/eir/downloads/Appx%20C_Pipeline%20Alignment%20Map%20Book.pdf (*see* pp. 14, 16, and 20).

[10] *U.S. v. Union Pac. R. Co.*, 353 U.S. 112, 114 (1957).

[11] *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 272 (1903).

[12] *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) (emphasis added).

[13] *Home on the Range v. AT&T Corp.*, 386 F.Supp.2d 999, 1021 (S.D. Ind. 2005) (no evidence that telephone line would legitimately serve a railroad use).

[14] http://wikimapia.org/4294517/Milligan-Salt-Works-Plant (one person resides in Milligan, near the salt works plant); see also

[15] http://www.actual-life.com/?p=784

nowhere is not a common railroad practice and is not the purpose of the Cadiz Project. The proposed water pipeline is scaled for much, much larger volumes of water conveyance and is not designed to support "legitimate" purposes of the Railroad Company.

Second, the Project applicant's offer to provide up to 10,000 gallons of water per day for the "future needs" of the railroad, when no such needs have even been identified or planned for, on its face does not serve a legitimate railroad purpose.[16]

Third, the proposal to operate a steam engine along this section of track does not require water stations, let alone a water pipeline, between the town of Cadiz and the end of the pipeline, 43 miles away. The proposed steam engine is the Santa Fe 3751, which holds 15,000 gallons of water and has regularly traversed the Mojave Desert, including through Cadiz in recent years, without any water refilling infrastructure in the 43 miles between Cadiz and the end of the proposed water pipeline.[17] Simply put, the steam engine will not need to fill its water tanks on the section of federal land proposed for the water pipeline. The pipeline is completely unnecessary to fulfill a "legitimate" railroad purpose. If the Cadiz Project applicant desires to undertake the proposed use of its private land in Cadiz for a steam-engine museum and a water refilling station, it is free to do so, but this has no bearing on the question of whether the export water pipeline within the federal ROW will further a railroad purpose.

2. **The water pipeline is much more like the activities that courts have *disallowed* than the activities courts have allowed within a ROW**

Federal courts have denied the use of a federal railroad ROW for: (1) public roads that run parallel to the railroad tracks; (2) installation of utilities and fuel stations not actually intended "for the purpose of facilitating the operation of the railroad itself"; and (3) subsurface extraction (even with proposed incidental

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[16] *See Home on the Range v. AT&T Corp.*, 386 F.Supp.2d 999, 1021 (S.D. Ind. 2005) (no evidence that telephone line would legitimately serve an existing or planned railroad use).

[17] http://www.sbrhs.org/history.html; http://en.wikipedia.org/wiki/Atchison,_Topeka,_and_Santa_Fe_Railway_Steam_Locomotive_No._3751; http://www.trainweb.org/chris/3751w.html (documenting the Santa Fe 3751 passing through Cadiz in May of 2012); http://santafe3751.bandcamp.com/album/cadiz-crawler-there-and-back-again (the Santa Fe 3751 rode from Los Angeles through Cadiz to the Grand Canyon and back in May 2012).

railroad use) of rocks, oil, and minerals.[18] In all of these cases it was clear that the railroad was pursuing a use that had little to do with its operations, and much to do with private gain. As stated by the 7th Circuit Court of Appeals: "The problem is always one of degree. In the instant case the filling station was not an incident to the legitimate use of the easement; it was the use itself. Clearly, it may not exist under the terms of the easement. To hold that it was proper would be an open invitation to abuse."[19] If the DOI refrains from exercising approval authority over the Cadiz Project because of this trumped up railroad purpose, it will accomplish just that: an open invitation for abuse.

Regarding parallel roads, the 9th Circuit Court of Appeals reasoned in the "*Holland*" case that a road crossing over a railroad track is one thing, but a parallel road, which could just as easily be located outside the ROW, is very different. The court's discussion is relevant to the Cadiz Project:

> The needs to which the railroad company's right to exclusive possession must yield are such only as arise out of, or are connected with, the maintenance of the right of way and the operation of a continuous line of railroad thereon. In other words, the railroad company is authorized to make, and may be compelled to make, reasonable provision for those needs only which it is instrumental in creating, or which inhere in the very nature of an unbroken right of way.
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> . . .
>
> It must have been contemplated [by Congress] that highway and other crossings would, in the very nature of things, be required, and in view of the self-evident need therefor, together with what must have been a common and well-understood practice of making provision for them in railroad operation, it is reasonable to suppose that the grant was made with the implied consent that ways of necessity, both public and private, might be laid out across the right of way at such places and under such conditions as would not unreasonably impair its usefulness for the purpose for which it was created.

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[18] *H.A. & L.D. Holland Co. v. N. Pac. Ry. Co.*, 214 F. 920, 926-927 (9th Cir. 1914); *Home on the Range v. AT&T Corp.*, 386 F.Supp.2d 999, 1021 (S.D. Ind. 2005) (no evidence that telephone line would legitimately serve an existing or planned railroad use); 58 Interior Dec. 160 (D.O.I.), 164, 1942 WL 4506, p. 3 (ROW grant is for "mere surface rights").

[19] *In re Chicago & N. W. Ry. Co.*, 127 F.2d 1001, 1006 (7th Cir. 1942).

> But in no substantial sense do these considerations apply to the case of a street or other highway *laid out along, instead of across, the right of way*. Granting the need of a road running parallel or in the same general direction with the railroad, there is no necessity for imposing the burden thereof upon the right of way. It is hardly probable that the practice of so locating a highway was common at the time the act was passed, and, upon the whole, *it is unreasonable to suppose that Congress anticipated that such a use would ever be made of the right of way*. It imposes a much greater burden than a mere crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use. ... *No motive other than that of gain could have actuated the railroad company in attempting to utilize a part of its right of way for a street.* It would have been entirely practicable to carve a street out of its aid land upon either side of, and contiguous to, the right of way, and the right of way was resorted to, not in consideration of any public need, but for reasons of private thrift alone. ... True, the [railroad company] may have entertained the view that the grant was in excess of its needs for railroad purposes, both present and prospective, but that was a question which was never committed to its judgment.[20]

The Cadiz Project fits almost exactly with this analysis: the pipeline is not crossing the railroad tracks of necessity, but running along it; Congress could not reasonably have anticipated such use, and the clear motive is gain.

3. A water pipeline buried up to 15 feet deep is not a customary use of the subsurface of a railroad ROW, nor is it a customary railroad use at all

As explained by the 10th Circuit Court of Appeals, a railroad company's use of the subsurface soils within its ROW is limited to customary railroad-related activities:

> Of course, a railroad company which acquires a right of way over and through lands of another acquires more than the mere right of passage over such lands. It acquires the right to excavate drainage

[20] *H.A. & L.D. Holland Co. v. N. Pac. Ry. Co.*, 214 F. 920, 926-927 (9th Cir. 1914) (emphasis added).

> ditches; to construct beneath the surface supports for bridges and other structures; to erect and maintain telegraph lines and supporting poles with part of the poles beneath the surface; to construct passenger and freight depots, using portions of the land below them for foundations; to construct signals; to make fills and cuts to decrease the grades of their rail lines, and to use material from the land covered by the right of way to make such fills; and to construct a roadbed and lay its ties and rails thereon. Hence, it has substantial surface and subsurface rights, which it is entitled to have protected.[21]

In fact, the recent Solicitor's Opinion M-37025 withdrew that portion of Solicitor's Opinion M-36964 that related to the scope of the 1875 Act.[22] The withdrawn portion of Opinion M-36964 had overruled a 1985 Solicitor's Opinion, which concluded that the subsoil beneath a railroad ROW is unappropriated public land and a railroad cannot authorize third parties to install buried systems.[23] The partial withdrawal of Opinion M-36964 effectively reinstated the 1985 Solicitor's Opinion that was overruled by Opinion M-36964. It is particularly important to prevent the use of the subsoil for buried systems that do not serve a traditional railroad-related purpose.

The Project applicant tries to compare the Cadiz Project to installing communications lines and electric lines. However, as one court aptly explained, such uses are only allowed when it is clear that "the construction of such lines [are] essential for the safe and efficient operation of the railroad and therefore clearly furthered the railroad's purpose."[24] Similarly, courts reviewing mixed-use refueling stations along railroad tracks have distinguished between those stations where the railroad use was a "sham," because the station purported to serve both railroad and retail customers but was "in reality" serving retail customers, from those stations where the retail use was "in addition to" the railroad use, and "the storage facilities would be the same" regardless of the retail use.[25]

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[21] *Kansas City S. Ry. Co. v. Arkansas Louisiana Gas Co.*, 476 F.2d 829, 834-35 (10th Cir. 1973) (railroad could not object to condemnation by a public utility of the substrata running below its tracks).
[22] Solicitor's Opinion M-37025, footnote 7, *supra*, p. 7.
[23] *Ibid.*
[24] *Hynek v. MCI World Communications, Inc.*, 202 F. Supp. 2d 831, 835, fn. 2 (N.D. Ind. 2002).
[25] *Mitchell v. Illinois Cent. R. Co.*, 384 Ill. 258, 263, 51 N.E.2d 271, 273, 276 (1943) (distinguishing *In re Chicago & N. W. Ry. Co.*, 127 F.2d 1001, 1002 (7th Cir. 1942)).

This Project is a sham attempt to abuse the scope of a federal railroad ROW. The water pipeline is "an unnecessary diversion to a foreign use,"[26] and is not essential for the safe and efficient operation of the railroad. Even if it were, the Railroad Company would not have the authority to install an underground pipeline to transport 44 million gallons of water per day, reserving an option for 0.02% of that amount (10,000 gallons) for its own use at an unknown future date.[27] Accordingly, the Railroad Company cannot authorize a third party to install the pipeline, either.[28] The Cadiz Project pipeline defies any notion of "incidental use" and "legitimate" railroad purposes.

Consequently, before the pipeline can be installed on BLM land, BLM must grant a ROW or similar permission which is evaluated under NEPA.

Thank you for considering this request. Please include this letter in DOI's administrative record, and notify us of any decision by DOI whether to require federal approval of the Cadiz Project and/or to conduct NEPA review.

Sincerely,

Ellen Trescott

Ellen L. Trescott

ELT:ljl

cc: Cadiz, Inc. – via U.S. Mail and Facsimile
Tanya L. Cecil, Arizona & California Railroad – via U.S. Mail & Email

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[26] *Holland, supra*, 214 F. 920, 926.
[27] 65 AM JUR2D RAILROADS § 75 (the right to use a ROW for purposes of operating a railroad means the right to use the surface of the land and "as much above and below its surface *as may be needed [to] further the business of the railroad*") (emphasis added).
[28] Solicitor's Opinion M-37025, footnote 7, *supra*, p. 11.

Quinn, Matthew <matthew_quinn@ios.doi.gov>

Cadiz

1 message

Quinn, Matthew <matthew_quinn@ios.doi.gov> Wed, Mar 12, 2014 at 2:58 PM
To: Patrick Wilkinson <p2wilkin@blm.gov>, Andrea Nelson <ANelson@blm.gov>

Can you guys give me the latest status on the Cadiz ROW? Here's what I have, which was put together about 9 months ago:

Cadiz Valley Water Conservation, Recovery and Storage Project: Costa sent a letter dated March 22, 2013, regarding BLM's approval of a water conveyance pipeline within a railroad right-of-way. Rep. Costa supports Cadiz's efforts to build a groundwater banking project in Southern California, as a means to help California prepare for dry years with innovative projects. He has encouraged the use of the Arizona and California Company railroad right-of-way for the use of a conveyance pipeline and power line as part of the project.

If asked for your commitment that BLM will review the pipeline request quickly

- BLM is looking at the ROW to determine if the pipeline is appropriate.
- BLM is also developing Final Guidance for Evaluation and Approval of Uses within Railroad Rights-of-Way.
- BLM believes that the guidance will be complete this summer, and it will complete its analysis following issuance of the guidance.

–

Matthew J. Quinn | Attorney - Advisor | Office of Congressional and Legislative Affairs | U.S. Department of the Interior | 202.208.3146

Quinn, Matthew <matthew_quinn@ios.doi.gov>

BLM Hot Issue Papers

1 message

Pals, Arie <apals@blm.gov> Wed, Mar 12, 2014 at 3:43 PM
To: Matthew Quinn <matthew_quinn@ios.doi.gov>
Cc: Stephenne Harding <stephenne_harding@ios.doi.gov>, Patrick Wilkinson <p2wilkin@blm.gov>, Andrea Nelson <anelson@blm.gov>

Matt,

As discussed, please see the attached hot issue papers covering the spectrum of BLM's key issues (including your request for Cadiz). The 15 Hot Bullet documents include a total of over 100 briefing documents consolidated by general subject area.

The papers have been updated over the last two weeks in preparation for BLM's upcoming budget hearing, and include figures from the President's FY15 budget proposal. They were last included in Neil's confirmation hearing book.

Please let us know if you have any questions.

--
Arie Pals
Legislative Specialist
Bureau of Land Management | Department of the Interior
Direct: (202) 912-7411
Cell: (202) 590-0405

15 attachments

Hot Bullets - Oil and Gas.docx
70K

Hot Bullets - Recreation.docx
22K

Hot Bullets - Renewable Energy.docx
4773K

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Hot Bullets - Fire and Forests.docx
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Hot Bullets - Grazing.docx
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attached

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Hot Bullets - NLCS.docx
20K

Hot Bullets - O&C Lands.docx
20K

3/7/2014

Lands

Disposal of BLM Land

- Several proposals to require BLM to sell public lands are active in Congress with hearings in HNRES.

- BLM opposed these bills, recommending instead that Congress reauthorize FLTFA to allow for the thoughtful, efficient, and economical disposal of appropriate public lands.

Key Points:

- FLPMA directs BLM to retain public lands in federal ownership unless it meets specific criteria for disposal:
  - Scattered isolated tracts difficult or uneconomic to manage,
  - Acquired for specific purpose no longer needed, or
  - Could serve important public objectives such as community expansion

- Through 157 RMPs, BLM makes decisions with public input on hundreds of issues including which lands to identify for disposal. This is only a preliminary process without NEPA clearances, surveys, and appraisals.

- Possible consequences of mandated rapid sell-off of public lands (even those identified preliminarily for disposal) include:
  - Reduced ability to respond to energy needs,
  - Reduction or elimination of grazing allotments,
  - Undermining of local communities by deflating property values, and
  - Redirection of BLM resources from other priorities.

Lands

Federal Land Transaction Facilitation Act (FLTFA)

- FLTFA expired July 24, 2011. President's FY15 budget includes proposal to reauthorize FLTFA which allows BLM to sell lands identified for disposal and use proceeds to acquire environmentally-sensitive lands.

- Senators Heinrich and Heller introduced FLTFA Reauthorization (hearing 4/25/13, markup 5/16/13). Representative Lummis (R-WY) has introduced House version (hearing 7/17/13).

Key Points:

- FLTFA has a proven track record of providing for thoughtful, efficient, and economical disposal of appropriate public lands.

- During FLTFA's 11 year history:
  - Over 27,000 acres of BLM land were sold;
  - Over 18,000 acres of environmentally sensitive and significant lands were acquired (BLM, NPS, FWS, & FS).

- Administration strongly supports FLTFA reauthorization, which allows BLM to:
  - Consolidate land ownership,
  - Provide increased access to recreational opportunities for the public, and
  - Reduce costs to Federal government in areas with fragmented land patterns.

Keystone Pipeline

- As currently proposed, 1,800-mile Keystone Pipeline would cross only approximately 42 miles of scattered BLM lands in eastern Montana.

Key Points:

- State Department is lead Federal agency responsible for compliance with NEPA and rendering decision for project.

- BLM has worked closely with State Department.

- Pursuant to Mineral Leasing Act, BLM responsible for issuing decision to approve or deny ROW across Federal lands.

- BLM cannot issue decision to approve or deny ROW until final route is decided.

- BLM will use EIS process and project design features and mitigation measures to inform decision to issue ROW for viable project.

Lands

Land & Water Conservation Fund (LWCF)

- Congress established the LWCF with a portion of revenues from offshore oil and gas development used to purchase land or easement to meet the needs of all Americans for outdoor space and recreation.

- President's FY15 budget for LWCF includes a FY15 request of $25 million and a permanent funding request for $64.4 million. Many of the projects are in collaboration with other Federal land managing agencies while others are solely BLM projects.
  - The $25 million FY15 request would fund 14 projects in eight states.
  - The $64.4 million permanent funding request would fund 15 projects in eight states.

Key Points:

- All BLM's proposed acquisitions for FY15 will increase public access for hunting, fishing, hiking, and other recreational pursuits – and are either within or immediately adjacent to existing BLM units.

- Acquisitions typically result in more efficient use of limited Federal dollars by consolidating land patterns.

- BLM only acquires land from willing sellers.

Resolution Copper

- H.R. 687 and S. 399 (Southeast Arizona Land Exchange and Conservation Act) would authorize exchange of 2,400 acres of FS land for nearly 5,000 acres of private land owned by Resolution Copper to facilitate development of a deep copper mine.

- Numerous tribes have expressed concerns about cultural values that could be negatively impacted by mine.

- BLM defers to FS on issues related to National Forest lands conveyed to Resolution Copper under proposed legislation.

Key Points:

- BLM testified several times on issue, most recently in Senate on Nov. 20, 2013, raising serious concerns on timing of environmental review, and stating DOI cannot support the bill.

- BLM supports acquisition of parcels specified in bills.

Lands

Railroad Right-of-Way Policy / Cadiz

- BLM is developing policy on scope of railroad's authority to undertake or authorize activities within railroad rights-of-way (ROW) under General Railroad Right-of-Way of March 3, 1875; new policy necessitated by 2011 Solicitor's Opinion which withdrew portions of previous Solicitor's Opinion on railroad's authority to undertake or authorize activities within railroad ROW.

- 2011 Solicitor's Opinion states third-party uses can only be authorized to extent those uses "'derive from or further a railroad purpose."

- Cadiz water pipeline, bringing water from Mojave Desert to Los Angeles, proposed to cross BLM land within Arizona & California Railroad Company railroad ROW.

- Sen. Feinstein (D-CA) opposes Cadiz pipeline project; Reps. Cook (R-CA), Negrete McLeod (D-CA), Campbell (R-CA) and Miller (R-CA) support.

- 2012 Appropriations Act directs DOI to determine if Cadiz pipeline is within ROW scope and specifies no appropriated funding be spent for approval (Feinstein).

- Under interim policy, BLM evaluating uses of railroad ROW, including Cadiz, on case-by-case basis.

Key Points:

- BLM committed to developing policy on railroad ROW to provide complete and accurate guidance following Solicitor's Opinions.

- BLM working with Cadiz, Santa Margarita Water District, Arizona & California Railroad Company, and other interested parties to evaluate proposed project in railroad ROW.

Lands

Military Land Withdrawals

- Public Law 113-66, National Defense Authorization Act for FY 2014, contained 6 public land withdrawals/disposal for military purposes:
  - Sec. 2835, Land conveyance, Camp Williams, Utah;
  - Title XXIX, Withdrawal, Reservation and Transfer of Public Lands to Support Military Readiness and Security
    - Subtitle B (Sec. 2931) Limestone Hills Training Area, MT.
    - Subtitle C (Sec. 2941) Marine Corps Air Ground Combat Center Twenty-nine Palms, CA; new withdrawal expanding existing base; impacts for Johnson Valley Off-Highway Vehicle Recreation Area.
    - Subtitle D (Sec. 2951) White Sands Missile Range, NM, and Fort Bliss, TX.
    - Subtitle E (Sec. 2961) Chocolate Mountain Aerial Gunnery Range, CA.
    - Subtitle F (Sec. 2971) Naval Air Weapons Station China Lake, California.

Key Points:

- BLM and DOI worked closely with DOD, Army, Navy, and Marine Corps to develop legislative proposal for military withdrawals.

- BLM committed to supporting military missions and training needs, while protecting public land natural resources and ensuring continued compatible uses, including recreational activities throughout Johnson Valley, CA.

Lands

Revised Statute (R.S.) 2477

- Enacted in 1866, R.S. 2477 granted rights-of-way for highways over public lands.
- It was self-executing; did not require claimant to record right-of-way.
- Law was repealed by FLPMA in 1976; rights established prior to repeal are valid.
- Validity is difficult to determine because claimant was not required to record a right-of-way; has led to extensive litigation, especially in Utah.
- In 1993, DOI proposed, but never finalized, regulations on processing R.S. 2477 claims.
- DOI now legislatively prohibited from issuing binding rules pertaining to recognition, management, and validity of R.S. 2477 claims.
- In 1996, environmental organizations sued to stop Utah counties from constructing roads in Grand Staircase-Escalante National Monument.
- In 2005, 10th Circuit U.S. Court of Appeals ruled state law governs whether right-of-way was "existing," and BLM lacks authority to make binding determinations.
- From 2005 through 2012, State of Utah and its counties filed 29 lawsuits asserting thousands of R.S. 2477 claims across public lands.
- In 2010, DOI clarified through Secretarial memorandum that R.S. 2477 issues should be resolved in light of case law standards developed by courts of applicable jurisdiction.

Key Points:

- Amended legal complaints now involve 12,240 individual road claims on BLM, NPS, and Forest Service lands.
- In 2010, DOI initiated Iron County Pilot Project to resolve R.S. 2477 claims outside of litigation; DOI, BLM, State of Utah, counties, and other stakeholders participate.
- United States has filed notice of appeal in case where district court issued final order to quiet title to 15 roads; 12 were found in favor of State of Utah or county.
- Final approval of negotiated settlement granted in late August in another case involving three roads in Juab County, UT.

Lands

Transmission Corridors & Pipeline Infrastructure

- BLM is working to update our transmission grid and expand our pipeline infrastructure to efficiently move electric power, oil, and gas from the energy sources to the places it is consumed.
- Processing of Right of Way (ROW) applications are done in accordance with applicable laws and through a coordinated approach that involves local and state governments, tribes, other federal agencies, local communities, and other stakeholders.

Key Points – Transmission Grid:

- BLM is participating on the interagency Rapid Response Team for Transmission (RRTT) to improve the overall quality and timeliness of electric transmission infrastructure permitting on both Federal and non-Federal lands.
- RRTT coordinate permitting, review, and consultation schedules and processes among involved Federal and state agencies; apply a uniform and consistent approach to consultations with Tribal governments; resolve interagency conflicts; and ensure that all involved agencies are fully engaged.
- BLM identified approximately 5,000 miles of Energy Policy Act of 2005 (EPAct 2005) energy corridors on BLM managed lands in 11 western states.
- From 2012 to 2013 the BLM approved permits which will enable construction of nearly 1,000 miles of transmission lines in seven states across Federal lands.
- There are currently 25 pending major transmission projects in various stages of environmental review. BLM is the lead Federal agency for 21 of these projects.
  - The pending projects total almost 5,000 miles, with approximately 1,700 miles crossing BLM land.
- Since January 2009, the BLM has approved permits for 75 major transmission projects (100 kV and larger), totaling over 2,300 miles, 1,300 miles of which cross through BLM lands in 10 western states.

Key Points – Pipeline Infrastructure:

- Oil and gas production is outpacing pipeline capacity and creating bottlenecks in some locations, putting a strain on America's pipeline infrastructure.
- As authorized by Section 28 of the Mineral Leasing Act (MLA), the BLM issues ROW grants for oil and natural gas gathering, distribution, and transmission pipelines and related facilities on any Public Lands, or on lands which are administered by two or more Federal agencies, except land in the National Park System and land held in trust for Indians.
- Since 2009 the BLM has participated in the approval seven major pipeline expansion projects totally nearly 1,750 miles of new oil and gas pipeline with nearly 750 of those miles crossing Federal lands.
- In the next 18 months the BLM is expected to complete review and disposition of three more major pipeline projects totaling nearly 500 hundred additional miles with nearly 250 of those miles across Federal lands.

Quinn, Matthew <matthew_quinn@ios.doi.gov>

Re: BLM Hot Issue Papers

Pals, Arie <apals@blm.gov> Wed, Mar 12, 2014 at 4:29 PM
To: "Quinn, Matthew" <matthew_quinn@ios.doi.gov>

Absolutely.

On Wed, Mar 12, 2014 at 3:53 PM, Quinn, Matthew <matthew_quinn@ios.doi.gov> wrote:

> Arie-
>
> Pat mentioned a Table of Contents as well. Can you send that too?
>
> Thanks,
> Matt
>
> On Wed, Mar 12, 2014 at 3:43 PM, Pals, Arie <apals@blm.gov> wrote:
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> > Please let us know if you have any questions.
> >
> > --
> > **Arie Pals**
> > Legislative Specialist
> > Bureau of Land Management | Department of the Interior
> > Direct: (202) 912-7411
> > Cell: (202) 590-0405

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Matthew J. Quinn | Attorney - Advisor | Office of Congressional and Legislative Affairs | U.S. Department of the Interior | 202.208.3146

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