



# United States Department of the Interior



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FEB 07 2020

Scott Slater  
CEO & President, Cadiz, Inc.  
550 South Hope Street  
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Dear Mr. Slater,

In response to the U.S. District Court for the Central District of California's opinion in *Center for Biological Diversity, et al. v. BLM* and *National Parks Conservation Association et al. v. U.S. Department of the Interior*, the Bureau of Land Management (BLM) has re-examined its letter dated October 13, 2017, to Cadiz, Inc., Arizona & California Railroad (ARZC), and Santa Margarita Water District, regarding the BLM's 2017 determination that the proposed Cadiz water conveyance pipeline project furthers a railroad purpose, and is thus within ARZC's rights to authorize under the General Railroad Right of Way Act of March 3, 1875 (1875 Act). A copy of the BLM's "Analysis Examining Whether Certain Components of the Cadiz Project Further a Railroad Purpose," dated February 7, 2020, and the October 13, 2017, letter are enclosed for your reference.

The BLM affirms that the proposed Cadiz water conveyance pipeline project furthers a railroad purpose and is within ARZC's rights to authorize under the 1875 Act. No further approval is required by the BLM for components of the project that are within the railroad right-of-way easement.

If you have any questions or concerns, please contact me at (916) 978-4600.

Sincerely,

  
Karen E. Mouritsen  
BLM California State Director

Enclosure (2)

- 2020 BLM's Analysis Examining Whether Certain Components of the Cadiz Project Further a Railroad Purpose
- October 13, 2017 Letter

INTERIOR REGIONS 8 & 10 • LOWER COLORADO BASIN & CALIFORNIA-GREAT BASIN

ARIZONA, CALIFORNIA, NEVADA, OREGON\*

\* PARTIAL

## Bureau of Land Management

### BLM's Analysis Examining Whether Certain Components of the Cadiz Project Further a Railroad Purpose

February 7, 2020

Consistent with the U.S. District Court for the Central District of California's (District Court) opinion in *Center for Biological Diversity, et al. v. BLM*, the Bureau of Land Management (BLM) is re-examining its letter dated October 13, 2017, to Cadiz, Inc., Arizona & California Railroad (ARZC), and Santa Margarita Water District (SMWD), relating to BLM's determination that the proposed Cadiz water conveyance pipeline project (Project) furthers a railroad purpose and is thus within ARZC's rights to authorize under the General Railroad Right of Way Act of March 3, 1875 (1875 Act)<sup>1</sup>. Specifically, the BLM is following the district court's direction that it "explain why it considered the same facts in 2015 and 2017 but came to opposing conclusions about whether such facts demonstrated any railroad purpose consistent with the incidental use doctrine." *Center for Biological Diversity, et al. v. U.S. BLM*, 2019 WL 2635587 at 31 (C.D. Cal., June 20, 2019) Slip Op. The analysis below explains and reaffirms BLM's conclusion in the 2017 letter.

#### Background

In 2008, Cadiz, Inc. and ARZC entered into a lease agreement to allow Cadiz to construct a pipeline along ARZC's 1875 Act right-of-way easement for the primary purpose of transporting water to Los Angeles. The lease agreement, which the parties amended in 2011, provides railroad benefits to ARZC. In particular, ARZC requested that Cadiz incorporate design features into the proposed Project to support the following uses: (1) fire hydrants placed along and connected to the proposed pipeline to suppress fires that might damage railroad trestles and facilities; (2) an access road on or within the leased area to allow ARZC access in case of train derailment or other railroad purposes such as maintenance of way inspections; (3) access to 10,000 gallons of water per day for future railroad needs, such as a railcar wash site, vegetation control, offices, or other future improvements; (4) access to power at meters<sup>2</sup> located along the railroad and emergency access to power at any location; (5) accommodations and water services to support a steam powered locomotive for the future operation of a contemplated excursion train and water to support accommodations for passenger terminals; and (6) the right to connect and deliver water at any future production facilities within ARZC's right-of-way. Cadiz incorporated these requested railroad benefits into its project design. Cadiz and ARZC also provided detailed information between 2011 and 2015 to BLM regarding these design features.

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<sup>1</sup> 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)

<sup>2</sup> The railroad and Cadiz did not continue to pursue a design of meters along the railroad, but did continue with a need for power.

In accordance with Department of the Interior’s legal interpretation (Solicitor’s Opinion M-37025) and BLM’s policy guidance (BLM Instruction Memorandum (IM) 2014-122), BLM analyzed the information provided by Cadiz and ARZC to determine whether the proposed Cadiz Project furthered a railroad purpose. On October 3, 2015, the BLM California State Director issued a determination (“2015 Determination”) that certain components of, and therefore the Cadiz Project itself did not further a railroad purpose. Following the 2017 rescission of IM 2014-122 and the Solicitor’s replacement of Solicitor’s Opinion M-37025, BLM reconsidered and reversed the 2015 Determination on October 13, 2017. Three environmental organizations filed two separate lawsuits challenging the October 13, 2017, determination (“2017 Determination”). On the merits, the district court held that BLM had not adequately explained the reversal of the 2015 Determination based on the same facts and remanded the 2017 Determination to BLM. Consistent with the district court’s order, BLM examines below the facts relating to each of the components of the proposed Cadiz Project identified as providing ARZC a railroad benefit and explains in detail how each component meets the “furthers a railroad purpose” standard. Where appropriate, BLM’s explanation describes the reason for changing positions from the 2015 Determination.

### Legal Standard

In accordance with the district court’s opinion, the analysis in this revised determination applies the “derives from or furthers a railroad purpose” standard adopted by the Ninth Circuit in *Barahona v. Union Pacific*, 881 F.3d 1122 (9th Cir. 2018).<sup>3</sup> Courts interpret 1875 Act easements as having conferred broad rights “for railroad purposes,” including rights beyond “simply run[ning] trains over the land.” *See id.* at 1133-34. Moreover, courts have long accepted and applied the “incidental use doctrine” when considering whether an activity furthers a railroad purpose.

Under the “incidental use doctrine,” the scope of a railroad’s right-of-way includes activities and uses that are incidental to railroad operations, including leasing to third parties. *Id.* at 1134. As highlighted in *Barahona*, courts have identified a variety of third party or commercial uses within a railroad right-of-way that fall within the incidental use doctrine, including, e.g., power lines<sup>4</sup>, communication lines<sup>5</sup>, freight warehouses<sup>6</sup>, gas stations, and storage tanks<sup>7</sup>. *Id.* The Ninth Circuit in *Barahona* held that an oil pipeline within a railroad’s right-of-way with a primary purpose of transporting oil for commercial sale could serve a railroad purpose if the railroad utilized some of the oil. *Id.* Accordingly, determining whether a particular activity is within the scope of the rights of a railroad’s 1875 Act easement is not limited to those activities carried out by the railroad or whether the primary purpose of the activity is to support railroad operations.

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<sup>3</sup> As acknowledged by the district court, Solicitor’s Opinion M-37048 identified the “furthers a railroad purpose” standard as a secondary interpretation of the 1875 Act and the BLM’s 2017 Determination applied that secondary standard. The district court also found that Solicitor’s Opinion M-37048 regarding the “furthers a railroad purpose” standard reached “basically the same conclusion” as the earlier opinion it replaced, i.e., Solicitor’s Opinion M-37025.

<sup>4</sup> *Illig v. United States*, 58 Fed. Cl. 619, 634 (2003)

<sup>5</sup> *Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226, 634 (W.D. Tex. 1990)

<sup>6</sup> *McSweyn v. Inter-Urban Ry.*, 256 Iowa 1140, 130 N.W.2d 445, 448 (Iowa 1964)

<sup>7</sup> *Mitchell v. Ill. Cent. R.R.*, 384 Ill. 258, 51 N.E.2d 271, 275 (1943)

Application of the incidental use doctrine focuses on whether a railroad obtains a benefit from an activity or use, but may be inapplicable to an activity providing only a “minimal or illusory benefit to railroad operations.” *Id.* at 1135. Under the “furthers a railroad purpose” standard, the BLM examines in detail each component of the proposed Project to determine whether it provides an incidental benefit to ARZC’s railroad operations and whether any such benefits are “minimal or illusory.”

Additionally, clarification of BLM’s application of the “furthers a railroad purpose” standard in this revised determination is necessary to explain how the BLM’s conclusions here may differ from those in the 2015 Determination. Specifically, there are critical distinctions between the “furthers a railroad purpose” standard the BLM is applying in this revised determination as compared to the 2015 determination, particularly how it relates to BLM’s reliance on IM 2014-122. IM 2014-122, which BLM rescinded in March 2017, identified factors the BLM must consider when evaluating whether an activity or use of an 1875 Act easement is within the scope of rights granted to the railroad.

The district court’s decision in *Center for Biological Diversity, et al. v. BLM* acknowledged that BLM relied on IM 2014-122 in making its findings in the 2015 Determination. However, the district court questioned whether IM 2014-122, as well as the 2015 Determination’s reliance on IM 2014-122, actually set forth a standard that differs from what is considered by the court and BLM to be the correct standard, i.e., “derives from or furthers a railroad purpose.” 2019 WL 2635587, \*28-30 (C.D. Ca, June 20, 2019). The district court also did not find any distinction between the legal standard articulated in the Solicitor’s 2011 M-Opinion and the legal standard applied as the alternative in the 2017 Determination. BLM agrees that the legal standard articulated in the 2011 M-Opinion and applied as the alternative in the 2017 Determination are similar. BLM, however, does believe there are several findings in the 2015 Determination that relied on certain factors from IM 2014-122, which in turn constrained the incidental use doctrine by using definitional terms and requiring an activity to either be necessary for railroad operations or construction or originate from a railroad purpose. Because IM 2014-122 was rescinded, this revised determination will not apply IM 2014-122, nor will the BLM evaluate whether components of the proposed Cadiz Project “originates” from a railroad purpose and whether the non-railroad purpose drives the purpose or design in its analysis of the facts. Instead, in accordance with applicable caselaw, the BLM will focus its analysis on whether there are facts to support a conclusion that components of the proposed Pipeline further a railroad purpose, i.e., provide a benefit to the railroad that is not “minimal or illusory.”

### CADIZ PROJECT

Cadiz, Inc.’s proposed pipeline is intended to convey for a 50-year span an annual average of 50,000 acre-feet (16.3 billion gallons)<sup>8</sup> of water pumped from a groundwater aquifer to the Colorado River Aqueduct (Aqueduct) for a distance of approximately 43 miles. It is proposed not to exceed 75,000 acre feet in any one year. Extraction wells (wellfield) would be built on Cadiz, Inc. property and a 43-mile underground water conveyance pipeline would be constructed

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<sup>8</sup> 1 acre-foot = 325,851 gallons. 50,000 acre-feet = 16,292,550,000 gallons annually (16.3 billion). 16.3 billion / 365 days in a year = 44,637,123 (44.6 million) gallons daily.

within the ROWs originating in Cadiz, California and terminating near the Aqueduct.<sup>9</sup> Depending on finalization of the project, the diameter of this steel pipeline is projected to be anywhere between four-and-a-half to seven feet (54 to 84 inches).<sup>10</sup> The water would be conveyed to the Aqueduct for delivery to Southern California Project Participants such as SMWD for purchase.<sup>11</sup> The pipeline's proposed location is parallel to and predominantly southwest of the Railroad's railroad tracks, and is planned to remain entirely within the Railroad's 200-foot-wide ROWs, at least 50 feet from the centerline whenever practicable and at a depth of 15 feet from the bottom of the pipeline to the ground surface.

Any pipeline crossings under the railroad tracks are proposed at a depth of at least five feet. The pipeline would make more than 70 wash and road crossings, and at wash crossings the pipeline would be buried at least five feet below the surface and would use concrete aprons and/or pads for protection from scouring. The pipeline component would have additional ancillary facilities visible on the surface including air relief/vacuum relief valves, blow-off facilities, and access manholes.<sup>12</sup>

The proposed water pipeline is expected to have enough water to turn in-line turbines to produce electricity for the Railroad.<sup>13</sup> The in-line turbine system would be approximately 20 feet in width and approximately 300 feet in length, and would be located near where the Aqueduct intersects with the terminus of the Cadiz, Inc. pipeline.<sup>14</sup>

Some components are presented as contemplated but not planned aspects of the Project. In an agreement with Cadiz, Inc. (the Longitudinal Lease Agreement and Amendment), the Railroad has reserved water for future contemplated uses as well as the use of water for the proposed steam-powered excursion locomotive, possible new warehouses, bulk transfer facilities, and other railroad related facilities on the rail line.

## CADIZ PROJECT COMPONENTS AND ANALYSIS

### Fire Suppression System and Access to Water

As discussed in the 2015 Determination, ARZC and Cadiz provided details and specifications regarding the proposed construction of a fire suppression system consisting of several components connected to the water conveyance pipeline. The main components include automated sprinklers and fire hydrants using water at 13 steel and 29 wooden railroad bridges, which utilize creosote-treated trestles,<sup>15</sup> to prevent small fires on these structures from escalation (automated sprinklers for trestle bridges), or to assist emergency response in larger fires

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<sup>9</sup> Cadiz Project Final Environmental Impact Report (FEIR), July 2012, at 1-3.

<sup>10</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary at 2 (Jan. 1, 2015).

<sup>11</sup> Project Participants include of the Railroad and six water districts including SMWD. FEIR at 1-4 thru 1-8.

<sup>12</sup> FEIR at 3-26.

<sup>13</sup> Letter from Cadiz, Inc. to BLM California State Director at 17-18 (Oct. 24, 2014).

<sup>14</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. binder, CH2MHill Tech. Memo, tab 1 at 10 (Jan. 1, 2015); *Id.* at 28 (For turbine location, "[t]he selected location for the installation of the LPS turbines on the Cadiz pipeline is immediately upstream of the intersection of the ARZC Railroad ROW with the Colorado River Aqueduct.... [T]his location is close to the end of the Cadiz pipeline").

<sup>15</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary at 2 (Jan. 1, 2015); *see also id.* at suppl. binder, CH2M Hill Tech. Memo at 2, 9.

(hydrants for trestle and steel bridges). Additional components of the fire suppression system include fiber optic sensors<sup>16</sup> and access road construction and improvement for hydrant access by emergency responders.<sup>17</sup> A fiber optic line is proposed for the 43-mile length of the pipeline, plus an additional four miles to Rice, California.<sup>18</sup> The fiber optic component would be used for telemetry in the automated fire suppression system, for pipeline communications by Cadiz, Inc., and for emergency communications by the Railroad. It will be physically located in the pipeline trench, except for the four-mile stretch to Rice, where it will run along the proposed electrical power line to Rice. The water conveyance pipeline itself would act as in-line storage for water given its large capacity. Steam locomotive watering tanks, proposed as elements of the excursion train component (see excursion train, below), are also described as having the ability to assist with fire suppression.<sup>19</sup>

There are important facts provided by ARZC and Cadiz regarding the fire suppression system that BLM did not refer to in the 2015 Determination. For example, RailAmerica (ARZC's former parent company) explained in various documents provided to BLM that fire is always a threat for railroads, especially to trestles. It noted the significant cost of replacing trestles due to fire and complete destruction, i.e., from \$1 million to more than \$25-30 million, as compared to contained fire damage, i.e., under \$500,000,<sup>20</sup> and provided examples of trestle fires it had experienced on its lines and the costs associated with the repairs.<sup>21</sup> ARZC and Cadiz also provided to BLM a railroad consultant's opinion about how the fire suppression system with telemetry would provide quicker response times and in turn would minimize damage, especially given the isolation of the line in a sparsely populated area.<sup>22</sup> ARZC further explained to BLM that fire suppression and the proposed system would be an upgrade to the safety and function of its railroad, made possible only because the pipeline would provide a reliable and constant source of water otherwise not available to ARZC.<sup>23</sup>

### Fire Suppression Analysis

The 2015 Determination acknowledged that fire suppression may further a railroad purpose in certain locations that are susceptible to fire and acknowledged that water may be the appropriate fire suppression substance. In spite of these acknowledgements, BLM concluded that the facts presented did not justify a conclusion that this fire suppression system serves a railroad purpose. In particular, the 2015 Determination relied on certain facts to find that the fire suppression system component of the Cadiz project required BLM authorization, including: (a) the

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<sup>16</sup> *Id.*

<sup>17</sup> Letter from RailAmerica, Inc. to BLM California State Director at 7 (Jan. 16, 2013) (“[C]oupled with the access road to be provided, fire crews will be able to reduce response time dramatically.”).

<sup>18</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. binder, CH2MHill Tech. Memo at 10 (Jan. 1, 2015).

<sup>19</sup> Letter from Cadiz, Inc. to BLM California State Director at 19 (Oct. 24, 2014) (“It is anticipated that Cadiz, Rice, and Parker will host tanks of at least 50,000 gallons to service the steam locomotives and to provide a reserve for use in firefighting.”).

<sup>20</sup> *See, e.g.*, Letter from RailAmerica, Inc. to BLM California State Director at 5-7 (Jan. 16, 2013).

<sup>21</sup> *Id.* at 6.

<sup>22</sup> R.L. Banks & Assoc. Inc. at 7 (Oct. 2014)

<sup>23</sup> Letter from RailAmerica, Inc. to BLM California State Director at 8 (Jan. 16, 2013).

inconsistent treatment of placing hydrants throughout the 43 miles of track that cross BLM administered land; (b) use of water to suppress fires on creosoted structures is uncommon; (c) the use of dry sand is recommended by the *American Railway Engineering and Maintenance of Way Association* as more effective than water for minor fires on creosoted structures; (d) *American Railway Engineering* also recommends fire barriers for protection of bridges from large fires and does not mention the use of water-supplied fire hydrants in suppressing fires on bridges; (e) a lack of history of fires along the railroad right-of-way for the 43 miles; and (f) a lack of water-based fire suppression on ARZC's 200-mile right-of-way and no plans beyond just the portions proposed for use by Cadiz, Inc. These findings, however, do not appear to consider other relevant facts or information provided by ARZC and Cadiz.

Consistent with the district court's direction, BLM re-examines these factual findings, as well as other relevant facts not considered in the 2015 Determination, and applies the legal standard described above to the facts to consider whether the fire suppression system connected to the water pipeline would further a railroad purpose. The analysis below also identifies several instances where the findings in the 2015 Determination emphasize or apply criteria from IM 2014-122, which is no longer in effect and, as applied in the 2015 determination, narrowed the circumstances in which an activity furthers a railroad purpose under the incidental use doctrine. As explained below, BLM concludes that a reversal of the findings in the 2015 Determination regarding the fire suppression system is reasonable and justified.

1. Inconsistent treatment of placing hydrants throughout the 43 miles and a lack of water-based fire suppression on ARZC's 200-mile right-of-way and no plans beyond just the portions proposed for use by Cadiz, Inc.

With respect to the facts relating to inconsistent treatment for the 43 miles and the lack of water-based fire suppression system for the entire line, BLM's 2015 Determination ignored information provided by the railroad. BLM referred only to RailAmerica's statement that no water hydrants currently exist and a fire protection system is not contemplated for the entire line to find the system "was added to draw some connection between the water conveyance pipeline and the railroad."<sup>24</sup> BLM did not acknowledge RailAmerica's complete response to BLM's question about why the fire suppression system is not proposed for all of ARZC's railroad line. RailAmerica's response explained that they could not compel Cadiz to extend water service to areas beyond the 43 miles, the fire system for the 43 miles represents a significant capital expenditure made possible by the partnership with Cadiz (and otherwise would not be financially feasible), and that it will look for ways to extend this protection in the future.<sup>25</sup> In other words, RailAmerica's response was more complicated than indicated by BLM.

Additionally, BLM's analysis suggested that a fire suppression system that addresses only a portion of a rail line has no railroad benefit. Such a conclusion, on its face, contradicts the incidental use doctrine. It is undisputed that the water conveyance pipeline would not travel the remaining 200-plus miles, i.e., Cadiz is not proposing to use all of ARZC's line. Furthermore, Cadiz's proposed use of ARZC's railroad right-of-way makes it possible for ARZC to obtain an

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<sup>24</sup> BLM's Evaluation of Cadiz at 12, fn 67 (citing Letter from RailAmerica to BLM California State Director at 8 (Jan. 16, 2013)).

<sup>25</sup> RailAmerica Letter to BLM at 8.

incidental benefit and not the other way around. As the Ninth Circuit and other courts, as well as the rescinded Solicitor's Opinion M-37025 and the current Solicitor's Opinion M-37048, make clear, the incidental use doctrine allows a railroad to authorize third parties to use an 1875 Act railroad easement if the use furthers a railroad purpose.<sup>26</sup> The incidental use doctrine does not suggest that an activity have a railroad benefit for the entire railroad line in order to further a railroad purpose. Requiring a third party use to serve an entire rail line equally would severely narrow the circumstances in which a third party use would ever serve a railroad purpose. Similarly, it is inconsistent with the incidental use doctrine's notion that a railroad can authorize a third party to do what the railroad could do within the scope of its right-of-way. In this case, ARZC would be within the scope of its rights to construct a water pipeline within a portion of their easement to support a fire suppression system. Because ARZC could do this on its own, it also should be permitted to authorize a third party to construct a water pipeline, in part, for ARZC's benefit. As a result, BLM's finding in the 2015 Determination based on the limits of the proposed fire suppression system ignored relevant facts and the appropriate legal standard.

## 2. Industry Standards and Recommendations

Regarding the application of industry standards, BLM's 2015 Determination took certain statements or recommendations from the *American Railway Engineering and Maintenance of Way Association* and ignored information provided by ARZC and Cadiz. *American Railway Engineering and Maintenance of Way Association* stated that sand is more effective than water in "extinguishing small fires on creosoted structures" and recommended the use of fire barriers at about 400 foot intervals to protect long bridges and trestles.<sup>27</sup> However, the manual also recommends that water barrels be installed on timber bridges, "1 barrel each for structures up to 50 feet long and 1 additional barrel for each additional 150 feet or fraction thereof,"<sup>28</sup> indicating that, in some instances, water is an appropriate fire suppression method. Furthermore, ARZC provided detailed information of examples of where railroads have deployed water hydrants for fire suppression systems, which the 2015 Determination did not acknowledge or consider.<sup>29</sup> ARZC's information also explained how the use of water for fire suppression is dependent on access to water.<sup>30</sup> In sum, industry standards referenced in the 2015 Determination do not support BLM's finding regarding the fire suppression system.

## 3. History of fires along ARZC's rail line

Finally, a lack of history of fires along the railroad right-of-way for the 43 miles does not mean that ARZC's proposed installation of such a system would not further a railroad purpose. BLM's 2015 Determination suggested that the lack of fires along ARZC's railroad line supports a finding that the fire suppression system does not further a railroad purpose because it is unnecessary. Such a finding is too narrowly focused because it ignores that fire is possible, suggesting instead that a fire suppression system would only be warranted if ARZC had a fire

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<sup>26</sup> *Barahona v. Union Pacific*, 881 F.3d 1122, 1134 (9th Cir. 2018)

<sup>27</sup> *American Railway Engineering and Maintenance of Way Association*, Railroad Manual, Vol. 2 sec. 4.9.6 at 7-4-18 (2012).

<sup>28</sup> *Id.*

<sup>29</sup> Letter from RailAmerica to BLM California State Director at 7-8 (Jan. 16, 2013).

<sup>30</sup> *Id.* at 8.



along the line. ARZC provided evidence of fire risks along its line and that an increased ability to deal with fire could save it significant sums of money.<sup>31</sup> It also provided examples of fire to other lines and the costs associated with those fires.<sup>32</sup> Moreover, ARZC recently had a fire on its line outside of the 43 miles associated with the Cadiz Pipeline.<sup>33</sup> In this regard, there now is proof that a fire has occurred along portions of ARZC's line and concrete details about the consequences and losses associated with fire, such that the factual underpinning of this portion of the 2015 determination – that there is no history of fires on the 43 miles of railroad – is incorrect.

#### 4. Emphasis on Criteria from IM 2014-122

While IM 2014-122 is now inapplicable, it is worth noting several findings in the BLM's 2015 Determination relating to the fire suppression system that relied on criteria from IM 2014-122, which are inconsistent with the incidental use doctrine. First, BLM stated:

The inconsistent treatment of the 43 miles of line through public land, the uncommon use of water for fire suppression according to industry standards, and the historical lack of fire do not support a finding that the fire suppression facilities and use of water for fire suppression support a railroad purpose. Activities that derive from or further a railroad purpose *must* actually come from, originate, or issue from the railroad purpose. [Citation to IM 2014-122, Attachment at p. 2] Here, there is no operational evidence that fire suppression, on this limited stretch of line, comes from, originates, or issues from a railroad purpose. On this basis, the installation of water-based fire suppression utilities requires approval from BLM.<sup>34</sup>

This finding emphasized a definitional requirement in IM 2014-122 that the fire suppression system must originate or issue from the railroad purpose and not that it could simply further a railroad purpose consistent with the incidental use doctrine.

Second, the 2015 Determination, in reliance on criteria from IM 2014-122, examined whether the railroad use or non-railroad use drove the fire suppression system's design.<sup>35</sup> Pointing to the Environmental Impact Report (EIR) for the Cadiz Project, BLM found that the fire suppression

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<sup>31</sup> *Id.* at 5-7 (Jan. 16, 2013); *see also* Memorandum from ARZC to BLM at 1-2 (Feb. 26, 2013) (describing the estimated costs to construct the fire suppression system to be over \$10 million, at no costs to the railroad). Cadiz provided additional information to support ARZC's desire and need for improved capabilities to address potential fires, plus a detailed discussion of examples of fires along rail lines and the wildfire risk within the Mojave Desert. *See, e.g.*, Letter from Cadiz, Inc. to BLM California State Director at 11-16 (Oct. 24, 2014).

<sup>32</sup> *See, e.g.*, Memorandum from ARZC to BLM at 2, attachments 1 and 2 (Feb. 26, 2013) (provided documentation of two fires along rail lines owned by ARZC's parent company and also described how the response times associated with these fires had a direct correlation on how much fire damaged occurred); *see also* R.L. Banks & Assoc. Inc. at 7 (Oct. 2014) (describing the differences in managing fire between populated areas versus sparsely populated areas like the Mojave Desert).

<sup>33</sup> [https://www.parkerpioneer.net/news/article\\_3281c0de-d7f3-11e9-ab4a-af2dc46fd3e4.html](https://www.parkerpioneer.net/news/article_3281c0de-d7f3-11e9-ab4a-af2dc46fd3e4.html). On September 14, 2019, ARZC's bridge over the Colorado River near Parker, Arizona caught fire, which started because of a brush fire below the bridge. The wooden support structures were heavily damaged by the fire and the railroad estimated a two-week outage. Because the bridge is in a populated area, numerous fire crews were able to respond quickly. Nevertheless, the fire spread to railroad ties in the steel sections.

<sup>34</sup> BLM's 2015 Determination at 13 (emphasis added).

<sup>35</sup> *Id.*

system was “driven by the need for groundwater capture and use, and not driven by or for railroad purposes,” and thus, did not serve a railroad purpose.<sup>36</sup> Such an analysis ignores the incidental use doctrine by suggesting that the railroad purpose must drive an activity’s design. This is inconsistent with various examples of activities considered as serving a railroad purpose, e.g., power lines, communication lines, and oil pipelines. Again, these instances merely reflect an analysis that is no longer relevant, and moreover, is inconsistent with the incidental use doctrine.

*Determination:*

In light of the above, we conclude that in reaching the 2015 Determination, BLM did not rely on the whole record before it and applied an inappropriate legal standard. Examining the proposed fire suppression system<sup>37</sup> as supported by the proposed water conveyance pipeline, we apply the incidental use doctrine by asking merely whether a third party use would further a railroad purpose in a way that is not minimal or illusory. As detailed above, there are ample facts and information provided by ARZC and Cadiz to sufficiently demonstrate how a fire suppression system made possible by the proposed water conveyance pipeline provides a significant benefit to the railroad, i.e., furthers a railroad purpose, including saving ARZC millions of dollars in both costs of construction and potential savings from losses due to trestle fires. Such a system with the potential to minimize millions of dollars in damage and operational losses does not qualify as minimal or illusory. The benefits of the fire suppression system are clear given the recent fire and the resulting damage to ARZC’s rail line. In sum, we determine the fire suppression system as proposed by ARZC and Cadiz will further a railroad purpose.

Access Road

The access road has been proposed to be 20 to 25 feet in width, including both new and existing road.<sup>38</sup> It was described as running parallel to the proposed water conveyance pipeline mostly within the railroad ROW alignment, although portions of the road may lie outside the boundary of the ROW.<sup>39</sup> Cadiz has not provided exact details for the proposed construction and improvement of a road system, or whether portions will fall outside the footprint of the Railroad’s ROW.

The access road is described as it relates to the pipeline project as “non-exclusive interests in the surface of the Property 25 feet wide and located more than 50 feet from the centerline of the existing railroad track to install, construct, operate, maintain, repair, renew and remove the Facilities (e.g. pipeline, manifold pipes, and power line; appurtenances thereto) as well as access roadways along the surface of the Property in an area within 25 feet wide adjacent to the outer

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<sup>36</sup> *Id.* at 13-14.

<sup>37</sup> We contemplate here the fire suppression system in its entirety, including the fiber optic line, hydrants, and access to water.

<sup>38</sup> Longitudinal Lease Agreement at 1; *see also* Letter from RailAmerica to BLM California State Director at 10 (Jan. 16, 2013).

<sup>39</sup> 2015 Determination at 4 (“[W]hile the [existing roadway system] generally parallels the [Railroad] alignment, in some cases it is some distance from the actual railroad tracks (up to approximately half a mile in some locations) and is in poor condition as it is not regularly maintained.”).

margins of the Premises.”<sup>40</sup> Secondary uses of the proposed access road would be for the Railroad to have easier access than what already exists to assist in crew changes, maintenance and inspection of the railroad, and for emergency response.<sup>41</sup> It was proposed that the roadway system would be granted by Cadiz, Inc. to the Railroad for its use.<sup>42</sup>

### Access Road Analysis

The 2015 Determination considered that the proposed uses of the access road may serve a railroad purpose. BLM, however, focused on whether the origin of the access road was for the support of a railroad or non-railroad purpose.<sup>43</sup> BLM concluded that the origin of the access road supported the water conveyance pipeline for public consumption and not a railroad purpose, thus requiring BLM authorization.<sup>44</sup> BLM also noted that authorizing a third party to construct a road for access relating to a non-railroad purpose further supported a requirement that the access road was beyond the scope of ARZC’s right-of-way. BLM’s determination also seemed to rely on other facts, including: (a) ARZC already has access to the right-of-way from county roads and other dirt roads; and (b) Cadiz’s proposal on how it would construct the access road is unclear.

The 2015 Determination’s findings are inconsistent with the incidental use doctrine. The incidental use doctrine does not require an inquiry into whether the primary purpose of an activity bears a relationship to the construction or operation of a railroad, but instead focuses on determining whether a third party use would provide a benefit to the railroad, i.e., further a railroad purpose. Here, it is irrelevant that the proposed access road’s primary purpose is to provide access for the construction and maintenance of the water conveyance pipeline. Instead, the relevant inquiry is whether the access road would further ARZC’s railroad purposes in a way that is neither minimal nor illusory. The information provided by ARZC and Cadiz explains ARZC’s need for better access to conduct inspections, maintenance and upgrades.<sup>45</sup> ARZC estimated the value of Cadiz’s proposal to grade and construct the access road at \$4.75 million, a cost Cadiz proposes to cover.<sup>46</sup> It also indicated to BLM that the access road would provide an estimated savings of “\$93,000 per year . . . in labor cost and mileage expenses by avoiding extending travel for crew changes and maintenance of way.”<sup>47</sup> On its face, the access road furthers a railroad purpose, which is supported by information and evidence offered by ARZC. This is true even if ARZC has other methods to access the tracks, because the road will provide improved access to increase efficiency so long as it remains within the footprint of its original grant.

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<sup>40</sup> Longitudinal Lease Agreement at 1.

<sup>41</sup> Letter from Cadiz, Inc. to BLM California State Director, suppl. Binder, Att. I at 120. (Oct. 24, 2014).

<sup>42</sup> FEIR at p. 3-40; *see also* Letter from Cadiz, Inc. to BLM California State Director, suppl. binder, Att. A at 5 (Oct. 24, 2014).

<sup>43</sup> 2015 Determination at 16-17.

<sup>44</sup> *Id.*

<sup>45</sup> Letter from Cadiz, Inc. to BLM California State Director at 4 (Jan. 19, 2015) (describes ARZC’s current access along a county road that in certain locations is up to a half a mile away from the rail line and is in poor condition due to infrequent maintenance).

<sup>46</sup> Memorandum from ARZC to BLM California State Director at 1 (Feb. 26, 2013).

<sup>47</sup> *Id.*

That said, we note that if Cadiz or ARZC propose construction outside of the footprint of ARZC's 1875 Act right-of-way grant, either on a temporary basis or as part of a more permanent installation, an application must be made to the BLM for that portion of the project.

*Determination:*

The facts presented by ARZC and Cadiz support a finding that the proposed access road, i.e., a feature associated with the water conveyance pipeline, does serve a railroad purpose. Specifically, the access road provides a substantial practical and economic benefit to ARZC by improving its access to the rail line. BLM concludes that such benefits to the railroad connected to the access road are not minimal or illusory.

Power Generation and Power Lines

Cadiz proposes components of the water conveyance pipeline that generate and distribute power for the benefit of ARZC. First, Cadiz proposes to install in-line turbines in the water conveyance pipeline to generate power.<sup>48</sup> The in-line turbines located within the pipeline use a design that spins with the passage of water, which turns a generator that converts the pipeline energy into electricity.<sup>49</sup> The turbines identified by Cadiz can be deployed in large (24 and 96 inches in diameter) water pipelines, and the proposed turbine system would be approximately 20 feet in width and 300 feet in length and would be located near where the Aqueduct intersects with the terminus of the Cadiz's pipeline.<sup>50</sup> Second, Cadiz would distribute this power via transmission lines to be built within the railroad's ROW for ARZC's use, including at their Rice transloading facilities.<sup>51</sup> It is anticipated that the power line will run for approximately four miles generally southeasterly from the in-line turbines to Rice, California.<sup>52</sup>

Early project descriptions included the Railroad's ability to tap into the once-proposed 43-mile power transmission line in emergency situations,<sup>53</sup> through the installation of emergency power meters of some sort along the line, but Cadiz, Inc. later replaced all meter discussion with a new in-line turbine project component and new contemplated uses – expanding and providing power to Railroad transloading facilities. Other power uses are briefly mentioned – uses such as signal systems and power switches, if railroad business were to increase.

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<sup>48</sup> Letter from Cadiz, Inc. to BLM California State Director at 2, 17 (Oct. 24, 2014).

<sup>49</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. binder, CH2MHill Tech. Memo at 10 and Attachment 1 to CH2MHill Tech. Memo at 2-2, 2-3, and Fig. Att2-1 and 2-3 (Jan. 1, 2015).

<sup>50</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. binder, CH2MHill Tech. Memo at 10 and Attachment 1 to CH2MHill Tech. Memo at 2-2, 2-3, and Fig. Att2-2 and 2-3 (Jan. 1, 2015).

<sup>51</sup> *Id.* at 10. Transloading is the process of transferring a shipment from one mode of transportation to another. It is most commonly employed when one mode cannot be used for the entire trip, such as when goods must be shipped internationally from one inland point to another.

<sup>52</sup> Letter from Cadiz, Inc. to BLM California State Director at 4 (Jan. 19, 2015). Although the record does not state the length of the power line from the in-line turbines to the siding location at Rice, it does state that the fiber optic line for this portion of the project would be collocated with the power line, and that the distance is four miles. Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. binder, CH2M Hill Tech. Memo, Tab 1 at 9 (Jan. 1, 2015).

<sup>53</sup> LLA Amendment (Dec. 2011) ("Access to power at any meters that are located along the ARZC railroad line, and emergency access to power at any location, whether it be provided by solar, gas, or otherwise provided."); *see also* Letter from RailAmerica to BLM California State Director at 4 (Jan. 16, 2013).

ARZC intends to use the electricity generated from the in-line turbines for installation of facilities for heating and refrigeration of containers, lighting for more efficient night-time operations, and surveillance cameras to help prevent vandalism at an existing side-track and lighting at an additional location.<sup>54</sup> ARZC currently has limited access to power, which limits their transloading business.<sup>55</sup>

### Power Generation and Power Line Analysis

The 2015 Determination concluded that power generation from in-line turbines does not further a railroad purpose based on the then interpretation of the incidental use doctrine and interpretation of information provided by ARZC and Cadiz. First, the 2015 Determination focused the inquiry on what the primary purpose is for the water conveyance pipeline, rather than considering whether aspects of the water conveyance pipeline provide a benefit to the railroad. It states that:

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.<sup>56</sup>

In essence, BLM applied a test that would narrow the incidental use doctrine to only those activities with a “primary purpose” of furthering a railroad purpose. That is now inconsistent with the interpretation of the incidental use doctrine adopted by the Ninth Circuit’s decision in *Barahona*.<sup>57</sup> As stated above, the incidental use doctrine test focuses only on whether the activity would further a railroad purpose. As long as it provides some benefit to ARZC’s operations, i.e., the in-line turbine is generating power for the railroad, the activity falls within the incidental use doctrine.

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<sup>54</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. binder, CH2MHill Tech. Memo, Tab 1 at 10 (Jan. 1, 2015) (“Access to electric power for lights, refrigerated containers, and heating would allow for an expanded transloading operation at the Rice site. Electrical power for lighting at the Freda Siding will also be possible, because the underground electrical conduit will pass that site on its way from the turbine generator to the Rice Siding... [I]t is anticipated that power will be available for 11 to 11 1/2 months per year to support ARZC’s transloading and lighting activities.”); *see also* Letter from Cadiz, Inc. to BLM California State Director at 18 (Oct. 24, 2014) (“Because the area is prone to vandalism, (due to remote location and lack of regularly posted staff) video surveillance capability in the Rice transloading yard could also be beneficial and provided in Rice with access to power.”).

<sup>55</sup> *Id.*

<sup>56</sup> 2015 Determination at 10. Other, similar statements in the 2015 Determination emphasize that the “primary purpose” of the activity must serve a railroad purpose, e.g., “[t]he primary purpose of the pipeline is to convey water for distribution to a separate and distance location for commercial distribution . . .,” *id.* at 8; “[t]here is no relationship between the express purpose for the pipeline and the railroad’s operation. Cadiz, Inc. has not provided any facts that adequately explain how this primary purpose helps promote or advance railroad purposes,” *id.*; and “[t]here simply are no facts that suggest that the continuation of railroad operations is in any way dependent on the water pipeline’s construction, nor does the proponent offer any evidence of such need,” *id.* at 9.

<sup>57</sup> *Barahona*, 881 F.3d at 1134-5.

Second, BLM's 2015 Determination questioned how the 20-foot wide turbines fit into a 7-foot diameter pipeline.<sup>58</sup> But the 2015 determination misunderstood the design of the in-line turbine system. The design specifications for the in-line turbines identified different components, i.e., the turbine, which would be placed inside of the water conveyance pipeline, and the turbine system, which is a box that surrounds the pipeline.<sup>59</sup> In other words, the turbine system would expand 20 feet surrounding the pipeline. Contrary to the misinterpretation of the design in the 2015 determination, Cadiz has adequately explained the design of the in-line turbine system explains and how it will fit with the construction of the overall project.

With respect to the proposed power line, the 2015 Determination stated that the proposed uses of the power from the power line may serve a railroad purpose, but concluded that such power lines would require BLM authorization because the origin of the power would be from the in-line turbines, a non-railroad purpose. In light of the analysis above regarding the in-line turbines, the conclusion in the 2015 Determination relating to the power line is no longer valid. Because the in-line turbines would serve a railroad purpose, the construction of a power line (either underground or above ground) to provide electricity for a variety of uses associated with ARZC's railroad operations furthers a railroad purpose.

#### *Determination:*

As discussed above, we conclude that BLM's 2015 Determination misapplied the incidental use doctrine and misunderstood certain facts. The generation of power through an in-line turbine design within the water conveyance pipeline may provide a benefit to ARZC's railroad operations. ARZC and Cadiz provided information about the intended uses of the power generation and the means of distributing this power. These uses, including an increased capacity to expand ARZC's transloading capabilities, are not minimal or illusory. In sum, this component, as proposed by ARZC and Cadiz, will further a railroad purpose.

#### Access to Water from the Proposed Water Conveyance Pipeline

Cadiz proposes to dedicate water from the pipeline for ARZC's use. As detailed above, the fire suppression system would rely on water from the pipeline in the event of a fire. Similarly, water in the pipeline also would serve to generate power for ARZC's purposes. Cadiz also has agreed to dedicate 10,000 gallons per day to other railroad uses. Contemplated uses include "washing railcars, controlling vegetation, serving its offices and other improvement and future operations, such as a steam-powered excursion locomotive, new warehouses (if any), bulk transfer facilities or other railroad related facilities on the line."<sup>60</sup>

#### Access to Water from the Proposed Water Conveyance Pipeline Analysis

The 2015 Determination erred in its application of the incidental use doctrine in analyzing whether the water conveyance pipeline furthered a railroad purpose. The determination focused

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<sup>58</sup> 2015 Determination at 9.

<sup>59</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, suppl. Binder, CH2MHill Tech. Memo at 10 and Attachment 1 to CH2MHill Tech. Memo at 2-2, 2-3, and Fig. Att2-2 and 2-3 (Jan. 1, 2015).

<sup>60</sup> FEIR at 3-40.

the inquiry on what the primary purpose was for the water conveyance pipeline, rather than considering whether aspects of the water conveyance pipeline provide a benefit to the railroad. It stated, for example, that “[t]he primary purpose of the pipeline is to convey water for distribution to a separate and distant location for commercial distribution, and nearly 100 percent of the conveyed water would be solely devoted to this purpose.”<sup>61</sup> Further, it found that “[t]here is no relationship between the express purpose for the pipeline and the railroad’s operation. Cadiz, Inc. has not provided any facts that adequately explain how this primary purpose helps promote or advance railroad purposes.”<sup>62</sup> By focusing the analysis on the primary purpose of the water conveyance pipeline, BLM narrowed the incidental use doctrine to only those activities with a “primary purpose” of furthering a railroad purpose. Similar to the analysis above regarding in-line turbines, such an emphasis is inconsistent with the interpretation of the incidental use doctrine adopted by the Ninth Circuit.

An appropriate application of the incidental use doctrine focuses only on whether the activity would further a railroad purpose. Contrary to the suggestion in the 2015 Determination, ARZC and Cadiz identified facts to explain how dedicated water from the water conveyance pipeline would further a railroad purpose, i.e., water for the fire suppression system, water to produce power, and 10,000 gallons of water per day for railroad operations. Again, the Ninth Circuit’s opinion in *Barahona* provides a comparable example that supports a finding that a pipeline providing some beneficial use to a railroad may fall within the incidental use doctrine.<sup>63</sup>

#### *Determination:*

As discussed above, we conclude that BLM’s 2015 Determination’s application of the incidental use doctrine was in error. The dedication of water from the water conveyance pipeline to railroad purposes falls within the incidental use doctrine. And while the amount of dedicated water as compared to the amount of water flowing through the pipeline might appear minimal or illusory, ARZC sufficiently detailed the significant value of the dedicated water to their railroad operations, both monetarily and practically. While the amount of water relative to the overall amount of water flowing through the pipeline would be small, ARZC would put the water to uses that are part of railroad operations. Therefore, we do not find the benefit of using the water to be minimal or illusory. In sum, the water conveyance pipeline will further a railroad purpose through the direct dedication of water for ARZC’s railroad operations.

#### Steam-Powered Locomotive

The excursion train proposal includes a steam locomotive that would pull tourist filled cars for recreational purposes on the Railroad’s existing rail line. The excursion train would be operated by a company formed by Cadiz, Inc.<sup>64</sup> for sight-seeing purposes on public land.<sup>65</sup> The water

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<sup>61</sup> 2015 Determination at 8 (citing FEIR at 1-1 and LLA and LLA Amendment).

<sup>62</sup> *Id.*

<sup>63</sup> *Barahona*, 881 F.3d at 1134.

<sup>64</sup> “CSER is currently being developed as an entity within Cadiz, Inc.,” 2014 Third Party Letter at 21.

<sup>65</sup> “CSER rail adventures will allow the public to visit the Mojave Desert . . . all CSER trains will feature large windows that will facilitate viewing the desert landscape . . .,” Project Participants and BLM meeting (Feb. 26, 2013) suppl. binder, CSER Concept Plan Brochure, Tab 7, at 5,6.

usage for the excursion train is said to be 30,000 gallons daily.<sup>66</sup> Other uses of the proposed excursion train would be to accommodate the disembarking of passengers from the train to allow recreational use and star-gazing activities, presumably on public land.<sup>67</sup>

In addition to the steam-powered locomotive train itself, appurtenances such as water tanks or stations, cultural centers, museums, locomotive shops and passenger stations are proposed.<sup>68</sup> Early project descriptions were for the Railroad to operate the excursion train. Later, a subsidiary of Cadiz, Inc., Cadiz Southeastern Railway (CSER), is described as the excursion train operator. CSER proposes water infrastructure for the excursion train, including three of five water facilities (located at Cadiz, Milligan, and Rice) that would be tied directly to the water conveyance pipeline.<sup>69</sup> The other two water facilities at Vidal, California, and Parker, Arizona, will serve as backup watering facilities.

### Steam Powered Locomotive Analysis

The 2015 Determination acknowledged that a steam-based excursion train may derive from or further a railroad purpose. BLM, however, identified a few facts that suggested the excursion train component would require BLM approval, including: (a) the proposal was unclear as to whether it was reasonably foreseeable or merely speculative; (b) the prospective use of a small portion of the pipeline's water did not convert the excursion train, the pipeline, or the water that runs through the pipeline into a legitimate railroad purpose; and (c) most components, e.g., water stations, of the excursion train would be outside of the 43-mile right-of-way. BLM applied these findings in a manner inconsistent with the incidental use doctrine to conclude that the excursion train connected to the water conveyance pipeline does not derive from or further a railroad purpose.<sup>70</sup> Specifically, the 2015 Determination focuses on whether the primary purpose to convey water is driving the design of the proposed excursion train, rather than considering whether the water dedicated from the proposed water conveyance pipeline would further a railroad purpose. Similarly, it focused on the narrow criteria from IM 2014-122 by examining what is driving the activity or design and whether the primary purpose of the activity is for railroad purposes. The appropriate inquiry under the incidental use doctrine is whether Cadiz's

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<sup>66</sup> Letter from Cadiz, Inc. to BLM California State Director, Executive Summary, at 5 (Jan. 9, 2015) ("The Pipeline will also supply water for the operation of a tourist-based steam engine that will run from Parker, Arizona, to Cadiz, which will conservatively require approximately 30,000 gallons of water per day.

<sup>67</sup> "CSER intends to offer prospector and desert explorer trains that will stop and allow time to search for minerals, having our staff provide hands-on experiences with the desert environment," 2013 Binder, CSER Concept Plan Brochure, Tab 7 at p. 5; *see also* "each of those [water tank] locations will serve as a flag stop . . . to any passengers that may seek to flag trains . . . during star-gazing events, as planned," 2014 Third Party Letter, suppl. binder, Att. I., at p. 121.

<sup>68</sup> Water-tanks: *Id.* at p. 20; Cultural center, museums, and kiosks: "Ideally located near the end of the Cadiz pipeline, CSER will construct a facility in Rice, California where the ARZC currently operates a small yard, a junction with the former rail line to Blythe, California and a wye track. At this location, Cadiz anticipates constructing . . . a small concession stand, a rest room and possibly, an outpost of the Cultural Center and Museum," *Id.*, suppl. binder, Att. I, p. 123; maintenance and passenger support facilities in or near Parker, Arizona: "These facilities will include a significant railroad shop . . . , a gift shop and passenger depot that will house concession and rest room facilities . . . the cornerstone of this development will be a locomotive watering station of the same capacity as Cadiz and Rice," *Id.* at p. 126.

<sup>69</sup> Cadiz Powerpoint Presentation at 36 (Dec. 10, 2014).

<sup>70</sup> 2015 Determination at 24.



proposal to dedicate 30,000 gallons per day from the pipeline for the purpose of running the proposed excursion train furthers a railroad purpose. Based on the information provided by Cadiz, such a dedication of water would further a railroad purpose. Although details about the excursion train may be tentative, a lack of specificity is legitimate given that the project likely could not proceed without the water. And even if certain facilities associated with the excursion train are beyond the 43-mile right-of-way connected to the pipeline, the water from the pipeline will make the proposal envisioned by Cadiz feasible. As a result, we believe the facts support a conclusion that dedicated water from the proposed water conveyance pipeline to support a steam-powered excursion train does serve a railroad purpose.

*Determination:*

As discussed above, we conclude that BLM's 2015 Determination incorrectly applied the incidental use doctrine as it is understood in the Ninth Circuit's *Barahona* decision, and criteria from IM 2014-122, which is now rescinded. Cadiz's proposal to dedicate water from the water conveyance pipeline to power the excursion train falls within the incidental use doctrine. Although there are aspects of the proposed excursion train that are uncertain, Cadiz is committed to providing 30,000 gallons of water per day for the operation of the train. Such a commitment, particularly if it is the difference between operating the excursion train or not, does not appear to be minimal or illusory. In sum, this component, as proposed by ARZC and Cadiz, will further a railroad purpose.

## CONCLUSION

Contrary to the 2015 Determination, and as explained above, both individually and considered together, the identified components of the Cadiz Project (fire suppression and water access, access road, in-line power generation, and steam powered locomotive) do further a railroad purpose. Although we have considered all of these components to determine whether they further a railroad purpose, ARZC and Cadiz need only demonstrate that one of these components further a railroad purpose to satisfy the requirements of the 1875 Act. This conclusion examines the facts and information presented by ARZC and Cadiz regarding the components of the Cadiz Project and applies the incidental use doctrine. As a result of this conclusion, BLM affirms the 2017 Determination, which means that ARZC, not BLM, has the authority to authorize the proposed Cadiz Project within ARZC's right-of-way easement. The 2017 Determination's reversal of the 2015 Determination's finding, therefore, is reasonable and justified.



United States Department of the Interior  
BUREAU OF LAND MANAGEMENT  
Washington, D.C. 20240  
<http://www.blm.gov>



Mr. Scott Slater  
CEO & President, Cadiz, Inc.  
550 South Hope Street  
Suite 2850  
Los Angeles, California 90071

OCT 13 2017

Dear Mr. Slater:

Thank you for your letters dated May 22, 2017, and July 17, 2017, cosigned by Santa Margarita Water District General Manager Dan Ferons regarding the Bureau of Land Management's (BLM's) October 2015 administrative determination for the Cadiz Valley Water Conservation, Recovery and Storage Project (Cadiz Project) proposed by Cadiz, Inc. In response to your specific inquiries:

- The October 2015 administrative determination is no longer an accurate representation of the BLM's view of the applicable law and facts, and therefore is expressly superseded by this letter.
- In light of further review of the relevant law, the BLM concludes that authorizing the proposed activity falls within the scope of rights granted to the Arizona and California Railroad (ARZC) under the General Railroad Right-of-Way Act of March 3, 1875 (1875 Act), and therefore does not require authorization by BLM.

The October 2015 administrative determination was based upon criteria described in BLM Instructional Memorandum (IM) 2014-122, which was based upon the legal interpretation of the 1875 Act set forth in Solicitor's Opinion M-37025. As noted in your letter, BLM issued IM 2017-060 rescinding IM 2014-122 on March 29, 2017. In addition, the Acting Solicitor temporarily suspended and withdrew Solicitor's Opinion M-37025 in order to determine if the analysis set forth in the opinion is complete and whether post-2011 decisions should be factored into the M-Opinion.

In light of further analysis of the general history and review of recent case law concerning the 1875 Act, the Acting Solicitor issued Opinion M-37048 on September 1, 2017, which permanently withdrew M-37025 and superseded Opinion M-36964 with respect to the Department of the Interior's interpretation of the 1875 Act. Opinion M-37048 concludes that 1875 Act right-of-way grants allow railroad companies to lease portions of their easement to third parties provided that such leases are limited to the surface, broadly defined, of the easement and do not interfere with the continued use of the easement for railroad operations. Alternatively, even if the scope of an 1875 Act right-of-way easement is limited to railroad purposes, the Act should be interpreted broadly in accordance with the incidental use doctrine. The incidental use doctrine would allow a railroad to authorize third party activities, as long as the activity is incidental to and does not interfere with continued railroad operations. Thus, the

legal and institutional authorities for the October 2015 administrative determination are no longer operative. The October 2015 administrative determination is no longer an accurate representation of the BLM's view of the applicable law and facts, and is therefore rescinded and superseded by this letter.

Applying these standards to the Cadiz Project, the BLM concludes that the Cadiz Project would not interfere with the continued use of the easement for railroad operations, nor would the proposed activities extend beyond the surface of the easement, broadly defined. In addition, BLM concludes in the alternative that the Cadiz Project would further a railroad purpose consistent with the historical understanding of the incidental use doctrine. There is no evidence that the Cadiz project would interfere with continued use of the easement for railroad operations, or that the proposed activities would extend beyond the surface of the easement, broadly defined. BLM has no evidence, and neither the railroad nor any other person or entity has claimed, that the Cadiz Project will interfere with ARZC railroad operations. To the contrary, as described below, ARZC has asserted that the project will benefit its railroad operations. Further, BLM has no evidence that the proposed elements of the project, including a pipeline located approximately 15 feet below the ground, would extend beyond the surface of the easement, as broadly defined in M-37048, or otherwise interfere with the BLM interest in the underlying subsurface mineral estate. Thus, consistent with the enhanced understanding of the applicable law, the BLM concludes that authorizing the use of rights-of-way granted under 1875 Act for the Cadiz Project falls within the scope of rights granted to the railroad company.

The BLM additionally and alternatively concludes that the activities proposed in the Cadiz Project further a railroad purpose, even if they do not originate or derive from that purpose. Specifically, these components further a railroad purpose as follows:

1. Water pumped through the Cadiz pipeline will enable the creation and operation of a new fire suppression system to prevent and minimize damage to railroad assets and disruption of railroad operations. Cadiz proposes to construct and provide water for a fire suppression system to protect against fire for the 13 steel and 29 wooden railroad bridges that utilize creosote-treated timber trestles and ties. The components of the fire suppression system would consist of automatic sprinklers and fire hydrants. The system would require the construction of fiber optic lines used for telemetry, for pipeline communications by Cadiz, and for emergency communications by ARZC.
2. Water pumped through the Cadiz pipeline will generate power that will be used in railroad operations. Cadiz also proposes to install in-line turbines within the water conveyance pipeline for the purpose of generating power, in part for ARZC to use for key railroad operations such as expanding and providing power for new railroad transloading facilities, signal systems, and power switches for potential increases in railroad activity.
3. The project will provide transmission lines to bring electrical power that enables ARZC to install climate controlled storage containers, provide around the clock maintenance, and improve railroad security. The Cadiz Project includes the installation of power lines to support necessary power distribution (including power generated by the in-line turbines) for the water conveyance pipeline. These power lines would in turn support

ARZC's installation of facilities for heating and refrigeration of containers, lighting for more efficient night-time operations, and surveillance cameras to help prevent vandalism at an existing side-track, as well as lightening at additional locations.

4. Cadiz proposes to provide ARZC with access to 10,000 gallons of water a day pumped through the pipeline for their future purposes, including, but not limited to, use at a rail car wash site, vegetation control, use in offices, or other potential improvements.
5. Pipeline operation and maintenance will require the construction of an access road that will facilitate smoother railroad operations. Cadiz proposes to construct a 20-foot access road along ARZC's ROW to install, construct, operate, maintain, repair, renew and remove the pipeline and related facilities. The access road will be available to ARZC and provide ARZC with easier access to railroad facilities and assets to assist in crew changes, maintenance and inspection of the railroad, and emergency responses.
6. Water piped through Cadiz pipelines will enable the operation of a steam-based excursion train on the ARZC rail line. Cadiz also proposes to operate a steam-based excursion train for tourists that utilizes water from the conveyance pipeline. Operation of such a tourist train would necessarily depend on the water obtained from the water pipeline.

As the railroad itself describes, these component elements of the Cadiz project all provide "critical benefits" to the railroad that facilitate elements of its operations. Accordingly, consistent with the incidental use doctrine, the benefits associated with the Cadiz Project further a railroad purpose.

In light of the above, the BLM determines that the ability to authorize the proposed uses of easements obtained under the 1875 Act falls within the decision rights of the railroad. Because those rights were transferred from the United States government as part of the 1875 easement, authorization by the BLM is unnecessary. This conclusion is limited to the rights and interests in land granted as easements under the 1875 Act, and does not affect BLM's rights, interest, and obligations to manage other public lands. It also does not express an opinion on any state or local authority over the project.

We look forward to continued coordination on this and other issues of mutual concern. A similar response is being sent to Mr. Ferons and ARZC President Brad Ovitt

Sincerely,



Michael D. Nedd  
Acting Director