



## United States Senate

WASHINGTON, DC 20510-0504

<http://feinstein.senate.gov>

June 30, 2009

The Honorable Ken Salazar  
Secretary of the Interior  
1849 C Street NW  
Washington, D.C. 20240

Dear Secretary Salazar:

I write to bring to your attention language included in the FY10 Interior Appropriations bill regarding Cadiz LLC's proposed use of the Arizona & California Railroad Right-of-Way (ROW) for a water conveyance pipeline in the Mojave Desert. I request that the Department start now to reexamine the previous administration's position that the proposed pipeline does not require federal authorization.

As the author of the California Desert Protection Act, which created the Mojave National Preserve, I am deeply committed to ensuring that that region's scarce water resources are protected. Consequently, I have enduring concerns about the potential impact of the Cadiz project primarily due to its proposed capture and sale of native groundwater from aquifers adjacent to the Preserve.

In September 2008, I wrote to then-Secretary Kempthorne to request the Department conduct a detailed analysis of the proposed Cadiz groundwater storage and conveyance project, including the use of the Arizona & California Railroad Right-of-Way for a forty-two mile long water pipeline linking the project site to the Colorado River Aqueduct. The Department responded on January 18, 2009, indicating that, based on a 1989 Solicitor's Opinion, the Arizona & California Railroad "may allow others to use the ROW for any purpose without the involvement of the BLM" and no "federal authorization or analysis would be required for the construction of this pipeline."

A 2005 Federal District Court opinion squarely rejected the 1989 Solicitor's Opinion relied upon by the Department. *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999 (S.D. Ind. 2005) (*rejecting* 96 ID 439-445, M-3694 (1989)). The *Home on the Range* court found that easements under the 1875 General Railroad

Right-of-Way Act are limited to uses for railroad purposes, excluding non-rail activities analogous to the water pipeline here. A Congressional Research Service (CRS) analysis reached the same conclusion. I have attached to this letter both the Federal Court opinion and CRS analysis.

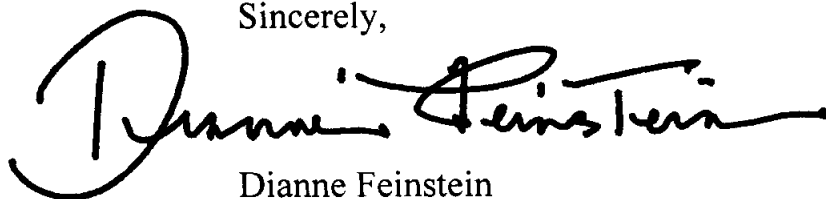
I strongly agree with the Federal Court's conclusion regarding the scope of railroad rights of way for two reasons. First, contrary to the assertion in the Solicitor's Opinion, rights of way granted pursuant to the 1875 General Railroad Right-of-Way Act – such as the Arizona & California Railroad Right-of-Way – are easements (rather than fee interests) for the limited purposes of constructing and operating a railroad, and do not allow non-rail related activities such as water conveyance. Second, the Solicitor's Opinion primarily focuses on the permissibility of subsurface fiber optic lines in a railroad right-of-way, a portion of which is used for the benefit of the rail line itself. To the best of my knowledge, the water pipeline would in no way aid the operation of the railroad.

Consequently, I have included language in the FY 2010 Interior Appropriations bill that would require that “any proposed new use of the Arizona & California Railroad Company's Right-of-Way for conveyance of water shall not proceed unless the Secretary of the Interior certifies that the proposed new use is within the scope of the Right-of-Way.” I have attached a copy of the bill and associated report language as well as the correspondence referenced above.

I would like to request that the Department now initiate a review of its right-of-way policy regarding this project, as well as the Solicitor's Opinion it is premised on, rather than waiting until the legislation is ultimately signed into law. It is my hope that by acting now, the Department can resolve the scope of the right-of-way promptly, rather than allowing legal questions and uncertainty to linger.

Thank you for your time and attention to this important matter.

Sincerely,

A handwritten signature in black ink, reading "Dianne Feinstein". The signature is written in a cursive style with a large initial "D".

Dianne Feinstein  
United States Senator

cc: John Giles, President and CEO, RailAmerica, Inc.  
Keith Brackpool, Chairman, Cadiz , LLC.