

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 21-2507-GW-ASx	Date	September 13, 2022
Title	<i>Center for Biological Diversity, et al. v. U.S. Bureau of Land Management, et al.</i>		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:
 None Present None Present

PROCEEDINGS: IN CHAMBERS - RULINGS ON: DEFENDANTS' MOTION FOR VOLUNTARY REMAND [42]; CADIZ INC. AND CADIZ REAL ESTATE LLC'S MOTION TO STRIKE ALLEGATIONS THAT THE CADIZ WATER PROJECT WILL CAUSE SIGNIFICANT HARMFUL ENVIRONMENTAL IMPACTS [67]; and CADIZ INC. AND CADIZ REAL ESTATE LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT [69]

Attached hereto is the Court’s Ruling on the above-entitled Motions. The Court GRANTS the Motion for Voluntary Remand and vacates the rights-of-way in light of the BLM’s reconsideration of Cadiz’s application.

In light of this ruling, the Court dismisses without prejudice the pending Motion for Partial Summary Judgment, Docket No. 69, and Motion to Strike Allegations that the Cadiz Water Project Will Cause Significant Harmful Environmental Impacts, Docket No. 67, as moot. The Court also declines to reach the outstanding Motion to File Supplemental Brief of Amici Curiae, Docket No. 116, as it is moot at this point.

A status conference is set for September 26, 2022 at 8:30 a.m.

_____ : _____

Center for Biological Diversity, Defenders of Wildlife, and Sierra Club v. U.S. Bureau of Land Mgmt. et al. and Cadiz, Inc., Intervenor-Defendants, Case No. 2:21-cv-2507-GW-ASx¹

The Native American Land Conservancy and National Parks Conservation Association v. Debra Haaland, U.S. Bureau of Land Mgmt. et al. and Cadiz Inc., Intervenor-Defendants, Case No. 5:21-cv-00496-GW-ASx

Rulings on: (1) Motion for Voluntary Remand; (2) Motion for Partial Summary Judgment; and (3) Motion to Strike Allegations that the Cadiz Water Project Will Cause Significant Harmful Environmental Impacts²

I. Background³

Plaintiffs Center for Biological Diversity (“CBD”), Defenders of Wildlife, the Sierra Club, The Native American Land Conservancy (“NALC”), and National Parks Conservation Association (“NPCA”)⁴ (collectively, “Plaintiffs”) sued Defendants Debra Haaland, United States Department of the Interior, United States Bureau of Land Management (“BLM”), Nada Wolff Culver, Karen Mouritsen, Andrew Archuleta, and Michael Ahrens (collectively, “Federal Defendants”), seeking declaratory and injunctive relief as to two rights-of-way which the BLM issued to for-profit entity Cadiz, Inc. and its wholly-owned subsidiary, Cadiz Real Estate, LLC (collectively, “Cadiz”), which allow Cadiz “to transport water through an existing 64-mile gas pipeline, that runs across federal lands from Cadiz to Wheeler Ridge (the ‘Northern Pipeline’).”⁵ See Complaint, Docket No. 1, ¶¶ 1-2.

For some time, Cadiz has sought to extract water from an aquifer underlying its land in

¹ Unless otherwise noted, the CM/ECF numbers in this Order correspond to the docket in this case.

² The Motion for Partial Summary Judgment and the Motion to Strike Allegations provoked responsive briefing from both the Plaintiffs and the Federal Defendants, but because they are dismissed as moot at this point, those responsive briefs are not listed here.

³ The Court has reviewed the filings in this case, including: Defendants’ Motion for Voluntary Remand (“Motion” or “Mot.”) (Docket No. 42); Cadiz’s Response in Opposition to Motion for Voluntary Remand (“Opp.”) (Docket No. 87); Plaintiffs’ Response to Defendants’ Motion for Voluntary Remand (Docket No. 85); NALC and NPCA’s Response to Cadiz’s Opposition to Motion for Voluntary Remand (Docket No. 75); Cadiz’s Response in Opposition to Plaintiffs’ Response in Support of Defendants’ Motion for Voluntary Remand (Docket No. 99); Brief of Amici Curiae Community Build, Inc., Southern Christian Leadership Conference of Greater Los Angeles, Los Angeles Metropolitan Churches, Newstart Housing Corporation, The Two Hundred for Home Ownership, Farmworkers Institute for Education & Leadership Development, League of United Latin American Citizens of California, and La Cooperativa Campesina de California (“Amicus Brief”), Docket No. 86; Plaintiffs’ Response to Cadiz’s Opposition to Motion for Voluntary Remand (Docket No. 98); and Defendants’ Reply in Support of Motion for Voluntary Remand (Docket No. 97). The facts in this section are derived from the Motion, Cadiz’s Opposition, and the factual record, where necessary.

⁴ The last two Plaintiffs in this list filed the related case, Case No. 5:21-cv-00496-GW-AS.

⁵ Although Cadiz was not initially named in the present lawsuits, the Court granted Cadiz’s motion to intervene as a defendant. See Aug. 23, 2021 Order, Docket No. 32.

California, located near the Mojave National Preserve and Mojave Trails National Monument, and transport it to sell to urban areas near Los Angeles. Mot. at 1. To reach its intended destination, the water must cross these federal lands in the Mojave Desert. *Id.* One of the ways the water can be transported is through a northern route, which is the route at issue in this case. *Id.* at 2. In order to accomplish this, Cadiz approached the BLM in July 2020 about potentially converting an existing right-of-way grant for a natural gas pipeline to use for water transport. *Id.*; Opp. at 8. The pipeline, to which Cadiz had purchased the rights from the El Paso Natural Gas Company (“EPNG”), runs from Cadiz, California to Wheeler Ridge, California. Mot. at 2. EPNG had a right-of-way to transport natural gas through the pipeline. *Id.* at 4.

In July 2020, Cadiz submitted an application to the BLM for a right-of-way. *Id.* In the application, Cadiz told the BLM that it planned to use the existing (though currently unused) natural gas pipeline to transport water. *Id.* It thus applied for a right-of-way to convey the water through the EPNG pipeline. *Id.* On September 23, 2020, Cadiz emailed the BLM about assigning the EPNG right-of-way, which that company used to transport natural gas through the pipeline, to Cadiz. *Id.* Cadiz told the BLM in the email that closing on the agreement between EPNG and Cadiz for the pipeline and right-of-way was “predicated on BLM’s approval of the assignment of the [EPNG] ROW to Cadiz.” *Id.* Cadiz emphasized that time was of the essence. *Id.* In an October 12, 2020 email, Cadiz suggested several options for processing the right-of-way: (1) the BLM could process the application all at once and amend the existing right-of-way, or (2) the BLM could take two separate steps – first, reassigning the existing right-of-way to Cadiz, and second, granting a new right of way under the Federal Land Policy and Management Act (“FLPMA”) for a water pipeline. *Id.* After a meeting with Cadiz, the BLM committed to completing its decision on the right-of-way by December 2020. *Id.* at 4-5.

When the BLM processed the application, it followed the suggestion by Cadiz to split the process. As the Federal Defendants describe,

BLM chose to process the application in two steps: the reassignment of the existing Mineral Leasing Act (“MLA”) right-of-way for oil and gas transport and the grant of a new FLPMA right-of-way for water transport. On December 11, 2020, BLM prepared two categorical exclusions (“CX”), one for each step. *See* Cadiz2020-00583, Cadiz2020-00650. For the MLA right-of-way, BLM relied on a CX specified in the U.S. Department of the Interior’s manual, 516 DM 11.9 E.(9), which applies to renewals of rights-of-way “where no additional rights are conveyed beyond those granted by

the original authorizations.” Cadiz2020-00584. For the FLPMA right-of-way, BLM relied on the CX in 516 DM 11.9 E.(12), which applies to “[g]rants of right-of-way wholly within the boundaries of other compatibly developed rights-of-way.” Cadiz2020-00650. For each CX, BLM concluded that there were no extraordinary circumstances associated with the actions that would require the preparation of an environmental analysis. Cadiz2020-00587; Cadiz2020-00654.

Mot. at 5 (citations to the record notated as “Cadiz2020-#####”). The BLM also found that both right-of-way grants fell within Exemption B8 of the California Protocol Agreement (“PA”), which is the alternative process by which the BLM in California satisfies its obligations under the National Historic Preservation Act (“NHPA”). *Id.* This exemption excuses compliance with Section 106, which requires a separate review of potential adverse effects on historic properties. *Id.* But when Plaintiffs filed an objection to the use of Exemption B8 on December 10, 2020, the BLM explained to the California State Historic Preservation Officer (“SHPO”) that it was no longer relying on Exemption B8. *Id.* at 6. Rather, it was relying on 36 C.F.R. pt. 800, and the BLM concluded that the right-of-way had “independent utility” – meaning that it was “not related to any other authorization for the use of public or private land and, specifically, was ‘not linked to the use of the groundwater under private lands held by Cadiz.’” *Id.* (quoting letter to SHPO).

On December 21, 2020, BLM issued a decision that transferred a portion of the EPNG MLA right-of-way to Cadiz and simultaneously granted a new, coextensive FLPMA right-of-way to Cadiz. Mot. at 6. Because the BLM had concluded that each right-of-way was covered by a “categorical exclusion” (“CX”), it did not prepare environmental analyses for them.

On March 23, 2021, Plaintiffs filed related lawsuits challenging this decision, alleging that “BLM fast-tracked the normal review process” and granted Cadiz’s request for the rights-of-way “with a haste that vitiated necessary compliance with the National Historic Preservation Act (‘NHPA’) and the National Environmental Policy Act (‘NEPA’).” Compl. ¶¶ 5, 10. Plaintiffs further allege that BLM failed to abide by its statutorily required duties under the FLPMA and that its grant of the FLPMA right-of-way to Cadiz was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law such that it violated the Administrative Procedure Act (“APA”). *See id.* ¶¶ 12, 14. Accordingly, Plaintiffs request that the Court: (1) find and declare BLM’s grant of an FLPMA right-of-way to Cadiz to have violated the APA, NHPA, NEPA, and FLPMA; (2) vacate BLM’s grant of the Northern Pipeline/EPNG right-of-way to Cadiz and remand the matter to BLM for further consideration consistent with applicable laws and

regulations; (3) enjoin BLM from authorizing or otherwise allowing any operation or modification of the Northern Pipeline for water transportation until BLM fully complies with the NHPA, NEPA, FLPMA, and all other applicable laws and regulations; and (4) award Plaintiffs fees and costs. *See id.* at 66.

The Federal Defendants agree – at least in part – with Plaintiffs and wish to remand for further agency consideration. Before the Court now is the Federal Defendants’ Motion for Voluntary Remand (“Motion”), Docket No. 42. The Federal Defendants ask the Court to “grant a remand of BLM’s decision to issue a right-of-way to [Cadiz] allowing it to operate a pipeline to transport water between Cadiz and Barstow, California” because “[i]n making that decision, BLM did not adequately analyze the potential environmental impacts of granting the right-of-way under the National Environmental Policy Act (‘NEPA’) and did not sufficiently evaluate potential impacts to historic properties under the National Historic Preservation Act (‘NHPA’).” Mot. at 1. Cadiz has filed an opposition, *see* Docket No. 87, and the parties have engaged in extensive briefing as described in note 3, *supra*.

II. Legal Standard

A. Voluntary Remand

When a court is reviewing an agency action, the court has equitable power to remand the action for back to the agency for further consideration. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001); *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior* (“NRDC”), 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002). “Voluntary remand is consistent with the principle that ‘administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.’” *NRDC*, 275 F. Supp. 2d at 1141 (quoting *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)).

In considering a remand, courts typically look to *SKF USA* for the standard of review. The Federal Circuit in that case described five general positions an agency may take when a court is considering remand. *See SKF USA*, 254 F.3d at 1027-30. Two are relevant here: (1) requesting a remand, “without confessing error, to reconsider its previous position,” and (2) requesting a remand because the agency “believes that its original decision was incorrect on the merits and it wishes to change the result.” *Id.* at 1028. With respect to the first scenario, the *SKF USA* court explained that in such a case, the agency:

might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might

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