

## Arnold Irrigation District EA comments

### The legal easement

1. Recent Oregon case law indicates that piping projects relying on easements may not dig beneath the existing canal bed nor devalue the properties through which they pass. The Farmers Conservation Alliance, author of this Environmental Assessment, is certainly aware of the case, Swalley Irrigation District v Alvis, having cited it in a preceding environmental assessment in support of an irrigation district's ability to pipe. However, in so doing the Farmers Conservation Alliance inexplicably failed to mention the important limitations imposed by this case, thereby conveying (whether intentionally or otherwise) the false impression that an irrigation district's legal right to pipe is absolute and unfettered. It is not. Thus it would appear to be of public service to rectify this omission by presenting extracts from the case so that the broader audience may judge for themselves. From the first instance judgement of Aiken J: "conversion of the canal to a buried pipeline will not unlawfully burden the property rights of defendants who own such lands, PROVIDED IT DOES NOT EXTEND BELOW THE BOTTOM OF THE EXISTING CANAL"; and from a combination of the headnote to the appeal decision and the appeal decision itself: "conversion of existing canal into pressurized pipeline did not exceed scope of irrigation district's right of way, despite removal of aesthetic benefits provided by open canal, WHERE CONVERSION DID NOT INCREASE BURDEN ON LANDOWNERS' PROPERTY, OR DEVALUE PROPERTIES" ... "here, the landowners have not presented evidence establishing that their property will be devalued by the proposed conversion." (The capitalization is not in the originals.) The property owners within the AID need not look far for evidence of devaluation – in Appendix D, you have already conceded its likelihood.

Given your evident awareness of this case, and given that this project will both dig beneath the canal bed and devalue properties in apparent violation of the law as it stands today, please explain clearly and unequivocally how you were able to reach the conclusion that the project is legally permissible. Please provide details of the written opinion(s) of legal counsel which you obtained in order to support such conclusion (or if you consider yourselves by the terms of such an opinion unable to disclose its details, please confirm its existence and general import). Alternatively, In the absence of any such opinion, please state whether you failed to seek such an opinion (which, given the plain language of precedent case law would appear to be not only negligent, but indeed wilfully reckless) or whether you sought such an opinion but no reputable counsel would provide it. Unless you are adducing a legal opinion to justify your position, please disclose the name and legal qualifications of the individual(s) at the Farmers Conservation Alliance, AID or Natural Resources Conservation Service responsible for making the determination of legality.

2. Please agree or disagree with the following proposition and provide reasoning therefor: "A private company with its own capital at risk would never undertake this piping project given the potential future liability for an impermissible expansion of the easement. A public or quasi-public entity, on the other hand, can choose to proceed without regard to the law of the land, safe in the knowledge that any future liability would be funded by patrons and taxpayers."

### **PL 83-566 – Easement Condition**

3. Under PL 83-566, the Secretary of Agriculture requires as an express condition to the provision of Federal funding that the local organization acquire the easements needed in connection with the proposed project. Oregon case law as it stands today does not allow an irrigation district to dig beneath the existing canal bed nor devalue servient properties, and since this project by its own admission does both, this would on its face appear to preclude Federal funding. Accordingly, with reference to the law in Oregon as it is today (and not as you may wish it to be at some future point), please explain clearly and unequivocally, for the benefit of the taxpaying public who fund the US Department of Agriculture, the legal analysis and written opinion from counsel (if any) which enabled the Natural Resources Conservation Service to advise the Secretary of Agriculture (or his or her delegate) that AID has the easements needed for this piping project.

### **Farmers Conservation Alliance**

4. The origins of the Farmers Conservation Alliance lie within the irrigation districts, and as with an irrigation district it exists to defend the interests of a specific set of private individuals. Whilst it is keen to advertise its environmental credentials, its official stated purpose in its most recently available IRS Form 990 for charities is “to develop resources solutions for rural communities” – there is no mention of conservation or the environment. Its taxonomy code is ‘Agricultural Programs’. According to its web site, it has strong ties with project consultants and engineers; half of its board are farmers; it retains advisers from irrigation districts. According to available public records, it pays its executive director and its chief irrigation adviser in excess of \$150,000 per annum; in 2017 it paid \$235,000 to Black Rock Consulting, a local company which provided project consultancy services in relation to various environmental assessments for piping projects and which also builds pipelines; in 2019, it paid an Idaho engineering firm over \$500,000, and over \$1,000,000 to an infrastructure construction company; it receives huge sums from the Government in the form of grants. Given these deep links to the irrigation districts, the piping industry and the Government, and given the torrent of taxpayers’ money that appears to cascade freely into the pockets of the Farmers Conservation Alliance and private for-profit firms, it would seem that the Farmers Conservation Alliance is in no way suited to produce a neutral, impartial environmental assessment. One would naturally expect the interests of farmers, irrigation districts and piping contractors to be favoured.

Accordingly:

- (i) please detail the safeguards, polices, and procedures in place at the Farmers Conservation Alliance to ensure that the determination of preferred alternatives is not in any way skewed toward the selection of piping projects – alternatively, please confirm on the record if in fact there are no such safeguards, polices, or procedures in place;
- (ii) please state how many environmental assessments in Oregon authored by the Farmers Conservation Alliance included a piping alternative for full consideration, and please state

whether such piping alternative was ever rejected or was in fact chosen as the preferred alternative each and every time;

- (iii) for all environmental assessments authored by the Farmers Conservation Alliance, please disclose whether any income of the Farmers Conservation Alliance is or was directly or indirectly contingent upon the selection of a piping project as the preferred alternative.

### **Tree survival analysis**

- 5. It is claimed that, with irrigation, 70 to 80% of trees not otherwise felled will survive the piping project. The only support cited for this claim is “prior experience with piping projects”. This figure and phrase is repeated word for word in the environmental assessments for several other piping projects (Central Oregon, Lone Pine, Swalley and Tumalo), which suggests an unfortunate lack of any real field work specific to the project area and its particular topography, geology and hydrology. It is vital for property owners who may lose a number of valuable and cherished trees to be assured that the appropriate due diligence has been performed and that a random number has not been plucked from the ether. Therefore please provide details of (1) the site visits to the AID project area, if any, and the name of the arborist or other suitably qualified scientist who undertook them; and (2) the original studies which comprise the “prior experience” referenced in various environmental assessments and the name of the arborist or other suitably qualified scientist who undertook them. If on the other hand you undertook no scientific studies but have based the 70 to 80% rate on anecdotal tales from irrigation district employees, please – out of respect for the affected residents who may end up losing many more trees than the Environmental Assessment forecasts - be honest and say so on the record.

### **PL 83-566 – Cost-Benefit Ratio**

- 6. If you can dollarize the benefit of reduced North Unit Irrigation District agricultural damage, reduced O&M, avoided damage from infrastructure failure, pumping cost savings, instream flow value and support to the spotted frog, you can certainly dollarize the cost of lost trees, lost carbon savings, patron hook up costs and property devaluation.
  - (a) Trees: please explain clearly and unequivocally why cost of loss of trees has not been included in the cost-benefit analysis required by PL 83-566. Federal case law indicates that such costs should be included (Burkey v Ellis). Please do not deflect the question with a spurious claim that loss of trees is not a quantifiable cost - as any qualified arborist would tell you, there are various acknowledged methods for economic valuation. Zero cannot be your default cost for anything which requires a modicum of work to quantify, unless your true intent is to disregard reality in producing your cost-benefit analysis.
  - (b) Lost carbon savings: why is there no social cost of carbon line item for the loss of the carbon storage capacity of the trees that will be felled or die as a result of the piping project?
  - (c) Patrons’ hook up costs: will patrons incur costs in connecting to the piped system and if so why are such costs not included in the calculation?

(d) Property devaluation: Appendix D cites a 2017 study which indicates that nearby canals increase residential property values by between 10% and 30%. Inverted, this gives a clear objective basis upon which to quantify the devaluation incurred if a canal feature were to be removed. Yet astonishingly, on the very same page, it is claimed that property devaluation caused by the piping project cannot be quantified due to lack of available data. The data is certainly available for the affected tax lots, but the Farmers Conservation Alliance has simply chosen not to collect it. Devaluation is eminently quantifiable with some basic effort. Notwithstanding this dereliction of duty, one can at least expect a sensible estimate utilizing the aforementioned 2017 study to be included for the purposes of the cost-benefit analysis mandated by PL 83-566 - but on the contrary we find a zero entry. It is frankly indefensible to ignore something which you admit in your own words to be “a likely cost”, a cost which will run into millions in the aggregate. It is clearly a major concern to the 125 residents who voiced concern during the scoping meeting, and who fear that hundreds of thousands of dollars will be wiped off the value of their homes. Accordingly please use the studies cited and available residential property values to produce a dollar figure for estimated property devaluation which at least bears some passing resemblance to reality, and include it in the PL 83-566 cost-benefit analysis.

A pattern appears to emerge whereby you exert yourselves to turn speculative benefits into quantifiable savings but show only disdain when it comes to producing dollar figures for real world costs. Only a full and frank response to these questions can dispel the suspicion that you have deliberately managed the inclusions and exclusions to engineer a positive cost-benefit ratio, without which you could not receive Federal funding under PL 83-566; that you twist the facts to fit that pre-ordained positive result, instead of simply and honestly researching and tabulating all costs and benefits and seeing which turns out to be the greater at the end of the day.

Please do not attempt to evade this question by claiming that you may not include private costs in the calculation – you have already included private benefits and thus you must forgo any such argument. Please respect the spirit of the legal process under the National Environmental Protection Act and provide plain honest answers to these simple questions.

### **Dismissal of alternatives**

7. In Appendix D it is stated as follows: *“on-farm upgrades and piping private laterals are not within the scope of actions that AID can entertain as the project sponsor under PL 83-566 because AID lacks the authority or responsibility to carry out, operate, and maintain on-farm infrastructure owned and operated by AID patrons”*. This seems a perverse and manifestly incorrect interpretation of the statute, a view echoed by WaterWatch in Comment 22.04 to the Tumalo Irrigation District Environmental Assessment: *“We.. were told that PL 566 did not allow for the funding of on-farm efficiencies... We have studied the Act and have found no such restrictions in the law; to the contrary, both the Act as well as the Watershed Plan PL-566*

*Handbook appear to contemplate that the sponsoring entity will help individual farmers on private lands.”*

Where PL 83-566 could be interpreted more broadly, it would seem generally advantageous to consider these additional alternatives. The only possible reason I can discern for your wilfully narrow reading of PL 83-566 is that you wish to minimize the number of alternatives in play so as to increase the chances of achieving your pre-ordained goal of selecting the piping project as the preferred alternative. What other possible motive could there be? In any event, please inform the public whether you have received written opinion from counsel to support your reading of the law, and if so please provide details thereof. If you consider yourselves unable to provide details of any such opinion, please explain why and at a minimum confirm the existence thereof. Unless you are adducing a legal opinion to justify your position, please disclose the name and legal qualifications of the individual(s) at the Farmers Conservation Alliance, AID or Natural Resources Conservation Service responsible for making this interpretation.

### **Agricultural land use**

8. The Draft EA notes that the project will support agricultural land use. Elsewhere it states that the water provided allows lands to be maintained for agricultural production. However one recent study noted that *“agriculture is simply not a driver of economic activity in this region, and has not been for at least two decades”* (Bureau of Economic Analysis. (2019). CAGDP9 Real GDP by county and metropolitan area 1/ Deschutes County). Even the most casual observer will know that many irrigation district patrons in Deschutes County no longer rely on the land for a living, and that property prices in the local area often demonstrate that purchasers are not motivated by agricultural profitability or viability. Accordingly, please state the percentage of AID patrons for whom irrigated agriculture is their single or primary source of income. If you have not previously obtained this data point, please explain why not and provide an estimate.
9. Per an article by Tod Heisler of Central Oregon LandWatch appearing in the Bend Bulletin in April, 2020: *“We have a water distribution problem — too much water available to properties that engage little in farming and not enough water to our large agricultural producers and to the Deschutes River. The best way to solve this distribution problem voluntarily is through water marketing.”*

With this comment in mind, please agree or disagree with the following proposition and provide detailed reasoning therefor:

“The statutes of the 1890s which underpin the irrigation system in Central Oregon were designed to encourage settlement of the arid West by enabling subsistent or profitable agriculture. Accordingly, when considering the necessity of changes to this irrigation system today, only the needs of those patrons who still farm the land for their primary source of income should be considered. Patrons with unrelated primary incomes, hobby farmers and those who use water for decorative landscape purposes are not relevant to the purpose of the laws of the 1890s nor the aims of PL 83-566. By creation of a voluntary water market or buyback scheme the non-agricultural water used by the hobby farmers could be re-distributed to the farmers

who actually derive their livelihoods from agriculture in a manner consistent with American free market forces and without spending taxpayer money. Although such schemes may not be eligible for funding under PL 83-566, as the holder of the right of way an irrigation district is not permitted to limit itself to PL 83-566 schemes nor is it free to choose the scheme most advantageous to itself – it must select the scheme which meets the purpose of the easement (which as noted above, is profitable irrigated agriculture (plus, as a permitted ancillary purpose, hydroelectric power generation), not irrigation for its own sake) whilst being least injurious to the properties through which the right of way runs. An irrigation district cannot know that a less invasive cooperative solution will not work unless and until it has first tried and failed to implement it.”

### **100 years?**

10. You have based your project analysis on a 100 year timeline, driven by the expected life of the physical materials used. However in so doing you appear to assume additionally that land use and irrigated agriculture in the area will remain at a constant level for the next 100 years. Please explain the methodology you used in arriving at this assumption - cursory analysis of local social and land use changes in the last few years would seem to indicate its fallacy.