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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**  
**EUGENE DIVISION**

**SAVE ARNOLD CANAL, an Oregon  
Non-Profit Corporation,**

**Plaintiff,**

**v.**

**ARNOLD IRRIGATION DISTRICT;  
RONALD ALVARADO, in his official  
capacity as State Conservationist,  
Natural Resources Conservation  
Service, United States Department of  
Agriculture; NATURAL  
RESOURCES CONSERVATION  
SERVICE, a federal agency of the  
United States Department of  
Agriculture;**

**Defendants.**

**Case No. 6:22-cv-1462**

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**DEMAND FOR JURY TRIAL**

Plaintiff Save Arnold Canal (“SAC”) respectfully brings this action challenging the actions of federal Defendants Ronald Alvarado and the Natural Resources Conservation Service (“NRCS”) authorizing funding for the Arnold Irrigation District Modernization Project

(“Modernization Project”). This suit alleges violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4231 *et seq.*, the Watershed Protection and Flood Prevention Act, PL 83-566, and the Administrative Procedures Act (“APA”), 5 U.S.C. § 706(2)(a)-(c), for arbitrary and capricious acts and acts in violation of Constitutional rights in adopting the Arnold Irrigation District Infrastructure Modernization Project Final Watershed Plan-Environmental Assessment (“Plan-EA”) and signing the Finding of No Significant Impact For Arnold Irrigation District Infrastructure Modernization Project Deschutes County, Oregon (“FONSI”).

Plaintiff further challenges the actions of all Defendants in authorizing, planning, and implementing the Modernization project is an unconstitutional taking under the United States and Oregon Constitutions and constitutes a private nuisance.

### **JURISDICTION AND VENUE**

1. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346(a)(2), & 1367(a). Final agency action exists that is subject to judicial review pursuant to 5 U.S.C. § 704. An actual, justiciable controversy exists between Plaintiff and Defendants. The court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 & 2202 and 5 U.S.C. §§ 705 & 706.

2. Venue is proper in this court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. Defendant Ronald Alvarado’s office is located within this judicial district, and the Plan-EA at issue in this litigation was prepared within this judicial district. The lands affected by the Project are within this judicial district.

3. Plaintiffs have exhausted any and all available and required administrative remedies.

## **PARTIES**

4. Plaintiff SAC is an Oregon non-profit corporation formed in 2021 with the purpose of organizing property owners along the Arnold Main Canal to work with the Arnold Irrigation District and federal agencies to seek mutually beneficial alternatives in the Modernization Project. SAC represents over 200 members and supporters. SAC does not have a parent corporation and does not issue stock.

5. On September 6, 2022 SAC, through its attorney, commented on the Plan-EA and FONSI signed by Defendant Ronald Alvarado.

6. SAC President and member Mark Elling owns property located in Deschutes County, Oregon along the Arnold Main Canal with easements held by defendant Arnold Irrigation District for irrigation purposes. Mark Elling commented on the Draft-Plan EA prepared by defendant NRCS on June 8, 2021 and a second comment during the extended commentary period with comments identified in Appendix A of the Plan-EA as 37.01 through 37.67 and 433.01 through 433.87. If the modernization project is to be implemented as planned, Mark Elling will suffer burdens to his property including property devaluation and loss of trees in addition to an uncompensated taking by a state agency by expanding the scope of its easement.

7. SAC members Debra Rudloff and Jerry Rudloff own property in Deschutes County, Oregon located along the Arnold Main Canal with easements held by defendant Arnold Irrigation District for irrigation purposes. Debra Rudloff and Jerry Rudloff commented on the Draft-Plan EA prepared by defendant NRCS on July 8, 2021 with comments identified in Appendix A of the Plan-EA as 53.01 through 53.04. If the modernization project is to be implemented as planned, Debra Rudloff and Jerry Rudloff will suffer burdens to their property

including property devaluation and loss of trees in addition to an uncompensated taking by a state agency by expanding the scope of its easement.

8. SAC Vice President and member Geoff Reynolds owns property in Deschutes County, Oregon located along the Arnold Main Canal with easements held by defendant Arnold Irrigation District for irrigation purposes. Geoff Reynolds commented on the Draft-Plan EA prepared by Defendant NRCS on July 3, 2021 with comments identified in Appendix A of the Plan-EA as 77.02 through 77.08. If the modernization project is to be implemented as planned, Geoff Reynolds will suffer burdens to his property including property devaluation and loss of trees in addition to an uncompensated taking by a state agency by expanding the scope of its easement.

9. Defendant Ronald Alvarado is the State Conservationist for Defendant NRCS and is sued in his official capacity. As the State Conservationist, Ronald Alvarado signed the FONSI for the project. Ronald Alvarado is the federal official charged with responsibility for all of NRCS officials' actions and inactions challenged in this Complaint.

10. Defendant NRCS is an agency of the United States and a division of the United States Department of Agriculture. NRCS is the agency that subcontracted the drafting of the Plan-EA and adopted the Plan-EA. NRCS is charged to follow NEPA statutes and regulations in determining whether a federal action will cause a significant environmental impact.

11. Defendant Arnold Irrigation District ("AID") is an Oregon quasi-municipal irrigation district organized under Oregon Revised Statute chapter 545. Defendant Arnold Irrigation District claims to hold various rights of way and easements for irrigation purposes across approximately 433 private parcels, including those owned by SAC members and supporters, for

the Modernization Project. Arnold Irrigation District is the local sponsor of the Plan-EA and will receive federal funding as the party designing and installing the piping described in the Plan-EA.

## **FACTS**

12. The Modernization Project is the proposed piping of approximately 11.9 miles of the Arnold Main Canal, an irrigation canal in Deschutes County on the southern outskirts of Bend, Oregon funded in part through NRCS by the Watershed Protection and Flood Prevention Act, PL 83-566. The Modernization Project includes areas of suburban, low-density rural, and rural residential areas with ninety-nine percent of the project area being privately owned.

13. The Modernization Project will install a concrete check and pipe inlet structure at the beginning of the pipe, excavate and bury a 48 to 60 inch high density polyethylene plastic piping along 11.9 miles of the Arnold Main Canal, and include supervisory control and data acquisition systems at two locations.

14. AID claims easements and rights of way under the Canal Act of 1891, and the Carey Desert Land Act of 1894, as well as private easement grants.

15. Plaintiff's members and supporters own private property along the Main Canal and enjoy the benefits it produces, including percolating irrigation deliveries adjacent to the Main Canal as patrons of AID, large Ponderosa Pine trees, riparian vegetation and wildlife habitat, recharged well aquifers, access to water for wildfire firefighting, and property valuation premiums. The Modernization project will negatively effect or eliminate these benefits.

16. Plaintiff's Members participated in the NEPA process by submitting comments to NRCS on the Draft-Plan EA in July 2021, and Plaintiff submitted comments to NRCS regarding the

Plan-EA in September 2022. During the open comment period, NRCS received over four hundred comments totaling over 1200 pages of commentary.

17. As explained by Defendants, the purpose of the project is to improve water conservation in AID infrastructure, improve water supply management and delivery reliability to District patrons, and improve public safety on up to 11.9 miles of the Arnold Main Canal.

18. The Modernization Project includes the intent to send “conserved water” volumes to North Unit Irrigation District in exchange for North Unit Irrigation District releasing water during the non-irrigation season from Wickiup Reservoir.

19. After initially considering nine alternatives, Federal Defendants eliminated seven of the alternatives and analyzed only two alternatives: the “No Action Alternative,” and the “Piping Alternative.”

20. On August 8, 2022, Defendant Ronald Alvarado signed the FONSI, and selected the Piping Alternative as the preferred alternative allowing the Modernization Project to move forward with federal funding, noting that it was the sponsor’s (AID’s) preferred alternative and stating that it was the National Economic Efficiency Alternative.

## **FIRST CLAIM FOR RELIEF**

### *NEPA Violations Alleged Against Federal Defendants*

21. Plaintiff incorporates by reference paragraphs 1-20 above.

22. Under 42 U.S.C. § 4332(2)(E) and 40 C.F.R. § 1508.9, NEPA requires that all reasonable alternatives be given full and meaningful consideration.

23. After eliminating seven other water conservation alternatives, finding them inconsistent with the purpose and need statement, the Plan-EA only evaluated two alternatives: the “No

Action Alternative,” and the preferred alternative of both NRCS and AID, “The Piping Alternative.”

24. The purpose and need statement was unnecessarily restrictive and narrow in order to only select piping as the preferred alternative. In doing so, Defendants intended to remove any legitimate alternative other than piping from evaluation based on dubious rationale.

25. Canal lining was eliminated based on flawed reasoning including: unexplained claims of deterioration of concrete lining test segments even after the Bureau of Reclamation had found test segments as being in excellent condition only three years ago, bloated estimates on shotcrete and geomembrane lining costs given by AID’s contract engineer, and a complete failure to examine non-membrane concrete canal lining as an identified alternative where limiting groundwater losses to communities bordering the canal is a high priority. The Plan-EA fails to apply the same analysis of benefits by the canal lining alternative as applied to the preferred alternative in terms of seepage reduction.

26. The Plan-EA has failed to take into account the costs needed to secure additional property interests for uses exceeding the Carey Desert Land and Canal Acts (discussed *supra*), which will drastically increase the cost of the project, thereby causing the cost-benefit estimates of the project to drop below its current rating. Moreover, the Plan-EA has failed to discuss the non-Carey Desert Land Act and Canal Act privately granted easements and whether those easements allow for the piping of the Arnold Main Canal. The Plan-EA does not adequately demonstrate the easement interests claimed by AID with any specificity in the project area, with only blanket statements of Carey Desert Land Act and Canal Act applicability and a blurry and illegible map provided in Appendix C of the Plan-EA.

27. Analysis of the drawdown of wells in the Plan-EA was downplayed when it amounts to a significant health and safety impact to residents near the Arnold Main Canal. The Plan-EA identifies the intensity of a permanent drawdown of well levels as measurable and permanent through its own findings yet ignores the issue. Well concerns are discussed on a basin-wide scoping which purposefully minimizes the immediate impacts on a public health and welfare issue for residents near the immediate project area. The punting on the issue of wells in proximity to the canal ignores any contextual analysis under NEPA, and ignores the intensity of a controversial issue as demonstrated in the public comments to the Draft Plan-EA, affects public health and safety, and results in a cumulatively significant impact when combined with climate change.

28. The Plan-EA has completely overlooked historic preservation requirements under NEPA. The Plan-EA states that the proposed project will avoid all NRHP eligible resources, and therefore requires no mitigation. This is a false statement, as during consultation with the Oregon State Historic Preservation Office (“SHPO”), NRCS has been informed that the Arnold Main Canal and associated features and appurtenances were all eligible for the National Register of Historic Places.

29. The Piping Alternative has failed to discuss any of the shortcomings or risks associated with piping. The Plan-EA, as designed by Defendants, has listed all of the benefits of HDPE pipe without any of its drawbacks or discussion of how it will address safety concerns. Defendants claim a pressurized irrigation system will deliver water to patrons despite having a low gradient to adequately provide for pressurization sufficient to justify hydropower generation, and the associated infrastructure needed by patrons to adapt to piped irrigation deliveries was wholly ignored. There has been no evaluation of piping structural integrity, how design lifetime was

calculated or any discussion of documented piping failures, buildup of silt and other blockages, security of the system, access points a child could enter through, or history of people or animals becoming trapped and drowning within a piped irrigation canal. Defendants claim that an open canal is a “safety concern” to AID despite no documented drownings in the history of the Arnold Main Canal, and have not demonstrated that a piped irrigation canal will be immune from drowning an adult or child.

30. The Plan-EA eliminated multiple alternatives by stating that voluntary acts are not compliant with the Watershed Protection and Flood Prevention Act, yet uses the contradicting voluntary act of North Unit Irrigation District releasing water from Wickiup Reservoir as one of the primary benefits and drivers of the Modernization Plan’s purpose. North Unit Irrigation District is one of the primary beneficiaries of the Modernization Plan and AID lacks the legal authority to carry out, operate, and maintain voluntary acts of North Unit Irrigation District.

31. Accordingly, the federal Defendants acted arbitrarily and capriciously, abused their discretion, and acted in excess of their statutory authority in contravention of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706(2)(a) & (c). The Plan-EA should therefore be rejected and remanded back to Defendants for further factual development and analysis.

## **SECOND CLAIM FOR RELIEF**

### *Improper Expansion of Easement Causing Unconstitutional Takings Alleged against all Defendants*

32. Plaintiff incorporates by reference paragraphs 1-31 above.

33. The United States Constitution provides in the Fifth Amendment, as incorporated to the States by the Fourteenth Amendment, that “nor shall private property be taken for public use,

without just compensation.” The Fourteenth Amendment also states “nor shall any state deprive any person of life, liberty, or property, without due process of law.”

34. Article I, Section 18 of the Oregon Constitution states that “[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded without just compensation...”

35. NRCS as a Federal Agency, and AID as a quasi-municipal agency, are State actors subject to the restrictions of converting private property to public use under the United States and Oregon Constitutions.

36. Defendant AID claims easements and rights of way granted under the Canal Act of 1891 and the Carey Desert Land Act of 1894 for irrigation purposes. Defendant AID has not demonstrated actual legal rights in the Plan-EA beyond blanket statements of possession and the submission to Defendant NRCS an illegible and blurry map in the Plan-EA. No specific demonstration of easement possession for the project area and the associated approximately 433 affected properties has been provided in the Plan-EA. Moreover, Defendants have not established what the original grant, if any, was in terms of width and depth on the affected approximately 433 properties so as to demonstrate the actual rights granted under the various easement grant acts for accuracy of the size and location of the original grants, as the Main Canal has been modified over the course of Defendant AID’s operation of the canal in terms of both depth and width. Assuming Defendants are able to prove the easements rights as claimed, these grants are not without limit.

37. The District of Oregon and the Ninth Circuit Court of Appeals has placed limitations on the scope of the Canal Act of 1891 and Carey Act of 1894 right of way grants as limiting the ability to pipe existing canals to within 50-feet of the marginal limits of the canal, and to the bed

of the existing canal. Additionally, the installation of irrigation piping cannot increase the burden on a landowner's property.

38. All Defendants are proposing in the Plan-EA to excavate and bury a 48 to 60 inch pipe below the bed of the canal and installing excavated and buried concrete structures at the beginning of the canal, which exceeds the limits of the grants under the Carey Desert Land Act and the Canal Act, and will be a physical intrusion onto the private property underlying any proven easements.

39. Upon piping, private property owners will experience a decrease in their property values of between five and twenty percent, and losses of large trees and vegetation from environmental disturbance, which will be a burden on their property.

40. The Plan-EA states that the piped areas will be converted into "green space" which is not an irrigation purpose within the Carey Desert Land Act or the Canal Act, which is again outside of the scope of the grants claimed by Defendants.

41. The Watershed Protection and Flood Prevention Act, PL 83-566 Sec. 1004 requires that as a condition of receiving federal funding that the local sponsor acquire the interests in land needed to install improvements without expense to the government.

42. Defendants have not initiated condemnation proceedings, easement expansion negotiations, paid for additional easement allowances, or received consent to excavate on private properties.

43. Defendants are not planning on compensating the planned expanded public use of their right of way grants as the Plan-EA states "AID would not need to acquire any additional easements for the installation of the proposed project."

44. The plan to excavate and bury the large plastic pipe exceeds the scope of the Canal Act and Carey Desert Land Act grants, physically intrudes on Plaintiffs' members' private property, increases the burden on the servient privately owned lands, and constitutes an uncompensated taking under the United States and Oregon Constitutions.

45. To the extent that Defendant AID actually excavates and emplaces a buried pipe on private property for public uses, Defendant AID must compensate private landowners for the expanded use and Federal Defendants must include the cost of the projected compensation in the calculations for the cost-benefit ratio in the Plan-EA.

46. The Plan-EA authorizes and funds a project that violates Plaintiff's members' Constitutional rights that protect them from uncompensated takings, making the Plan-EA unlawful under 5 U.S.C. § 706(2)(b). The Plan-EA should therefore be rejected and remanded back to Defendants for further factual development and analysis.

### **THIRD CLAIM FOR RELIEF**

#### *Private Nuisance Alleged Against Arnold Irrigation District*

47. Plaintiffs incorporate by reference paragraphs 1–46 above.

48. The impermissible easement modifications unreasonably interfere with property owners' private use and enjoyment of their land through the elimination of vegetation and the desertification caused by the Modernization Project.

49. The Plan-EA admits property devaluation will occur, which property devaluation will cost all private property owners affected piping the Main Canal up to twenty percent of the value of the property, or an amount to be proven at trial.

#### **FOURTH CLAIM FOR RELIEF**

##### *Watershed and Flood Prevention Act Violations Alleged Against Federal Defendants Under the APA*

50. Plaintiff incorporates by reference paragraphs 1–49 above.

51. The Watershed Protection and Flood Prevention Act requires the Modernization Project’s benefits to exceed its costs and sets rules for what can and cannot be considered in the Modernization Project’s cost-benefit analysis.

52. The cost-benefit analysis set forth in the Plan-EA fails to meet the requirements of the Watershed Protection and Flood Prevention Act, used higher than market cost estimates for evaluation of alternatives, and reduced life expectancy of alternatives based on anecdotal information.

53. Accordingly, the federal Defendants acted arbitrarily and capriciously, abused their discretion, and acted in excess of their statutory authority in contravention of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706(2)(a) & (c). The Project as currently designed must be declared unlawful, and the Plan-EA must be rejected and remanded back to Defendants for consideration consistent with the applicable laws

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that the court grant the following relief:

1. On Plaintiffs’ First, Second, and Fourth Claims for Relief, declare that Federal Defendants’ actions are in violation of NEPA, the Watershed Protection and Flood Prevention Act, and the APA, and the implementing regulations of each Act, as set forth above;

2. Declare unlawful and set aside the Plan-EA and FONSI until such time as the Defendants have complied with NEPA;

3. Declare that Defendant AID in expanding the scope of its claimed easements is subject to the United States and Oregon Constitutions requiring compensation for converting private property to public uses and must compensate affected property owners for conversion of private property into public uses;

4. On Plaintiffs' Third Claim for Relief Declare that Defendant AID will create a private nuisance on private property and must compensate private landowners for creating the private nuisance;

5. On all Claims for Relief, award preliminary and permanent injunctive relief by enjoining Defendants from implementing the Project on private properties;

6. Retain jurisdiction over this action to ensure compliance with its decree;

7. Award Plaintiffs their costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions; and

8. Grant such additional relief and remedies as this court deems proper.

DATED this 28th day of September, 2022

Respectfully Submitted,



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