

Irrigation canal piping projects prevail in court

BY MATEUSZ PERKOWSKI

Capital Press

Irrigation canal piping projects in Central Oregon have racked up a couple of court victories recently, with a federal judge rejecting legal arguments against replacing open canals.

The Arnold and Tumalo irrigation districts have both encountered opposition to canal piping, which is intended to conserve

water, from neighbors who fear the projects will reduce their property values and harm nearby vegetation.

A federal judge on Aug. 24 rejected a preliminary injunction sought by the Save Arnold Canal nonprofit and several landowners, who alleged the Arnold Irrigation District's project violated federal environmental law and the terms of the canal easement.

The opponents said the U.S. Department of Agriculture provided funding for the project without complying with the National Environmental Policy Act by failing to consider enough alternatives to the 12-mile pipeline, such as lining the canal but leaving it open.

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While the landowners are "particularly aggrieved" that canal lining wasn't chosen, the USDA adequately reviewed this option and rejected it due to valid public safety concerns, said U.S. District Judge Michael McShane. "Failing to select plaintiffs' preferred alternative is not arbitrary and capricious," McShane said.

Though the project's opponents said risks of drowning in an open canal were exaggerated, the public safety concern was supported by news articles about at least 10 deaths in nearby canals, the judge said.

"It is hard to imagine that plaintiffs take seriously their public safety argument. Any child growing up around these canals (this writer included) heard the constant and consistent refrain from their parents to 'stay the heck out of that canal,'" he said. "The court needn't stress how obvious it is that any entity managing open irrigation canals has a duty to the public to protect children from drowning."

The plaintiffs argued that USDA impermissibly considered public safety in framing its "environmental assessment" of the project, violating the National Environmental Policy Act by pre-ordaining that a pipeline would be chosen over canal lining, the judge said.

"The court declines to leap to this same conclusion," McShane said, adding that worries about children drowning in canals long predate the piping project. "Plaintiffs' argument that considering public safety is some sort of sham ginned

As to the lawsuit's other claims, the judge said the preliminary injunction isn't warranted because opponents "have not demonstrated any likelihood of success" in arguing the irrigation district's easement only allows an open canal and not a pipeline.

Legal precedents have established that irrigation district easements permit such an upgrade, which prevents seepage and "does not overly burden the servient estate," or the property on which it's located, the judge said.

Though the landowners have demonstrated "a likelihood of irreparable harm," due to reduced property values and the loss of ponderosa pines dependent on seepage, that doesn't outweigh the broadly supported environmental benefits of the project, he said.

Tumalo Irrigation District

In the lawsuit against the Tumalo Irrigation District's project, a federal magistrate judge recommended this week dismissing the remaining federal claims in the case. Arguments alleging the canal replacement violated the irrigation district's easement terms were rejected last year.

U.S. Magistrate Judge Mustafa Kasubhai has disagreed with allegations that USDA violated the National Environmental Policy Act by insufficiently analyzing its financial support of the project.

The opponents alleged USDA didn't fully review the possibility of on-farm efficiency improvements that would have

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A small section of an Arnold Irrigation District concrete-lined canal near Bend. Bulletin file

However, the judge said the agency isn't required to pick the "best possible alternative," but rather to demonstrate it had made a "reasoned choice" among the possible options.

The USDA met that standard when it rejected the onfarm efficiency option because open canals would still pose a public safety risk, which "reflects a sufficiently reasoned choice," he said.

The agency's "public safety rationale was based on a public need and supported by substantial evidence in the record," Kasubhai said.

For procedural reasons, the judge rejected arguments the project was ineligible for federal funding and that USDA should re-open the project to public comment due to potential hydroelectric upgrades to the irrigation system.

up by the irrigation district to plow ahead with the piping plan is meritless.” saved water while allowing the canal to remain open.

The agency adequately considered the project’s costs and benefits, as well as the cumulative effects from the loss of “localized artificial wetlands created through leakage,” which would be minor compared to its streamflow benefits, he said.

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