

Pioneer Irrigation District

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NAIDA KELLEHER
Secretary-Treasurer

April 10, 2006

Pioneer Irrigation District is in receipt of a letter from the District's Attorney, Scott Campbell, outlining the legal reasons why Pioneer should not accept urban storm water drainage into water conveyance facilities owned or operated by Pioneer.

My Board of Directors has asked that I forward a copy of this letter to the developers and other interested personnel in our area in hopes of helping you understand the legal reasons why Pioneer must take the stand of *not* accepting storm water drainage into our system.

The District understands this does not meet with the requirements the City of Caldwell is placing upon you. However, at this time, it is the consensus of the Board of Directors of Pioneer Irrigation to enforce the District's policy of not accepting storm water from sources other than agricultural sources to enter Pioneer's facilities.

The District's Superintendent and Engineer have both been advised to not sign off on or accept any plans or documents which show urban storm water drainage into Pioneer's facilities.

Sincerely,

Naida E. Kelleher
Secretary/Treasurer

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

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Board of Directors
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Re: Legal Liability Exposure for Acceptance of Urban Storm Water Drainage
MTBR&F File No. 18946.108

Gentlemen:

I am providing this correspondence in response to your recent request that I provide you with a letter discussing the legal liability risks of accepting urban storm water drainage into water conveyance facilities owned or operated and maintained by Pioneer Irrigation District ("Pioneer"). I will divide the discussion of the liability issues into two parts: 1) state law issues and 2) federal law issues.

1. State Law Liability Issues

Pioneer is an irrigation district, organized under the Idaho statutes permitting the creation of such entities. Idaho Code §§ 43-101 through 43-119. As an irrigation district, Pioneer's actions are restricted by the authorities conferred by Idaho statutes and as those statutes are interpreted by the Idaho appellate courts.

One of the basic statutory requirements for irrigation districts is the prevention of damage to other property owners from water escaping from the ditches owned by them. Idaho Code section 42-1204 provides:

The owners . . . of ditches, canals, works . . . using . . . the same to convey the waters of any stream . . . whether the said ditches, canals, works . . . be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same . . . in good repair and condition so as not to damage or in any way injure the property or premises of others

Also, Idaho Code section 42-1203 requires that the owner of

any irrigating ditch, canal or conduit shall carefully keep and maintain the embankments thereof in good repair . . . and shall not at any time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain or than can be used for beneficial or useful purposes; it being the meaning of this section to prevent the wasting and useless discharge and running away of water.

In addition to these statutory requirements, the Idaho Supreme Court has affirmed liability decisions against irrigation districts and canal companies for damages to adjoining property owners from flooding or seepage from canals or ditches owned by the irrigation entity. *Albrethson v. Carey Valley Reservoir Co.*, 67 Idaho 529, 186 P.2d 853 (1947); *Johnson v. Burley Irrigation Dist.*, 78 Idaho 392, 304 P.2d 912 (1956); *Harris v. Preston-Whitney Irrigation Co.*, 92 Idaho 398, 443 P.2d 482 (1968); *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 548 P.2d 80 (1976).

In addition to these legal duties and restrictions upon irrigation districts, the history involving the construction of the extensive, interconnected system of canals, lateral ditches, flumes, siphons, drainage/delivery ditches, and pipelines must be considered. All of these facilities were constructed for the purpose of delivery and removal of irrigation water to and from the arid lands within Pioneer's boundaries.

Before the construction of these facilities, none of the lands within Pioneer had a water supply for irrigation use. Some of the original portions of the main canals were constructed in the 1880's and 1890's. Later expansions of the main canals, lateral ditches and construction of the drains occurred in the early part of the 1900's. These facilities were engineered and sized to deliver and remove irrigation water to and from the land. The volume of water which can be safely carried in these facilities has not changed in over 100 years, in the case of some canals, even longer.

It is also important to remember that when the Pioneer canals and ditches were constructed, there were no paved roads, sidewalks, interstate freeways, state highways, parking lots, driveways, major residential subdivisions, large commercial buildings, and other facilities which have resulted in the addition of millions of square feet of impervious surfaces. This is an extremely important concept to understand.

Prior to the construction of all of these impervious surfaces, the farms, ranches, grazing land, and dirt roads could absorb the storm water generated by natural precipitation events. If irrigation water was present in Pioneer's system of canals and ditches, any additional storm

water from a rainfall event which was not absorbed by the relatively undeveloped agricultural land and dirt roads could be handled if it flowed into those same canals and ditches.

Now, because of the original size limitations of the design and construction of Pioneer's facilities, in addition to the huge increases in volumes and velocities of urban storm water caused by the massive increases in impervious surfaces, Pioneer's facilities will not accommodate the water which urban storm water discharges produce. During the several consecutive days of rain in December 2005, overflow of Pioneer canals and ditches occurred in the lower end of the system. (As you are aware, the size and carrying capacity of the canals and ditches diminish from the higher parts of Pioneer to the lower segments.) Obviously, no irrigation water was present in the system when this flooding happened. If these storm events had occurred during the irrigation season, serious flood damage likely would have taken place.

While the water delivery canals and ditches generally get smaller as they extend out from the main canals, the drain ditches typically do not. One might think that the drains could accommodate additional flows as a result. This is faulty reasoning because of one major factor. The drain ditches are interconnected with the water delivery canals and ditches to such an extent that excess water discharged into the drain ditches will cause flooding in the canals and lateral ditches even if the drain itself does not flood.

In addition, there are many drain ditches and canals which cross over each other. One potentially disastrous problem area involves the Five Mile Drain where the Phyllis Canal crosses over it in a concrete flume structure. The Bureau of Reclamation recently conducted a storm water flow projection study involving the Five Mile Creek/Drain Watershed. This study concluded that the flow of the Five Mile Drain at the Phyllis Canal, during 24 hour 50 and 100 year storm events, would range from 1,100 to over 1,500 cubic feet per second after the upstream area of the watershed is fully developed (projected to occur in 10 to 15 years.) During the irrigation season under current conditions, Jeff Scott told me he has seen the Five Mile Drain flow at 100 to 175 cubic feet per second at the Phyllis Canal flume. At the higher flow rate, the daylight between Five Mile Drain water levels and the bottom of the Phyllis Canal flume is less than 12 inches.

If the high flows projected by the Bureau of Reclamation study occur in Five Mile Drain, particularly during the irrigation season when the Phyllis Canal is full of water, the Five Mile Drain flows will overtop the Phyllis Canal flume. In fact, the Bureau projected this in their study and assumed that the Phyllis Canal would act as an additional flow channel for the excess Five Mile Drain flows. The Bureau did not assess the flooding potential downstream in the Pioneer system which would be caused by this overtopping of the Phyllis Canal flume at the Five Mile Drain intersection.

Unfortunately, the Bureau of Reclamation study did not consider the more probable consequence of flows in excess of 1,000 cubic feet per second in the Five Mile Drain at the Phyllis Canal flume: rupture of the flume. At that location, the flume typically carries between 350 and 500 cubic feet per second, depending upon the water demand during the irrigation season. If the flume ruptured because of the excess flows in Five Mile Drain during the irrigation season, between 1,350 and 2,000 cubic feet per second of water would be flowing downstream in the Five Mile Drain. To put this in laymen's terms, 2,000 cubic feet per second is equivalent to a flow rate of 897,660 gallons per minute. Put another way, if a 2,000 cubic feet per second flow rate continued for one hour, it would produce 53,860,000 gallons of water.

Currently, the land area in the vicinity of the Phyllis Canal flume over the Five Mile Drain is largely agricultural. Unfortunately, in the ten to fifteen years until projected full development of the drainage basin, this land will undoubtedly be residential subdivisions. The flood damage to residential property, if this potential scenario occurs, would be astronomical. Pioneer would be bankrupted or the costs would increase assessments to such a degree that it is unlikely that landowners would be able to pay them.

I have described the Five Mile Drain projections in such detail because the Bureau of Reclamation spent considerable time and federal funds to develop the computer model and information to make these projections. These projections are the best that scientific methodology can produce. It is likely that similar scenarios will be played out throughout Pioneer in other locations if urban storm water discharges are accepted into Pioneer facilities. The canals and ditches were simply not built to deal with the volumes and velocities of water which is generated from the impervious surfaces of urbanization.

2. Federal Law Liability Issues

The federal law liability issues, related to urban storm water discharges into Pioneer facilities, are more complex and potentially more costly than the state law issues. I will try to simplify the discussion of these issues to the extent possible.

The primary federal law considerations stem from the Federal Water Pollution Control Act of 1972, as amended, commonly referred to as the Clean Water Act. This federal law regulates water quality in a complex, comprehensive program which involves the U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), and the Idaho Department of Environmental Quality ("DEQ").

I will not attempt to explain the details of the Clean Water Act in this letter. That would be impossible. Instead, I will focus on the liability implications of acceptance of urban storm water drainage into Pioneer facilities under the Clean Water Act.

First, I must explain a few basic concepts. Under the Clean Water Act, any discharge of water with material or chemical compounds which exceed threshold levels, from a pipe or other defined outlet, into “waters of the United States,” constitutes a “point source” discharge under the Act. Such a point source discharge requires a National Pollution Elimination System Discharge Permit (“NPDES permit”), issued by the EPA, to avoid substantial civil and criminal penalties under the Act. In addition to these penalties, violations of this requirement subject the discharger to civil litigation exposure from “citizen suits” which can be brought by any interested party against the discharger. The citizen suit provision is usually used by environmental activist organizations and can result in the civil penalties I mentioned and large attorney fees awards in favor of the environmental plaintiff. These awards must be paid by the discharger.

Fortunately, irrigation activities, including discharge of irrigation return water into canals and drains which have been declared “waters of the United States” under decisions of the U.S. Court of Appeals for the Ninth Circuit (includes Idaho), is exempted from the definition of “point source.” This is so even though irrigation return water is frequently discharged via pipes and other outlets which would otherwise meet the definition of “point source.” The exemption from the requirement of an NPDES permit is limited to “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. 1362, § 502(14). Additionally, Section 402(l)(1) of the Act states that an NPDES permit shall not be required “for discharges composed entirely of return flows from irrigated agriculture . . .”

In contrast, NPDES permits are required for municipal storm water discharges. 33 U.S.C. 1342, §§ 402(p)(2)(C)&(D). Because of this separate treatment of agricultural storm water and irrigation return flows from municipal storm water discharges, the potential liability risks for Pioneer are huge if it accepts municipal storm water discharges into its facilities.

This is because the exemption from the NPDES permit requirements of the Clean Water Act for all agricultural/irrigation return flows could be lost if Pioneer authorizes the commingling of municipal storm water discharges with the agricultural/irrigation return flows in its facilities. If this exemption is lost, Pioneer would have to comply with the NPDES permit requirements under the Act. Compliance would require construction of multi-million dollar treatment plants, similar to those used by cities for sewage treatment, at every Pioneer drain ditch or canal as it leaves the district or where it intersects with another irrigation district’s canal or drain. Clearly, this financial liability should be avoided if possible.

In addition to the Clean Water Act liability issues, potential liability exists under the Endangered Species Act (“ESA”). A number of groups advocate the construction of fish passage facilities at the Hells Canyon Complex of Idaho Power Company dams on the Snake River. These efforts are part of the Federal Power Act license process for those facilities which is pending before the Federal Energy Regulatory Commission (“FERC”). If fish passage

facilities are ordered at the Hells Canyon Complex dams, eventually salmon and steelhead which are currently ESA listed species will be swimming in the Boise River. This may be good or bad, depending upon your viewpoint and who is paying the bill. Apart from the fish screen and fish ladder/passage costs on irrigation district facilities, the ESA requires heightened compliance with water quality impacts to ESA listed fish. If the water quality of Pioneer facilities is diminished by municipal storm water discharges, the ESA liability exposure in the future would be in addition to any Clean Water Act liabilities.


Obviously, it is not possible to predict the future. The reintroduction of salmon and steelhead into the Snake and Boise Rivers may not occur. If it does, however, the water quality standards for these fish will be much stricter than the current regulatory programs require. Therefore, it would not make sense to accept municipal storm water discharges now, thereby making it even more difficult and expensive to clean up the water from Pioneer's facilities which eventually must discharge into the Boise River.

3. Conclusion

I have attempted to explain the liability considerations which Pioneer should consider if it decides to re-evaluate its long-standing policy of refusing to authorize municipal storm water discharges into its facilities. I have discussed the major considerations of the liability risks under Idaho law and the primary liability concerns under federal law, which Pioneer should consider. I realize this letter is much longer than you expected. In reality, it is much shorter than I expected. I could go into much greater detail on a number of the issues and will be glad to do so if you desire.

I hope this letter is helpful to you in your consideration of these issues. Please do not hesitate to contact me if you have questions or desire to discuss these issues in greater detail.

Very truly yours,


Scott L. Campbell

SLC/dll