

BEFORE THE SENATE COMMITTEE ON GENERAL GOVERNMENT,  
CONSUMER AND SMALL BUSINESS PROTECTION

WRITTEN TESTIMONY ON SB 598

WILLIAM M. GANONG  
ATTORNEY AT LAW  
514 WALNUT AVENUE  
KLAMATH FALLS OR 97601

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The discharge of urban, suburban, and municipal drainage water into irrigation canals and agricultural drains is an issue that nearly every district in the state of Oregon now faces or has addressed in the past few years. In many cases, acceptance of municipal storm water by agricultural water districts has occurred gradually over a period of time without any thought or consideration, and the districts' facilities have become the de facto municipal storm water drainage system. Ultimately, the decision to accept or not accept non-agricultural drainage in irrigation canals and drains is a policy decision of the Board of Directors of the district. Each situation is fact-specific. A decision to accept and manage storm drainage water in one situation or to reject it in another situation, after discussion and consideration of the financial, political, and legal issues, is understandable and appropriate.

Among the issues a district faces in conveying non-agricultural drainage, intentionally or by default, are:

I. Purpose for Which the District was Organized

Most agricultural water delivery and drainage districts were organized for specific purposes. In all cases, to provide service to the land included in the district, which pays the costs of operating and maintaining the irrigation and drainage facilities.

Irrigation districts organized under ORS 545 have no specific authority to accept municipal storm water, to convey that water, or to be otherwise involved in the management of that water. Irrigation districts were organized by landowners of land susceptible to irrigation from a common source. See ORS 545.025. Generally, irrigation districts have only those powers that are specifically granted by statute, by express or clear implication. Redmond Realty Co. v. Central Oregon Irrigation District, 140 Or 282, 12 P2d 1097 (1932). ORS 545.257 authorizes irrigation districts to acquire and operate municipal water systems. However, the right to operate such systems is limited as follows:

"However, the power to furnish water for domestic and municipal uses granted by this section shall not be exercised in such a manner as to impair the service of the district in furnishing water for irrigation purposes." ORS 545.257(3).

There is no specific statutory authority for the acceptance, conveyance, or operation of a part of a municipal storm water system.

Drainage districts organized under Chapter 547 arguably are authorized to accept and manage municipal storm water. ORS 545.005 provides in part that the owners of land within the drainage district may establish the district:

"\* \* \* for the purpose of having such lands reclaimed and protected by drainage or otherwise from the effects of water, for sanitary or agricultural purposes, or when the same may be conducive to the public health, convenience, and welfare or a public utility or benefit."

Drainage and flood control districts organized under ORS Chapter 549 and water improvement districts organized under ORS Chapter 552 appear to have specific authority to function as part of a municipal water system. Water control districts organized under ORS Chapter 553 may accept and operate as part of a municipal storm water system, but may not be organized for that specific purpose and must operate in furtherance of its specific authorized purpose of:

"\* \* \* acquiring, purchasing, constructing, improving, operating and maintaining drainage, irrigation, and flood and surface water control works in order to prevent damage and destruction of life and property by floods, to improve the agricultural and other uses of land, and to improve the public health, welfare, and safety."  
ORS 553.020(1).

## II. Easements

Generally, the canals and drains of most agricultural water delivery organizations are located on easements. The easements may be express written easements prepared at the time the district was constructing its system. They may be easements that arise under federal laws, or they may be easements that have been acquired by use over a period of time. In determining whether to accept municipal storm drainage water into its system, a district must review its easements. If the purpose of an easement is specific and provides that the easement may be used for the delivery of irrigation water to land in the district but is silent as to use of the facility for conducting non-agricultural storm drainage water, then the district may violate the terms of the easement and be subject to injunctive or other relief if it determines to use its facilities for municipal storm drainage. Generally, in determining whether a new or expanded use of an easement is permitted by the easement, the court will look to the wording of the easement. If the wording is general in nature, then the court will look to the facts and circumstances existing at the time the easement was created and at the purpose(s) for which the easement was created. If a new or expanded use of an easement is created, the court will look to the relative burden on the land on which the easement is located and the use of that land by the landowner, the nature and character of the past and proposed uses of the easement, and the rights to the use of the land that remains in the owner of the fee to the land over which the easement passes. If a canal or drain has been used primarily during the irrigation season for the benefit of the agricultural land in the

district, and if municipal storm water is present in the canal or drain during the winter and spring months when the system did not operate in the past, the court may find that there is a significant additional burden to the land owner, particularly if the presence of municipal storm water in the system interferes with or decreases the value of the system for the purpose of draining the land owner's agricultural land, and bar the use of the canal or drain for non-agricultural drainage. See Doyle Mill Co. v. Georgia Pacific Corp., 256 Or 271, 473P2d 135 (1970) and House v. Hager, 130 Or App 646, 883 P2d 261, rev den. 320 Or 492 (1994).

### III. Labor Law Exemptions

Oregon's Labor Law, ORS Chapter 653, and the Federal Labor Law, 29 U.S.C. § 207, et seq., provide that employees must be paid at the rate of 1 ½ times their normal wage for all hours worked in excess of 40 hours in one week and generally ten hours in one day. However, ORS 653.269(2) exempts from the overtime requirement:

"Employees of an irrigation system district actually engaged in the distribution of water for irrigation or domestic use."

and the Federal Labor Law, 29 U.S.C. § 213(12) provides an exemption for:

"Any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for a profit, or operated on a share crop basis, and which are used exclusively for supplying and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; \* \* \*."

To qualify for exemption from the overtime requirements of the law, the district must meet both the federal and state definition. The use of district facilities to convey municipal storm water may expose the district to the loss of this exemption and result in a significant fiscal impact if it fails to qualify for the exemption and is required to pay overtime to its employees.

### IV. Federal Reclamation Projects

A district within a federal reclamation project must comply with the requirements of Department of Interior, Bureau of Reclamation, Regional Policy Letter No. RES-3.20-400/150-1, which establishes a policy and governance for the management of storm water runoff and speaks specifically to urban storm water drainage. Prior to acceptance of urban storm water drainage in a reclamation related facility, the district must comply with the policy and regulation set forth in the Policy Letter. The Policy Letter is an excellent outline of the federal laws and regulations that must be considered when considering the use of district facilities for urban storm water drainage. Those regulations include, but are not limited to, compliance with the Clean Water Act, the Endangered Species Act, the potential for compliance with the National Environmental Policy Act, and the Fish and Wildlife Coordination Act.

The Clean Water Act requires a National Pollutant Discharge Elimination System permit (NPDES Permit) for the discharge of any pollutants into the waters of the United States. What are waters of the United States is a question that is the subject of ongoing litigation and is not well defined. As a rule, the district should consider itself subject to the Act, unless it has obtained written assurance from the Environmental Protection Agency and/or the Oregon Department of Environmental Quality that its facilities are not subject to the Act. At 40 CFR 122.3 subpart A(e), the Act contains an exemption from the NPDES Permit requirements for:

"Any introduction of pollutants from non-point source agricultural and silver cultural activities, including storm water runoff from orchards, cultivated crops, pastures, rangelands, and forestlands, \* \* \*."

Currently, there are exemptions for storm water discharges from small towns. However, it is likely that the regulations and/or Act itself or the interpretation of the Act will continue to tighten and require NPDES Permits for all urban storm water drainage in the future. Further, most small towns grow over time and become subject to the NPDES Permit requirements. The use of district facilities to convey urban storm water will ultimately subject the district to the costs and liabilities under federal regulations.

## V. General Liability Issues

### A. Water Quality.

Although some municipalities disagree, it is generally accepted by scientists applying the best commercial science that urban storm water carries pollutants, including but not limited to household herbicides, oil, gasoline, and other petroleum waste from parking lots, streets, and other impervious surfaces found in urban areas, human and domestic pet waste, paint, and other chemicals generally found in and around residential, commercial, and industrial land use areas. At times, the presence of such pollutants in municipal storm water may not be a significant issue if the storm event causing the discharge of those pollutants into district facilities is of such a magnitude that the pollutants in the water is highly diluted. However, some storm events, such as late summer storms following a dry period where pollutants have had the opportunity to accumulate on impervious surfaces, may result in discharges of urban storm water into the district's system carrying pollutants in concentrations that exceed established standards. The presence of pollutants in the district's system can result in the loss of endangered fish and other species, and penalties under the Endangered Species Act. Said pollutants may be discharged through irrigation systems onto agricultural crops where they may damage the crop or may disqualify the crop from "organic" designation. In the case of a major pollution event, it is often difficult to determine the source or cause of the pollutant, yet because the pollutant was present in the district's system and under the "control" of the district, the district becomes the initial, if not ultimate, party responsible for the cleanup of that pollutant. The clean up may require the district to shut down water deliveries and close its system while the cleanup is underway, which can cause damage to crops in the district. The district, therefore, can have significant liability under common law theories to land owners and others who are damaged by the polluted water, and can have strict statutory liability under the Clean Water Act, Endangered Species Act, and

other statutory laws and regulations for that polluted water. Further, with respect to the quality of water, the district's insurance policy may not insure the district for damage arising from the discharge of pollutants in violation of the Clean Water Act or for damage caused to endangered species.

#### B. Water Quantity.

In addition to considering water quality issues, the district must consider the timing and quantity of the discharge of non-agricultural storm water into its system. It may be that the district's system is of adequate size and configuration to accept storm water during the winter and spring time when the district is not delivering agricultural water to its customers. However, major storm events during the agricultural irrigation season can add flow to the district's system, which when added to the agricultural water in the system exceeds the capacity of the system. Historically, the rule of law in Oregon is that if you artificially contain or control water, you are strictly liable for the damage caused by the escape of that water. There is some indication that the courts are attempting to move away from the hard strict liability rule in recognition of the benefit of agricultural systems not only to the land within the district but to the public in general. Nevertheless, the presence of urban storm water in a non-agricultural irrigation or drainage system that does not have the capacity and facilities to control the water likely would lead to an adverse decision if a canal is breached and land is flooded. Depending on the circumstances, the liability arising from such an event could far exceed the district's liability insurance.

#### VI. Conclusion

An Intergovernmental Agreement with a municipality or other public body for the acceptance of non-agricultural storm drainage water into a district's system can address each of the issues described above and allocate liability, as appropriate, between the public body and the district. The agreement may go beyond addressing the acceptance and management of storm water and address other uses of district facilities by the public body, for example, bridges across district facilities, pipelines under or across district facilities, and it may address needs of the district for providing safety measures for district facilities. It may also provide for the appropriate allocation of the cost of operating and maintaining the district's facilities between the parties who benefit from those facilities. Ultimately, the final agreement will address the impact of non-agricultural storm water in district canals and drains, if the parties are required to participate in open and frank discussion of the pros and cons of using water delivery and drainage facilities for conveyance of that water.