IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR ADAMS COUNTY

COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, Plaintiff, v. EAST COLUMBIA BASIN IRRIGATION DISTRICT, Defendant.	Case No. 15-2-00176-4 PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (RCW Chapters 7.24 and 87.03)

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Preliminary Statement

The Columbia Snake River Irrigators Association ("CSRIA") represents landowners who are victims of the East Columbia Basin Irrigation District's ("District") demand to pay an unlawful Development Fee which CSRIA, as their agent, has refused to pay. As explained at length in the Verified Complaint, after decades of inaction, at long last, in March 2014, the Washington Department of Ecology ("Ecology") has made available surface water from Lake Roosevelt for delivery to Odessa Subarea farmers to replace their rapidly failing groundwater supplies. This water will be conveyed via the East Low Canal, to six or seven separate pump and pipe systems that would provide water to private sector irrigators. At all relevant times, the construction of the separate distribution systems was always viewed as being the financial responsibility of the irrigators. (Verified Cmplt. ¶ 12 (quoting U.S. Bureau of Reclamation Record of Decision).)

CSRIA represents the farmers who seek to build their own pressurized pipe systems for distribution of the water from the East Low Canal. The District, however, has determined to assess those farmers (and any others who construct their own distribution systems) an unprecedented $120/acre/year Development Fee, to be collected for the next thirty years. The District also has told the farmers that if they permit the District to build the distribution systems, they will instead be charged an assessment on the order of $240/acre/year, plus annual operation charges, to recover the full costs of those systems (including interest), a charge that the District says "includes" the District's Development Fee. This fee is at the heart of the District's proposed Odessa Groundwater Replacement Program ("OGWRP").

The Development Fee for irrigators who pay for their own system construction costs is roughly half of the cost of the entire OGWRP. This is obviously illegal. The law of Washington permits the District to recover its costs for water delivery service, but does not authorize the

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District to stand as the troll under the bridge extracting booty from farmers to build a fund for internal administration and future projects. RCW Chapter 87.03 requires the District to ensure that the assessments it levies through fees are "proportional to benefits accruing to lands assessed". RCW 87.03.240. The District's Development Fee is unlawful for at least four independent reasons, beyond the obvious fact that fees must actually be tied to the costs of providing water service delivery—the system benefits.

1. The District has made no attempt to comply with the statute other than to assert that everyone will benefit equally from completion of all separate systems, but none of the systems provide common water delivery benefits—they are all separate pieces of hardware.

2. The Development Fee was instead set on the basis of landowner willingness to pay, with the goal being to extract the maximum feasible revenue stream. Case law confirms this is an unlawful basis for the assessment.

3. The District's so-called "normalization" policy—ostensibly to equalize the cost of receiving Odessa replacement water, is arbitrary and capricious. It is not a general policy at all, but an *ad hoc* choice made for the apparent purpose of injuring CSRIA and those whom CSRIA represents.

4. In a context with seven separate distribution systems to be developed over many years, and which may never be completed, the District lacks authority to assess Development Fees against those seeking to construct the first project to subsidize the costs of those speculative future projects.

For any and all of these reasons, this Court should strike down the illegal Development Fee, enjoin the District from collecting it, and remand the matter to the District for further proceedings. The CSRIA has provided the District with a lawful cost allocation system, as presented in Exhibit 15 to the Declaration of Dr. Darryll Olsen, filed herewith.

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Statement of Facts

A. The Factual Context.

1. The Problem of the Odessa Subarea.

The Odessa Subarea is a portion of central Eastern Washington State that contains significant amounts of irrigated agriculture. (Verified Cmplt. ¶ 5.) The Odessa Subarea is located within the Columbia Basin Project ("CBP"), a federal reclamation project owned by the U.S. Bureau of Reclamation (the "Bureau" or "USBR"). (*Id.* ¶ 6.) Water for irrigation comes from Lake Roosevelt, the reservoir behind Grand Coulee Dam. (*Id.*) The Bureau originally planned to build the East High Canal, which would have irrigated approximately 330,000 additional acres but the infrastructure was never built. (*Id.* ¶ 7.)

Farmers in the area initially turned to ground water as their primary source of water for irrigation. (*Id.* ¶ 8.) In the 1960s and 1970s, Ecology issued permits to the groundwater irrigators in the Odessa Subarea assuming that development of the CBP would continue and that CBP surface water would eventually serve most of these lands. (*Id.*) Meanwhile, water levels continued to drop, and groundwater quality has declined to the point where it is interfering with the production of crops. (*Id.* ¶ 9.) Wells are failing and conventional crop rotations are being impaired. (*Id.*)

In August 2012, after many years of study and discussion, the Bureau and Ecology released the Final Environmental Impact Statement ("FEIS") for the Odessa Subarea Special Study. (*Id.* ¶ 10.) The FEIS evaluated alternatives to deliver surface water from the CBP to irrigated land currently relying on the declining groundwater supply. (*Id.*) The FEIS concluded that the failure to address the problems of the Odessa Subarea would mean that up to 35% of the wells in the Odessa subarea could cease production by 2020, resulting in 3,600 lost jobs and

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$211 million in lost regional income. (*Id.*) The FEIS noted that construction of new distribution systems to deliver replacement water could begin as early as 2014. (*Id.*)

In April 2013, the Bureau issued its Record of Decision ("ROD") for the Odessa Subarea Special Study FEIS. (*Id.* ¶ 11.) In its ROD, the Bureau adopted "Alternative 4A: Modified Partial Replacement-Banks with the revised Limited Spring Diversion Scenario for implementation in stages." (*Id.*) The adopted alternative would provide surface water replacement for approximately 70,000 acres of currently groundwater-irrigated lands both north and south of I-90. (*Id.*)

In the ROD, the Bureau also stated that "[c]onstruction of facilities is expected to proceed in phases from north to south consistent with expected distribution system requirements [to individual landowners]." (*Id.* ¶ 12.) The Bureau also warned that that "no Federal funding is committed or expected for implementing this project," a position that it has reiterated throughout the relevant time period. (*Id.*) Rather,

> "The State and the irrigators anticipate moving forward with non-Federal funding for the project. The expected scenario would consist of the State funding construction of conveyance infrastructure (such as widening canals, siphons, and appurtenant structures) and irrigators funding distribution systems from the canal to the farm . . ." (*Id.* (quoting ROD).)

In March 2014, Ecology issued a new secondary use water right for water stored in Lake Roosevelt and authorized the Bureau to withdraw up to 164,000 acre-feet of water per year. (*See id.* ¶ 13.) The water right, according to Ecology, will affect "70,000 acres of ground capable of being served by the Columbia Basin Project distribution system and associated facilities . . . within the boundaries of the [Odessa Subarea]." (*Id.*) Ecology noted that new "laterals will be required to deliver water to individual farms in the Odessa Subarea." (*Id.*) Ecology established a development schedule that called for the project to begin on April 1, 2014 and be completed by April 1, 2024. (*Id.* ¶ 14.)

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2. Role of CSRIA.

Over the last five years (and with an initial invitation from Ecology and the Adams County Board of Commissioners), CSRIA has worked extensively with its irrigator membership in the Odessa Subarea, to respond to the Odessa Subarea groundwater problems. (*Id.* ¶ 15.) This work has included preparation of economic analyses of the Ecology-USBR Odessa Subarea replacement water environmental impact statements, economic and engineering analyses for irrigation system distribution systems served by the East Low Canal both north and south of I-90, and water system agreements and financial backing for construction of new irrigation systems. (*Id.*)

Specifically, CSRIA has obtained formal authorization from landowners in the Odessa Subarea for about $42 million dollars to build "System One, North I-90," the first of several phases of farmer-funded water distribution systems to be constructed. (*Id.* ¶ 16.) CSRIA has also obtained $100 million in associated lender commitments for completing additional systems. (*Id.*) The District has already completed improvements to the East Low Canal that were necessary predicates before replacement water could be delivered in the vicinity of System One, North I-90. (Olsen Decl. ¶ 16.)

CSRIA is the agent for a specific group of landowners, called Participants, who have contracted to build the System One Project. (Verified Cmplt. ¶ 17.) In a meeting on January 28, 2015, ECBID's Manager asked CSRIA if the Participants would be willing to pay the $120/acre fee in order to pay for System One. (*Id.* ¶ 46; *see also* Olsen Decl. Ex. 1 at 133 (Simpson Tr. 222).)[1] CSRIA, in its capacity as representative agent of the Participants, refused. (Verified

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[1] Mr. Simpson has reserved the right to review and revise the transcript, but has not yet exercised it. We do not anticipate material changes, but will file a supplemental declaration prior to the hearing if any pertinent testimony is revised.

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Cmplt. ¶ 46.) The System One landowners themselves also continue to reject the OGWRP as too expensive. (Olsen Decl. ¶ 11.) Other CSRIA members in Systems Two and Four have expressed the same unwillingness to pay the Development fee of $120/acre/year, or to join the District's development scheme. (*Id.*)

CSRIA is authorized to sue on behalf of the Participants and advance their interests. (Verified Cmplt. ¶ 17.) Most of the Participants are direct members of CSRIA. (*Id.*) CSRIA also sues on its own behalf and to vindicate the interests of its other, non-Participant members. (*Id.*)[2]

3. Response of the District: the Development Fee.

The District opposes the CSRIA project, and over time developed what is in substance a competing proposal to float revenue bonds and use the revenues to construct several distribution systems along the East Low Canal. (Verified Cmplt. ¶ 20.) The decision-making process leading to this competing proposal is somewhat obscure, inasmuch as the General Manager of the District could not put his finger on any particular document documenting when the scope of the program expanded to competing distribution systems. (Olsen Decl. Ex. 1 at 18 (Simpson Tr. 71).)

The District's proposed OGWRP consists of completing improvements on the East Low Canal ("ELC"), as well as six or seven lateral distribution systems. (*See* Olsen Decl. Ex. 15 (11/12/15 map of systems).) The system identified by the District as EL22.1 (referring to the mile marker along the ELC) corresponds roughly in location to System One, North I-90. (Olsen Decl. Ex. 1 at 20 (Simpson Tr. 73).)

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[2] The facts set forth in this paragraph demonstrate that CSRIA has standing to challenge the Development Fee. (*See also* Verified Cmplt. ¶ 47.)

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In October 2014, according to its formal minutes, the District's Board began discussing the "benefit of establishing a development fee for new water service contracts" that would raise money to pay for the OGWRP. (Verified Cmplt. ¶ 25.) The "benefit" the Board had in mind was unrelated to any direct benefit to landowners: the Board saw that a development fee would create "a revenue stream" to "help us with bonding". (Olsen Decl. Ex. 1 at 77 (Simpson Tr. 148).) *It was the first development fee the District had ever proposed.* (Olsen Decl. Ex. 1 at 86 (Simpson Tr. 157).)

By Resolution 2014-14, adopted in a Board Meeting on October 27, 2014, the Board addressed the provisions of contracts for initial water deliveries and declared that all such contracts "shall be subject to an Odessa Groundwater Replacement Project Development Fee established by the Board of Directors and charged to each acre served." (Verified Cmplt. ¶ 27.) The Board further declared that "the Development Fee for each acre shall be divided equally over a 30 year period and paid annually with their contract assessment". (*Id.*)

In a November 21, 2014 Board Meeting, "Development Coordinator Johnson reiterated to the Board that the latest estimate for construction of all [distribution] systems and additional East Low Canal Improvements [beyond those covered by the Ecology grant] was $240/acre per year" (*id.* ¶ 37 (quoting Exhibit 4 to Verified Cmplt.)), plus annual operational charges. At the meeting, the Board adopted a $120/acre/year development fee for those irrigators paying their own system construction costs, to be charged for thirty years, apparently on the basis that this represented the highest fee the landowners might bear to get the District toward recovering the $240/acre total cost before going to bond markets for funding. (*See infra* pp. 17-18.)

The November 21, 2014 Minutes further state: "The development fee would be assessed to all new water service contracts that receive groundwater replacement water," including contracts that would cover the water made available by Ecology. (Verified Cmplt. ¶ 38.) This

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would, according to the Minutes, help "normalize the cost for the entire 87,700 acres receiving groundwater replacement water." (*Id.* ¶ 39.)

The District is already billing the $120/acre/year Development Fee to landowners who wish to build their own smaller water delivery systems (typically adjacent to the canal) and have executed new water service contracts for initial water deliveries. (*Id.* ¶ 48.) These bills involve very substantial annual payments; delivery of replacement ground water to a single crop circle is associated with roughly $15,000 in annual Development Fee costs—and these fees are to continue for thirty years. (*See id.*; *see also* Olsen Decl. ¶ 12 & Ex. 19.) The fees stand as an obstacle to (and irreparably injure) landowners' ability to construct their own irrigation systems. (Olsen Decl. ¶ 17.) Some landowners who agreed to or reviewed these water service contracts have contacted CSRIA and asked for an explanation of the Development Fee, as the District has not adequately explained it. (*Id.* ¶ 13.)

The most recent figures available concerning the District's plans consist of a one-page spreadsheet predicting an average cost/acre for all seven distribution systems of $3,478, with the capital costs/acre ranging from $2,147 to $3,975 for the various systems involved. (*Id.* Ex. 8.) As set forth below, only one of the seven systems, EL47.5, has been authorized by the District's Board, but the landowners in the vicinity have stated their opposition to it (*id.* ¶ 11 & Ex. 16).

Argument

I. THE DISTRICT'S DEVELOPMENT FEE SHOULD BE DECLARED UNLAWFUL.

A. The Statutory Scheme Protects Landowners from Disproportionate Assessments such as the Development Fee.

The Legislature of Washington has long concerned itself with the operation and decisionmaking of Washington irrigation districts, beginning with the basic irrigation act of 1889-90. RCW Chapter 87.03 currently governs the operation of such districts, which are

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limited to such "powers that may now or hereafter be conferred by law". RCW 87.03.005. Among the basic powers enjoyed by irrigation districts is the power to condemn land for the construction of "any canal or canals, and the necessary branches of laterals for the same . . .". RCW 87.03.140.

Irrigation districts are also empowered by statute to assess the real properties they serve for the costs of carrying out their statutory purposes, but the Legislature (and the courts) have long protected landowners from unreasonable assessments through a statutory requirement that such assessments "be made in proportion to the benefits accruing to the lands assessed and equitable credit shall be given to the lands having a partial or full water right". RCW 87.03.240.[3] While the statute does not specify how the "benefits accruing to the lands assessed" are to be measured, as discussed below, courts and commentators have generally focused upon a requirement that the assessments be tied to improvements in land value related to the costs to provide water to specific land.

The District apparently determined to assess the "Development Fee" challenged herein pursuant to RCW 87.03.445. Though the Board Resolution declaring that the Development Fee will be charged is silent on the statutory basis of the charge (Olsen Decl. Ex. 5, at 2), the District has already executed several contracts with landowners which refer to RCW 87.03.445 and state the charges imposed in the contract are "an assessment upon and against the lands for which they are levied". (*See* Olsen Decl. ¶ 12 & Exs. 17 at 6 & 18 at 6 (Little Jug Contracts); *see also* Olsen Decl. Ex. 1 at 136-137 (Simpson Tr. 242-243) & Ex. 11 at 5-6, Ex. 12 at 5-6, and Ex. 13 at 4

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[3] More generally, the Washington Constitution imposes a general requirement that "[a]ll taxes should be uniform upon the same class of property". Wash. Const. Art. VII, § 1.

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(present and future form contracts all contain this language.); *see also* Olsen Decl. Ex. 13A (Fee listed with other assessments).

RCW 87.03.445 provides:

> For the purpose of defraying the costs and expenses of the organization of the district, and of the care, operation, management, maintenance, repair, and improvement of the district and its irrigation water, domestic water, electric power, drainage, or sewer facilities or of any portion thereof, or for the payment of any indebtedness due the United States or the state of Washington, or for the payment of district bonds, *the board may either fix rates or tolls and charges*, and collect the same from all persons for whom district service is made available for irrigation water, domestic water, electric power, drainage or sewerage, and other purposes, *or it may provide for the payment of said costs and expenses by a levy of assessment therefor, or by both said rates or tolls and charges and assessment.*

RCW 87.03.445(2) (emphasis added).

As set forth in § 6(f) of the foregoing contracts, the District itself characterizes the development fee as an assessment and provides "for the payment of said costs and expenses by a levy of assessment therefor." In particular, the District did not use the alternative method of collecting funds provided in RCW 87.03.445(5), pursuant to which charges would be based "upon the quantity of water" delivered.

The statute further provides that:

> "If the rates or tolls and charges method is adopted in whole or in part, the secretary shall deliver to the board of directors, within the time for filing the assessment roll, a schedule containing the names of the owners or reputed owners, as shown on the rolls of the county treasurer as of the first Tuesday in November of each year such a schedule is filed of the various parcels of land against which rates or tolls and charges are to be levied, the description of each such parcel of land and the amount to be charged against each parcel for irrigation water, domestic water, electric power, drainage, sewerage, and other district costs and expenses. *Said schedule of rates or tolls and charges shall be equalized pursuant to the same notice, in the same manner, at the same time and with the same legal effect as in the case of assessments."*

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RCW 87.03.445(4) (emphasis added).[4] This subsection of the statute necessarily imports the requirements of RCW 87.03.240.

For all these reasons, the Development Fee is an "assessment" within the meaning of RCW 87.03.240, and subject to the requirement that assessments be "proportional to benefits accruing to the lands assessed". The Development Fee fails to meet that requirement, as it is manifestly not imposed on landowners proportional to benefits accruing to the lands assessed.

B. Washington Case Law Confirms that the Development Fee Is Unlawful Because It Is Not Assessed in Proportion To Benefits.

The judicial authority interpreting Washington irrigation statutes strongly supports CSRIA's position that the Development Fee is unlawful.[5] *Union Trust Co. v. Carnhope Irrigation District*, 132 Wash. 538 (1925), involved a tiny, 200-acre irrigation district outside of Spokane, of which 33.43 acres were owned by the plaintiff. The district had constructed a piping system which "touched" the land of the plaintiff. *Id.* at 539. However, there were no lateral lines through plaintiff's land, and in order to serve all the large number of lots on his land, he would be required to "construct laterals throughout his land, and if the appellant does this at his

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[4] Reference to rates being "equalized" is somewhat misleading in this context. As the Attorney General has explained, "[e]qualization of assessments has, for its general purpose, to bring the assessments of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax". (AGO Opinion 1953 No. 495, at 1-2 (quoting *Cooley on Taxation*).) When asked in deposition to explain the equalization process, the Manager seemed unable to explain what the District had done and how it was in compliance with Washington law. (*See* Olsen Decl. Ex. 1 at 118-119 (Simpson Tr. 207-208).)

[5] There is a large body of Washington law interpreting statutes that provide much more specific guidance for assessments in the context of "local improvement districts" ("LIDs"), but here the District elected not to pursue creating LIDs for each distribution system, preferring to rely upon its general authority to assess landowners within the entire District. (Olsen Decl. Ex. 1 at 67 (Simpson Tr. 125).) Accordingly, we will not address these cases, which turn on the intricacies of those statutory schemes, unless raised by the District.

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own expense, even by the use of wooden pipes, the expense to him will be approximately $2,500." *Id.* By contrast, the expense of the District's entire system was $25,000, which it had funded with a bond. *Id.*

Plaintiff challenged his assessment to repay the bond, which had been set at $15/acre for all land in the district. *Id.* at 539-40. The basis of the claim was that "other lots in the district received greater service than his land, and that he was therefore compelled to pay more to distribute water over his land . . .". *Id.* at 540.

The Supreme Court construed an earlier instance of the identical statutory language requirement assessments to be made "in proportion to the benefits accruing to the lands assessed." *Id.* at 541 (quoting statute). The Supreme Court reviewed at length the interpretation of this statute, quoting and emphasizing language from an early treatise, *Hamilton's Law of Special Assessments*:

> "'*The only rational view to take of this subject as to what property is subject to special assessment* is the one from the standpoint of enhancement in the market value of the real property affected. *If it is, or may be, enhanced in value by the improvement, it should be subject to assessment; but if it is not so favorably affected, or it is impossible that it should be so benefited, it should not be assessed.*' (Sec. 287.)"

Id. at 547 (emphasis in original). The Supreme Court concluded:

> "It is apparent here that the respondent adopted the area basis, which sometimes may be coincident with the enhancement of the market value basis, but it is not necessarily so, and in the instant case *the most casual glance at the map of the district shows it is here not coincident*."

Id. at 548 (emphasis added).

For many reasons explained below, "the most casual glance" at the facts here confirm, as in *Carnhope*, that farmers developing their own distribution systems at their own expense receive no benefit whatsoever from a Development Fee that exceeds common water delivery costs, such as improvements to the East Low Canal. This Court should conclude that "[t]he assessment

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having been made apparently upon an unsound and illegal basis in law, the district is held to have acted arbitrarily and fraudulently, and the assessment is therefore set aside and the matter returned to the authorities of the district to make the proper assessment." *Id.* at 551.

C. The District's Development Fee Is Void for Several Independent Reasons.

1. The District has not conducted the requisite statutory analysis to support the Development Fee.

The statutory requirement for assessments plainly embodies the fundamental principle that the benefits of water delivery must be tied directly to the costs of receiving such benefit. This basic principle is not lost on the courts. As the Supreme Court explained in *Carnhope*,

> In determining the enhancement of the market value a great many elements, of course, are to be taken into consideration; the market value of the property before the improvement, the nature of the soil, topography of the property itself, use of the improvement, its proximity and availability, its area, frontage, and all the various elements which go to determining the fair market value of a piece of property. This price or value is to be determined as it was before the improvement was in and as it is after the improvement has been constructed. The increase, if any, which the improvement has made in this value is the limit of the benefit which that property has acquired by reason of the improvement. Having determined these various increases in the various pieces of property, then a fair apportionment such as the statute calls for should be made between the different property owners in proportion to the benefits which their property has received. *The theory that the benefit is measured by the amount of water furnished by the district or made available to the landowner may be one of the elements which go to make up the determination of the enhancement of the market value of the land, but is not, as the respondent claims, the sole element to be taken into consideration. The availability of the water and the expense of utilizing it to the same extent as it can be utilized by other property owners are elements which go to the determination of the value of the property.*

Carnhope, 132 Wash. at 548-549; *see also* AGO Opinion 1953 No. 495, at 2 ("An irrigation district has perhaps greater potential variation in degree of benefit per acre than any other type of district. There are many variables involved in arriving at an equitable determination of the potential benefit to each taxpayer's land from one year's irrigation.").

The District was not ignorant of these legal requirements. In fact, the District's financial advisors warned the District of the statutory requirements to evaluate benefits to property

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owners, and in particular of a requirement that assessments "must not exceed the special benefit of the improvement to the parcel." (*See* Olsen Decl. Ex. 1 at 95 (Simpson Tr. 166) & Olsen Decl. Ex. 6 at 2.) The District's General Manager admitted that the issue of the incremental increase in market value from supplying Odessa replacement water was discussed with the District's financial advisors. (Olsen Decl. Ex. 1 at 96 (Simpson Tr. 167).) The problem was that "there wasn't enough additional value in the property, as an increase, to cover what would be necessary to get LID [local improvement district] bonds". (*Id.*) The financial advisors were concerned about property values because the District hoped to pay for the OGWRP with unsecured bonds, not backed by the full faith and credit of the District. (Olsen Decl. ¶ 9.) The District's plans imposed enormous costs upon the landowners, did not allocate benefits to costs in a proportional manner, and expected the financial market to embrace what amounted to a speculative means of raising revenue. (*See id.*)

At the same time, however, the District Manager also denied that the financial advisor had ever prepared any forecasts of "how the land value might increase as a result of the construction of distribution systems" and, in fact, was never asked by the District to do so. (Olsen Decl. Ex. 1 at 99 (Simpson Tr. 170); *see also* Olsen Decl. Ex. 1 at 114 (Simpson Tr. 190).)

The only study of benefits ever done was the Odessa Subarea Special Study (*see* Olsen Decl. Ex. 1 at 59 (Simpson Tr. 117)), but this study only involved an attempt to ascertain the overall project costs and benefits of replacing Odessa groundwater, and certainly does not contain information necessary to implement RCW Chapter 87.03.240 and 87.03.445. (Olsen Decl. ¶ 15.) The District has no plans whatsoever to engage in the analysis required by the statutes. (*See* Olsen Decl. Ex. 1 at 59 (Simpson Tr. 117).)

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It is manifestly arbitrary and capricious for an agency to "entirely fail[] to consider an important aspect of the problem". *Neah Bay Chamber of Commerce v. Wash. State Dep't of Fisheries*, 119 Wn.2d 464, 471 (1992) (quoting *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), *overruled in part*, *Washing. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 906 (2003).

The defects of the Development Fee were pronounced and sufficiently obvious that the District's minutes reflect an attempt by the District's attorney to prevent the District from acting unlawfully. At the November 21, 2014 Board Meeting, the District's attorney had warned that "the development fee needed to have some kind of definition derived from the common cost" and that it must "have a reasonable basis and have a cost in common throughout the project, that being the widening of the East Low Canal." (Verified Cmplt. ¶ 34; *see also* Olsen Decl. Ex. 4 at 3-4.)

Regrettably, the District ignored the advice of its attorney, and has instead attempted to justify the imposition of the Development Fee in a staff memorandum dated September 11, 2015 (Olsen Decl. Ex. 1 at 111-112 (Simpson Tr. 187-188) & Olsen Decl. Ex. 9.) The District staff memorandum offers the most recent and definitive statement of the District's justification for the Development Fee:

> "The development fee charged by the District is supported by the fact that there is a value to all landowners that are benefitting from OGWRP implementation regardless of delivering being taken from a District or non-District system. *In the case of deliveries taken from a District system, the Development fee simply represents a portion of the District revenue required to service District debt.* For landowners with a WSC [water service contract] that will possibly remain independent of a District delivery system, the development fee represents a normalized contribution for total OGWRP implementation, and, again, to service District debt. The contribution covers full OGWRP implementation, including remaining ELC improvements and administration. This cost will be covered by all participating lands in an equal matter regardless of their location in the CBP [Columbia Basin Project]." (Emphasis added.)

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(Olsen Decl. Ex. 9 at 10.) The staff memorandum alone confirms that the District never even attempted to adjust the Development Fee and make it "proportional to benefits accruing to the lands assessed," as required by RCW 87.03.240.

The claim in the staff memorandum that all landowners benefit "from OGWRP implementation" is simply not true. Farmers would clearly benefit from completion of lateral distribution systems from the East Low Canal that serve their land. They do not benefit from other lateral distribution systems many miles away.

The claim in the District's staff memorandum that costs to cover "full OGWRP implementation . . . will be covered by all participating lands *in an equal manner*" (emphasis added) is obviously false. Those constructing their own systems are manifestly paying the full cost of those systems *plus* the $120/acre Development Fee; those who receive District-built systems need pay only the cost of the systems including the Development Fee. (Olsen Decl. Ex. 1 at 117 (Simpson Tr. 206).)

In the Board Minutes, the District's Manager attempted to relate the Development Fee to the far higher costs of not merely widening the East Low Canal, but also to the costs of building all seven of the distribution systems proposed by the District, claiming that "the fee is for the whole OGWRP [Odessa Ground Water Replacement Program] because without all components the project lands would not be receiving groundwater replacement water." (Verified Cmplt. ¶ 41 & Olsen Decl. Ex. 4 at 4.) This too is obviously false, as farmers on the initial distribution systems will get water whether or not the subsequent systems are ever built. (*See* Verified Cmplt. ¶ 42; *see also* Olsen Decl. Ex. 1 at 108-109 (Simpson Tr. 184-185).)

Under *Carnhope*, the District must consider whether some landowners have the same "expense of utilizing [replacement water] to the same extent as it can be utilized by other property owners," *Carnhope*, 132 Wash. at 549, but the Development Fee manifestly imposes

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extra costs upon those seeking to construct their own systems. This is not equal treatment, but the product of the District acting "arbitrarily and fraudulently" within the meaning of *Carnhope,* 132 Wash. at 551; *see also Laycock v. Lake Chelan Reclamation District*, 124 Wash. 544 (1923)(rejecting $110/acre assessment applicable to subset of district landowners).

It is arbitrary and capricious to disregard entirely nearly 100% cost differences between distribution systems, which are necessarily associated with widely varying benefits to landowners. The District is using the $120-per acre Development Fee to confer substantially unequal benefits to favored landowners, some of whom cost nearly half as much to serve as others. The only costs that might lawfully be imposed upon irrigators building their own systems are the common carrier costs of additional East Low Canal modifications (and continuing maintenance and operations charges by the District and U.S. Bureau of Reclamation).

In sum, not only has the District failed to pay attention to benefits as required by statute, it has also willfully ignored the evidence before it which demonstrates that the benefits are not equal among recipients of Odessa replacement water. The District may not lawfully ignore the question of proportionality of benefits, particularly in the teeth of evidence that benefits are not proportional. A remand is required to permit the District to reassess what, if any, fees it may assess consistent with the requirement that they be proportional to the benefits conferred.

2. The Development Fee was set on the basis of landowner willingness to pay, which is not a lawful basis for assessments.

At the meeting that set the level of the Development Fee, the Board received a staff recommendation to set the fee at $125/acre/year. The staff member told the Board that the number was "a more palatable amount for landowners [than the total estimated capital cost of $240/acre/year] that still provided a substantial revenue stream for financing OGWRP development". (Olsen Decl. Ex. 4 at 3.) According to the staff memorandum, "the $120

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development fee represents 46% of the total annual revenue required to service debts [from building out the entire OGWRP]." (Olsen Decl. Ex. 9, at 10.)

The initial $125/acre/year proposal was based on "just having discussions with the landowners over the course of time." (Olsen Decl. Ex. 1 at 105 (Simpson Tr. 181)); *see also* Olsen Decl. Ex. 1 at 106-107 (Simpson Tr. 182-183).) The General Manager suggested that the only documentation which "perhaps" supported the recommendation was the District's surveys concerning landowner "willingness to pay". (*Id.*) There is no dispute that the level of the Development Fee was not "related to any particular assessment of benefits conferred". (Olsen Decl. Ex. 1 at 109-110 (Simpson Tr. 185-186).) The "only benefit considered was the global benefit" of being part of the OGWRP. (Olsen Decl. Ex. 1 at 114 (Simpson Tr. 190).) No such global benefits accrue to irrigators who prefer to build and finance their own systems; nor do such asserted "global" benefits proportionally allocate benefits and cost recovery assessments among the various systems.

The Supreme Court has rejected precisely such a "landowner willingness to pay" rationale as a basis for setting irrigation district assessments. In *Laycock*, the Supreme Court emphasized that "all assessments are required to be made in accordance with benefits". *Laycock*, 124 Wash. at 548. Reviewing a $10/acre assessment, the Court held:

> "This assessment, as appears from the testimony of the secretary of the district, was not made on the basis of benefits. In response to a question as to how the $10 assessment was arrived at, the secretary stated, 'Because that was the amount the board seemed to feel was the maximum that the people would be able to pay.'"

Id. That, in substance is how the District set the level of the Development Fee here, and, as in *Laycock*, the assessment should be voided.

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3. The District's so-called "normalization" process is itself arbitrary and capricious, and unlawfully discriminates against landowner-constructed distribution systems.

There is no uniform cost recovery per acre throughout the Columbia Basin Project. (Olsen Decl. Ex. 1 at 70-71 (Simpson Tr. 135-136).) Different classes of land are charged different amounts for receiving the same water. (*See* Olsen Decl. Ex. 1 at 122 (Simpson Tr. 211).) The farmers served by preexisting facilities along the East Low Canal will not pay costs of the OGWRP, even though it improves the very Canal from which they receive water (Olsen Decl. Ex. 1 at 89-91 (Simpson Tr. 160-162))—consistent with the general principle that assessments should not be placed on those not benefitted by the development.

The District has in many prior cases simply delivered water to common delivery points, as proposed by CSRIA, allowing landowners to put in distribution systems at their own cost without paying any development fees. (*See* Olsen Decl. Ex. 1 at 26-32 (Simpson Tr. 79-85).) The District has also previously required specific areas associated with costs of service to those areas to pay those costs on an area-specific basis. (Olsen Decl. Ex. 1 at 88 (Simpson Tr. 159).) These prior charges and lack of "normalization" are consistent with, and required by, the law set forth herein; the Development Fee is an unprecedented departure.

There is not even any general policy to normalize costs for the delivery of Odessa replacement water, as opposed to water generally. The District has written a series of contracts prior to 2014 for delivery of Odessa replacement water that are, by Board determination, to bear lower costs. (Olsen Decl. Ex. 1 at 4 (Simpson Tr. 42)); *see also* Olsen Decl. Ex. 1 at 74 (Simpson Tr. 139).) These contracts need not pay a development fee. (Olsen Decl. Ex. 1 at 5 (Simpson Tr. 43).) *And in the design of its own proposed systems*, the District contemplates allowing farmers beyond the ends of the systems it wishes to build (outside the normalized price

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footprint) to build their own systems, thereby incurring higher costs for the receipt of water than so-called "normalized" customers. (*See* Olsen Decl. Ex. 1 at 52-53 (Simpson Tr. 105-106).)

The supposed "normalization" policy is also not the product of any federal or state requirements. The documents pursuant to which the Washington State Department of Ecology issued replacement water, as well as the U.S. Bureau of Reclamation decision documents authorizing its delivery, do not require any normalization policy. (Olsen Decl. Ex. 1 at 10-12, 14-15 (Simpson Tr. 53-55, 57-58)); *see also* Olsen Decl. Ex. 1 at 25-26 (Simpson Tr. 78-79).)

The District's General Manager was unable to identify any particular reason for changing its policy suddenly to tax landowner-developed systems in pursuit of "normalization". (Olsen Decl. Ex. 1 at 32-35, 39-40 (Simpson Tr. 85-88, 92-93).) He characterized normalization, in substance, as a pure exercise of Board discretion. (Olsen Decl. Ex. 1 at 123 (Simpson Tr. 212).) That discretion operates to subsidize the District-built systems at the expense of landowners constructing their own systems. (Verified Cmplt. ¶ 50(a).)

Ironically, the District admits that it is most expensive to serve landowners in the System One area; the District's EL22.1 system is the highest cost system. (Olsen Decl. Ex. 1 at 37 (Simpson Tr. 90).) From this perspective, the very adoption of a supposed normalization policy that taxes CSRIA's Participants is entirely irrational, as it tends to transfer funds away from this higher cost areas to provide even lower costs for the rest of the lower cost areas.

All in all, it seems obvious to CSRIA that the true purpose of the Development Fee is to attack the System One Project by imposing extra costs upon it, but this Court need not make any finding concerning motives to set aside the Development Fee. It is enough that the fee has the effect of arbitrarily discriminating against non-District-built distribution systems.

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4. The Development Fee may not lawfully be based upon future, speculative OGWRP development and costs.

At all relevant times, it has been obvious that that lateral distribution systems would be completed on a phased basis, with the southerly systems awaiting completion of ELC improvements. (*See* Olsen Decl. Ex. 1 at 42-43 (Simpson Tr. 95-96)) (while "multiple pumping stations could be built at one time," one would not wait until all the East Low Canal improvements were done before starting to build systems.)[6]

To date, the District's Board has only authorized the EL47.5 System to go beyond the design stage. (*See* Olsen Decl. Ex. 1 at 63-64 (Simpson Tr. 121-122) & Olsen Decl. Ex. 2 ("At their continued meeting today [October 27, 2014,] the ECBID Board approved District staff to pursue the development of a pump plant and distribution station originating near mile 47 . . ."). (Olsen Decl. Ex. 1 at 81-82 (Simpson Tr. 152-153) (no motions to proceed with other systems).) This project has been characterized by the District as a "pilot project"—"the plan was to do that one first". (Olsen Decl. Ex. 1 at 55 (Simpson Tr. 113) & Olsen Decl. Ex. 3.) Given the objections of the proposed participants (*see* Olsen Decl. ¶ 11 & Ex. 16), this project may never proceed.

The District contemplates further systems, but they too may never come to pass, a prospect sufficiently likely that on April 1, 2015, the Board passed a resolution providing for a refund of Development Fees in the event the systems were not constructed. (Olsen Decl. Ex. 1 at 134a (Simpson Tr. 233) & Olsen Decl. Ex. 10 at 6.) The District's assessment of financing scenarios even contemplates entirely separate phases of bond financing for the EL47.5 system

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[6] At this juncture, the District has no financing to complete the improvements needed to deliver water beyond EL54.9. (*See* Olsen Decl. Ex. 1 at 10 (Simpson Tr. 53).)

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(together with some portion of additional East Low Canal costs) and future systems. (Olsen Decl. Ex. 1 at 101-102 (Simpson Tr. 172-173) & Ex. 7; *see also* Olsen Decl. Ex. 1 at 128-129 (Simpson Tr. 217-218) ("multiple phases").) At this juncture, the District has not even determined the overall footprint of its proposed systems, and in particular how far the lines will be extended. (Olsen Decl. Ex. 1 at 51 (Simpson Tr. 104).) The total cost of the ultimate system is unknown, though the District does have estimates. (*Id.*)

Under all these circumstances, the Development Fee is also invalid as it relates to future works. As explained in *Carnhope*, "[i]t is the present enhancement in value of the property assessed which authorizes the assessment for benefits; and the future effects of the same improvement or the effect of future contingent improvements, are not to be considered in estimating benefits." *Carnhope*, 132 Wash. at 549-50 (quoting Hamilton § 482). The *Laycock* case also holds that assessments based on future construction costs are illegal. *Laycock*, 124 Wash. at 548-49.

Assessing landowners based on common East Low Canal costs is more consistent with the requirements of the statutory scheme and *Carnhope*, but would result in a substantially lower Development Fee recovering costs to complete the East Low Canal improvements for the length of the canal. (*See* Olsen Decl. ¶ 16 & Ex. 15.) Such cost estimates have ranged from about $20-30 million; utilizing a mid-range estimate of about $25 million is appropriate. (Verified Cmplt. ¶ 59.) To create a per-acre cost analogous to a development fee requires spreading the common cost over all land subject to assessments, which may be conservatively estimated at about 75,000 acres (the larger acreage numbers used by the District in its estimates may understate costs per acre). (*Id.*) The resulting fee, $26/acre, is substantially lower than the District's unfounded Development Fee. (*Id.*)

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D. CSRIA Is Entitled to a Declaratory Judgment and Permanent Injunction.

Pursuant to RCW 7.24.020,

> "*A person* interested under a deed, will, written contract or other writings constituting a contract, or *whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise*, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

(Emphasis added.) The District's determination to impose a Development Fee on CSRIA's members, Participants, and others affects their rights within the meaning of this statute. A Declaratory Judgment is particularly valuable to "remove an uncertainty" as to the lawfulness of the Development Fee and provide guidance to the District upon remand. RCW 7.24.050. Such uncertainty is crippling CSRIA's ability – and the ability of others – to solve the Odessa Subarea problems. (Verified Cmplt. ¶ 70.)

The injury suffered by CSRIA members, Participants, and others is effectively irreparable (*id.* ¶ 73; *see also* Olsen Decl. ¶ 17) and injunctive relief is appropriate to restraining continuing violations in this context. *Layton*, 124 Wash. at 549.

Conclusion

For the foregoing reasons, this Court should grant CSRIA's motion for summary judgment, declare the Development Fee unlawful, enjoin further attempts to collect it, and remand the action back to the District for further proceedings.

Dated: December 15, 2015.

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CERTIFICATE OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On December 15, 2015, I caused the following document to be served:

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

on the parties listed below in the following manner:

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