MEMORANDUM

To: Dr. Darryll Olsen, Board Representative
Columbia-Snake River Irrigators Association
Kennewick, Washington

FROM: Daniel Seligman, Attorney at Law
Columbia Research Corp.
Seattle, Washington

SUBJECT: The East Columbia Basin Irrigation District's "development fee" for new Water Service Contracts

DATE: August 14, 2015

QUESTION ASKED

At your request, I have reviewed the memorandum from legal counsel James Buchal dated July 21, 2015 to the Columbia-Snake River Irrigators Association ("CSRIA") regarding the authority of the East Columbia Basin Irrigation District ("ECBID") to impose an annual $120 per acre "development fee" in new water service contracts.

The ECBID contends that the $120 per acre fee, if paid each year by all landowners for 30 years, would generate a significant but undefined portion of the estimated revenue to complete the East Low Canal expansion (now underway) *and* to build the entire Odessa Ground Water Replacement Program ("OGWRP") distribution system to serve 87,700 acres that currently rely on diminishing supplies of ground water. According to information supplied by CSRIA to Buchal, only $22-25 of the $120 per acre fee is legitimately tied to the expansion of the East Low Canal, which genuinely benefits all landowners (and which CSRIA supports).

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Buchal therefore concluded that ECBID's $120 per acre fee violates RCW 87.03.240, which requires, among other things, that an assessment shall "be made in proportion to the benefits accruing to the lands assessed." Charging the landowners five times more ($120 per acre divided by $25) than the amount associated with the cost to complete the East Low Canal expansion "is obviously disproportional and unlawful," the Buchal Memo concluded, citing *Union Trust Co. v. Carnhope Irrigation District*, 132 Wash. 538 (1925) and *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917 (2014).

You asked me to provide an independent second opinion whether Buchal's conclusions in his memorandum ("the Buchal memo") were correct and how RCW 87.03.240 should be applied.

PRELIMINARY ANSWER

I believe the Buchal Memo accurately describes the obligation of ECBID to demonstrate that any assessment on landowners must be made in proportion to the benefits accruing to the land assessed. Based on information provided by CSRIA, I also conclude that ECBID has not gone through this analysis and its $120 per acre development fee appears to be unlawful.

In preparing this memo, I have reviewed information you have provided and have attempted to discuss the conclusions of the Buchal Memo with ECBID legal counsel Richard Lemargie but did not receive a response.

Based on my research to date, I believe there are four additional issues that are relevant and which CSRIA and others may want to take into further consideration.

1. Equalization

The irrigation code describes the process that a Board of Directors of an irrigation district must use to equalize assessments. In other words, state law does more than mandate that any assessment must reflect the benefits accruing to the land.

The statute, as I interpret it, also requires that the district constitute itself as a "board of equalization" and hold a public hearing to consider adjustments to the assessment rolls. See RCW 87.03.240, 245, 250 and 255. It is unclear from the meeting minutes provided by ECBID to CSRIA whether the district followed this formal process.[1]

2. The provisions of RCW 87.03.445

RCW 87.03.445 allows an irrigation district to pay for the cost and expenses of providing irrigation water in a number of ways:

> [T]the board may either fix rates or tolls and charges, and collect the same from all persons to whom district service is made available…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)

If the assessment method is used, then the district must conform with the procedures in the statute, a requirement that I interpret would include the "benefits accrued" analysis of RCW 87.03.240, cited in the Buchal Memo. The same is true if rates or tolls and charges are used, in which case the district must provide a schedule of parcels against which rates or tolls and charges are to be levied, and these charges must be equalized.

Furthermore, the new water service contracts between ECBID and landowners specifically refer to RCW 87.03.445 and conclude that the charges imposed in the contract are an "assessment upon and against the lands for which they levied."

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[1] Failure to comply with this process raises statutory and Constitutional issues, according to an Attorney General Office opinion from March 1953, which concluded that an irrigation district board may not levy an assessment before the district's assessment roll has been equalized. Bypassing the Board of Equalization step creates due process concerns under the Fourteenth Amendment of the U.S. Constitution as well as problems related to Article VII, section 9, of the state Constitution, the AGO opinion concluded. "Since the assessments are to be made proportionate to the benefits accruing, it is essential that an opportunity to be heard be afforded each taxpayer within the district by an equalization board." AGO Opinion 1953 No. 495.

As we have seen, the term "assessment" has special meaning because it triggers RCW 87.03.240, which requires that assessments shall be made in proportion to the benefits accrued. [See additional discussion of the contract terms at page 5 of this memo.]

3. The ECBID Minutes

The minutes from the meeting of the ECBID Board of Directors on November 21, 2014 show that the annual $120 per acre development fee was a compromise amount and that the Board may have disregarded legal advice when it approved the fee. Unfortunately, the compromise, as described in the minutes, does not reflect any quantitative methodology for the assessment and leaves many questions unanswered. On what is it based? What portion of the $120 per acre fee is allocated to complete the East Low Canal? What portion of the distribution system would be built? Which parcels of land would benefit? Would landowners who sign contracts pay for benefits that do not accrue to their parcels?

According to the minutes, the Board first discussed whether to impose a $160 per acre fee but the proposal did not pass. ECBID staff member Levi Johnson then recommended that the Board consider a $125 per acre "as a more palatable amount for landowners that still provided a substantial revenue stream for financing OGWRP development."

In response to a question from Board president Osborne, district manager Craig Simpson said the development fee represented the portion of the OGWRP development that "everyone receiving groundwater replacement water within the Odessa Subarea must pay." The fee therefore helps "normalize" the cost of serving the entire 87,700 acres with groundwater replacement water, Simpson said.

But the minutes suggest that ECBID attorney Richard Lemargie offered a different view of what the development fee should represent -- an opinion that was apparently rejected.

According to the minutes:

> Lemargie commented [that] the development fee needed to have some kind of definition derived from the common cost. He also stated the development fee is to have a reasonable basis and have a cost in common throughout the project, *that being the widening of the East Low Canal*. Manager Simpson stated that the fee is for the whole OGWRP because without all components the project lands would not be receiving groundwater replacement water. (Italics added for emphasis.)

At that point, Director Booker moved to set the development fee at $160 per acre but the motion failed to receive a second. Director Johnson then moved to set the development fee at $120 per acre "with the justification being the Board recognizes there is a value to all landowners within the OGWRP and all lands within the OGWRP are benefitting from the OGWRP groundwater replacement..." The motion passed with one "no" vote.

As a result, ECBID began imposing the $120 per acre fee and invoicing landowners who signed new water service contracts. The distinction that ECBID legal counsel Lemargie apparently attempted to introduce at the meeting – that the development fee should cover ECBID's portion of East Low Canal, not the entire groundwater replacement program -- goes to the heart of CSRIA's objections.

4. The Contract Language

As part of the research for this memo, you provided me with sample contracts that implement the annual $120 per acre fee and an invoice to a landowner in ECBID. It appears that ECBID is relying on section 6(b)(4) of the contract to support the amorphous $120 per acre charge.

That language states:

> 6(b) The minimum annual per acre charge for the lands to be irrigated under this contract…will consist of the following:
>
> 1 ….[omitted text]
>
> 4 *Such additional charge as the District may make for its own purposes.* (Italics added for emphasis.)

At best, it appears that this vague language is what authorizes ECBID to collect the annual $120 per acre fee. But the contracts themselves are not for the entire OGRWP but for two components of water, the Lake Roosevelt Incremental Release Program ("LRIRP") and Coordinated Conservation Water, which are scheduled to deliver a total of 17,700 acre feet a year to ECBID (approximately 20% of the total projected replacement water).

The contracts themselves do not make mention of the follow-on costs needed to complete the entire OGWRP nor do they authorize ECBID to build the distribution systems. An analysis of the contract terms is beyond the scope of this memo, but it appears that ECBID has improperly structured the contract to allow it to levy the $120 per acre fee.

Finally, it is important to note that the contracts refer to RCW 87.03.445 and state that both ECBID and the landowner:

> [H]ereby agree that the charges for the delivery of water hereunder may be assessed, collected and enforced in the manner provided in RCW 87.03.445 for the collection and enforcement of rates, tolls and charges. All charges imposed by this contract, upon compliance with the applicable procedural provisions of said RCW 87.03.445 shall at once become and constitute *an assessment upon and against the lands for they are levied…*" Section 6(f). (Italics added for emphasis.)

In sum, the contract incorporates the statutory provisions of RCW 87.03.445, and, by implication, the language of RCW 87.03.240, which requires that assessments "made in order to carry out the purpose of this act shall be made in proportion to the benefits accruing to the lands assessed…." The ECBID's actions appear inconsistent with these statutory requirements.