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MEMORANDUM

To: Mr. Ron Reimann, CSRIA President;
Dr. Darryll Olsen, CSRIA Board Representative; and
CSRIA Members Reviewing ECBID Water Service Contracts

From: James L. Buchal, CSRIA Legal Counsel

Date: July 21, 2015

Re: Is the East Columbia Basin Irrigation District Development Fee Charge for New Water Service Contracts Legal?

You have asked me whether the \$120/acre “development fee” or “system repayment cost” the East Columbia Basin Irrigation District (ECBID) proposes to charge for certain water service contracts for Odessa Subarea is lawful. As explained below, I conclude that this charge would violate RCW 87.03.240’s requirement that any such assessment “*be made in proportion to the benefits accruing to the lands assessed*” (emphasis added).

ECBID is currently offering what it calls a contract for “first phase continuation acres in the Odessa Subarea utilizing Lake Roosevelt incremental storage releases for ground water replacement” (using conservation and LRIRP water supplies). ECBID has provided a very rough estimate for the total capital costs to complete development of a groundwater replacement system to serve approximately 87,000 acres within the Odessa Subarea per its “normalized” cost proposal. ECBID concludes that such costs can be recovered through a fee of \$240/acre/year for a thirty-year term. You have advised me that these estimates are preliminary at best, lack financial commitments from the landowners, and depict uncertain financial assumptions, which may be another basis for finding a violation of RCW Chapter 87. But the disproportionality discussed in this memorandum does not depend upon the accuracy or basis of this estimate.

ECBID proposes to charge \$240/year for those landowners for whom it would construct a distribution system; a \$120/acre charge would be assessed against those landowners moving ahead to construct the distribution systems at their own expense.

ECBID arbitrary divided the total costs by two for these landowners. The difficulty with this approach is that it results in assessments grossly out of proportion to the benefits accruing to the lands assessed.

That is because the vast majority of system costs are for development of the distribution systems, and not the common canal-related facilities. ECBID has already received \$32 million from the State for canal improvements to allow delivery of Odessa replacement water; approximately \$20-25 million in work remains to be done, presumably at ECBID expense. Many landowners could build distribution systems along portions of the canal that have already been improved at State expense; as to them, the \$120 fee is an assessment unrelated to any benefits received, because ECBID would not be conferring benefits other than agreeing to serve the landowner under a contract that already, through other charges, recovers all costs of the ECBID.

Even assuming that the entire \$20-25 million in remaining canal-related costs is allocated over all Odessa replacement acres, you have informed me that this would result in an annual assessment of no more than \$22-25/acre/year (using ECBID's financial assumptions). This is a small fraction of the \$120/acre/year ECBID proposes to charge.

It is conceivable that ECBID could attempt to argue that it can take into account the degree, if any, to which the improvement for which costs are being assessed has increased the value of landowners' properties. See *Union Trust Co. v. Carnhope Irrigation District*, 132 Wash. 538, 541, 549 (1925). The availability of Odessa replacement water will provide some incremental benefit to land values for Odessa subarea farmers. In the case of those landowners building their own distribution system, the only "improvement" offered by ECBID is the canal work, comprising roughly 10% of the cost to be incurred by the District; for the remainder, ECBID will offer a distribution system as well, comprising the remaining 90% of improvement costs.

One need not compute any precise increase in land values to see that the proposed \$120/acre/year charge violates RCW 87.03.240, for it is reasonable to assume that the availability of Odessa Replacement water will benefit all the Odessa landowners equally. The statutory violation arises because ECBID proposes to charge those who wish to build their own system only a 50% discount on the full cost, when they are in fact receiving improvement providing only 10% of the benefit.¹ See *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 933 (2014) ("a property should not bear 'proportionately more than its share' of the total assessment relative to other parcels"); see also *Union Trust*, 132 Wash. at 550 ("Benefits assessed must be confined to the improvement ordered").

¹ Arguably, under *Union Trust*, no assessment *at all* may be permitted for those landowners constructing their own distribution systems, because "[w]here property cannot be benefited except in the case of subsequent work for which no provision has been made, it cannot be assessed for [any initial] improvement". *Id.* at 550.

Charging the initial landowners constructing facilities five or more times more than any amount associated with the costs incurred to benefit them, as compared to the remaining landowners, is obviously disproportional and unlawful. Such a charge appears part and parcel of ECBID's general campaign against landowners building their own distribution systems. The U.S. Bureau of Reclamation and Ecology should be concerned about involvement in a scheme under which "the district is [likely to be] held to have acted arbitrarily and fraudulently," *Union Trust*, 132 Wash. at 551.

East Columbia Basin Irrigation District
Columbia Basin Project Groundwater Replacement Water Service Contracts
Annual Assessment

Combined LRIRP and CC Water Supplies
(based on 1.0 ac-ft of CC and 2.0 ac-ft of LRIRP)

1	Development Fee	\$120/acre/yr (for 30 years upon signing of WSC)
2	Operation & Maintenance (Conserved 2-Party)	\$47.17/acre/yr (in 2015; O&M varies annually, pay 75% of O&M fee)
3	Emergency reserve (Conserved 2-Party)	\$0.47/acre/yr (varies annually; equal to 1% of total O&M charge)
4	Construction (Conserved 2-Party; Reclamation Construction Repayment) for CC @\$0.8767/ac-ft	\$0.8767/acre/yr (indefinite assessment fee)
5	Construction (Conserved 2-Party; Reclamation Construction Repayment) LRIRP at \$0.87/ac-ft	\$1.74/acre/yr (indefinite assessment fee)
6	Construction (Conserved 2-Party Second Bacon Siphon & Tunnel Construction - SBS&T) CC @ \$3/ac-ft	\$3/acre/yr (indefinite assessment fee)
7	Construction (Conserved 2-Party Second Bacon Siphon & Tunnel Construction - SBS&T) LRIRP @ \$3/ac-ft	\$6/acre/yr (indefinite assessment fee)
8	Construction (Weber Siphon Complex) LRIRP @ \$3.71/ac-ft	\$7.42/acre/yr (indefinite assessment fee)
9	Pump Charges (Pump 1 and Pump 2, existing debt service)	\$1.70/acre/yr
10	Account Fee (per entity)	\$40/entity/yr
Total Per Acre Annual Assessment		\$188.38 (acre/yr) + \$40 (per yr)