Columbia-Snake River Irrigators Association
Policy Memorandum

DATE:	February 1, 2016
TO:	Gary Chandler, AWB; Tom Tebb/Maia Bellon, Ecology; Legislative Distribution List; CSRIA Board Members and Interested Parties
FROM:	Ron Reimann, President, CSRIA Darryll Olsen, Ph.D., CSRIA Board Representative
SUBJECT:	CSRIA Position on "Water Spreading" and Real Odessa Subarea Issues.

The attached memorandum reflects the previous discussion and CSRIA recommendation to Tom Tebb and Alan Reichman regarding water spreading, for issuing the Odessa Subarea superseding certificates and moving forward with private sector construction of the independent water systems served by the East Low Canal. Both the state and USBR have complete legal discretion to proceed with the regulatory/legal path outlined therein. At the technical level, this is "child's play" for the Eastern Region Office (Keith Stoffel), or CSRIA, to implement.

The water spreading "issue" was never a real issue.

The "issue" was a creature fed by ECBID management, and some Board members, to prevent the private sector development of System 1 and other systems (tying up $42 million of private sector capital approved by lenders). It yielded nothing of value to the irrigators, Ecology, the legislators working to assist surface water delivery, the state, the USBR, or even the ECBID.

But it did yield at least three years of delay in building the distribution systems, an intrinsically flawed financial/funding scheme by the District, a lack of focus by the District to modify the Canal (the expectation of the House Capital Committee providing $27 million), and two lawsuits by the irrigators to get the distribution systems built with private capital and expertise.

The critical path to getting surface water "on the ground" remains the same: 1) distribution system development by the private irrigators; 2) the District needs to get the Canal modifications completed (so Board member Johnson can get access to canal water); and 3) the OCR-Ecology needs to lead with the issuance of the new superseding certificates. This also is the critical path for Sen. Mark Schoesler (or others) to prevent his long-term, Odessa Subarea development vision from being cast into economic purgatory.

Relative to ECBID, the CSRIA has proposed to the District a litigation settlement discussion, the purpose of which is to redirect ECBID assessments toward an expedient completion of Canal modifications (with more than sufficient private sector funding), and to get the new water service contracts issued to the private irrigators. If a settlement is reached, OCR-Ecology should feel confident in moving forward with the superseding certificates, along with a better understanding by USBR of the legal parameters and implementation process.

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Attachment: Memorandum from CSRIA Legal Counsel James Buchal to Alan Reichman, Asst. Attorney General for Water Resources Program/Ecology.

cc Sen. Mark Schoesler, Sen. Judy Warnick, Rep. Tom Dent; and Reps. Joe Schmick, Mary Dye; and Sens. Jim Honeyford, Sharon Brown, and Mike Hewitt.

Reps. Brian Blake, Bruce Chandler, Hans Dunshee, Terry Nealey, Marcus Riccelli, Norma Smith, and Steve Tharington.

Mr. Richard Lamagie and Mr. Craig Simpson, and ECBID Board Members.

Ms. Lori Lee, USBR, and Mr. Jack Hockberger@sol.doi.gov.

CSRIA Board/Members and Interested Parties.

Mr. Keith Stoffel, ERO, Ecology.

Mr. Derek Sandison, Director, WA State Ag.

James Buchal, CSRIA Legal Counsel.

And General Distribution.

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MEMORANDUM

To: Mr. Alan Reichman, Office of Attorney General, WA

Cc: Dr. Darryll Olsen, Board Representative, CSRIA

From: James L. Buchal, CSRIA Legal Counsel

Date: January 29, 2016

Re: Process for System One (and Other Systems), North I-90 Project Water Rights

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This memorandum responds to your request for additional information concerning a process whereby Ecology could lawfully cooperate with Odessa Subbasin farms in a program to make more efficient use of water delivered by the U.S. Bureau of Reclamation as a replacement for failing groundwater supplies.

At the outset, we note that Reclamation has full power under Washington law to determine that it may deliver water at less than three acre-feet/acre. *See* RCW 87.03.115. However, the ground must be eligible to receive the water, giving rise to our request that Ecology process water rights changes to expand the place of use of existing groundwater rights to receive the replacement water on additional acreage.

The Legislature's most recent and specific intent concerning the relationship between the existing failing groundwater rights and new Reclamation deliveries may be seen by comparing the pre- and post-2011 versions of RCW 90.44.510. The pre-2011 version stated that:

> The total number of acres irrigated by the person under the groundwater right and through the use of water delivered from the federal project *must not exceed the quantity of water used and number of acres irrigated* under the person's water right permit or certificate for the use of water from the aquifer." (Emphasis added.)

The post-2011 version stated that:

> The total number of acres irrigated by the person under the groundwater right and through the use of water delivered from the federal project *must not exceed the quantity of water authorized by the federal bureau of reclamation and number of acres irrigated* under the person's water right permit or certificate for the use of water from the aquifer." (Emphasis added.)

In other words, the Legislature knew and understood that many of the existing groundwater rights were for water duties less than Reclamation customarily provided, and did not wish quantity limitations in the existing water rights to restrict the existing acreage from receiving the full and customary water duty.

This demonstrated an intent to benefit the Odessa subarea farmers even beyond the Legislature's 2006 determination that "any period of nonuse of a right to withdraw groundwater from the aquifer is deemed to be involuntary due to a drought or low flow period under RCW 90.14.140(2)(b)". RCW 90.44.420(1)(a). Under this provision, farmers would automatically retain the full "nameplate" quantities of their existing groundwater rights irrespective of any nonuse. With the 2011 revisions, farmers are entitled to whatever quantity of water Reclamation chooses to deliver on their existing acreage, even if the original rights were for less than such quantity.

Consistent with the water duties presented in the Odessa Subarea EIS, Ecology has recognized that the Legislature specifically intended for Odessa farmers to receive a total quantity of water measured at about three-acre-ft./acre, times the number of acres on existing groundwater permits. CSRIA further proposes that Ecology recognize the important environmental and economic benefits of constructing distribution systems to stop continued use of the Odessa aquifer by taking steps to permit farmers to finance such systems by more efficient use of the Legislatively-approved quantity of water.

Specifically, CSRIA asks Ecology to entertain proceedings under RCW 90.03.380 to expand the place of use of existing permits to a larger number of acres, which, with water delivered at a reduced duty, will result in a quantity of water being delivered that equals the quantity expressly intended by the Legislative. You have previously acknowledged that the Legislature has never manifested any intent to limit the operation of RCW 90.03.380 in the Odessa Subarea.

Pursuant to RCW 90.03.380, Ecology is authorized to expand the place of use of existing groundwater rights (after application and public notice) upon a determination that there no "detriment or injury to existing [water] rights". This is the ultimate finding required by the statute, for it states: "If it shall appear that such transfer or such change may be made without injury or detriment to existing rights, the department *shall issue* to the applicant a certificate in duplicate granting the right." (Emphasis added.)

Inasmuch as CSRIA seeks to have Ecology issue the superseding groundwater permits or certificates as required by RCW 90.44.510, and Ecology has already found that issuance of the water right Reclamation would deliver is in the public interest and without detriment to existing rights, it can only appear to the department that the certificates sought by CSRIA will not produce injury or detriment to existing rights.

You have pointed out that one means by which Ecology often assesses the absence of detriment to existing rights is found in a sentence of RCW 90.03.380 that states: "A change . . . to enable irrigation of additional acreage . . . may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right." It is our view that, in the circumstances here, language stating that Ecology "may" act upon such a finding does not mean that Ecology can *only* act if it makes such a finding. The ultimate "shall issue" test is absence of injury or detriment to existing rights.

To further address your concerns here, CSRIA has proposed that the superseding groundwater certificates clearly state that the expanded place of use is contingent upon use of the replacement surface water, and that any future use of water under the groundwater right must be confined to the original place of use. For this reason, even should Ecology chose to interpret RCW 90.03.380 to require an express finding of no change in annual consumptive quantity under the groundwater right in this context, Ecology can find that there will be no increase in annual consumptive quantity of water used under the groundwater right, because the only water used will be under the right issued for surface water--unless an asteroid strike or other unlikely circumstances require use of the groundwater right, which will revert back to its former state.

Operationally, Ecology would simply include a conditional use provision to the superseding certificates that stipulates that any future groundwater use would occur only with interruption of surface water delivery, and that any reactivation of the groundwater rights would be restricted to their pre-change place of use and pre-change water allocation per acre. This type of conditional use provision is routinely attached to water right change/transfer decisions by the Water Conservancy Boards and Ecology.

We further note that "annual consumptive quantity" (ACQ) is a term of art defined as "the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right". Nothing in RCW 90.03.380 requires Ecology to make specific estimates or calculations of ACQ for the water rights involved here where a "no increase" finding can be made without such estimates or calculations for the reasons stated above.

Moreover, because all Odessa groundwater nonuse effectively "qualifies for one or more of the statutory good causes or exceptions to relinquishment in RCW 90.14.140"

(on account of RCW 90.44.420(1)(a)), any ACQ estimate would reach back in time beyond the most recent-five year period of continuous beneficial use to the most recent five-year period of the fully-authorized quantity—in all likelihood, back to issuance. Insofar as there is no basis for assuming any estimated difference in return flows between such historical use and the asteroid-strike-based emergency future use of the groundwater on the original acreage, Ecology has an alternative and independent basis for finding no increase in ACQ, in the Record of Examination. The overall purpose and obvious effect of the operation is to decrease ACQ under the groundwater right, and this will unquestionably occur.

In a context where it is now entirely clear that Odessa Subarea farmers are rejecting the ECBID systems as unreasonably expensive, and that more efficient use of the replacement water is necessary to fund such systems and maximize the replacement of Odessa groundwater rights—a result important for both economic and environmental reasons. The important goals of Odessa Subarea groundwater replacement have manifestly been crippled by Ecology's peculiar change of position since former Director Sandison's July 3, 2014 e-mail, and we again ask Ecology to confirm that it will not stand in the way of the CSRIA proposals to the extent Reclamation chooses to deliver water in this fashion.

Subj: **Federal and State Authority Protecting State Water Rights**
Date: 1/5/2016 4:11:29 P.M. Pacific Standard Time
From: DOlsenEcon@aol.com
To: tom.dent@leg.wa.gov, judy.warnick@leg.wa.gov, garyC@awb.org, mark.schoesler@leg.wa.gov
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Tom, as discussed, see below federal and state protection for state water rights...the issue in Odessa is ECBID's manager/Board member.

D.O.

43 U.S. Code § 383 - Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

(June 17, 1902, ch. 1093, § 8, 32 Stat. 390.)

RCW 90.54.080

State to vigorously represent its interests before federal agencies, interstate agencies.

The state shall vigorously represent its interest before water resource regulation, management, development, and use agencies of the United States, including among others the federal power commission, environmental protection agency, army corps of engineers, department of the interior, department of agriculture and the atomic energy commission, and of interstate agencies with regard to planning, licensing, relicensing, permit proposals, and proposed construction, development and utilization plans. Where federal or interstate agency plans, activities, or procedures conflict with state water policies, all reasonable steps available shall be taken by the state to preserve the integrity of this state's policies.

[1971 ex.s. c 225 § 8.]

Darryll Olsen, Ph.D.
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