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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

COLUMBIA SNAKE RIVER
IRPRIGATORS ASSOCIATION,
individually and on behalf of the System 1
Project Participants,

Plaintiff,

v.

UNITED STATES BUREAU OF
RECLAMATION; ESTEVAN LÓPEZ, in
his capacity as the Commissioner for the
U.S. Bureau of Reclamation; LORRI LEE
in her capacity as the Pacific Northwest
Regional Director for the U.S. Bureau of
Reclamation,

Defendants.

Case No. 4:15-CV-05039-RMP

**PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION**

Hearing (in Richland)
September 23, 2015, at 1:30 p.m.

(previously-without-oral-argument)

1 **Preliminary Statement**

2 Columbia Snake River Irrigators Association (“CSRIA”) sues on behalf of a
3 group of farmers in the Odessa Subarea who are losing the water they require to grow
4 crops because of a general failure of the aquifer—and of defendants. They have
5 entered into a contract to build a \$42 million distribution system to draw water from
6 the East Low Canal, a facility within the Columbia Basin Project: the System One,
7 North I-90 Project (the “Project”). The water the farmers need was released by the
8 Washington Department of Ecology (“Ecology”) to the U.S. Bureau of Reclamation
9 (“BOR”) in March 2014 (ECF No. 13, at 31-52). In order to take this water, the
10 farmers require a contract with BOR, and potentially with the East Columbia Basin
11 Irrigation District (“District”) as well.

12 On May 29, 2014, CSRIA forwarded proposed contracts to BOR and the
13 District. (ECF No. 8, at 38-97.) The District responded by asking BOR to review the
14 contracts. (ECF No. 13, at 69.) BOR refused, setting off an extended chain of
15 interactions culminating in a March 5, 2015 letter from BOR’s Regional Director
16 reiterating four principal excuses for denying CSRIA’s request, discussed in Counts
17 1-4 of First Cause of Action in CSRIA’s Complaint. (ECF No. 1, at 24-27.)

18 Specifically, defendants determined that (1) the Project cannot be
19 accomplished without a violation of Washington state water law assertedly forbidding
20 efficient water use within the Odessa Subarea (RCW 90.44.510); (2) that the Project
21 cannot be accomplished without a violation of federal law assertedly forbidding the
22 Project participants from recovering the costs of development in a non-uniform
23 manner; (3) that the National Environmental Policy Act (“NEPA”) forbids BOR from
24 contracting to facilitate the Project unless additional NEPA documentation is
25 prepared; and (4) that BOR’s existing contracts with the District require District
26 consent to contract with CSRIA, and the District will not issue such consent.

1 As explained at length in the Declaration of Dr. Darryll Olsen, all of these
2 excuses are false, and worse still, the product of incompetence and dishonesty within
3 BOR and the District. (*See generally* ECF No. 13, at 27-29.) BOR has not entered
4 into any contractual arrangements allowing the District to veto the Project (*id.*
5 at 15-16), and, indeed, may contract directly with the Project participants so that the
6 District need not be involved at all (*id.* at 16). BOR’s NEPA determination is plainly
7 wrong (*id.* at 13-14), as is its interpretation of state water law (*id.* at 23). But the full
8 briefing of the merits of these claims is beyond the scope of this memorandum; we
9 merely outline the merits of the claims to demonstrate justiciability.

10 BOR’s determinations, crystallized in the Regional Director’s letter, constitute
11 “agency action, findings, and conclusions” which are “arbitrary, capricious, an abuse
12 of discretion, or otherwise not in accordance with law” within the meaning of the
13 Administrative Procedure Act, 5 U.S.C. § 706(2)(A). (ECF No. 1, at 28.) CSRIA
14 does not challenge defendants for making an unwise decision—though they are
15 surely making one—but because their determinations are arbitrary and capricious,
16 and not in accordance with law. In substance, BOR has advanced unlawful
17 determinations, and an arbitrary and capricious assessment of the surrounding
18 circumstances, *to refuse to exercise its contracting discretion at all.*

19 Defendants’ determinations represent discrete questions of the sort commonly
20 resolved by federal courts in judicial review of agency action, and are properly
21 resolved without regard to the question of whether defendants might ultimately be
22 compelled to contract with CSRIA under the Reclamation Acts. CSRIA does not
23 seek a contract, but merely an order remanding to defendants to exercise their
24 contracting discretion in a manner which is not arbitrary, capricious and contrary to
25 law. Ample authority supports such an order.

1 Remarkably, defendants assert that this Court is *without judicial power to hear*
2 *this dispute at all*. Defendants are wrong. There is no sovereign immunity defense,
3 for Congress has waived sovereign immunity in the APA. Nor must CSRIA
4 demonstrate an entitlement to a Reclamation contract. Where, as here, defendants
5 assert misconstructions of law (and a contract) as an excuse for failing to exercise
6 their contracting discretion, those misconstructions are reviewable under 5 U.S.C.
7 § 706(2)(A), whether or not CSRIA might be “entitled” to a contract.

8 Defendants point to cases limiting claims under § 706(1) of the APA, which
9 provides a remedy to “compel agency action unlawfully withheld or unreasonably
10 delayed”. While this is not a remedy often granted, seldom does the record before a
11 Court present such staggering evidence of unreasonable delay. Defendants have been
12 promising to solve the problems of the Odessa farmers for decades, and their
13 dithering now threatens Eastern Washington with tremendous economic losses. Their
14 willful blindness to the only workable means for abandoning the long-established
15 model of federal subsidies to development of irrigated agriculture cries out for a
16 judicial remedy. (*See generally* ECF No. 13, at 6-12.)

17 **Argument**

18 **I. THE UNITED STATES HAS WAIVED ITS SOVEREIGN IMMUNITY** 19 **FOR THIS SUIT.**

20 The starting point for resolving defendants’ jurisdictional challenges is that the
21 Administrative Procedure Act (APA) is a “general waiver” of sovereign immunity,
22 *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct.
23 2199, 2204 (2012), wherein Congress declared:

24 “An action in a court of the United States seeking relief other than
25 money damages and stating a claim that an agency or an officer or
26 employee thereof acted or failed to act in an official capacity or under
color of legal authority *shall not be dismissed nor relief therein be*

1 intended the courts to review *discretionary* administrative action, and federal courts
2 review agency exercises of discretion day in and day out.

3 The only exception to the general presumption in favor of review is if “(1)
4 statutes preclude judicial review; or (2) agency action is committed to agency
5 discretion by law.” 5 U.S.C. § 701(a)(2). Defendants do not claim that the “statutes
6 preclude judicial review” within the meaning of § 701(a)(1), which would require
7 “showing of ‘clear and convincing evidence’ of a . . . legislative intent” to restrict
8 access to judicial review. *Abbott Laboratories*, 387 U.S. at 141.

9 Rather, defendants claim that the discretionary nature of BOR contracting
10 decisions means that defendants’ refusal to contract with CSRIA is “committed to
11 agency discretion by law” within the meaning of § 701(a)(2). As the Supreme Court
12 has repeatedly explained, “[t]his is a very narrow exception. . . . The legislative
13 history of the Administrative Procedure Act indicates that it is applicable in those rare
14 instances where ‘statutes are drawn in such broad terms that in a given case there is
15 no law to apply.’ S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).” *Heckler v.*
16 *Chaney*, 470 U.S. 821, 830 (1985) (quoting *Citizens to Preserve Overton Park, Inc. v.*
17 *Volpe*, 401 U.S. 402, 410 (1971) (footnote omitted)).

18 Defendants do not and cannot demonstrate that there is “no meaningful
19 standard against which to judge the agency’s exercise of discretion,” *Heckler*, at 830,
20 or “no law to apply,” *Overton Park*, at 410. BOR has made specific and erroneous
21 determinations of law upon which it predicated its refusal to exercise its contracting
22 discretion, and *that law* provides a “meaningful standard” for review.

23 For this reason, defendants’ focus upon the text of the Reclamation Act alone
24 in determining whether there is “law to apply,” misses the point. CSRIA alleges that
25 defendants have premised their denial of CSRIA’s request to contract on errors with
26 respect to other law: (1) RCW 90.44.510, 90.03.380 and Washington water law (ECF

1 No. 1, at 25-26); (2) federal statutes relating to the recovery of costs (*id.* at 26); (3)
2 the National Environmental Policy Act (NEPA) (*id.* at 27); and (4) the construction of
3 a 1968 contract between BOR and the District (*id.*). Defendants’ specific and final
4 determinations with respect to these issues can be evaluated against these bodies of
5 law without regard to whether BOR might be compelled to contract with CSRIA.
6 While construction of the 1968 contract represents a “mixed question of law and
7 fact,” BOR’s interpretation of the contract is manifestly arbitrary and capricious if not
8 contrary to law.

9 Beyond defendants’ errors of law compelling them to refuse even to exercise
10 their contracting discretion is an even more fundamental point, of vital importance to
11 the people of Eastern Washington: in an era where subsidies are undisputedly no
12 longer available for irrigation development (*see* ECF No. 13, at 6-7), can BOR
13 willfully blind itself to the fact that the only means of private sector financing to
14 solve the Odessa Subarea problem is the method provided by the Project (*see id.*
15 at 9-12), such that Reclamation’s waiting for a conventional alternative can never
16 succeed. It has long been the law that agency conduct is arbitrary and capricious if
17 the agency “entirely failed to consider an important aspect of the problem,” *Motor*
18 *Vehicle Mfgs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and
19 that is precisely what defendants are doing here.

20 While it is not essential to deny this motion to dismiss, this Court may also find
21 that the Reclamation statutes, operating in the unique statutory and regulatory context
22 of the problems of the Odessa Subarea, as exemplified in the agency Record of
23 Decision, also distinguish this case from the “committed to agency discretion” cases
24 cited by defendants. The question is “not whether the statute viewed in the abstract
25 lacks law to be applied, but whether ‘*in a given case*’ there is no law to be applied”.

1 *City of Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978) (quoting *Strickland*
2 *v. Morton*, 519 F.3d 467, 570 (9th Cir. 1975) (emphasis in original)).

3 The *Santa Clara* Court found statutory language requiring an agency to
4 “transmit and dispose of [surplus energy from reservoir projects] in such manner as to
5 encourage the most widespread use thereof” to be “too vague and general to provide
6 law to apply”.¹ The Court thus rejected claims “concerning the proper allocation of
7 [electric] power among preference entities”. *Id.* at 668. Here, as Dr. Olsen explains
8 in his declaration, there is no available alternative (ECF No. 13, at 10-12), and BOR
9 is not writing upon a blank slate. BOR is called upon the exercise its discretion in the
10 context of a specific plan to which it has already committed itself in the Record of
11 Decision, and on which it worked closely in cooperation with Ecology to produce the
12 water right at issue. (ECF No. 13, at 31-52 (Ecology’s Record of Examination).)
13 There is, indeed, what defendants call a “myriad of federal and state laws” to apply.
14 (ECF No. 7, at 4.) It is because defendants so egregiously misconstrue these laws
15 that relief is required to get relief efforts for the Odessa farmers on track.

16 While it is not necessary for the Court to reach this question to deny the motion
17 to dismiss, the reclamation statutes *themselves*, in concert with the Record of
18 Decision and Record of Examination, provide “law to apply” in this context. The
19 applicable statutes (43 U.S.C. §§ 423e & 485h) provide detailed standards for
20 contracting that are sufficient to support judicial review, particular in a context where
21 the agency has adopted a Record of Decision providing substantial further detail. *Cf.*,
22 *e.g.*, *Nuclear Data, Inc. v. Atomic Energy Commission*, 344 F. Supp. 719, 726 (N.D.
23 Ill. 1972) (finding law to apply to AEC waiver decision “consistent with the policy of
24

25 ¹ The Ninth Circuit later retreated from this holding in another case cited by
26 defendants, *Pac. Northwest Generating Coop. v. BPA*, 596 F.3d 1065, 1077 (9th Cir.
2010). In that case, the Court found a requirement that BPA “operate in accordance
with ‘sound business principles’ *did* provide law to apply. *Id.* at 838.

1 this section”); *Dubrow v. Small Business Administration*, 345 F. Supp. 4 (C.D. Cal.
2 1972) (reviewing refusal to grant disaster relief loan under statute authorizing agency
3 to make such loans as “the Administration may determine to be necessary or
4 appropriate”).

5 BOR has previously attempted to induce this Court to dismiss challenges to
6 exercises of its contracting authority on jurisdictional grounds. This Court reached
7 the merits to determine that “Congress expressly gave the Bureau discretion to enter
8 into short-term contracts to furnish water for irrigation,” but granted the motion to
9 dismiss. *Grant County Black Sands Irrigation Dist. v. United States*, 539 F. Supp.2d
10 1292 (E.D. Wa. 2008). On appeal, the Ninth Circuit also reached the merits of the
11 claims, and specifically clarified that this Court had erred in characterizing its ruling
12 as a dismissal. *Grant County Black Sands Irrigation Dist. v. United States*, 579 F.3d
13 1345, 1349 n.1 (9th Cir. 2009), cert. denied, 562 U.S. 1134 (2011). Defendants omit
14 to disclose the Ninth Circuit history. Had BOR’s contracting decisions been
15 committed to agency discretion by law, neither court could have reached the merits.

16 **III. CSRIA IS NOT REQUIRED TO DEMONSTRATE AN UNQUALIFIED**
17 **RIGHT TO A BOR CONTRACT AS A PREDICATE TO JUDICIAL**
18 **REVIEW.**

19 BOR claims that unless CSRIA can demonstrated that it was entitled to relief
20 in the nature of mandamus, commanding BOR to contract with CSRIA, CSRIA is
21 entitled to no relief at all. This argument has long been rejected by the federal courts.
22 The federal courts have long recognized that if agency denials of discretionary
23 requests were unreviewable, the agencies would be free to misconstrue the law—as
24 BOR did here—resulting in unlawful denials of such requests.

25 As the D.C. Circuit has explained,

26 “It is true that applicant acquired no vested interest by the mere
27 filing of his application. But he did have the right to avail himself of
28 the application route in an effort to perfect an interest to the extent

1 that this was not precluded by law or some valid exercise of the
2 agency's discretion. Were it otherwise an applicant could be
3 unlawfully deprived of the right to pursue his application to the point
4 of a consummated interest without means for effective complaint.”

5 *Krueger v. Morton*, 539 F.2d 235, 238 (D.C. Cir. 1976) (finding jurisdiction to review
6 lawfulness of Secretary’s denial of coal prospecting permit). That is precisely what is
7 happening here: defendants are unlawfully depriving CSRIA of lawful consideration
8 of its contracting requests by inventing unlawful predicates to the exercise of BOR’s
9 contracting discretion.

10 And in *Gonzalez v. Freeman*, 334 F.2d 570, the D.C. Circuit explained:

11 “. . . to say that there is no "right" to government contracts does not
12 resolve the question of justiciability. Of course there is no such right; but that
13 cannot mean that the government can act arbitrarily, either substantively or
14 procedurally, against a person, or that such person is not entitled to challenge
15 the processes and the evidence before he is officially declared ineligible for
16 government contracts. An allegation of facts which reveal an absence of legal
17 authority or basic fairness in the method of imposing debarment presents a
18 justiciable controversy in our view.” *Id.* at 575.

19 From this perspective it does not matter that defendants assert the right to wait
20 until the Odessa Subarea returns to natural desert before acting, or that they need not
21 contract with CSRIA, or need not offer any particular terms. (*See* ECF No. 7, at 12.)
22 What matters is that defendants have the power to offer contracts, and refuse to
23 exercise it *for unlawful reasons*.

24 A similar line of cases allows judicial review of an agency’s refusal to enforce
25 a statute premised on legal error, even though such “prosecutorial” decisions are
26 often viewed as committed to agency discretion by law. As the Ninth Circuit has
27 explained, there are

28 “two exceptions to the general rule of unreviewability of agency
nonenforcement decisions: 1) agency nonenforcement decisions are
reviewable when they are based on a belief that the agency lacks
jurisdiction, *International Longshoremen's Ass'n v. National
Mediation Bd.*, 251 U.S. App. D.C. 410, 785 F.2d 1098, 1100
(D.C.Cir. 1986); and 2) an agency's statutory interpretations made in

1 the course of nonenforcement decisions are reviewable, *International*
2 *Union, United Automobile, Aerospace & Agricultural Implement*
3 *Workers v. Brock*, 251 U.S. App. D.C. 239, 783 F.2d 237, 245 (D.C.
4 Cir. 1986).

5 *Mont. Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations*
6 *Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) (finding “impermissible statutory and
7 regulatory interpretations . . . formed the basis of [the] decision not to issue an unfair
8 labor practice complaint”).

9 Against these lines of authority, defendants cite *Rank v. Nimmo*, 677 F.2d 692
10 (9th Cir. 1982), a case in which a veteran sought to set aside a foreclosure based on
11 asserted duties in a loan guaranty program of the Veterans Administration. The
12 statute “used the precatory ‘may’ and then, as if to leave no doubt, added, [that
13 forbearance, if any, would be] ‘at the Administrator’s option’”. *Id.* at 699-700. Mr.
14 & Mrs. Rank did not receive forbearance, and sued. But they did not identify any
15 errors of law beyond the VA’s bare refusal to grant forbearance, arguing that such
16 forbearance was “unlawfully withheld” under 5 U.S.C. § 706(1). Here, CSRIA
17 challenges specific unlawful determinations upon which the refusal to contract was
18 predicated.

19 Moreover, BOR’s duties under the Reclamation statutes are not akin to a
20 statutory discretion to forgive borrowers. The *Rank* case distinguished circumstances
21 in which “the applicable statute or legislative history clearly revealed a Congressional
22 intent to require the agency to implement a statutory program.” *Rank*, 677 F.2d at
23 701. Where Congress has expressed a desire for expeditious action, jurisdiction is
24 commonly found to compel agency decisionmaking on discretionary applications.
25 *See, e.g., ENSCO Offshore Co. v. Salazar*, 781 F. Supp.2d 332, 336-37 (E.D. La.
26 2011), *appeal dismissed*, 478 Fed. Appx. 113 (5th Cir. 2012).

1 That is certainly the case here. Beyond the general Reclamation statutes and
2 Columbia Basin directives, Congress has appropriated millions of dollars to BOR,
3 *specifically to allow BOR to complete the paperwork to solve the Odessa problem.*²
4 Congress has indicated that it expects the “active participation” of BOR to solve the
5 problem (Cong. Rec., daily ed. at H10048 (Nov. 9, 2005) (remarks of Rep.
6 Hastings)), not throw up a blizzard of erroneous determinations that threaten to
7 ensure the problem is never solved at all.

8 **IV. CSRIA’S CLAIMS ARE RIPE FOR REVIEW**

9 Defendants admit, in substance, that CSRIA has established the first factor
10 demonstrating ripeness: “hardship to the parties of withholding judicial
11 consideration”. (See ECF No. 7, at 20 (quoting *Ohio Forestry Ass’n, Inc. v. Sierra*
12 *Club*, 523 U.S. 726, 733 (1998)). The threats to the Odessa area, and the Project
13 participants in particular, are extraordinary and worsening. (See generally ECF
14 No. 13, at 5-6.)

15 Defendants thus focus upon the second factor, “fitness” of the issues for
16 judicial decision, which in turn fractures into the questions (1) whether judicial
17 review would “inappropriately interfere with further administrative action” and (2)
18 whether this Court “would benefit from further factual development of the issues
19 presented” in further administrative proceedings. (See ECF No. 7, at 20 (quoting
20 *Ohio Forestry*, 523 U.S. at 733).) As to the second factor, there are no further
21 administrative proceedings to be had to develop issues.

22 As to the first factor, the notion that reviewing the specific issues raised by
23 CSIRA would constitute unwarranted “judicial interference” or result in “prematurely
24

25 ² See, e.g., H. Rep. No. 108-554, 108th Cong., 2d Sess. 70 (\$250,000 for appraisal of
26 the Odessa Subaquifer); S. Rep. No. 110-416, 110th Cong., 2d Sess. 92 (\$1,000,000
for Odessa Subarea Special Study); H. Rep. No. 111-278, 111th Cong., 1st Sess. 278
(\$2,846,000 for same).

1 adjudicating” the issues is meritless. CSRIA has pursued these issues
2 administratively for more than a year, culminating in the March 5, 2015 letter from
3 the Regional Director conclusively taking the agency position that the issues
4 constituted insuperable obstacles to considering CSRIA’s request for a contract.

5 To support their ripeness argument, defendants grossly mischaracterize
6 CSRIA’s complaint as “demanding that Reclamation award CSRIA award CSRIA a
7 contract before Reclamation requests proposal and competitive bids”. (ECF No. 7,
8 at 21.) Again, CSRIA seeks no such relief in its complaint, and there is no
9 competitive bidding process in the Reclamation statutes.

10 Defendants also claim that their response to CSRIA’s request to contract does
11 not constitute “agency action” within the meaning of the APA, and is therefore not
12 ripe for judicial review. The starting point for analysis is 5 U.S.C. § 551(13), which
13 broadly defines “agency action” as: “includes³] the whole *or part of* an agency rule,
14 order, license, relief, or the equivalent or denial thereof, or failure to act . . .”
15 (emphasis added). “Order” in turn “means the whole or part of a final disposition,
16 whether affirmative, negative, injunctive *or declaratory in form*, of an agency in a
17 matter other than rule making . . .”. 5 U.S.C. § 551(6) (emphasis added).
18 Defendants’ letters, culminating in the March 5, 2015 letter, represent orders
19 *declaring* legal obstacles to the exercise of contracting discretion that this Court has
20 jurisdiction to remove.

21 The Ninth Circuit has adopted a “pragmatic and flexible” approach to
22 determining finality. *ONRC v. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006)
23 (quoting *ONRC v. Harrell*, 52 F.3d 1499, 1504 (9th Cir. 1995)). The basic test is
24 “whether the agency ‘has rendered its last word on the matter’”. *Id.* at 984 (citations

25 _____
26 ³ That the definition is phrased in terms of “includes” refutes defendants’ claim that
this is a “limiting” definition. (*See* ECF No. 7. at 12.)

1 omitted). In making such a determination, this Court is not to defer to any agency
2 conclusions as to finality. *Id.* at 979 n.1. There can be no serious dispute that the
3 March 5, 2015 letter from the Regional Administrator represents the “last word” on
4 these matters.

5 That the declaration occurs in a letter does not bar judicial review. It is well
6 established that an agency may not “avoid judicial review ‘merely by choosing the
7 form of a letter to express its definitive position on a general question of statutory
8 interpretation’”. *Her Majesty the Queen v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990)
9 (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986)). What
10 matters is whether the letters may reasonably be construed as the agency’s final
11 position concerning the issues presented. In the Queen’s case, there was no dispute
12 that EPA had not made a final decision on the plaintiffs request to initiate a “section
13 115 remedial process”. *Id.* at 1531. But EPA had clearly, by letter, offered statutory
14 interpretations specifically rejecting “petitioner’s requests for a separate proceeding
15 limited to endangerment and reciprocity findings”. *Id.*

16 The D.C. Circuit therefore reviewed EPA’s interpretation on the merits,
17 characterizing it as “effectively final agency action [construing section 115] that the
18 agency has not frankly acknowledged”. *Id.* at 1532 (quoting *Sierra Club v. Thomas*,
19 828 F.2d 783, 793 (D.C. Cir. 1987)). So too have the interactions between CSRIA
20 and agency staff, culminating in the March 5th Regional Director’s letter, provided
21 effectively final action denying CSRIA request for contracting based on errors of law
22 (and contract interpretation).

23 The March 18th letter from BOR counsel suggesting that “delay in completely
24 embracing CSRIA’s proposal is simply the necessary time a complex organization
25 needs to effectively internally understand [it]” (ECF No. 8, at 227-28) is frankly
26 disingenuous. Defendants are not “detail[ing] concerns” about the Project (ECF

1 No. 7, at 7); they are, through their Regional Director, *denying* the Project based on
2 final and reviewable determinations, for the apparent purpose of empowering the
3 District to engage in an astounding and illegal effort at self-aggrandizement. (*See*
4 *generally* ECF No. 13, at 27-29.)

5 **A. Defendants’ NEPA Determination Is Reviewable**

6 Defendants have consistently maintained that the Project is sufficiently
7 different from the action analyzed in Odessa Subarea Special Study Final
8 Environmental Impact Statement and adopted in BOR’s Record of Decision (ECF
9 No. 8, at 7-37) that BOR is without power to execute contracts with CSRIA absent
10 further environmental analysis under the National Environmental Policy Act (NEPA).
11 (*See generally* ECF No. 13, at 13-15; *see also id.* at 72-76.)

12 A briefing of the merits of this claim is beyond the scope of this memorandum,
13 but the record before the Court is sufficient to determine that this is the sort of
14 specific agency determination that is routinely resolved by federal courts when the
15 adequacy of NEPA documentation is challenged. In general, no further NEPA
16 documentation is needed unless “the agency makes substantial changes in the
17 proposed action that are relevant to environmental concerns” or “there are significant
18 new circumstances or information relevant to environmental concerns,” 40 C.F.R.
19 § 1502.9(c)(1), and neither is the case here.

20 **B. Defendants’ Contractual Construction Is Reviewable.**

21 As explained in some detail in the accompanying Declaration of Dr. Darryll
22 Olsen (ECF No. 13, at 15-17), defendants maintain that by reason of the existing
23 contractual relations with the District, they lack power to contract with CSRIA. The
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25
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1 construction of the contract asserted to withdraw BOR’s power to contract is a
2 straightforward question of the kind routinely resolved by federal courts.⁴

3 **C. Defendants’ Water Law Determination Is Reviewable.**

4 As Dr. Olsen has explained in detail, it has at all times been obvious that
5 private sector financing of distribution systems to deliver Odessa replacement water
6 will not “pencil out” unless the longstanding three foot/acre allotment is spread over
7 additional acreage, and all parties, including BOR, initially cooperated in such a plan.
8 (*Id.* at 18-19.) As late as January 28, 2015, this issue did not appear to be an issue at
9 all. (*Id.* at 21-22.)

10 BOR now argues that it is bound to adhere to state water law, and asserts, in
11 substance, that a specific statute, RCW 90.44.510, operates to forbid it to contract
12 with CSRIA to deliver the water as requested. At the outset, a state law that forbid
13 delivering Reclamation water to acreage authorized by Congress—the case here—
14 would be preempted by federal law, for Reclamation’s deference to state law does not
15 extend to state law “directly inconsistent” with federal law. *See California v. United*
16 *States*, 438 U.S. 645, 678 (1978). But RCW 90.44.510 need not be interpreted to be
17 in conflict at all, and is not presently being interpreted by Ecology as defendants
18 claim. (*See, e.g.*, ECF 13, at 23 (reviewing analogous transaction.)

19 It is true that subsequent to the March 5th letter, under circumstances that
20 defendants are apparently concealing through an ongoing violation of the Freedom of
21 Information Act (*see id.* at 28), defendants procured a letter from a Washington
22 attorney purporting to represent Ecology, suggesting that Ecology “is inclined” to
23 adopt defendants’ interpretation. CSRIA objects to consideration of this letter (ECF
24

25 _____
26 ⁴ If defendants assert in their Answer that the District is a necessary party to a suit
27 construing its contract, CSRIA is prepared to implead the District, which would then
28 provide an alternative basis for jurisdiction under 43 U.S.C. § 390uu. If this Court

1 No. 8, at 232-39) on this motion as hearsay; because it does not represent any formal
2 agency determination; and because BOR cannot rely upon something that happened
3 afterwards to justify its refusal to exercise its discretion. *Cf., e.g., Burlington Truck*
4 *Lines v. United States*, 371 U.S. 156, 168 (1962) (courts may not accept “post hoc
5 rationalizations” for agency action).

6 In any event, full briefing of the interpretation of Washington water law and
7 federal preemption thereof is plainly beyond the scope of this memorandum. It
8 suffices to deny the motion to dismiss to recognize that defendants have made a final
9 determination concerning the statutes, giving rise to a dispute of the kind routinely
10 resolved by federal courts.

11 **D. Defendants’ Application of Cost Recovery Statutes Is Reviewable.**

12 BOR contends that federal law forbids it from contracting with an entity that
13 proposes to recover construction costs by zones, with higher costs for those irrigators
14 in zones of higher cost to service. However, neither of the two federal statutes BOR
15 cites addresses contracting with entities constructing their own distribution systems,
16 but rather addresses cost recovery *by BOR*. In fact, they require the Bureau to
17 apportion its own construction costs “equitably” (43 U.S.C. § 461) and permit the
18 Bureau “to fix different construction charges against different classes of land under
19 the same project” for that purpose (43 U.S.C. § 462). CSRIA’s claim for declaratory
20 relief establishing that BOR may contract without violating any federal law or policy
21 concerning differing costs in differing water delivery areas is again the sort of
22 question routinely resolved by federal courts.

23 Defendants suggest that this Court’s declaration resolving the foregoing issues
24 would be an “impermissible advisory opinions” (ECF No. 7, at 18), but each and
25

26 determines to dismiss the contract interpretation claims—and it should not—CSRIA
27 requests leave to replead, joining the District as a defendant.

1 every time a federal court remands an action to an agency after issuing an opinion
2 instructing the agency concerning the applicable law, the court is *advising* the agency
3 on how to exercise its discretion. There is nothing impermissible sought here.

4 **V. EVEN IF BOR’S RESPONSE IS CHARACTERIZED AS A “FAILURE**
5 **TO ACT,” CLAIMS OF UNREASONABLE DELAY ARE**
6 **REVIEWABLE UNDER THE APA.**

7 As set forth above, CSRIA’s has identified specific agency action and findings
8 reviewable and reversible under 5 U.S.C. § 706(2)(A) as “arbitrary, capricious, an
9 abuse of discretion, or otherwise not in accordance with law”. Defendants have,
10 notwithstanding their firm, repeated, and conclusive assertions of insuperable legal
11 obstacles to contracting with CSRIA, all the way up the chain of command to the
12 Regional Director, now taken the position that that there has been no “final denial” of
13 CSRIA’s request. (*E.g.*, ECF No. 8, at 227 (letter from defendants’ attorney dated
14 March 18, 2015)). Even if this Court were to regard defendants’ action as nonfinal—
15 and it should not—“[w]hen administrative inaction has precisely the same effect on
16 the rights of the parties as denial of the requested agency action, an agency may not
17 prevent judicial review by masking agency policy in the form of inaction rather than
18 an order denying the action requested.” *Mountain States Legal Foundation v. Andrus*,
19 499 F. Supp. 383, 396 (D. Wyo. 1980) (finding jurisdiction to review refusal to act on
20 oil and gas leasing applications).

21 Congress has expressly required each and every federal agency, including
22 BOR, “to conclude a matter presented to it” within a reasonable time, 5 U.S.C.
23 § 555(b), and provided an express remedy for agency action “unreasonably delayed,”
24 *id.* § 706(1). For this reason, the federal courts have long recognized that
25 unreasonable delay in responding to an application is judicially reviewable. Under
26 the principles discussed above, the “court can compel the agency to act, but has no
27 power to specify what the action must be”. *Norton*, 542 U.S. at 65. This is precisely

1 the relief sought by CSRIA on its § 706(1) claim. (See ECF No. 1, at 29-30 (prayer
2 for relief ¶ 3.)

3 Whether an agency delay is unreasonable is determined by a “rule of reason,”
4 involving, among other things, “the complexity of the task at hand, the significant
5 (and permanence) of the outcome, and resources available to the agency”. *Mashpee*
6 *Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). The
7 task presented to defendants was not complex: execute or modify the contract drafts
8 provided by CSRIA on May 29, 2014. The outcome is of immense significance to
9 the Odessa Subarea farmers whose wells are going dry. CSRIA asked for no subsidy
10 from defendants, and the only resources involved concern the need for defendants
11 and their employees to review and execute contracts.

12 The farmers of the Odessa Subarea have been waiting for decades for relief
13 from the problems that arose when they moved there and started farming based on
14 BOR’s representation that service would be extended to the area. All the necessary
15 predicates for immediate agency action have occurred, yet defendants dither as the
16 wells run dry. BOR’s conduct is extraordinary, as the agency by all appearances
17 seeks to delay until 2020, apparently as a matter of administrative convenience,
18 contracting for the distribution of water. (ECF No. 13, at 6.) The agency takes this
19 position even though the systems must be completed by 2024 (*see id.* at 5) to avoid
20 the risk of losing the water. Defendants’ continuing failure to exercise its contracting
21 discretion since May 29, 2014, in this factual context, with wells failing and losses
22 mounting, is manifestly unreasonable.

23 Defendants respond with *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55
24 (2004). This case does not undermine the long-established principles of
25 administrative law set forth above concerning refusals to exercise discretion in
26 § 706(2) cases; it addresses § 706(1). Significantly, the federal courts have declined

1 to apply *Norton* in the context here, of a refusal to grant specific permit, unless there
2 are other barriers to jurisdiction. *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp.
3 972, 985-86 (N.D. Cal. 2013) (distinguishing *Norton*, but finding action “committed
4 to agency discretion by law”), *aff’d*, 729 F.3d 967 (9th Cir. 2013).

5 The *Norton* case concerned efforts to secure “general enforcement” of certain
6 land use plans which constituted a mere “statement of priorities”. *Norton*, 542 U.S.
7 at 71. Specifically, environmentalists challenged BLM’s failure to take regulatory
8 action restricting off-road vehicle use. The Court held that a claim for “failure to act”
9 under § 706(1) could only be pursued where “an agency failed to take a *discrete*
10 agency action that it is *required to take*”. *Id.* at 63.

11 The rationale for the rule in *Norton* has no application here, for CSRIA does
12 not seek “general orders compelling compliance with broad statutory mandates”
13 which would require “the supervising court, rather than the agency, to work out
14 compliance with the broad statutory mandate, injecting the judge into day-to-day
15 agency management”. *Norton*, 542 U.S. at 67. CSRIA merely seeks declarations
16 correcting defendants’ serious errors of law and contract construction, and remanding
17 the ultimate contracting decision for consideration in accordance with law.

18 Moreover, in *Norton*, the Court also explained that “an action called for in a
19 plan may be compelled when the plan merely reiterates duties the agency is already
20 obligated to perform, or perhaps when language in the plan itself creates a
21 commitment binding on the agency”. *Id.* CSRIA’s request for relief does not relate
22 to an abstract contracting decision under the bare Reclamation statutes, but to a
23 decision already made to pursue precisely what CSRIA offers. (*See* ECF No. 13,
24 at 13-15 (Project is congruent with Record of Decision).)

25 Defendants would also have this Court attempt to expand the *Norton* ruling
26 beyond the § 706(1) context to cover § 706(2) claims as well, where, as here, the

1 Dated: August 6, 2015.

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on August 6, 2015, I electronically filed the foregoing with
3 the Clerk of the Court using the CM/ECF system which will send notification of such
4 filing to the following:

5
6 Vanessa R. Waldref
7 Assistant United States Attorney
8 E-mail: USAWAE.VWaldrefECF@ussdoj.gov

9 and to the following non-CM/ECF participants: N/A

10
11 /s/ James L. Buchal
12 Counsel for Plaintiff