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Columbia Snake River Irrigators Association

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)

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Preliminary Statement

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

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

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

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

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

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

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

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

Argument

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

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

> "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or 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*

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> *denied on the ground that it is against the United States*". 5 U.S.C. § 702 (emphasis added).

The only limitations to this general waiver are where "any other statute grants consent to suit expressly or impliedly forbids the relief which is sought. *Patchak*, 132 S. Ct. at 2204 (quoting 5 U.S.C. § 702); *see also Tucson Airport Authority v. General Dynamics Corp*., 136 F.3d 641, 644 (9th Cir. 1998). In short, the APA is an "omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review". *Lexmark, Int'l v. Static Control Components, Inc*., 134 S. Ct. 1377, 1389 (2014). Sovereign immunity having been waived, this Court has jurisdiction under 28 U.S.C. § 1331. *See South Delta Water Agency v. BOR*, 767 F.2d 531, 535 (9th Cir. 1985) (upholding district court denial of motion to dismiss).

Defendants' sovereign immunity cases are not at all on point. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084 (9th Cir. 2007) interpreted the waiver of sovereign immunity in 28 U.S.C. § 1346(a)(1) to require that an administrative claim be first presented; the suit was dismissed for failure to first present such a claim. *Id.* at 1089. And in *Lane v. Pena*, 518 U.S. 187 (1996), there was no issue as to sovereign immunity for injunctive relief; the question related to claims for damages under the Rehabilitation Act, 29 U.S.C. § 794(a). CSRIA does not seek damages.

II. DEFENDANTS' DECISIONS ARE NOT "COMMITTED TO AGENCY DISCRETION BY LAW".

There is a general presumption that all agency decisions are reviewable under the APA, with federal courts to assess whether the actions were "arbitrary, capricious, or an abuse of discretion." *See Abbott Laboratories v. Gardner,* 387 U.S. 136, 139-141 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). In providing a remedy expressly for "abuses of discretion," Congress manifestly

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

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

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

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

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

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

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

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

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

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

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

[1] The Ninth Circuit later retreated from this holding in another case cited by 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.

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

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

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

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

As the D.C. Circuit has explained,

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

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

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

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

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

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

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

> "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

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

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

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

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

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

IV. CSRIA'S CLAIMS ARE RIPE FOR REVIEW

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

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

As to the first factor, the notion that reviewing the specific issues raised by CSIRA would constitute unwarranted "judicial interference" or result in "prematurely

[2] *See, e.g.*, H. Rep. No. 108-554, 108th Cong., 2d Sess. 70 ($250,000 for appraisal of 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).

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

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

Defendants also claim that their response to CSRIA's request to contract does not constitute "agency action" within the meaning of the APA, and is therefore not ripe for judicial review. The starting point for analysis is 5 U.S.C. § 551(13), which broadly defines "agency action" as: "includes[3] the whole *or part of* an agency rule, order, license, relief, or the equivalent or denial thereof, or failure to act . . ." (emphasis added). "Order" in turn "means the whole or part of a final disposition, whether affirmative, negative, injunctive *or declaratory in form*, of an agency in a matter other than rule making . . .". 5 U.S.C. § 551(6) (emphasis added). Defendants' letters, culminating in the March 5, 2015 letter, represent orders *declaring* legal obstacles to the exercise of contracting discretion that this Court has jurisdiction to remove.

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

[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.)

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

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

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

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

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

A. Defendants' NEPA Determination Is Reviewable

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

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

B. Defendants' Contractual Construction Is Reviewable.

As explained in some detail in the accompanying Declaration of Dr. Darryll Olsen (ECF No. 13, at 15-17), defendants maintain that by reason of the existing contractual relations with the District, they lack power to contract with CSRIA. The

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construction of the contract asserted to withdraw BOR's power to contract is a straightforward question of the kind routinely resolved by federal courts.[4]

C. Defendants' Water Law Determination Is Reviewable.

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

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

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

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

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

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

D. Defendants' Application of Cost Recovery Statutes Is Reviewable.

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

Defendants suggest that this Court's declaration resolving the foregoing issues would be an "impermissible advisory opinions" (ECF No. 7, at 18), but each and

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

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

V. EVEN IF BOR'S RESPONSE IS CHARACTERIZED AS A "FAILURE TO ACT," CLAIMS OF UNREASONABLE DELAY ARE REVIEWABLE UNDER THE APA.

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

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

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

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

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

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

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

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

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

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

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

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agency has not "failed to act" but has instead taken discrete action injurious to the plaintiff. The opinion cannot be generalized in this manner. *Cf., e.g., ONRC*, 465 F.3d at 983 (explaining *Norton's* limitation to § 706(1) claims). As the Supreme Court explained in *Norton*, "[a] 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline." *Id.* at 63. BOR's response to CSRIA's contract proposal is clearly a "denial".

BOR may or may not ultimately determine to contract with CSRIA, but what it may not do is refuse to contract based on misconceptions of the law. It is axiomatic that "an order may not stand if the agency has misconceived the law". *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). It is not legally required that BOR contract with CSRIA, but CSRIA does not seek in its Complaint an order requiring such relief. What is "legally required" is that BOR exercise its discretion in a manner consistent with law, and what CSRIA seeks is an order declaring that BOR has failed to do so, by misconceiving the law in numerous respects.

No case supports the extreme position of Reclamation in this case, namely that unless CSRIA might compel relief in the nature of mandamus directing defendants to execute a contract, it may compel no relief at all. Rather, courts routinely set aside discretionary agency decisionmaking for reliance upon erroneous legal determinations, and permit the agency to reconsider the matter with the Court's guidance. That is all that CSRIA seeks here.

Conclusion

For the foregoing reasons, defendants' motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

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

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