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

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

16 Plaintiff,

17 v.

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

25 Defendants.

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

**DECLARATION OF DR.
DARRYLL OLSEN**

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27
28 DECLARATION OF DR. DARRYLL OLSEN
Case No. 4:15-CV-05039-RMP

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1 Darryll Olsen, Ph.D declares:

2 1. I am the Board Representative/Principal Consultant for the Columbia-
3 Snake River Irrigators Association (“CSRIA”), and make this Declaration in
4 opposition to the motion to dismiss of defendants.

5 2. I hold a Ph.D. Degree from Washington State University specializing in
6 Resource Economics and Regional Planning, directed by the Office of Applied
7 Energy Studies, the Program in Environmental Science and Regional Planning, and
8 the Depts. of Agricultural Economics and Rural Sociology (1983). During the past
9 30 years, my employment and consulting work has included positions/projects with
10 Argonne National Laboratory, the Pacific Northwest Utilities Conference Committee,
11 the Northwest Irrigation Utilities, the U.S. Army Corps of Engineers, the State of
12 Utah Water Resources Dept./MWH Engineers, the Office of Columbia River-
13 Ecology/Adams County Commission, FortisBC Hydro, the Benton County Water
14 Conservancy Board, and with several other agencies and private sector groups. I also
15 hold an adjunct faculty position with Washington State University Tri-Cities, where I
16 teach graduate level courses in water resources economics (ESRP-490-590) and
17 provide associated guest lectures.

18 3. Defendants have provided a Declaration of Michael Cobell in support of
19 their motion to dismiss, who declares that he is “familiar with the subject matter” of
20 this lawsuit. (ECF No. 8, at 2.) I have been the person principally responsible for
21 contact with the U.S. Bureau of Reclamation (“BOR”) concerning the System 1,
22 North I-90 Project (“the Project”), and to the best of my knowledge, CSRIA has had
23 little, if any, dealings with Mr. Cobell. The principal BOR employees involved, and
24 the only ones who can testify with personal knowledge of relevant issues, are BOR’s
25 Senior Counsel Jack Hockberger, former Ephrata Office Manager Stephanie Utter,
26 and Christina Davis-Kerman, Contract Specialist.

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2 4. It is paramount to convey to the Court by way of summary that BOR's
3 failure to deal in a competent and honest manner in its review of the proposed
4 contracts for the Project totally ignores 21st century water use efficiencies, disregards
5 the necessity for direct private sector financing given the lack of federal funding for
6 the Odessa Subarea, and essentially corrupts the investment the State of Washington
7 has already committed to the East Low Canal modifications. In acting incompetently
8 and dishonestly, BOR has acted in a manner that is in an arbitrary and capricious
9 manner toward those it should be serving, and contrary to law. BOR's wrongful
10 conduct is causing continuing harm to the irrigators participating in the Project, and
11 to Odessa Subarea irrigators generally and their supporting communities.

12 **Background**

13 5. Mr. Cobell reports that for over a decade, BOR and the Washington
14 State Department of Ecology ("Ecology") "studied options for delivery of water in
15 the portion of the Odessa Groundwater Management Subarea ('Odessa
16 Subarea') . . .". (ECF No. 8, at 2.) He omits to disclose CSRIA's direct involvement
17 in this process, which began formally in the fall of 2010 with the issuance of the draft
18 of what later became the Odessa Subarea Special Study Final Environmental Impact
19 Statement "Draft EIS"). Through CSRIA, I was involved in various actions including
20 review comments that compelled BOR to reinstate direct water system delivery from
21 the East Low Canal north of I-90. The omission of this alternative from the Draft EIS
22 was itself arbitrary and capricious, and for reasons explained below, suggested
23 serious deficiencies in the decisionmaking of BOR management.

24 6. In the spring of 2011, Ecology and the Adams County Commission
25 asked CSRIA to assist in the process of reviewing the Draft EIS and advising how to
26 effectively deliver Columbia River water to the Odessa subarea. Specifically, CSRIA

1 was asked to address the configuration of delivery systems proposed in the Draft EIS
2 and the associated economic analyses. I was involved in multiple discussions and
3 formal presentations to BOR staff concerning the economic analysis in the Draft EIS.
4 In making these presentations, I employed an approach that was, in substance,
5 consistent with the National Economic Development (“NED”) direct value
6 accounting utilized by federal agencies such as BOR, and applications that would be
7 important for state considerations, such as the Regional Economic Development
8 (“RED”) account.

9 7. This interactions with CSRIA prompted the Bureau to reconfigure its
10 preferred alternative to reflect what became the actual “modified” alternative in the
11 Final EIS. The Draft EIS had totally excluded the North I-90 area from service from
12 the East Low Canal, even though this was and is the most cost-effective area for
13 development of distribution systems.

14 8. CSRIA also prepared a complete benefit-cost analysis for the entire
15 project systems being considered for the Final EIS modified alternative, including
16 pre-construction engineering analysis (Phase I analysis) followed by a Phase II
17 engineering and economic analysis of the potential project systems North of I-90. At
18 the request of several state legislators, this review was formally presented to
19 Washington State legislative committees. At the request of the local irrigators,
20 CSRIA also prepared further engineering and economics reviews and later included
21 System 4, South I-90. Several meetings were held with the System 3 participants as
22 well, who indicated their preference to build directly their own system, separate from
23 others or with what would later become the “normative” construction approach of the
24 East Columbia Basin Irrigation District (“the District” or “ECBID”). What was
25 ultimately under consideration were six systems all feeding off the East Low Canal,
26 but this case concerns only System 1.

1 9. On March 10, 2014, Ecology issued a Report of Examination (“ROE”)
2 confirming that BOR was authorized to withdraw up to 164,000 acre/feet of water per
3 year to serve up to 70,000 acres of irrigated agricultural lands within the Odessa
4 Subarea. A true copy of this Record of Examination is attached hereto as Exhibit 1.

5 10. The ROE established a development schedule that called for the project
6 to deliver replacement water to begin on April 1, 2014 and be completed by April 1,
7 2024. Absent any extension of this schedule by Ecology, BOR will lose the right to
8 supply the replacement water after 2024.

9 11. It is important to understand that the problem our Project is designed to
10 solve is one that has been festering for nearly fifty years and has now become critical.
11 As far back as 1967, Ecology closed the Odessa Subarea to drilling of large wells
12 because of declining groundwater levels. Farmers have been able for quite some time
13 to cope with such declining levels by drilling deeper wells, but this is no longer
14 working. Some of the Project participants have wells that have failed; in one case, an
15 attempt to drill a replacement well 3,000 feet deep failed—a dry hole.

16 12. Worse still, the groundwater quality has declined to the point where it is
17 interfering with the production of crops. Higher sodium levels limit the crops that
18 can be grown, as do ever higher sodium levels in the soil, which interfere with
19 nutrient uptake by crops. Farmers have attempted to offset these effects through the
20 use of offsetting soil amendments, such as calcium, but the long-term mineral buildup
21 threatens to turn the Odessa Subarea into not only a desert where no groundwater
22 may any longer be pumped, but where the soil is poisoned to the extent that it might
23 never be irrigated. There is an overriding public necessity to solve the groundwater
24 problem, but defendants are arbitrarily and capriciously rejecting the only available
25 solution: the Project.

1 13. The failing water supply threatens Eastern Washington with very large
2 economic losses, which defendants have computed in the range of \$210 million in
3 lost regional income (and 3,600 lost jobs) as early as 2020, just five years from now,
4 with larger losses as time goes on and groundwater levels continue to drop. It is
5 therefore not surprising that in the Final EIS, BOR expressed the possibility that
6 facilities construction could begin as early as 2014. These factors were further
7 stressed in the CSRIA Economics and Engineering Review provided to the
8 legislature.

9 14. Our best understanding of defendants' intentions concerning timing of
10 any efforts to distribute the water provided is in a July 18, 2014 letter from
11 defendants in which they state: "Reclamation is hopeful that among the results of the
12 process to renew the MWSC [Master Water Service Contract with the District
13 expiring in 2020] will be the achievement of a satisfactory arrangement to
14 accommodate the groundwater replacement needs of CSRIA's System 1 Project
15 participants". (ECF No. 8, at 99.)

16 15. Delay until 2020 or later before even entering into contracts to address
17 the critical groundwater problems of the Odessa Subarea, much less even
18 commencing construction of distribution systems, is manifestly unreasonable. There
19 is, as a practical matter, no alternative to the Project to serve the needs of the Odessa
20 Subarea, and BOR has not identified any such alternative, or entered into any
21 alternative contracts for service.

22 **The Vital Importance of Distribution System Economics.**

23 16. Representatives of BOR, including defendant Lorri Lee, have made it
24 clear that no federal monies for construction of facilities to replace Odessa
25 Groundwater will be forthcoming. The State of Washington did provide
26 approximately \$32 million to the District in a construction grant for an East Low

1 Canal widening project intended to increase canal capacity to deliver Odessa
2 groundwater replacement water—funding that CSRIA helped to secure by briefing
3 multiple legislators on the need for such. This work is distinct from the work
4 contemplated in the Project, which involves building lateral distribution systems off
5 the East Low Canal.

6 17. All of the Canal improvements needed for operation of the Project
7 (System 1) have been completed, but further improvements, estimated to cost \$20-25
8 million, are required to serve the entire Odessa Subarea lands. As of late 2014 and
9 early 2015, I was engaged in contacts with the Washington Legislature and
10 understood that the Legislature was prepared to provide these additional funds, but
11 only if BOR and the District ceased their unfounded objections to going forward with
12 the Project and related future projects to be funded by area landowners. At no time
13 has State funding of the distribution systems themselves been on the table; rather, the
14 Legislative leaders have expressed significant support for the System 1 Project and its
15 private funding approach.

16 18. For all these reasons, the distribution systems must be funded by the
17 farmers who will benefit from them. In order for this to “pencil out,” the incremental
18 crop revenues from an improved water supply must suffice to support the increased
19 costs required to pay down the costs of the capital improvements. Each system and
20 farm must have enough land in production to cover adequately the costs of new
21 construction.

22 19. Much of BOR’s EIS economic focus has been academic in nature and
23 not focused on the relationship between economics and finance on the ground. It has
24 at all times been obvious to landowners and their lenders that the incremental benefit
25 to Participants from replacing groundwater with surface water is to optimize the
26 water use across lands that have previously received water in some manner to

1 support the construction of the new distribution systems. With more efficient and
2 modern irrigation technology, farmers can grow substantially more crops on more
3 acreage with the same water, realizing the revenues needed to support the costs of
4 new distribution systems if the water is “spread” over this additional acreage. This
5 factor is what now drives the economics and financing of private sector irrigation
6 along much of the Columbia River system.

7 20. In discussion with BOR Regional Director Lee in Spokane, WA
8 (January 28, 2015), Ms. Lee appeared to be oblivious to the private sector irrigation
9 development in Eastern Washington that relies on water spreading technologies. For
10 example, her comments reflected no knowledge of CSRIA’s and its membership
11 extensive private irrigation development in Eastern WA/OR.

12 21. Working closely with staff of Ecology, we developed a plan to utilize
13 Ecology’s authority under Washington State water law, specifically RCW 90.03.380,
14 under which the new superseding water certificates to be issued to replace the retired
15 (and now standby) groundwater certificates (using permit surface water) would be
16 spread over additional acreage, reducing the amount of water to be applied annually
17 from three feet/acre (the standard BOR allotment) to about two feet/acre (2.1 acre-
18 ft./acre, System wide average). There were multiple discussions with Ecology, with
19 the lender representative present, to confirm the numbers and agreement that Ecology
20 would support using this approach in the Draft Water Service Contract for System 1.

21 22. Through the Project documents, the Participants have executed a “Water
22 and Primary Irrigation System Agreement (System One, North I-90),” binding
23 themselves collectively to mortgage their properties to fund a distribution system.¹

24 The signatures of the Participants on this document confirm that the landowners and
25

26 ¹ This document appears at ECF No. 8, at 72-97.

1 their financial institutions have carefully confirmed that the additional revenues from
2 groundwater replacement as provided in the Project are sufficient to fund the
3 distribution system. This is the same type of contract that is used by multiple project
4 irrigators on the mainstem Columbia-Snake River system.

5 23. We have on numerous occasions attempted to explain to defendants that
6 the distribution systems cannot be built unless they “pencil out”. The most extensive
7 effort to do so was at a meeting on October 3, 2014 in Ephrata, Washington. At this
8 meeting BOR staff raised questions concerning the economic viability of the System
9 1 water spreading, relative to the NED accounting used by BOR. Among other
10 things, I stressed that BOR practice of using enterprise budgeting to estimate direct
11 net values for irrigated agriculture was a cultural artifact of the mid-1950s, when real
12 markets did not exist. Today, the irrigated land markets do exist (the thing in itself),
13 and that was the basis for our benefits analysis, as further evidenced by the lenders
14 willingness-to-pay (lend) for new project development (replacement surface water).

15 24. I have about 30 years of experience in working with the NED Accounts,
16 including work on an early Odessa Subarea EIS released by BOR in the late 1980s.
17 At the meeting, I reconfirmed the positive benefit-cost ratios that had been presented
18 in the CSRIA 2012 Economics and Engineering report prepared for Ecology and
19 Adams County Commission, and re-emphasized the point that the spreading
20 increased the value of the “secondary” acres and actually made the projects
21 financially feasible for private irrigator funding. As referenced above, I stressed that
22 the market does not lie, but its invisible hand would slap anyone that ignored it,
23 including BOR or the District. That is, the BOR-District approach to financing will
24 fail, forcing delay and further economic harm to the irrigators.

25 25. I also pointed out that BOR staff had not previously considered the
26 necessity of, and feasibility limitations of, private irrigator funding in their

1 decisionmaking processes. CSRIA had been the only entity “working on the ground”
2 with the irrigators dealing with project engineering, economics, and finance.

3 26. Defendants eventually provided a detailed list of questions by e-mail of
4 November 14, 2014 (ECF No. 8, at 116-17), some of which related to these issues,
5 and by letter of November 21, 2014, a true copy of which is attached hereto as
6 Exhibit 2, we responded in detail. At no time have defendants ever provided us with
7 information to suggest that our review of the fundamental economics driving
8 privately-funded irrigation systems to deliver Odessa replacement water was
9 incorrect. And sadly, the BOR question list indicated that they had not even
10 bothered to read the Draft Water Service Contract, and supporting materials that had
11 been provided to them back in May.

12 27. The District has from time to time asserted that it can successfully build
13 distribution systems achieving the goals of the Project by issuing revenue bonds for a
14 local improvement district (“LID”) under Washington Law. The District’s
15 suggestions are associated with substantially higher construction costs arising
16 because of public contracting laws and general inefficiencies. Because of the novel
17 legal status of LID bonds under Washington law, as well as current capital market
18 conditions, there do not appear to be any tax-exempt interest savings through bond
19 financing. We have explained in detail to defendants how and why any District-
20 based alternative to the Project is either infeasible or much more costly than direct
21 private sector lending. Attached as Exhibit 3 is a true copy of an agenda and charge
22 used to explain these matters at an August 12, 2014 meeting between CSRIA and
23 defendants.

24 28. Subsequent to the August 12th meeting, many of the farmers to be served
25 by the District have executed formal statements rejecting the District proposal and
26

1 declaring “no confidence” in its alternative plans, which remain too vague for serious
2 analysis. Attached as Exhibit 4 is a true copy of such statements of no “confidence”.

3 29. Without farmer support, the District will be unable to fund any
4 alternative distribution system, and the farmers will not support a system that costs
5 more than the revenues to be realized to support it. Equally strange, in my direct
6 conversations with several irrigators, they repeatedly have asked me to explain the
7 District’s “normative financing” proposal/contracts, and how the District derived its
8 numbers, and how can the District justify its proposed assessments.

9 30. The vast confusion caused by the District’s proposals/contracts has led
10 CSRIA to request that a legal opinion be prepared concerning the legality of the
11 District’s “development fee”. A true copy of this opinion is attached hereto as
12 Exhibit 5, which demonstrated that the District’s proposal to charge, for example,
13 anyone building their own distribution system a \$120/acre fee is well beyond any
14 lawful parameters established under the state irrigation district code for assessments.
15 Specifically, the District’s development fee goes well beyond collection of costs for
16 proportional benefits received by the land assessed.

17 31. Another fallacy underlying the BOR-District “normative” approach is
18 that by attempting to “normalize” costs across multiple parties, the costs do not
19 decrease but *increase* given the acreage in play and District construction costs. In the
20 course of CSRIA’s work with the irrigators in the System 3 area, I learned that the
21 parties the farthest away from the East Low Canal turn-out cannot afford to pay the
22 system costs under either the Project or the District’s alternative, and the parties
23 nearer the Canal turn-out are subjected to higher costs under the District’s proposal
24 than actual construction costs—thus compelling them to not accept the District’s
25 normative cost structure.

1 32. Had BOR offered a timely response to our May 29, 2014 proposals (ECF
2 No. 8, at 38-97), construction would already be underway on the Project, and water
3 would have been flowing to the Participants by the start of the farming year in 2016.
4 We also stand ready to develop further project units to the maximal extent that can be
5 supported with private sector financing—that is, covering those areas where the
6 economic benefits of groundwater replacement are sufficient to support the cost of
7 the new distribution systems. It should be noted that there is nothing out of the
8 ordinary about private distribution systems operating in the Columbia Basin Project;
9 some 18,000 acres of land are already served by privately-developed irrigation
10 systems off the East Low Canal.

11 33. Although the State of Washington stands ready to issue up to 164,000
12 acre/feet of water for up to 70,000 acres of land, the Project and contemplated sister
13 projects will not reach these constraints absent fundamental and unexpected changes
14 in the costs of constructing distribution systems and the revenues Columbia Basin
15 farmers realize from irrigated agriculture in the Odessa Subarea.

16 34. In short, were BOR as an agency behaving in a fashion that was not
17 arbitrary, capricious and contrary to law, with any prospect of actually *solving* the
18 groundwater problems of the Odessa Subarea, BOR would recognize that the Project
19 is the only alternative available that can timely avoid serious economic disruption in
20 and around the Odessa Subarea.

21 **Initial Involvement of the East Columbia Basin Irrigation District.**

22 35. On July 14, 2014, the District advised BOR in writing that “our review
23 prior to Reclamation’s formulation of a Basis for Negotiation would be
24 unproductive” and that “the ECBID Board of Directors has instructed ECBID staff to
25 request that Reclamation complete a review of the proposal and related contracts
26 prior to completing an ECBID review”. (A true copy of this letter is attached as

1 Exhibit 6.) This remained the only statement by the District concerning the Project
2 until its manager, Craig Simpson, co-signed a letter with defendant Lorri Lee on
3 March 5, 2015 finally denying the Project; that letter is discussed below.

4 36. Defendants' immediate response to both the May 29th request for
5 contracting, and the District's July 14th letter asking for contract review, was to state
6 that they were "disinclined to complete formal review and consideration of the
7 contracts proposed by CSRIA for reasons identified below". (ECF No. 8, at 98.) The
8 very first reason articulated was that the Project "fall[s] outside the scope of [prior
9 environmental studies conducted pursuant to the National Environmental Policy Act
10 ("NEPA") and] would require further study and environmental compliance". *Id.*

11 **The NEPA Excuse.**

12 37. I have had extensive training (graduate-level course work in
13 Environmental Science and Regional Planning, WSU) and experience in the
14 preparation of documentation required under NEPA and accompanying regulations
15 issued by the Council on Environmental Quality ("CEQ") and expertise in the NEPA
16 requirements.

17 38. Preparing environmental documents required under NEPA has become
18 an expensive and time-consuming exercise. A federal agency might, in its
19 decisionmaking, reasonably attempt to avoid taking actions that would trigger the
20 need for additional NEPA analysis. A determination that additional NEPA analysis
21 would be required to contract with CSRIA, as opposed to other viable alternatives
22 (nonexistent in this case) would be a reason properly and significantly influencing
23 BOR's exercise of discretion in this matter.

24 39. However, BOR's assertion that "further study and environmental
25 compliance" would be required is obviously wrong. While a full exposition
26 concerning this issue is beyond the scope of this Declaration, the Project falls within

1 the proposed action analyzed in the FEIS and BOR may enter into the contracts we
2 seek without additional environmental analysis. BOR has stated as much in its ROD
3 to implement the preferred alternative in the FEIS. Paragraphs 37-39 of our
4 Complaint quote pertinent portions of the ROD, which BOR has put in the record as
5 ECF No. 8, at 7-37.

6 40. Ecology shared this understanding; the pertinent portion of its ROE (my
7 Exhibit 1) is quoted at paragraph 44 of the Complaint. The question of NEPA
8 coverage was discussed with both BOR and Ecology staff (Utter and Sandison) prior
9 to CSRIA submission of the Draft Water Service Contract. Even as early as the fall
10 of 2013, it was understood that considerable agency discretion applies here, as long
11 as the total acre-ft. and acres in the EIS were not expanded.

12 41. We provided additional explanation as to why BOR's NEPA fears were
13 groundless by letters of July 30, 2014, September 9, 2014, and October 10, 2014, true
14 copies of which are attached hereto as Exhibits 7, 8, and 9. BOR responded by letter
15 of November 5th that the Project was "in apparently irreconcilable tension with OSSS
16 [Odessa Subarea Special Study] planning documentation and the NEPA/SEPA
17 Record of Decision" (ECF No. 8, at 105.)

18 42. In substance, BOR claims that because the Project is not identical to
19 detailed designs analyzed as part of a detailed engineering report prepared at about
20 the same time as the Final EIS, additional NEPA analysis would be required. It is
21 obvious from the documentation that the NEPA analysis was never limited to a
22 specific design (as confirmed in discussion with Utter and Sandison); the ROD itself
23 notes that the specific "locations of pumping plants, canal side plants, re-lift plants,
24 and distribution pipelines are dependent upon participation of local landowners and
25 ECBID". (ECF No. 8, at 35)—necessarily meaning that the precise acreages within
26 the project area depended upon landowner participation as well. Even if the FEIS

1 were construed to evaluate the specific design analyzed by BOR staff, which it should
2 not be, the differences between the Project and that detailed design are not of
3 environmental significance. The environmental impacts of significance arise from
4 withdrawing additional water from the Columbia River, impacts which do not depend
5 upon the particular configuration of pipes used to deliver the water, not from
6 irrigating land which has already been irrigated.

7 43. There is, in short, an active controversy between BOR and CSRIA
8 concerning a straightforward question of law: whether or not entry into the proposed
9 contracts would require additional NEPA analysis. BOR's attorney has at times
10 identified this as a "first step" legal obstacle that has barred consideration of further
11 issues. A judicial declaration that there is no legal obstacle to contracting with
12 CSRIA arising from inconsistencies with BOR's planning documents will remove the
13 principal legal obstacle BOR has identified to contracting with us, and allow BOR to
14 exercise its contracting discretion uncontaminated by this error of law.

15 **No Requirement for District Involvement.**

16 44. The second reason for refusing to evaluate the Project which was
17 articulated in the July 18th response from defendants was that "any proposal . . . will
18 rely upon the active participation of the ECBID". (ECF No. 8, at 98.) This position
19 later evolved into the claim that such participation, and indeed a veto power by the
20 District over any contract with CSRIA, was mandated by BOR's contracts with the
21 District.

22 45. Specifically, by e-mail of February 11, 2015, BOR took the position that
23 its "Amendatory, Supplemental and Replacement Repayment Contract between the
24 United States of America and the East Columbia Basin District" (hereafter, "the 1968
25 Contract") forbid it from contracting with CSRIA: "USBR is not in a contractual
26

1 position to assume the formal role of arbiter between competing CSRIA and ECBID
2 economic approaches to OSSS service”. (ECF No. 8, at 119.)

3 46. As we pointed out by letter of February 17, 2015 (a true copy of which is
4 attached hereto as Exhibit 10), the District’s response to the CSRIA proposal had
5 been to request that BOR review the Project, a response inconsistent with any view
6 on the part of the District that BOR was powerless even to entertain the proposal,
7 inconsistent with the notion that the District had veto power over the proposal, and
8 also inconsistent with BOR’s previously-acknowledged power to contract directly
9 with CSRIA.

10 47. Prior to the February 11, 2015 communication, defendants had
11 confirmed that that they possessed independent authority to contract directly with
12 CSRIA. By letter of September 9, 2014 (my Exhibit 7), CSRIA formally requested
13 that defendants consider, as a potential alternative to the contract documents provided
14 back on May 29th, that BOR “discuss a direct service contract with System One
15 participants”. In his letter of November 5, 2014, BOR’s attorney acknowledged that
16 BOR has authority to contract directly with CSRIA, but stated that the agency was
17 declined to consider the exercise of such authority in light of the (baseless) its NEPA
18 objections discussed above. (ECF No. 8, at 101.)

19 48. By letter of March 2, 2015, defendant Regional Director Lee reaffirmed
20 BOR’s position that the 1968 contract gave the District, in substance, a veto power
21 over CSRIA’s proposal, declaring: “Without the support, coordination and consent
22 of the District, the Program cannot proceed.” (ECF No. 8, at 225.) This letter
23 constitutes, in substance, a refusal to contract with CSRIA based on an imagined lack
24 of power to do so without District consent. (The 1968 contract is ECF No. 8, at 122-
25 223.)

1 52. CSRIA had carefully reviewed existing groundwater rights within the
2 Odessa Subarea, characterized as “primary acres water permits,” with Ecology, and
3 reached agreement with Ecology concerning both the validity of these “primary acre
4 water permits” and the use of RCW 90.03.380 powers to spread water beyond the
5 places of use specified in those permits to additional acreage that had previously been
6 irrigated, and thus met BOR’s criteria for irrigable land. Specifically, CSRIA and
7 Ecology had identified approximately 9,733 primary acres, which would be expanded
8 to approximately 14,350 acres via state authorized water spreading, with no
9 expansion to the quantity of the allowed replacement water rights.

10 53. Ecology’s grant of the new secondary use permit replacement water
11 rights set forth in the ROE (my Exhibit 1) represents an administrative adjudication
12 of the water quantity allowed for replacement water rights, where the parent water
13 right is also a “perfected” certificate. As such, under Washington water law and as a
14 matter of administrative practice, neither Ecology nor the state conservancy boards
15 would make any attempt to limit the quantity of water that may be changed in place
16 of use under RCW 90.03.380 based on actual past use, a process known as an “annual
17 consumptive quantity analysis”. Rather, Ecology confirmed that we would simply
18 spread the initial three foot/acre BOR allotment beyond the 9,733 primary acres to
19 additional eligible acreage.

20 54. It is difficult to understand how much each and every person then
21 involved in the problems of the Odessa Subarea understood that this procedure was
22 both necessary and lawful. Those directly involved in the process of identifying the
23 acreage involved in the Project and the process of “spreading” the water included the
24 Director of the Columbia River Office of the Washington Department of Ecology,
25 Derek Sandison; Keith Stoffel, from Ecology’s Central Regional Office; as well as
26 the General Manager of the District, Craig Simpson; and Stephanie Utter and

1 Christina Davis-Kerman from BOR. Even prior to CSRIA's May 29, 2014 request to
2 contract with BOR, the BOR staff (Utter) expressed the need for the BOR to
3 reevaluate its contract policies, to take into account real world needs.

4 55. On July 1, 2014, representatives of CSRIA travelled to Othello,
5 Washington to present the Project to the District. We were surprised to hear Mr.
6 Craig Simpson objections to the water spreading concept. What was especially
7 surprising is that it was and is our understanding that the District has, in connection
8 with its own alternative proposals, also assumed that water could be spread to
9 improve the cost-effectiveness of distribution development, and based on the
10 available information,² notwithstanding the remarkable series of events described
11 below, *the District continues to rely upon the spreading concept, even as it now*
12 *insists it would be unlawful if utilized in connection with our project.*

13 56. By all appearances, Mr. Simpson and Mr. Sandison (and more recently
14 Mr. Sandison's attorney) have somehow induced BOR to believe in an interpretation
15 of Washington water law that not is only obviously incorrect, but also *one which they*
16 *have no intent to apply to anyone other than CSRIA and the Project Participants.*

17 57. In any event, in the wake of the July 1st meeting with the District, Mr.
18 Sandison issued an e-mail on July 3, 2014, declaring:

19 ". . . there have been proposals to distribute a portion to the water actually
20 allocated to lands that are determined to be eligible for replacement water to
21 lands that were previously irrigated under state-issued, seasonal water right
22 transfers. At this time, the department neither endorses nor opposes such
23 proposals. Decisions as to whether such proposals are appropriate lie within
24 the purview of the Bureau of Reclamation and the East Columbia Basin
25 Irrigation District, not the Department of Ecology."

26 ² For example, a handout from the District used at a meeting of landowners on November 20, 2014
27 (attached hereto as Exhibit 11), confirms that the District intends to allow landowners to include

1 He reiterated this point later that month in a meeting we had with Washington State
2 Senator Judy Warnick (Moses Lake, WA) stating, in substance, that he was not going
3 to override BOR. At this juncture, Ecology was stating that it had no objection to the
4 water spreading features of the Project so long as BOR did not.

5 58. Ecology is the agency charged by the Washington Legislature with the
6 administration of Washington water law, and it is further charged to “vigorously
7 represent [the State’s] interest before water resource regulation, management,
8 development, and use agencies of the United States”. RCW 90.54.080. The
9 fundamental axiom of Washington water law is to obtain “maximum net benefits”
10 from the State’s water resources, and in particular Ecology is charged to reduce
11 wasteful practices to the maximum extent practicable, taking into account sound
12 principles of water management, the benefits and costs of improved water use
13 efficiency, and the most effective use of public and private funds, and, when
14 appropriate, to work to that end in concert with the agencies of the United States and
15 other public and private entities”. RCW 90.03.005.

16 59. From this perspective, it is both remarkable and unseemly for an
17 Ecology official to declare, in substance, that Ecology “takes no position” on the
18 interpretation of Washington water law, and cause the Court to have concerns that
19 whatever Mr. Sandison, or his attorney, might say on this subject ought not to be
20 regarded as reliably relating to any formal position of Ecology. What this
21 communication also demonstrates, however, is that Ecology, or at least Mr. Sandison
22 (who has since left Ecology) was and apparently still is taking its cues from
23 defendants, hence this lawsuit against them. I must reiterate here that Mr. Sandison
24 consented to the numbers included in the Draft Water Service Contract to BOR—I
25

26 “seasonally transfer acreage” in water service contracts. It is precisely these same areas, not served
27 by the primary groundwater rights to be retired, to which the Project would spread water.

1 made it fundamentally clear that CSRIA would not put anything in the Draft WSC
2 that Ecology objected to—consent was required.

3 60. By letter of November 7, 2014, BOR’s attorney suggested that spreading
4 what he characterized as a “widely accepted benchmark delivery target of 3 acre-feet
5 per acre per year” to a lower number of feet/acre was “a significant break from past
6 practice requiring thorough explanation and justification from all governmental and
7 contracting entities involved”. (ECF No. 8, at 101-02.) Past practice, of course,
8 involved federal funding of the projects, with cost-benefit analyses that did not
9 require that irrigators bear the capital costs of improvements necessary to provide
10 service in the manner prevailing in the private sector. With the general abandonment
11 by BOR of federal funding for new irrigation development, it has at all times been
12 obvious that a new approach was needed.

13 61. We eventually, after multiple requests starting in August 2014, and
14 substantial delays, secured a meeting on January 28, 2015 with defendant Lorri Lee,
15 who as Regional Director appears to be the decisionmaker with respect to the matters
16 about which we complain. Prior to the meeting, we circulated materials emphasizing
17 the need to bring “21st century irrigation development” to the Odessa subarea, and
18 provided material from an engineering consultant explaining the cost advantages of
19 the Project. A true copy of those materials is attached hereto as Exhibit 12.

20 62. The meeting began on a sour note, as BOR’s attorney circulated a short
21 legal memorandum insisting, in substance, that so long as BOR refused to act on
22 CSRIA’s proposal, CSRIA was powerless to secure any legal relief. (A true copy of
23 his handout is attached hereto as Exhibit 13.)

24 63. Regional Director Lee, however, made no final denial, instead directing
25 staff to continue to work with CSRIA—she agreed that legal counsel for BOR and
26 CSRIA should proceed in a real review of the water service contract. Many of the

1 issues previously raised by BOR, *including the issue of delivering water to additional*
2 *acreage not within the existing places of use of groundwater rights*, were not even
3 raised by BOR, and did not then appear to be an obstacle.

4 64. CSRIA re-briefed the Regional Director on the fundamental features of
5 the Water Service Contract, noting that the CSRIA is the only entity that had previous
6 experience in building the systems (not the District); the only entity that had fully
7 secured financing to commence construction (\$42 million), and that CSRIA had
8 commitments for up to about \$100 million to move forward with multiple system
9 construction. The systems would all be “turn-key” projects, constructed by CSRIA
10 and the Participants, with operational control turned over to the District. It was clear
11 that BOR staff had not previously advised the Regional Director concerning the
12 “turn-key” nature of the Project.

13 65. Unfortunately, as described above, the next thing we heard from
14 defendants was the February 11th e-mail, which not only declared that BOR’s contract
15 with the District made it impossible for BOR to act with respect to the Project, but
16 also declared that as a matter of Washington water law, and specifically RCW
17 90.44.510, the plan to spread the water to additional acres was illegal. (ECF No. 8,
18 at 120.) By letter of February 17 (Exhibit 10 hereto), we offered our initial thoughts
19 as to why this view was incorrect.

20 66. On or about March 5, 2015, we received a letter jointly signed by
21 defendant Lorri Lee and the District General Manager, Craig Simpson, which
22 asserted that “Ecology has informed us that it has been determined that under
23 Washington state law relating to the Odessa Subarea, irrigated acreage cannot be
24 expanded in the manner proposed by CSRIA because water can only be supplied to
25 places of use specified under currently effective water right documents”. (ECF No. 8,
26 at 225.)

1 this being an invention of BOR and the District. We later learned, through a Public
2 Records Act request to Ecology, that defendants had solicited Mr. Sandison's
3 signature on this letter as well, but that he had declined to do so.

4 72. When we pressed both Ecology and defendants for disclosure of the
5 supposed determination, we received a letter from a lawyer purporting to represent
6 Ecology and "communicate Ecology's position on the state water rights permitting
7 processes that would be applicable to the" Project. (ECF No. 8, at 232-39.) I am an
8 expert on Washington State water permitting and water spreading processes, and this
9 dispute arises in a context where there is no controlling regulation, rule, or policy
10 issued by Ecology. Moreover, the letter was released literally as Mr. Sandison was
11 leaving his job with Ecology, and we can only speculate as to what sort of
12 misinformation produced the letter.

13 73. The attorney's claim that some sort of "tentative determination of the
14 extent and validity" concerning the Odessa groundwater rights would have to be
15 conducted here is inconsistent with Ecology practice, as confirmed by Exhibit 14. It
16 is also inconsistent with Washington water law as implemented in the context of
17 newly issued water rights such as Exhibit 1. As noted above, the superseding water
18 right represented by Exhibit 1 is tied to a fully perfected reservoir storage certificate,
19 it replaces existing certificates, and it is subject to an administrative adjudication
20 exempt from relinquishment conditions for five years.³

21 74. As the attorney acknowledges (ECF No. 8, at 236), the purpose of such
22 examinations in this context is confirm actual use (undisputed here) and then
23 determine whether the stated amount on the water right has been relinquished through
24 nonuse. Here, however, the Legislature has declared that "any period of nonuse of a
25

26 ³ CSRIA has previously confirmed through litigation with Ecology and deposition questioning of
27 Mr. Sandison the water law principles and practices discussed here.

1 right to withdraw groundwater from the aquifer [within the Odessa groundwater
2 subarea] is deemed to be involuntary due to a drought or low flow period” (RCW
3 90.44.510(1)(a)), avoiding any claim of relinquishment. There is no reason
4 whatsoever to conduct any “extent and validity” examination in this context—other
5 than to verify that the Participants in the Project held valid groundwater rights, which
6 I already accomplished as described above.

7 75. The Legislature intended that Ecology issue a “superseding water right
8 [which] shall designate that portion of the groundwater right that is replaced by water
9 from the federal Columbia Basin project as a standby or reserve right that may be
10 used when water delivered by the federal project is curtailed or otherwise not
11 available”. RCW 90.44.510. The water from the federal Columbia Basin project to
12 which the statute refers is the water right documented in Ecology’s ROE discussed
13 above.

14 76. The new water right, like any other water right, is subject to spreading
15 under RCW 90.03.380. There is nothing about the Odessa Subbasin that makes this
16 statute inapplicable within its boundaries. The procedure I worked out with
17 Ecology’s regulators—rather than the attorney—simply combines the issuance of the
18 superseding water right with application of RCW 90.03.380. No law or rule forbids
19 this procedure.

20 77. The attorney’s letter contemplates a two-step process whereby initial
21 superseding certificates would be issued, and then modified, and then claims that in
22 the second step, Ecology “is inclined towards the denial” of the modifications “in
23 advance of the potential receipt of water supply” as “detrimental to the public
24 interest”. (ECF No. 8, at 239.) There is no reason to believe that when BOR
25 ultimately determines to deliver the water as we request, Ecology would be inclined
26 to stand in the way of solving the Odessa problem. It is difficult to express how

1 irrational and contrary to all prevailing law, practice and procedure such a “public
2 interest” conclusion would be. Fighting 21st century agricultural development
3 because it would “enable increases in irrigated acreage” (*id.*) with the same quantity
4 of water ought to offend all interests involved in Washington policy.

5 78. As far as we know, the attorney never spoke with the Ecology
6 representatives who worked with me to devise the plan of Project implementation.
7 We are confident that discovery of these representatives will confirm that the attorney
8 is at best entirely misinformed.

9 79. The last statement of defendants’ position was a letter dated March 18,
10 2015, in which defendants claim a “consensus,” based on a June 28, 2011 meeting
11 that Odessa Subarea irrigators generally favor a three foot/acre water allotment, and
12 that to “impose a two acre-foot per acre per year duty on those water right holders
13 would, in a sense, dilute their lands’ existing vested entitlements . . .”. (ECF No. 8,
14 at 229.) I am familiar with the attitudes and wishes of irrigators within the Odessa
15 Subarea, and whatever they might think in the abstract about how much water they
16 might like to receive if the federal government is subsidizing the capital costs of
17 delivery systems with federal appropriations, if they have to pay for the distribution
18 systems themselves, they cannot and will not do so unless the benefits of the water
19 are maximized as proposed in the Project. In multiple meetings with the irrigators
20 since 2011, they have repeatedly stressed their preference for water spreading, as
21 demonstrated by their approval for the Draft Water Service Contract. The BOR
22 staff’s question to the irrigators was academic, at best.

23 80. We have seen no evidence, in all our dealings with defendants, that they
24 grasp not only that application of RCW 90.03.380 in this context is lawful, but also
25 that it is *essential*. They are overlooking entirely a fundamental obstacle to the
26 implementation of their own ROD. So long as they insist, wrongly, that Washington

1 state water law forbids spreading the three-foot/acre allocation, private funding of
2 distribution systems simply does not pencil out.

3 **What Is Really Going On, and Why This Court Can Help.**

4 81. By all appearances, BOR's response to the Project is motivated in
5 material part by improper political interference from proponents of the District's
6 competing project. BOR's decisions have been based, in part, upon District self-
7 interest not relevant to lawful BOR decisionmaking. This self-serving motivation is
8 particularly clear in its attempts to compel irrigators to sign what amounts to
9 fraudulent contracts—forcing assessments for costs that grossly exceed benefits for
10 the land served.

11 82. In campaigning against the System 1 Project, the District is seeking its
12 own financial aggrandizement contrary to the interests of its irrigators. As far as we
13 can tell, the District is diverting some of the funds provided by the State of
14 Washington for canal-related improvements to attempt to develop alternative
15 distribution systems that would serve the substantially the same landowners as the
16 Project, yet failing entirely as described above. Mr. Sandison secured that Legislative
17 funding by depicting all the costs to be associated with canal improvements (attached
18 as Exhibit 17 is a true copy of the PowerPoint slide used by Mr. Sandison to present
19 the funding request during January 2013). The relevant construction grants from
20 Ecology disbursing the funds also do not appear to permit use of the funds to develop
21 distribution systems. (It is true that the final budget proviso language does not clearly
22 limit expenditures to canal improvements only.)

23 83. We are also informed and believe that the District has hired a powerful
24 Board member's relative to manage efforts to develop a competing project. As noted
25 above, the District has already proposed unlawful charges to those irrigators
26 struggling to develop their own irrigation systems under a limited program to utilize

1 water made available prior to Ecology's issuance of the ROE. Specifically, the
2 District proposes to impose a \$120/acre development charge bearing no relation to
3 any costs these irrigators would impose on the District.

4 84. The Regional Director's decision to permit the District's manager to co-
5 sign the March 5th letter with her is evidence of the Bureau's indulgence and support
6 of such illegal conduct and is a discredit to BOR. In declaring solidarity with the
7 District's efforts to collect substantial development charges barred under Washington
8 law, BOR is facilitating these violations by the District, conduct which further
9 supports our claim of conduct arbitrary, capricious and contrary to law.

10 85. Upon information and belief, BOR's response is also based upon the
11 improper factor of reacting against CSRIA's exercise of First Amendment rights, for
12 CSRIA has eventually come to criticize the District and BOR for what CSRIA has
13 described as acts of dishonesty and incompetence based on the events recited herein
14 and other events.


15 86. Back on March 2, 2015, CSRIA issued a Freedom of Information Act
16 request to BOR for communications between defendant Lorri Lee and her staff, or
17 representatives of the District, which relate to the replacement of groundwater in the
18 Odessa Subarea. BOR subsequently demanded \$590.25 to respond to this request,
19 which CSRIA paid back on April 8, 2015. CSRIA has yet to receive any responsive
20 documents, and strongly suspects that defendants are willfully withholding
21 documents that would confirm that their objections to contracting with CSRIA are
22 dishonest fabrications. We also have requested the District to provide a detailed
23 explanation of the development fee costs (\$120/acre) for those irrigators paying for
24 their own systems, and no response has been forthcoming.

25 87. By denying defendants' motion to dismiss, and proceeding to the merits
26 of the dispute, exposing BOR's stated objections as lacking any foundation in fact or

1 law, this Court's decision can penetrate the haze of dishonesty and incompetence that
2 defendants have thrown about the Project, and allow higher authorities in
3 Washington, D.C. to put BOR on a lawful path toward consideration of CSRIA's
4 contract proposal.

5 I certify under penalty of perjury that the foregoing is true and correct.

6 Executed on August 6, 2015

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9 Darryll Olsen, Ph.D
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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:

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

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

/s/ James L. Buchal
Counsel for Plaintiff