

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

AUDUBON SOCIETY OF GREATER DENVER, a Colorado non-profit corporation,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

1. Since its creation in 1974, the 5,378 acre Chatfield State Park has become one of the most beloved and utilized state parks in the State of Colorado. Given its close proximity to Denver, the Park hosts over 1.6 million visitors per year (more than any other park in the State) and offers a wide and diverse range of activities to its visitors including boating, biking, hiking, ballooning, horse-back riding, and wildlife viewing. Additionally, the cottonwoods and meadows that surround the reservoir provide habitat to the greatest number of birds in the region. Chatfield is a nature sanctuary and rich outdoor educational laboratory for adults and children looking to escape urban life and learn.

2. The Park is also home to a great diversity of terrestrial and aquatic habitat and wildlife including fourteen bird species that are listed or protected at the federal or state level.

3. On May 29, 2014, the United States Army Corps of Engineers, Omaha District, (“Corps”) authorized a plan, which will radically transform the Park, bringing in construction crews to clear-cut hundreds of acres of vegetation and intermittently flood the cleared area in order to expand the Chatfield Reservoir.

4. The Chatfield Reallocation Project will disrupt walleye spawning and destroy hundreds of acres of cottonwood trees, natural wetlands, and habitat for birds and other wildlife in the park. The reallocation will also result in an unsightly “bathtub ring” of mudflats around the reservoir because most of the time the reservoir will not be full to its new capacity. Further, the park will lose many of the existing day-use areas, associated infrastructure, and 587 acres of wildlife habitat and recreational land. The Corps expects these project impacts to result in a loss of \$3.4 million in park revenues and a substantial loss in number of park visitors.

5. These impacts to the recreational and educational opportunities at the Park represent significant costs to the public to create additional storage capacity for water providers with junior-priority water rights, even though many have already dropped out of the project.

6. Denver Audubon asked the Corps to evaluate and adopt more meaningful and less impactful alternatives to deal with the storage request from junior-priority water right holders, including the use of readily available off-site gravel pits directly adjacent to

the Park or existing reservoirs with excess storage capacity. Instead, the Corps turned a blind eye and simply ignored Denver Audubon's suggested alternatives.

7. In the process of approving the Chatfield Reallocation, the Corps has failed to comply with federal laws that require it to consider a reasonable range of project alternatives, foster informed public participation, and select the least environmentally damaging alternative.

8. The Corps focused on junior-priority water rights holders' preferred, and ultimately chosen, alternative instead of fully exploring reasonable solutions such as use of alternate sites and enhanced water conservation. In so doing, the Corps chose the most environmentally damaging alternative when it approved the Chatfield Reallocation.

9. Further, because the Corps utilized inconsistent water yield terms and did not disclose essential information on the project participants' water rights, neither the Corps, nor the public, have a complete and fully informed understanding of the true impacts of the Chatfield Reallocation.

10. Finally, the Corps improperly evaluated the project by segmenting the reallocation of recreational facilities and mitigation from the reallocation. This improper segmentation allowed the Corps to avoid selecting the least environmentally damaging alternative.

11. This case is filed pursuant to D.C.Colo.LAPR 10.2(c) and challenges the Corps' approval of the Chatfield Reallocation Project.

12. Specifically, Denver Audubon challenges the Corps' May 29, 2014 decision approving the Chatfield Reallocation Project as a violation of the National Environmental Policy Act ("NEPA"), Clean Water Act ("CWA"), and Administrative Procedure Act ("APA").

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1346 (civil action against the United States) because the United States Government is a defendant, and it arises under the federal laws of the United States.

14. This Court may grant the relief requested pursuant to 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing injunctive relief); and 5 U.S.C. §§ 701-706 (providing for judicial review of agency action under the APA).

15. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the events or omissions out of which these claims arise took place in this district.

16. There exists now between the parties an actual, justiciable controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

PARTIES

17. Plaintiff AUDUBON SOCIETY OF GREATER DENVER ("Denver Audubon") is an independent autonomous chapter of the National Audubon Society with its office and nature center located in Chatfield State Park in Littleton, Colorado. Denver Audubon is a non-profit organization whose mission is to advocate for the environment, connecting people with nature through conservation, education, and research.

18. Denver Audubon has been involved with the Denver community for over 42 years, offering educational opportunities to children and adults throughout the Greater Denver region and at the Audubon Center in Chatfield State Park. Denver Audubon is also actively engaged in promoting conservation activities throughout the Greater Denver region.

19. Denver Audubon's office is located in Chatfield State Park. Members regularly visit Chatfield State Park to enjoy the beauty and ecological wealth of the area. Members of Denver Audubon engage in outdoor recreation, wildlife viewing, and other recreational activities in Chatfield State Park and intend to continue to do so.

20. The Chatfield Reallocation will adversely impact the educational, recreational, aesthetic, and conservation interests of Denver Audubon and its members. Thus, Denver Audubon, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by the Corps' failure to comply with NEPA and CWA. Denver Audubon brings this action on behalf of itself and its adversely affected members. The requested relief will redress Denver Audubon's and its members' injuries.

21. Defendant UNITED STATES ARMY CORPS OF ENGINEERS is an agency of the United States within the Department of the Army. The Corps owns Chatfield Reservoir and was responsible for reviewing and authorizing the Chatfield Reservoir Reallocation Project.

FACTUAL BACKGROUND

Chatfield State Park Overview

22. Since its creation in 1974, Chatfield State Park has become the most visited state park in Colorado by attracting approximately 1.6 million visitors per year.

23. The park offers a wide range of unique recreational activities ranging from fishing, boating, birding, hot air ballooning, hiking, biking, horse riding, scuba diving, lap swimming, kayaking, canoeing, rescue dog training, cross country skiing, snowshoeing, conducting nature studies, camping, to model airplane flying.

24. As the park is located just 25 miles from downtown Denver at the confluences of the South Platte River, Deer Creek, and Plum Creek, it provides natural space and recreational opportunities for many people in the Denver Metro area.

25. The 5,378-acre park also consists of a variety of habitat types ranging from wetlands, to grasslands, to mature cottonwoods.

26. These habitats support a wide range of natural wildlife that is a large part of Chatfield's character and appeal to visitors.

27. Specifically, Chatfield provides habitat to 14 bird species that are listed or protected at the federal or state level.

28. Further, the Corps identified 375 different species of birds that occur in Chatfield State Park.

29. One group that greatly relies on Chatfield State Park is Denver Audubon. Denver Audubon was invited to establish its offices as well as a nature center in Chatfield in 1998.

30. Denver Audubon relies on Chatfield State Park to further its organization's mission of conservation, education, and research, as well as to provide valuable educational and recreational experiences for a variety of age groups utilizing the park.

Chatfield Reservoir Reallocation Storage Impacts

31. On May 29, 2014 the Corps issued the Record of Decision (“ROD”) approving Alternative Three for the Chatfield Reallocation.

32. The approval of the Chatfield Reallocation Project in the ROD means construction crews will begin to cut and remove approximately 296.3 acres of trees in preparation for rising water levels.

33. Crews will destroy approximately 42.5 acres of mature cottonwoods during this process.

34. Tree removal could be completed in one to three months depending on the size of construction crews.

35. After the crews remove the trees, the Corps will potentially flood 587 acres of parklands and wildlife habitat.

36. The tree removal and flooding will destroy wildlife habitat, many recreational opportunities, and the aesthetic of the park.

37. Flooding may impact 157.2 acres of vegetated wetlands if the water levels are maintained at the maximum storage level of 5,444 feet for an extended period of time.

38. The reallocation will also require the dredging and filling of 6.9 acres of natural wetlands in order to move the recreational facilities away from the rising water.

39. The reallocation will further change the aesthetic of the park by creating an ugly “bathtub ring” around the entire reservoir resulting in extensive mudflats most of the time because maximum water storage in the reservoir is only projected to occur one every 3.5 years.

40. Furthermore, the project will result in a loss of \$3.4 million in park revenue and a number of park visitors.

41. This decreased revenue could affect other Colorado state parks, as some money raised at Chatfield is used to support other, less profitable parks.



Current Conditions – East Perimeter



Post-Reallocation – Low-water conditions (depiction)



Post-Reallocation – Rare High-water conditions (depiction)

Images from savechatfield.org

Chatfield Reservoir Storage Reallocation History

42. The Chatfield Reallocation process began in 1986 when the Water Resources Development Act of 1986 authorized the Secretary of the Army to study whether to reallocate storage space in Chatfield Reservoir used for flood control to other uses, if requested by the state.

43. Beginning in 1996, a Reconnaissance Study was conducted on Chatfield Reservoir, which determined 20,600 acre-feet was the maximum amount of additional water storage the reservoir could take without jeopardizing its flood control abilities or requiring major costs.

44. In the beginning of the project, 30 water providers were interested in Chatfield, but only 16 chose to pursue the project and pay a share of the feasibility study costs.

45. In 2004, the Corps issued a notice of intent to the public declaring its plan to prepare an Environmental Impact Study and a Feasibility Report on Chatfield. The Corps then began scoping meetings with the public and government agencies on the project and its potential alternatives.

46. The scoping process continued through 2005.

47. In 2009, a project website was developed by the Colorado Water Conservation Board to host materials from the Corps regarding the project.
<http://chatfieldstudy.org/>.

48. From 2007 to 2012, the project proponents posted a limited number of project information signs around the park gates and information centers.

49. The contact phone number on these signs was incorrect.
50. Although Denver Audubon brought this issue to the attention of the Corps and project proponents, nothing was done to fix the problem for at least five months. State Park personnel fixed the signs, rather than the Corps or the project proponents.
51. As the project has continued over the years, more and more water providers have left the project for better solutions to their water needs.
52. In 2007, Hock Hocking left the project.
53. Just a year later, Parker Water and Sanitation District also dropped out of the project.
54. Parker WSD built the Rueter-Hess Reservoir project to meet its future water needs.
55. In 2011 and 2012, both Perry Park and the City of Brighton dropped out, respectively.
56. Upon information and belief, indicate that both the City of Aurora and Roxborough are trying to leave the project or have already left.
57. The Colorado Water Conservation Board has been purchasing empty storage space to enable the project to proceed even though numerous water providers have found more feasible and efficient alternatives.
58. At this time, the project has yet to attract a single new participant.
59. Denver Audubon has been an active stakeholder and participant throughout the project's planning phases including participating in the state's mitigation planning process.

60. Denver Audubon representatives have attended “coordination meetings” with the Corps, the State, and the water providers since early 2002 to express concerns over the project and the need for full mitigation of all its impacts.

61. Denver Audubon submitted comments at the scoping phase of the NEPA process, as well as both the draft and final EIS.

62. Denver Audubon Board Members also participated in an initial tour of the project site in 2003.

63. Two Denver Audubon members (Ann Bonnell and Gene Reetz) served as Technical Advisors to the Project. For example, Ann Bonnell served on the committee that calculated the Ecological Function Values that were used in determining the extent of mitigation needed to compensate for the project’s impacts.

Studies Conducted on Chatfield Reallocation

A. Draft Integrated Feasibility Report and Environmental Impact Statement

64. In June 2012, the Corps issued the “Draft Integrated Feasibility Report and Environmental Impact Statement” (“DEIS”) for public comment.

65. At the time the DEIS was published, the project had 15 participating water providers.

66. The DEIS examined four alternatives.

67. Alternative One is a no-action alternative relying on Penley Reservoir and gravel pit storage. Alternative One floods only 186 acres of land (including approximately 12.26 acres of wetlands), has no water quality impacts, results in minimal vegetation loss, and utilizes already existing gravel pits resulting in no additional environmental impacts.

68. Alternative Two, the least costly alternative to Chatfield Reallocation, calls for the use of non-tributary ground water and gravel pit storage. Alternative Two requires some construction for new wells and gravel pits but destroys even less vegetation than Alternative One, and only floods nine acres of wetlands.

69. Alternative Three calls for 20,600 acre-feet of storage in Chatfield Reservoir. Alternative Three destroys 586 acres of bird and other wildlife habitat, a minimum of 42.5 acres of mature cottonwood trees, and 159 acres of natural wetlands.

70. Alternative Four examines the use of a combination of gravel pit storage, non-tributary ground water, and just 7,700 acre-feet of storage in Chatfield Reservoir. Alternative Four impacts 328 acres of wildlife habitat and 119 acres of wetlands.

71. The Corps selected Alternative Three, the most environmentally damaging alternative, as its preferred alternative.

72. During the DEIS alternatives analysis, several alternatives were removed from further consideration including the use of Rueter-Hess reservoir and gravel pits, as well as aquifer storage and recovery.

73. The DEIS removed Rueter-Hess from consideration on the basis that it would require the construction of entirely new and expensive infrastructure.

74. The DEIS also removed Rueter-Hess because it was off-stream.

75. The DEIS also removed Rueter-Hess because the Corps believed that Parker Water and Sanitation District, the reservoir owner, had not made any additional capacity available.

76. The DEIS did not consider using existing and planned infrastructure to move water through the Chatfield area to Rueter-Hess Reservoir for storage.

77. However, there is existing or planned infrastructure from Project WISE that connects Chatfield Reservoir to Rueter-Hess. Corps of Engineers, Public Notice NWO-1997-80472-DEN. (2011).

78. Project WISE is a partnership between water providers to maximize the use of both Denver and Aurora's reusable return flows. This partnership includes many participants of the Chatfield Reallocation Project.

79. The Corps is also involved in permitting for Project WISE, but there is no coordination between Project WISE and Chatfield that is apparent to the public, such as Denver Audubon.

80. The existing infrastructure of Project WISE anticipates using 34 miles of pipeline laid down by Aurora running from the South Platte River to Aurora Reservoir as part of the Aurora Prairie Waters Project.

81. In the future, infrastructure will run from Aurora Reservoir to Rueter-Hess.

82. As a result, water could run through Chatfield Reservoir, down the South Platte River, to be piped to Aurora Reservoir, which will be later be connected to Rueter-Hess Reservoir.

83. The DEIS also eliminated upstream gravel pits from further consideration, including the Titan ARS gravel pit. These gravel pits are different from the downstream gravel pits considered as part of Alternatives One and Two.

84. The Titan ARS gravel pit is located approximately one mile from Chatfield State Park with 11,000 acre-feet of potential storage capacity.

85. The DEIS eliminated the Titan ARS gravel pit due to its limited storage capacity and the logistics of combining the pit with other small capacity reservoirs in the area.

86. The DEIS also did not consider the use of enhanced water conservation to meet the project's purpose and need.

87. California demonstrates the impacts of enhanced water conservation programs. The Metropolitan Water District of Southern California saved almost 1.9 million acre-feet of water over the past 20 years by increasing its use of water conservation measures.

88. The Metropolitan Water District of Southern California implements many more water conservation measures than Colorado at this time.

89. Denver Water recently partnered with other Western municipal water suppliers and the Department of Interior to promote enhanced water conservation projects for the Colorado River, further demonstrating the availability of conservation measures to increase water available for other uses.

90. The DEIS only considered existing water conservation programs rather than additional water conservation measures in the alternatives analysis.

91. The DEIS eliminated water conservation by stating that "the water shortages of sustainable water supplies . . . will not be resolved by water conservation measures alone . . ." U.S. Army Corps of Engineers, Dep't of the Army, Draft Integrated Feasibility

Report & Environmental Impact Statement for Chatfield Reservoir Storage Reallocation 2-16 (Jun. 2012).

a. The 404(b)(1) Guidelines Analysis

92. The DEIS also contained a CWA 404(b)(1) analysis on the project.

93. For this analysis, the Corps segmented Chatfield Reallocation into three parts: (1) the raising of water levels in the reservoir, which does not involve any dredge and fill; (2) the relocation of the recreational facilities as a result of the rising water levels, which does involve dredge and fill; and (3) the environmental mitigation required as a result of the rising water levels, which also involves dredge and fill.

94. The Corps applied a 404(b)(1) analysis to just the relocation of recreational facilities and environmental mitigation portions of the project.

95. The Corps made conflicting statements in the DEIS regarding the interdependence of the reallocation, recreational facilities relocation, and environmental mitigation.

96. Early in the DEIS, the Corps says that the facilities relocation is “an integral component of [Alternative Three], as it is required to address the adverse impacts caused by operating the reservoir under the new system, which involves a significant change in how water levels fluctuate within the reservoir.” U.S. Army Corps of Eng’rs, Dep’t of the Army, Draft Integrated Feasibility Report & Environmental Impact Statement for Chatfield Reservoir Storage Reallocation 6-2 (Jun. 2012) [hereinafter DEIS].

97. Similarly, in its Compensatory Mitigation Plan, the Corps states that the environmental mitigation “is considered an integral part of the recommended plan, and as

such, its implementation must be carried out concurrently as part of the overall project.”

DEIS at app. K, 22.

98. Then, in the CWA 404(b)(1) analysis, the Corps states that the facilities relocation and environmental mitigation are “incidental to the proposed reallocation.”

DEIS at app. W, W-5.

99. The DEIS does not explain why the Corps changed its position regarding the integral nature of the relocation of facilities and mitigation to the overall project.

100. As a result of the project segmentation, the Corps did not appropriately complete a Least Environmentally Damaging Practicable Alternative (“LEDPA”) analysis on the project alternatives considered in the NEPA process.

b. Commentary on the DEIS

i. Battelle

101. The Corps hired an independent expert, Battelle Memorial Institute (“Battelle”), to review the DEIS.

102. Battelle presented its findings in a “Final Independent External Peer Review Report,” which provided twenty-seven specific criticisms on the DEIS.

103. Specifically, Battelle noted that “more detail could have been presented in the FR/EIS to allow comparisons of water supply yields and reliability among the various alternatives.” *Final Independent External Peer Review Report Chatfield Storage Reallocation Study and Environmental Impact Statement*, 2011 Battelle Memorial Inst. iii, available at <http://savechatfield.org/documents/BattelleReport.pdf>.

104. Battelle also went on to note that the EIS contained inconsistencies in terminology on water yield and water yield analyses that made it difficult to determine water yield characteristic differences between the alternatives.

ii. Denver Audubon

105. Denver Audubon submitted comments on the DEIS calling for the use of gravel pits, aquifer storage and recovery, Rueter-Hess reservoir, and enhanced water conservation programs to be considered by the Corps as a reasonable alternative(s).

106. Denver Audubon alerted the Corps that the DEIS was confusing to use and understand, particularly the use of mixed terms describing the water yield from the project.

107. Denver Audubon also voiced concerns that the Corps demonstrated serious bias toward the preferred alternative to the detriment of the overall DEIS.

108. The comments from Denver Audubon on the DEIS also discussed the improper segmentation used by the Corps for its CWA 404(b)(1) analysis on the project.

109. Denver Audubon was not the only commentator to criticize the Corps' segmented 404(b)(1) analysis. EPA also repeatedly told the Corps that segmentation of the project was improper.

110. EPA twice stated that in the case of Civil Works projects, such as Chatfield Reservoir, the Corps' 404(b)(1) Guidelines, the Corps' Planning Guidance Notebook, and the Corps' regulations on dredge and fill all consider a single and complete project.

111. EPA later changed its position on the 404(b)(1) analysis without explanation.

B. Final Integrated Feasibility Report and Environmental Impact Statement

112. In July 2013, the Corps released the “Final Integrated Feasibility Report and Environmental Impact Statement” (“FEIS”) for public comment.

113. In drafting the FEIS, the Corps included the following purpose and need statement:

The purpose and need is to increase availability of water, providing an additional average year yield of up to approximately 8,539 acre-feet of municipal and industrial (“M&I”) water, sustainable over the 50-year period of analysis, in the greater Denver Metro area so that a larger proportion of existing and future water needs can be met.

114. The FEIS contains the same four final alternatives as the DEIS to meet this purpose and need statement.

115. In comparing the four alternatives, the FEIS applied inconsistent terminology when explaining water yield analyses of each alternative to determine if the alternative could meet the purpose and need of the project.

116. In various parts of the FEIS the Corps calculated either an “average year yield” or a “dependable yield” for the project and its alternatives.

117. The FEIS defines “average year yield,” or “average annual yield,” as the average annual amount of water expected to result from the storage of available water rights.

118. The FEIS repeatedly uses “average year yield” instead of the more widely accepted terms of “safe” or “firm” yield.

119. The use of the term “average year yield” is contrary to what is used in the Corps’ Handbook on Water Supply Planning and Resource Management, which uses “safe” yield.

120. The Corps’ handbook defines “safe yield” as the maximum quantity of water that can be reliably available throughout the most severe drought of record, or some other specified criterion.

121. The Corps’ handbook does not define the term “average year yield.”

122. While the project has an estimated 8,539 acre-feet of average year yield, it has **zero dependable yield**. (emphasis added). Even though the Corps examined multiple different measures for “dependable yield,” the dependable yield at Chatfield is zero however it is calculated.

123. The important finding of zero dependable yield was buried in Appendix BB of the FEIS.

124. The FEIS does not contain the specific water rights that were the basis of the average year yield calculations.

125. Environmental impacts to the park as well as to downstream habitat may change depending on the types and amounts of water rights stored in Chatfield Reservoir.

126. Further, the purpose and need statement requires an additional 8,539 acre-feet of M&I water.

127. However, the tables of water rights in the FEIS show that agricultural water rights will be stored in Chatfield Reservoir.

128. The FEIS does not contain an explanation for whether these agricultural rights were used in calculating the average year yield of M&I water for the project to meet the purpose and need.

129. The FEIS also does not explain whether the project may satisfy its purpose and need without these agricultural rights in the M&I water average year yield calculations.

130. The FEIS also does not contain an explanation of how it used the water rights of the Colorado Water Conservation Board (“CWCB”) in calculating the project’s average year yield of M&I water.

131. The CWCB’s water rights are only to be used to preserve the natural environment and are not for M&I water usage.

132. However, CWCB currently holds approximately 25% of the unassigned water storage that will be available after reallocation.

133. The FEIS does not contain an explanation of whether the project meets its purpose and need of 8,539 acre-feet of average year yield for M&I water with CWCB claiming 25% of the project’s unassigned water rights.

a. The 404(b)(1) Guidelines Analysis

134. The FEIS also contains the final CWA 404(b)(1) analysis on the project.

135. The 404(b)(1) analysis remains identical to the analysis in the DEIS.

136. The FEIS continues to segment the Chatfield Reallocation into three parts before doing the 404(b)(1) analysis.

137. As in the DEIS, the Corps did not complete a Least Environmentally Damaging Practicable Alternative (“LEDPA”) analysis on the project alternatives considered in the NEPA process.

b. Commentary on the FEIS

i. Denver Audubon

138. Denver Audubon again submitted comments on the FEIS, and again called for enhanced water conservation, aquifer storage, Rueter-Hess reservoir, and gravel pits to be considered as an alternative.

139. Denver Audubon once again alerted the Corps that the FEIS was confusing for the public to use and understand, which was furthered by the mixed use of terms for the project’s water yield.

140. Denver Audubon continued its criticism of the Corps’ 404(b)(1) analysis, since the project does not avoid and minimize impacts, and the project has been improperly segmented for the analysis.

141. Denver Audubon went on to question the reliability of mitigation in the park as Denver Audubon has a vested interest in the long-term well-being of the park.

Record of Decision

142. On May 29, 2014, the Corps issued the Record of Decision (“ROD”) approving Alternative Three for the Chatfield Reallocation. Jo-Ellen Darcy, the Assistant Secretary of the Army for Civil Works signed the ROD.

143. The ROD is a final agency action.

144. The ROD's approval of the Chatfield Reallocation Project was based on the FEIS.

FIRST CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
Improper Exclusion of Reasonable Alternatives

145. Each and every allegation contained in the preceding paragraphs of this complaint is incorporated by references as if fully set forth herein.

146. The Corps' Chatfield Reallocation failed to comply with the mandate that NEPA analysis and documentation be based on a reasonable range of alternatives. 42 U.S.C. §§4332(2)(C)(iii) & (E).

147. NEPA requires that agencies consider, evaluate and disclose to the public "alternatives" to the proposed action and "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of resources". 42 U.S.C. §§4332(2)(C)(iii) & (E). NEPA's implementing regulations require federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. §1502.14. Additionally, the evaluation of alternatives must constitute a "substantial treatment," presenting the impacts of the alternatives in comparative form "sharply defining the issues and providing a clear basis for choice among options by the decision-maker and public." Id.

148. The Corps may not exclude an alternative solely on the basis that the alternative alone cannot solve the entire problem being addressed. *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002).

149. Here, the Corps excluded enhanced water conservation and gravel pits on the basis that alone they cannot offer a complete solution to the water shortage issue addressed by the project.

150. In addition, the Corps may not eliminate a reasonable alternative because it requires action by an outside party. *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

151. Further, when an alternative meets the purpose and need of the proposed action, it must be considered by the agency in the EIS. *See* 40 C.F.R. § 1502.13; *Custer Cnty.*, 256 F.3d at 1041.

152. Here, the Corps eliminated Rueter-Hess Reservoir as an alternative because the reservoir's owner, Parker Water and Sanitation District, had not made any additional capacity available.

153. The Corps also stated that it eliminated Rueter-Hess Reservoir because the reservoir could not meet the project's purpose and need, as it required the construction of entirely new infrastructure. However, planned and existing infrastructure mean Rueter-Hess can in fact satisfy the purpose and need of the project.

154. Therefore, the Corps violated NEPA, its implementing regulations, and applicable case law by improperly excluding a range of reasonable alternatives that incorporated enhanced water conservation, the Titan ARS gravel pit, and the possible use of Rueter-Hess Reservoir. *See* 40 C.F.R. § 1502.14; *Mineta*, 302 F.3d at 1122; *Morton*, 458 F.2d at 836.

155. The Corps' failure to adequately consider reasonable alternatives featuring water conservation, gravel pits, and Rueter-Hess was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5 U.S.C. § 706(2)(a).

SECOND CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. §§ 4332)
Failure to Promote Informed Public Participation and Decision-Making

156. Each and every allegation contained in the preceding paragraphs of this complaint is incorporated by references as if fully set forth herein.

157. In order to meet the twin aims of NEPA, the EIS must foster informed public participation and informed decision-making by including information essential to a reasoned choice among alternatives. 40 C.F.R. § 1502.22(a) ; *Friends of Marolt Park*, 382 F.3d at 1095; *Colo. Env'tl. Coal*, 185 F.3d at 1172.

158. Here, the Corps is engaging in a water storage project, but failed to disclose essential information to the public regarding the water rights that are going to be associated with this project. The Corps did not provide such information as the water rights origins, priorities, and yield calculations. The changing list of participants in the project also hinders informed decision-making and public participation.

159. The Corps also undermined informed public participation and informed decision-making by selectively using terms that are misleading and contrary to the Corps' own practices.

160. The Corps' failure to disclose essential information, failure to make key consequences of the project clear in the FEIS, and its use of misleading terms prohibited its own informed decision-making, as well as the public's informed participation.

161. These actions by the Corps were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law under the APA. 5 U.S.C. § 706(2)(a).

THIRD CLAIM FOR RELIEF

Violation of the Clean Water Act (40 C.F.R. § 230)
Improper Segmentation of the Chatfield Reservoir Storage Reallocation

162. Each and every allegation contained in the preceding paragraphs of this complaint is incorporated by references as if fully set forth herein.

163. The Corps, in authorizing its own discharge activities, must adhere to the CWA's 404(b)(1) Guidelines and choose the LEDPA. 30 U.S.C. §1344; 40 C.F.R. § 230.10(a).

164. The Corps has segmented the Chatfield Reallocation Project into smaller actions, thus enabling them to constrict the LEDPA analysis to just the relocation of facilities and the environmental mitigation. The Corps compared the mitigation measures to other onsite mitigation alternatives, instead of comparing Alternative three to the other Alternatives. Without the existence of the reservoir reallocation, these mitigation measures would have no life of their own and would not be necessary.

165. Because of this improper segmentation, the Corps did not conduct a proper LEDPA analysis for the Chatfield Reallocation project. The Corps should have compared Alternative three to the other alternatives to determine the LEDPA.

166. This action by the Corps was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5 U.S.C. § 706(2)(a).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Audubon Society of Greater Denver respectfully requests that the Court enter judgment granting the following relief:

1. Declaratory judgment that the Corps' failure to consider enhanced water conservation, the Titan ARS gravel pit, and Rueter-Hess Reservoir as part of a range of reasonable alternatives violated NEPA;

2. Declaratory judgment that the Corps violated NEPA with its failure to disclose essential relevant information regarding the participants' water rights and by its use of misleading terms;

3. Declaratory judgment that the Corps violated the 404(b)(1) Guidelines by improperly segmenting the project and conducting a LEDPA analysis for the facilities relocation and mitigation measures instead of for the whole project;

4. Vacate the May 29, 2014, Record of Decision for the Chatfield Reservoir Storage Reallocation project;

5. Enjoin the Corps from going forward with the Chatfield Reservoir Storage Reallocation, cutting down and removing the trees and vegetation, beginning mitigation measures, and allowing the storage of water by the participants, or any portion thereof, unless and until the violations of law set forth herein have been corrected to the satisfaction of this Court;

6. Award Plaintiff its costs of litigation, including reasonable expert witness fees and attorney fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or any other applicable provisions of law; and

7. Grant plaintiff such further relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted,

/s/ Kevin J. Lynch

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Dated: October 8, 2014

Plaintiff:

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