



U.S. Department of Justice

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October 2, 2018

Via CM/ECF

Elisabeth Shumaker, Clerk of Court
Byron White Courthouse
United States Court of Appeals for the Tenth Circuit
1823 Stout Street
Denver, CO 80257
(303) 844-3157

Re: *Audubon Society of Greater Denver v. U.S. Army Corps of Engineers*,
10th Cir. No. 18-1004 (argued on September 24, 2018)

Dear Ms. Shumaker:

At oral argument, Audubon suggested that the Corps' selection of the Chatfield Reallocation was arbitrary because it would result in "zero dependable yield." Arg. at 6:05-6:32. The panel asked the Corps to address whether the Reallocation would in fact supply additional water and what factors would affect that supply. This letter filed under FRAP 28(j) responds to those questions.

First, Audubon has forfeited its claim that the Reallocation will be ineffective because it raised that claim for first time on appeal at oral argument. *Federal Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998). Second, Audubon raised similar claims in the district court, PAA333-41, and the court rejected them, PAA511-20.

Regardless, the Corps selected the Reallocation alternative after concluding that it would provide "additional average year yield of up to approximately 8,539 acre-feet" and would therefore meet the project's purpose and need. PAA628. The average year yield is the average amount of water the providers will be able to capture and store

each year, taking into account their water rights and ability to recapture water, Colorado law, and natural inflows. PAA628, 645-46, 741, 1070-71. The average yield calculations were based on data showing that the providers could have captured and stored between 2,379 and 20,600 acre-feet of water each year from 1942 to 2000. PAA648, 966.¹ The Corps anticipates that the providers with rights to store water in the reallocated space will recapture and store at least 2,379 acre-feet of used water in drought years, PAA799, 964-66, and will likely capture and store the 20,600 acre-feet maximum every three to four years, PAA778, 1068-69.

References to “dependable yield” do not undermine the Corps’ analysis. “Dependable yield” refers to the reliability or predictability of water supply. PAA964. Given environmental factors and the providers’ junior rights, the providers will likely capture and store between 2,379 and 20,600 acre-feet of water each year. PAA778, 799, 964. The Corps took that variability into account when it calculated the 8,539 acre-feet average yield. PAA815, 827.

Sincerely,

/s/ Sommer H. Engels

Sommer Engels

Attorney for the Federal Appellees

cc: Counsel of Record (via EM/ECF)

¹The Corps also disclosed that the water rights to be stored could change. PAA645-46, 964, 981.

CERTIFICATIONS

I hereby certify that this letter complies with the type-volume limitations of Fed. R. App. P. 28(j) because the body of the letter contains 350 words total.

I also certify that on October 2, 2018, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. The parties in this case will be served electronically by that system.

This filing does not require paper copies and no privacy redactions have been made. The digital submission has been scanned for viruses using the most recent version of Endpoint Protection and is free of viruses according to that program.

/s/ Sommer H. Engels
SOMMER H. ENGELS

Attorney for the Federal Appellees