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October 8, 2018

Elizabeth Shumaker, Clerk of the 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,

The Corps submitted a FRAP 28(j) letter on October 2 which did not cite any new supplemental authority, but instead cited the administrative record for points discussed extensively in the district court. Denver Audubon respectfully submits this letter in response.

The court directly asked counsel for the Corps whether there would be an increase in water supply from the Chatfield Reallocation Project. Arg. at 14:30-14:42; 15:23-15:27; 15:40-15:51. The Corps failed to answer that question directly, either at oral argument or in its 28(j) letter. However, as counsel for Denver Audubon pointed out, the discussion of “zero dependable yield” for the project was found in Appendix BB of the Final Environmental Impact Statement. PAA0964.¹ “Dependable yield” refers to the reliability and predictability of water supply. PAA0964. The Corps’ discussion of the term

¹ The Corps used five separate measurements to calculate “dependable yield,” not six as initially stated by counsel for Audubon at oral argument. PAA0964; Arg. at 6:16-6:30.

“average year yield” obscures the fact that in many years, especially the driest years, the yield of the project will be zero. PAA0337-41.

Furthermore, Appellees did not answer the court’s questions about how decreed water rights impact reliability. Arg. at 16:28-16:51. However, the Corps’ own analysis provides a direct answer: “groups seeking storage space in Chatfield have relatively minor water rights, they will often not be able to capture inflows, as senior rights holders have priority for available water and capture most of the run-off.” PAA0964. Additionally, because numerous participants have dropped out of the project, no one knows what decreed water rights might potentially be stored at Chatfield.²

Denver Audubon respectfully requests that the court vacate the Corps’ Record of Decision and wishes to remind the court of Denver Audubon’s pending motion for an expedited ruling, in light of the ongoing construction activities at Chatfield State Park.

Sincerely,

/s/ Kevin J. Lynch
Kevin J. Lynch
Alexandra Tressler
Arthur Sayre

Attorneys for the Audubon Society of Greater Denver, Appellants

² Although this issue figured heavily in argument before the district court, PAA0333-37, it was not included in this appeal. However, the facts are in the record, *see, e.g.*, PAA0646, and respond to the court’s questions on decreed water rights.