IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:14-cv-02749-PAB

AUDUBON SOCIETY OF GREATER DENVER,
Petitioner,
v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent;

CASTLE PINES METROPOLITAN DISTRICT, ET AL.,
Intervenors-Respondents.

Petitioner's Motion for Preliminary Injunction

Certification of Compliance with Duty to Confer

Pursuant to D.C.COLO.LCivR 7.1, the Audubon Society of Greater Denver conferred with counsel for Respondent and Intervenors by email and telephone, who indicated that their clients oppose this motion.

Introduction

The Audubon Society of Greater Denver ("Denver Audubon") respectfully moves for this court to enjoin the United States Army Corps of Engineers ("Corps") from approving any further plans to implement the Chatfield Reallocation Project ("Project"). Furthermore, Denver Audubon asks this court to enjoin the Intervenors from starting or continuing the construction work at Chatfield State Park ("Park").[1] This includes commencing any construction on the new recreational facilities and any clearing of vegetation associated

[1] The Intervenors formed the Chatfield Reservoir Mitigation Company ("CRMC") to implement the Chatfield Reallocation Project and control the CRMC.

with that construction or otherwise because the implementation of the project will irreparably harm Denver Audubon and its members.

Despite the fact that this Project was approved based on the Corps' faulty Clean Water Act ("CWA") analysis and its arbitrary and capricious decisionmaking, the Intervenors are assuming that this court will rule in their favor and plan to implement the beginning stages of the Project. This implementation will cause irreparable harm to Denver Audubon by eliminating the ability of its members to utilize and enjoy the natural and diverse environment throughout the Park. Denver Audubon has continuously monitored the Park and hoped that a decision on the merits of its claims would be made prior to any detrimental action taking place. However, as soon as Denver Audubon became aware of the Intervenors' concrete plans to begin implementing the Project, it has worked to prepare this motion enjoining such actions as quickly as possible. (Ex. 4, Gene Reetz Decl. ¶ 4-7.) [2]

Legal Background

Preliminary injunctions are an appropriate remedy if: (1) the movant is likely to suffer irreparable harm absent the injunction; (2) the movant is likely to succeed on the merits of the case; (3) the harm the movant is likely to suffer absent the injunction outweighs any harm the injunction will impose on the defendant; and (4) the injunction is

[2] Although review of Administrative Procedure Act ("APA") claims is limited to the evidence contained in the administrative record, when a party to an APA suit is seeking an injunction, the court may look to evidence outside of the record for non-merits issues. *See Art Smart*, 843 F.3d at 898 (three-day evidentiary hearing held for preliminary injunction.)

not adverse to the public interest. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).[3]

A movant suffers irreparable harm if: (1) its environmental interests are injured because "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration i.e., irreparable," and (2) the harm demonstrated is not merely speculative, but is both certain and imminent. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236, 1249-50 (10th Cir. 2017). In the Tenth Circuit, harm is imminent if it is likely to occur prior to a decision on the merits. *N.M. Game & Fish*, 854 F.3d at 1250.

The second factor the court weighs is the likelihood of the movant succeeding on the merits. In order to establish a substantial likelihood of success on the merits the movant must present a prima facie case, but need not show a certainty of winning. *Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. US Dept. of Transp*., 843 F.3d 886, 901 (10th Cir. 2016).

The third factor the court weighs is the balance of harms. The balance of harms weighs in favor of the movant if it can demonstrate that the harm it is likely to suffer absent

[3] The Tenth Circuit has historically disfavored injunctions that disturb the status quo, injunctions that are mandatory as opposed to prohibitory, and injunctions that afford the movant all the relief it may recover at the conclusion of a full trial on the merits. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1994). However, Denver Audubon is not seeking a disfavored injunction. This injunction would maintain the status quo, is prohibitory, and would not afford Denver Audubon all of the relief it seeks because it would simply prevent the CRMC from altering the status quo of the park for a limited duration.

the injunction outweighs any harm the injunction will impose on the defendant. *Valley Cmty. Pres. Comm'n v. Mineta,* 373 F.3d 1078, 1083 (10th Cir. 2004). When the harms that an enjoined party is likely to suffer are minimal due to an injunction that will not serve to enjoin a party for a long duration, those harms should be diminished. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014). Furthermore, the court also discounts harms that are "self-inflicted." *Valley Cmty.,* 373 F. 3d 1078 at 1086-87.

Lastly, the court will weigh the public's interest in the injunction. The Tenth Circuit recognizes a movant's right to equitable relief so long as the injunction would not be adverse to the public interest. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1201 (10th Cir. 1992). The public has an "undeniable interest" in an agency's compliance with the National Environmental Policy Act ("NEPA") and the CWA; therefore, injunctions that would ensure that an agency is complying with the NEPA prior to implementing a project would not be adverse to the public interest. *Colorado Wild Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1223 (D. Colo. 2007); *Sierra Club v. City of Colo. Springs*, No. 05-cv-01994-WDM-BNB, 2009 U.S. Dist. LEXIS 73922, at *51 (D. Colo. Aug. 20, 2009).

Factual Background

In 1999, the Audubon Society for Greater Denver established its office and nature center in the Park because it is one of the best birding destinations in Colorado, is very close to Denver, and has the unique benefit of having developed infrastructure. (Ex. 1, Norm Lewis Decl. ¶ 11.) Since then, Denver Audubon has been providing park visitors with

educational and recreational opportunities to view the variety of rare bird species that live in and migrate throughout the Park. (Hugh Kingery Decl. ¶10, ECF 49-5.)

In 2013, the Project was approved and has since presented a substantial threat to the diverse environment within the Park that the members of Denver Audubon use and enjoy. AR040957. The Project will allow water providers to store additional water in the reservoir by raising the maximum water level for storage of municipal water from 5,332 feet above sea level to 5,444 feet. AR036150.

As a result of this elevated high-water level, many of the Park's recreational facilities in their current locations would be submerged when the water is at its highest. AR041040. To implement the Project, the Intervenors were forced to agree to relocate all of these facilities. AR041043. They intend to relocate some of the facilities to where the new shoreline will be or raise the plots that some of the facilities are on using fill material to accommodate that new water level. AR044448. However, the new shoreline will rarely be at the new high water level, making it likely that in most years the new facilities will be far away from the shoreline of the reservoir. *See* AR038272.

In each of these areas the first step prior to beginning construction is what is known as "clear and grub." AR038320-42. Furthermore, the CRMC's Tree Management Plan describes that in the interest of safety to boaters, it will remove "wood debris," which is defined as vegetation on the ground greater than two inches in diameter, in any area that will be submerged by the reallocation. (Ex. 4, Gene Reetz Decl., Attach. E.)[4]

[4] Respondent and Intervenors stipulate that the Chatfield Construction Schedule and Tree Management Plan attached are accurate copies of portions of the CRMC's website.

Due to a concern that it would suffer irreparable harm if the Project was implemented, Denver Audubon, unsuccessfully, sought information about the Corps and the Intervenors' plans for implementing this Project numerous times. (Ex. 4, Gene Reetz Decl., Attach. A-C.) Finally, in late November 2017, the CRMC released a schedule of construction activities and associated closures of various areas of the Park on its website. (Ex. 4, Gene Reetz Decl., Attach. D.) According to the schedule, construction on the Balloon Launch Area, Catfish Flats Day Use Area, Deer Creek Day Use Area, Fox Run Day Use Area, Jamison Day Use Area, Massey Draw Day Use Area, North Boat Ramp, and Swim Beach, began on December 4, 2017. *Id.* All of these areas will be closed to the public during construction. *Id.* Furthermore, the West Perimeter Road will be closed at various times to accommodate construction vehicle traffic. *Id.* Construction on these areas and the associated closures have already begun throughout the Park. (Ex. 4, Gene Reetz Decl. ¶ 7.)

Argument

The implementation that has already begun, specifically, the effects of operating construction machinery, and the habitat removal along with the eventual flooding of the Park is irreparably harming the individual members of Denver Audubon and the organization itself. Furthermore, Denver Audubon has shown that it is substantially likely to succeed on the merits, that any environmental injuries it would suffer absent this injunction outweigh any harms the defendants are likely to suffer, and that the injunction would not be adverse to the public interest.

I. Denver Audubon will suffer irreparable harm that is imminent absent this injunction because the implementation of this Project will disrupt the peaceful and diverse environment of the Park.

The implementation of the Project will negatively impact the wild and natural areas of the Park that Denver Audubon and its members use and enjoy in a variety of ways. Because these impacts negatively affect the environmental, recreational, educational, and aesthetic interests of the organization and its members, they constitute irreparable harm that cannot be compensated through monetary damages. Furthermore, because the implementation is currently underway, these harms are imminent.

A. The implementation of the Project will have significant negative impacts on the interests of Denver Audubon.

The implementation of this Project will irreparably harm Denver Audubon and its members because the noise and other impacts associated with construction, the removal and destruction of habitat, and the eventual flooding of the Park will render specific areas of the Park either unenjoyable or unusable for the organization and its members. Additionally, each of these harms will hinder the ability of Denver Audubon to carry out its organizational mission.

Construction activities will harm Denver Audubon and its members as soon as they begin. Construction of this magnitude will involve the use of machinery and will force the Corps to close areas of the park while construction is ongoing. (Ex. 4, Gene Reetz Decl., Attach. D.) Many members of Denver Audubon recreate and lead birding field trips in the densely vegetated areas surrounding the Swim Beach and Plum Creek, two areas that are currently closed or will be in December 2017. (Ex. 1, Norm Lewis Decl. ¶ 5.) The noise from machinery and these closures will diminish or eliminate the ability of Denver Audubon's members to use and enjoy these areas peacefully. (Ex. 1, Norm Lewis Decl. ¶8.) For

example, due to the limited access to certain areas of the park, Denver Audubon will not be able to perform its yearly Christmas Bird Count, eliminating one year of scientific data that has been collected since 1974. (Ex. 5, Polly Reetz Decl. ¶ 3-6.) Further, it will likely scare off the more skittish species of bird, and reduce the recreational value of the Park for members of the organization that enjoy birding in these areas. (Ex. 1, Norm Lewis Decl. ¶ 7.)

The clearing and grubbing of vegetation and the removal of underbrush, which the Corps dismissively refers to as "removing debris," will cause further irreparable harm to Denver Audubon and its members. The vegetation and underbrush is essential habitat for a variety of animals including the various species of bird found throughout the Park. (Ann Bonnell Decl. ¶ 11, ECF 49-4.) It provides several important ecological functions including food, water, and cover for resident and migratory bird and wildlife species. (Ex. 1, Norm Lewis Decl. ¶ 7.) And, although it is difficult to ascertain the exact quantity of harm that will result to these species, the harm is certain, not theoretical. *Id.* The removal of this habitat will, at a minimum, make the areas inhospitable to animals and force the birds to relocate. *Id.* This reduction in bird habitat and wildlife in the Park will force the members of Denver Audubon, many of whom live very close to the Park, to have to travel a potentially great distance to view what they previously could in their own backyard. (Ex. 1, Norm Lewis Decl. ¶ 10.)

Lastly, the flooding of the Park and its associated impacts will lead to a less attractive, and therefore, less utilized state park by Denver Audubon and its members as well as the general public. Because the high water level will only occur three out of every ten years, most years there will be an unsightly mud ring around the edge of the reservoir.

This will diminish the aesthetic appeal of the Park. This diminishment in appeal will reduce Colorado Parks and Wildlife revenue generated by the Park by $3.4 million and reduce the Park's recreation economic development value by $15.6 million over a 50 year period. AR036242. The reduction in the park's value will negatively impact the ability of Denver Audubon to carry out its organizational mission. (Ex. 1, Norm Lewis Decl. ¶ 11.)

In pursuit of its mission to educate the Denver Community, Denver Audubon provides wildlife education trips to schools, birders, corporate groups and others who want to experience and learn about birds and their environment. (Ann Bonnell Decl. ¶ 5, ECF 49-4.) These programs are so successful because of the Park's infrastructure, its incredibly diverse environment, and its proximity to Denver. (Ex. 1, Norm Lewis Decl. ¶ 11.) Removing it would diminish, or prohibit altogether, Denver Audubon's ability to offer these services that are the core of its organizational mission. (Ann Bonnell Decl. ¶ 5, ECF 49-4.)

The Corps may argue, as it did in the EIS, that the environmental harms caused by this project will be fully mitigated. However, as the Supreme Court stated in *Amoco*, environmental injury is often permanent or long lasting. *Amoco,* 480 U.S. at 545. Even if the Corps does mitigate these impacts by replacing vegetation in the Park and elsewhere, it will take decades for that vegetation to mature to the point where it is able to support the diverse wildlife that the existing vegetation can. (Ex. 1, Norm Lewis Decl. ¶ 7.) Much of this replacement will not mitigate the harm suffered by Denver Audubon because the majority of it will occur outside the Park, some of it on private land inaccessible to Denver Audubon's members. AR036570.

The harm that will occur to Denver Audubon should the implementation of the Project be allowed is irreparable in the sense that it is permanent or long lasting and cannot be compensated by monetary damages. The loss of habitat that will occur should the underbrush and vegetation be removed cannot be adequately replaced. As a result, Denver Audubon members will no longer be able to bird or peacefully enjoy the serenity of the Park, and the organization will no longer be able to fulfill its mission to connect people with nature through conservation, education, and research." (Ex. 1, Norm Lewis Decl. ¶ 11.)

B. Because this Project has begun and will continue to expand, these harms are likely to occur prior to the Court making a decision on the merits.

While the Court has reviewed its claims, Denver Audubon has refrained from attempting to enjoin the implementation of this project. However, as the CRMC began construction activities on December 4, 2017, Denver Audubon faces the threat of continuing and imminent irreparable harm. Because it would appear that the opposing parties are proceeding with implementing the Project before the Court can make a decision on the merits, Denver Audubon respectfully requests that the Court enjoin the CRMC and the Corps from continuing to move forward with the Project until it makes a decision, which according to opposing counsel is expected to be soon.

The schedule indicates that construction on the recreational facilities along with the mitigation at Plum Creek are the first steps of the Project. The irreparable harm from this construction will begin immediately. The noise from the construction machinery will hinder the organization's members' ability to quietly enjoy the peaceful environment of the Park, and it will scare away any birds in the area eliminating the ability for private and

educational birding. (Ex. 1, Norm Lewis Decl. ¶ 8.) This will occur even before the contractor breaks ground because staging these elaborate construction projects will require it to close the areas in order to move in machinery. (Ex. 4, Gene Reetz Decl., Attach. D.) Therefore, the harm is likely to occur prior to a decision on the merits of Denver Audubon's claims.

One of the first stages of the modifications to recreational facilities is the removal of any underbrush and "wood debris" that the Corps believes will pose safety hazards to boaters. (Ex. 4, Gene Reetz Decl., Attach. E.) This will destroy essential habitat for birds and other animals, irreparably harming Denver Audubon's members and the organization itself. Because this is one of the first steps of the construction that began on December 4, 2017, it is likely that the irreparable harm it will cause to Denver Audubon will occur prior to a decision on the merits.

If the Corps continues to approve various portions of the implementation of this Project, and the Intervenors are allowed to continue construction, Denver Audubon will suffer irreparable harm. The environmental interests of Denver Audubon will be significantly impacted because its members will no longer be able to peacefully enjoy the Park and engage in any birding. Because construction has already begun throughout the areas of the Park that the members use, this harm is imminent. Therefore, the further implementation of the Project should be enjoined until the Court makes a decision on the merits of this case.

II. Denver Audubon is substantially likely to succeed on the merits because the Corps' approval of the Project was arbitrary and capricious and not in accordance with the law.

As shown in Denver Audubon's briefs, this Project was approved based on a faulty CWA analysis and is the result of arbitrary and capricious decisionmaking. (Pet'r Opening Br. at 16) (ECF 49). The Corps failed to select the Least Environmentally Damaging Practicable Alternative ("LEDPA") as required by the CWA, failed to perform an adequate alternatives analysis in the EIS, and it did not foster informed decisionmaking. *Id.* Therefore, Denver Audubon is substantially likely to succeed on the merits.

A. The Corps violated the CWA by segmenting the Project in order to avoid having to compare all four NEPA alternatives in its 404 analysis, and as a result it did not choose the LEDPA.

The Corps not only failed to abide by its own regulations, but it also departed from established precedent without a reasoned explanation by failing to use the NEPA alternatives as a basis for its 404(b)(1) analysis. (ECF 49 at 17.) Instead the Corps unlawfully segmented the Project and only analyzed alternatives to the proposed recreational modifications. *Id.* at 23. This meant that the Corps chose Alternative 3 to the Project, which is the **most** environmentally damaging alternative. *Id.* at 21. Because the administrative record shows that the Corps failed to abide by its own regulations and departed from precedent by arbitrarily segmenting this project under its 404(b)(1) analysis, it is likely that Denver Audubon will succeed on the merits of its CWA claim.

B. The Corps failed to comply with NEPA, which requires an agency to evaluate all reasonable alternatives and foster informed decisionmaking and public participation.

As discussed in Denver Audubon's opening brief, the Corps' approval of this project was not in accordance with the law because it eliminated some alternatives due to the fact that they would not solely accomplish the purpose and need and another alternative

because it required action by a third party. (ECF 49 at 30.) In addition, the Corps made incorrect assumptions regarding future water rights holders and used misleading, non-standard terms regarding water yield when conducting the EIS. *Id.* at 42. Therefore, Denver Audubon has shown that it is substantially likely to succeed on the merits of its NEPA claims.

III. Because the harms suffered by Denver Audubon are irreparable and any harm suffered by the opposing parties as a result of this injunction would be minimal, the balance of the harms weighs in favor of Denver Audubon.

Any harm from a temporary delay to the start of construction on the Project caused by this injunction would be outweighed by the environmental harm suffered by Denver Audubon and its members absent this injunction. The Corps will likely not suffer any harms as a result of this delay because it is not responsible for funding or completing any of the construction associated with the recreational modification. AR041043. Any harms suffered by the Intervenors as a result of a short term injunction would be extremely minimal. The injunction would only enjoin the parties from continuing with the implementation of the project until the Court issues a decision on the merits, which the Court has indicated will be soon. Furthermore, any harms the opposing parties would suffer would be "self-inflicted" because they have "jumped the gun" by starting the construction before the completion of ongoing litigation. *Valley Cmty.*, 373 F. 3d 1078 at 1086-87.

The Intervenors may claim that this injunction harms their ability to provide increased water storage for public use. However, similar to the harm in *League of Wilderness*, the harm imposed by this injunction would be de minimis when diminished to reflect the limited amount of time the injunction will be in place. Any delay would be minor

when compared to the amount of time this project will take to complete and would not likely impact the date that the Intervenors could start storing water. Therefore, the irreparable harm Denver Audubon is likely to suffer absent this injunction outweighs any minimal and self-inflicted harm it would impose on the opposing parties.

IV. This injunction would not be adverse to the public interest because it would maintain the status quo and vindicate the public interest served by the CWA and NEPA.

The public has an undeniable interest in compliance with NEPA and the enforcement of the CWA. *Colorado Wild,* 523 F.Supp.2d at 1223; *Sierra Club* 2009 U.S. Dist. LEXIS 73922, at *51. Because Denver Audubon is seeking this injunction to prevent the implementation of a federal project that does not comply with either NEPA or the CWA, it is actually in the public interest.

V. Because this Court has discretion when deciding whether to require security, and Denver Audubon is seeking to vindicate the public interest served by NEPA, this Court should waive the surety bond.

A surety bond, in the context of a preliminary injunction, is used to pay the "costs and damages" affecting an enjoined party when it is determined upon appeal that it has been wrongfully enjoined. Fed. R. Civ. P. 65(c). However, Rule 65(c) does not mandate that a surety bond always be posted by the moving party. *RoDa Drilling*, 552 F.3d at 1215. Furthermore, in cases where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered. *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002).

This court should exercise its discretion to waive a security bond because: (1) the Corps is attempting to commence construction on a project that is the result of a faulty

CWA analysis and arbitrary and capricious decisionmaking, making it unlikely that the Corps will be wrongfully enjoined; (2) Denver Audubon is seeking to vindicate the public interest served by the CWA and NEPA; and (3) Denver Audubon is a public interest organization with limited ability to secure a bond. (Ex. 7, Karl Brummert Decl. ¶ 3.)

Conclusion

For the foregoing reasons, this Court should grant Denver Audubon's Motion for Preliminary Injunction. Denver Audubon has been made aware that this Court plans to make a decision "relatively soon". If the Court plans to make its decision prior to issuing an order on this motion, and that decision is in Denver Audubon's favor, Denver Audubon requests a permanent injunction. Conversely, if the decision is not in it's favor, it requests an injunction pending appeal.

Dated: December 8, 2017

Respectfully submitted,

/s/ Kevin J. Lynch
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For Petitioner Audubon Society of Greater Denver

Certificate of Service

I certify that on December 8, 2017 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all Counsel of Record.

/s/ Kevin J. Lynch

Movant's List of Exhibits

Exhibit 1	Declaration of Norm Lewis
Exhibit 2	Declaration of Mary Keithler
Exhibit 3	Declaration of Karl Brummert
Exhibit 4	Declaration of Gene Reetz
Exhibit 5	Declaration of Polly Reetz