

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

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

AUDUBON SOCIETY OF GREATER DENVER,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent;

CASTLE PINES METROPOLITAN DISTRICT ET AL.,

Intervenor-Defendants; and

COLORADO DEPARTMENT OF NATURAL RESOURCES,

Intervenor-Defendant.

**PETITIONER'S MOTION TO
COMPLETE AND SUPPLEMENT THE ADMINSTRATIVE RECORD**

INTRODUCTION

Respondent U.S. Army Corps of Engineers (“the Corps”) has authorized a project that would reallocate space in Chatfield Reservoir from flood control to water storage. While this project would allow certain water providers to store more water at Chatfield during particularly wet years, it would also devastate the beautiful state park that has built up around Chatfield Reservoir over the past decades, to the great detriment of the public and particularly Petitioner Audubon

Society of Greater Denver (“Denver Audubon”). Because the water rights anticipated to be stored as a result of the project are so junior, the project will reliably increase the water supply in the region by **zero** acre feet per year. Yet, because the vegetation currently surrounding the park cannot survive being inundated during particularly wet years, many acres of the park along the banks of the reservoir and the input rivers will have to be clearcut and significant portions of the park infrastructure and recreational facilities will have to be relocated above the new high-water line. All of this work plus additional mitigation necessary to offset the negative environmental impacts of the project means that the project will cost approximately \$123 million, the largest share of which will be borne by the state government because Defendant-Intervenor Colorado Department of Natural Resources (“the State”) is the largest participant at nearly 40%.

Denver Audubon, whose offices are located at Chatfield State Park where regular education and outreach activities are conducted, has consistently participated in the planning process for the Chatfield Reallocation Project (“the Project”) for many years and has consistently raised concerns that the environmental impacts of the Project and its costs were not justified by its benefits. Denver Audubon commented on both the draft and final Environmental Impact Statement (“EIS”) prepared by the Corps for the Project, arguing among other things that reasonable alternatives such as enhanced conservation, gravel pits, and Rueter-Hess reservoir should have been given consideration as full alternatives to the

Project. Denver Audubon also raised concerns about the uncertainty regarding what water would actually be stored at Chatfield, given the changing composition of the participating water providers and the eventual need for the State to step in and fund a large portion of the project as water providers dropped out or reduced their interest in the project. Denver Audubon also raised concerns about compliance with the Clean Water Act as the Corps' own analysis showed its chosen alternative was not the least environmentally damaging practicable alternative, as required under the Section 404(b)(1) Guidelines, and if anything the chosen alternative was the most environmentally damaging one.

Denver Audubon now respectfully moves this Court to add documents necessary to complete and supplement the administrative record in this case. Although the record prepared by the Corps is large, it does not include all documents that were relied upon, directly or indirectly, by the Corps. Specifically, documents outlining expected impacts of climate change on water flows in the South Platte River and agency guidance documents outlining the treatment of mitigation in the Clean Water Act LEDPA analysis were properly before the agency decision makers and should be added to complete the record. Additionally, because Denver Audubon's NEPA claims involve arguments that the Corps did not adequately consider all reasonable alternatives or was attempting to sweep serious issues under the rug, more documents should be added to supplement the record in this case. Specifically, documents showing the feasibility of Project WISE/Rueter-

Hess Reservoir and enhanced water conservation as alternatives should be added. Additionally, documentation showing the uncertainty regarding water rights to be stored at Chatfield is necessary because the EIS prepared by the Corps assumed that certain junior water rights would be stored as part of the Project, but a large portion of the storage space will be sold off by the State to as-yet-undetermined water providers in the future. Because those water providers may have different seniority water rights, this could dramatically change the environmental impacts of the project.

CERTIFICATION OF CONFERRAL PURSUANT TO D.C.COLO.LCivR 7.1(a)

Pursuant to local rule of civil procedure 7.1(a), counsel for Denver Audubon conferred regarding this motion with counsel for the Corps, the Project Participants, and the State beginning with a letter sent on April 29, 2015 and continuing with phone calls and emails subsequently. Although the parties were able to narrow the scope of their dispute, the Corps and the Project Participants have each indicated that they oppose this motion. The State has not indicated its position (emails were sent on May 26 and May 29).

FACTUAL BACKGROUND

Chatfield State Park

Chatfield State Park, home of the Chatfield Reservoir, exhibits unmatched biological diversity along the Front Range of the Rocky Mountains. The Park hosts over 1.6 million visitors a year and is one of the highest grossing parks in Colorado.

A.R. 39780. Chatfield's 5,378 acres are a sanctuary for plants, animals, birds, fish, and humans alike. Chatfield's diverse system of habitats provides a home for 14 protected bird species, the endangered Preble's Meadow Jumping Mouse, and many other species. A.R. 36175. Flooding part of the Park will severely decrease critical forest habitat for these species to flourish. Beyond the natural services the habitat provides, the Park also provides for a range of activities, such as horseback riding, fishing, boating, hiking, ballooning, biking, and wildlife viewing. A.R. 36354-55. If the Project is carried out, this treasured state park will be inundated and transformed into a much diminished biological and recreational space. Moreover, the entire Colorado State Park system stands to lose approximately \$3.4 million from the severe decrease in annual visitors at Chatfield. A.R. 36491.

The Proposed Reallocation Project

In 1996, the Corps began the initial formal study for the Chatfield Reallocation Project, which would allow for increased water storage in Chatfield Reservoir. A.R. 36178. The studies showed that large increases in expenses would occur at a water level of 5,445 feet msl, and so the plan was developed to raise the water level up to 5,444 feet msl, which amounted to 20,600 acre-feet of additional storage capacity. A.R. 36179. The purpose and need for the project was reverse-engineered by calculating how much water could have been stored if Chatfield dam was in place and the participating entities could have stored up to 20,600 acre feet of water during the period from 1942-2000, thus arriving at a "purpose and need" of

8,539 acre-feet of municipal and industrial water, based on the term “average year yield.” A.R. 36153. The additional alternatives considered were reallocation of 7,700 acre-feet (again based on impacts to existing facilities), a No Action Alternative involving construction of a new Penley Reservoir, and the use of nontributary groundwater/downstream gravel pits. A.R. 36179. The chosen alternative, reallocation of 20,600 acre-feet of storage, was not the least cost alternative and it also has greater environmental impacts than other alternatives.

The chosen alternative, Alternative Three, calls for the flooding of 587 acres of parklands and wildlife habitat, A.R. 36235, including the loss of 474.8 acres of vegetation in the raised inundation zone, A.R. 36238, and the dredging and filling 6.9 acres of natural wetlands. A.R. 36582. These impacts include loss of 454 acres of habitat for the threatened Preble’s Meadow Jumping Mouse, including 155.2 acres of critical habitat. A.R. 36240. The fluctuation of the water level in the reservoir (due to the junior priority water rights to be stored) would also result in mudflats and shorerings around the reservoir, negatively impacting the aesthetics of the park. A.R. 36242. Despite all of these impacts and the high cost of the Project, the Corps chose Alternative 3 as the preferred alternative. A Record of Decision officially selecting Alternative 3 was signed by the Corps on May 29, 2014. A.R. 41876.

Litigation History

Denver Audubon filed its Petition for Review of Agency Action on October 8, 2014. The petition included two claims under the National Environmental Policy Act

and one Clean Water Act claim. The first claim for relief was based on the improper exclusion of reasonable alternatives from the EIS (“NEPA Alternatives claim”). Specifically, Denver Audubon argues that the reasonable alternative of enhanced water conservation combined with storage at Rueter-Hess reservoir and the Titan ARS gravel pit should have been considered in the EIS. The second claim for relief was based on failure to comply with NEPA’s mandates to ensure informed agency decision-making and public participation, based on the use of misleading and confusing terms in the EIS as well as the failure to disclose what water rights will be stored as part of the project, or that the water rights to be stored at Chatfield are unknown. The third and final claim for relief was based on the failure to properly identify the Least Environmentally Damaging Practicable Alternative under the Clean Water Act based on improper segmentation of the project to treat the relocation of recreational facilities and environmental mitigation separate from the raising of the water level of the reservoir.

Two groups have intervened in this case, the Colorado Department of Natural Resources and a group of water providers which together represent the entities which will pay for the Chatfield Reallocation Project. The Corps filed the Administrative Record on April 1, 2015 with a supplement filed on April 21, 2015. The parties conferred regarding disputes over the administrative record, and the unresolved disputes are the subject of this Motion to Complete and Supplement the Administrative Record.

LEGAL BACKGROUND

I. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (“NEPA”) is our nation’s basic charter for environmental protection and was “enacted in recognition of the profound impact of man’s activity on the interrelation of all components of the natural environment.” *Utah Shared Access Alliance v. Carpenter*, 63 F.3d 1125, 1130-31 (10th Cir. 2006). One of the principal requirements of NEPA is that an agency must rigorously explore all reasonable alternatives. 40 C.F.R. § 1502.14(a). Additionally, the twin aims of NEPA include “the obligation to consider every significant aspect of the environmental impact of a proposed action” while also ensuring “that the agency will inform the public that it has indeed considered environmental concerns in its decision making process.” *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). These two central requirements of NEPA form the basis of Denver Audubon’s NEPA claims in this case.

NEPA requires agencies to rigorously explore and objectively evaluate all reasonable alternatives to derive a reasonable range of alternatives for consideration in detail. *Utahns for Better Transportation v. United States Dept. of Transportation*, 305 F.3d 1152, 1166 (10th Cir. 2002); 40 C.F.R. § 1502.14. During the process of alternative consideration, there are particular actions that agencies may not perform. Most relevant for this Motion, an agency cannot eliminate alternatives because standing alone, they do not fulfill the project’s objectives. *See*,

e.g., *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972) (stating it is inappropriate to “disregard alternatives merely because they do not offer a complete solution to the problem” and, if an alternative would result in supplying only a portion of the solution, then its use might reduce the scope of the program).

NEPA also requires an agency to actively foster public participation and informed decision making by obtaining and disclosing all information that is necessary and relevant to the agency decision. 40 C.F.R. §§ 1506.6, 1502.22(a); *Friends of Marolt Park v. Dept. of Transportation*, 382 F.3d 1088, 1095 (10th Cir. 2004); *Colo. Env'tl Coalition v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999). An agency fulfills this duty when it discloses all relevant and necessary data, including any shortcomings in information or methodology. *Friends of Marolt Park*, 382 F.3d at 1095-96; *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2004). An agency must include all necessary information in the EIS. *Dombeck*, 185 F.3d at 1172; *Trout Unlimited v. United States Dept. of Agriculture*, 320 F. Supp. 2d 1090. Where an agency lacks relevant information or data that is necessary for informed decision making, it must disclose the absence of such information in the EIS. *See Dombeck*, 185 F.3d at 1172. If petitioners show that the missing information is essential to a reasoned decision and the public was unaware of the limitations of the data the agency relied on, then the agency action is invalid under NEPA. *Id.*

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II. CLEAN WATER ACT

Section 404 of CWA requires the Corps to review discharges of dredged or fill material. 33 U.S.C. § 1344. Under Section 404(b)(1), the Corps must not issue a permit if a discharge would result in significant degradation of the waters of the United States or if a practicable alternative exists to the discharge that is less environmentally damaging. 40 CFR §230.10(a). This preferred alternative is referred to as the “least environmentally damaging practicable alternative,” or LEDPA. When the action is also subject to NEPA, the alternatives considered in the NEPA process will in most cases provide the alternatives to be compared in the LEDPA analysis. *Id.* § 230.10(a)(4). Unlike NEPA, however, the Clean Water Act has substantive requirements which mandate that the agency choose the least environmentally damaging of the practicable alternatives.

The 404(b)(1) guidelines were developed jointly by EPA and the Corps, and those agencies adopted a series of additional guidance documents to elaborate on the requirements contained in the guidelines. In 1990, the EPA and the Corps signed a memorandum of agreement that says, “compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of least environmentally damaging alternatives.” *See Memorandum of Agreement Between the Dept. of the Army and the Env’tl Protection Agency Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (1990)* at 4 (attached as Exhibit 2). Although the Memorandum of Agreement focuses on

standard permits issued under Section 404, the Guidelines apply to all discharges of dredged or fill material, including Corps civil works projects. *Id.* at 1. Thus, for a Corps civil works project, the agency must compare the alternatives to the entire project and compare the environmental impacts before compensatory mitigation, choosing the least environmentally damaging of the practicable alternatives.

STANDARD OF REVIEW

Motions to complete or supplement the administrative record are reviewed under the Administrative Procedure Act. Although judicial review of agency action under the APA is generally confined to the administrative record prepared by the agency, the court must ensure that the record includes (1) materials which were actually considered by the agency, yet omitted from the administrative record (“completing the record”); and (2) materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry (“supplementing the record”). *Colo. Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1238 (D. Colo. 2010).

The standard to be applied in deciding a motion to complete the record is “whether the record contains all documents and materials directly or indirectly considered by the agency.” *WildEarth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1253 (D. Colo. 2010) (internal citations omitted). Although the court presumes the record prepared by the agency is complete, this presumption may be overcome by clear evidence showing that the record fails to include documents or

materials considered by the agency in reaching its decision. *Id.* In order to meet the clear evidence requirement, a party must show “(1) when the documents were presented to the agency; (2) to whom; and (3) under what context.” *Id.* at 1254. While identifying documents that were directly considered is “ordinarily a straightforward proposition,” the more difficult issue is whether documents were indirectly considered. *Id.* at 1255. The test for whether documents cited in the recommendations presented to the decision maker is whether the cited documents were “so heavily relied on the recommendations that the decision maker constructively considered it.” *Id.* at 1256. When documents were not actually considered, directly or indirectly, but they should have been considered, then the proper request is for supplementation of the record. *Id.* at 1255 n.9.

Although courts have noted numerous different formulations of when documents are necessary to supplement an administrative record, *Colo. Wild*, 713 F. Supp. 2d at 1239-40, the most relevant exception to this case has been described as the “NEPA Exception.” The NEPA exception has been tacitly acknowledged in the Tenth Circuit and explicitly recognized in other circuits. *See Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *Suffolk v. Sec. of Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Colo. Wild*, 731 F. Supp. 2d at 1239-40 (discussing court of appeals precedent). As the Tenth Circuit has recognized, extra-record evidence may be necessary in NEPA cases to “illuminate whether an

[environmental impact statement] has neglected to mention a serious environmental consequence, failed to adequately discuss some reasonable alternative, or otherwise swept stubborn problems or criticism ... under the rug.” *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (citing *Lee*). Supplementation of the record is necessary in this case because review of an agency decision under NEPA is based on procedural requirements to objectively explore all reasonable alternatives and to consider and disclose to the public the environmental impacts of its decision. *Colo. Wild*, 713 F. Supp. 2d at 1240 (discussing difference between substantive and procedural review of agency decisions). Supplemental materials therefore may be necessary “to illuminate a broad section of analysis that is wholly lacking in the record.” *Id.* at 1241. Supplementation can also be necessary “to see what the agency may have ignored” in order to ensure adequate discussion of environmental effects and alternatives. *Suffolk*, 562 F.2d at 1384.

ARGUMENT

Although the record in this case is quite large, several documents are missing which are essential to allow the Court to conduct a thorough and probing review of the Corps’ action. While the record for the most part includes all the relevant documents that the agency considered, two documents were before the agency and should be added to complete the record. More significantly for the NEPA claims in this case, several important issues were inadequately considered by the agency or

were not considered at all, and therefore additional documents are necessary for the Court to assess whether the agency failed to adequately discuss reasonable alternatives and swept serious problems under the rug in order to avoid public attention to some of the worst aspects of the Project. As explained below, each of these documents should be added to either complete or supplement the record.

A. Documents Necessary to Complete the Record

Documents Related to Future Water Supply Projections

One of the critical assumptions behind the Project is that water will be available in the future to store in Chatfield Reservoir. As acknowledged by the Corps, the junior nature of water rights expected to be stored at Chatfield means that the full capacity of the reservoir would only be used in approximately 3 out of 10 years, based on historic water data. A.R. 36153 (low inflows combined with low seniority of water rights meant full storage space would only have been used in 16 out of 59 years, or less than 30% of the time). However, future water supplies may not follow historical patterns, particularly due to changes related to climate change. Thus, if water supplies decrease in the future, then there will be even starker differences between the amount of water that can be stored using junior water rights compared to senior water rights. Because one of Denver Audubon's claims relates to the insufficient disclosure related to water rights to be stored as part of the project, information about future projections of water supply is thus relevant and critical to fully assessing the Corps' compliance with NEPA. The document

discussed below bears on that topic and should be included in the record, as it was before the agency decision makers.

1. Bureau of Reclamation, SECURE Water Act Section 9503(c) – Reclamation Climate Change and Water (2011)

This document, attached as Exhibit 1, was presented to the agency on June 2, 2011 by Mike Muller of the Sierra Club in a meeting of the Chatfield Cooperators hosted by Tetra Tech and led by Tom Browning of the Colorado Water Conservation Board. A.R. 19906. The meeting discussed updates on the preparation of the EIS for the Project and also allowed attendees to raise issues. *Id.* The document was discussed for its implications based on projected reduction in runoff of 14% on the South Platte River expected by the 2050s due to impacts associated with climate change such as increased evaporation due to higher temperatures. *Id.* This government study with basin-specific projections of lower water supply shows that the differences between storing junior and senior water rights in the Project would be significant and perhaps greater than considered in the EIS, which did not account for the effects of climate change.

In the alternative, if this document was not considered by the agency, it should be used to supplement the record. Although the Corps did acknowledge that climate change might impact future water supplies, *see, e.g.*, A.R. 36164, it explicitly did not include climate change impacts in the modeling of pool elevations which are related to the availability of water to be stored. A.R. 36461. Exhibit 1 is important because it goes beyond the general statements in the EIS that the effects of climate

change are uncertain but that flows in the South Platte River might decrease in the future along with being more variable. Thus, this document is important to supplement the record to show the significant decreases in water flow which would enhance the importance of the missing information on water rights to be stored at Chatfield (since nearly 40% of the storage capacity is being paid for by the state to be sold to unknown parties in the future, who may have relatively senior or junior water rights).

Agency Guidance Documents

2. Section 404(b)(1) Guidelines Mitigation MOA: Questions and Answers (1990)

The next document, attached as Exhibit 2, is related to Denver Audubon's Clean Water Act claim and involves an inter-agency agreement between the Corps and EPA. This document, which is in the possession of the Corps as part of its regulatory guidance, was presented to the Corps, in a May 18, 2010 letter addressed to Colonel Robert J. Ruch, by Carol L. Campbell with EPA Region 8. A.R. 18023. The letter discussed EPA concerns over the selection of LEDPA under the 404(b)(1) Guidelines enacted jointly by EPA and the Corps. As the letter and the cited document makes clear, alternatives must be compared in choosing LEDPA *prior to mitigation*. *Id.* (emphasis added). This document is relevant because the Corps mistakenly asserted, contrary to its own Memorandum of Agreement with EPA, that its chosen alternative is LEDPA because "the environmental impacts of Alternative 3 at Chatfield can all be fully mitigated." A.R. 36557. If mitigation is properly

excluded from the LEDPA analysis, then the chosen alternative is not the least, but rather the most environmentally damaging alternative, in violation of the Clean Water Act.

Denver Audubon has included this request to complete the record with this document out of an abundance of caution. An alternative approach would have been to simply cite to this document in the Opening Brief along with a request for the Court to take judicial notice, since it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, such as EPA and the Corps. FED. R. EVID. 201(b)(2); *see also Oregon Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1133 n.14 (9th Cir. 2008). However, because only two of the three opposing parties agreed not to file a motion to strike if this document is cited, Denver Audubon has chosen to request that this document be added to complete the record, or alternatively request the Court to affirm that judicial notice can be taken of this document.

B. Documents Necessary to Supplement the Record

The remainder of the documents that Denver Audubon seeks to add to the record are necessary to supplement the record related to its NEPA claims, and therefore the principles behind the “NEPA exception” to the record-review requirement apply here. Specifically, documentation related to Project WISE and Rueter-Hess Reservoir must be added because Denver Audubon’s NEPA Alternatives claim rests, in part, on the argument that Rueter-Hess should have been

carried forward and evaluated as a full alternative, by itself or in combination with other actions, rather than being screened out early in the EIS process. Because the Corps failed to adequately analyze this alternative, the record is lacking on the details of the project and why it could have been a feasible alternative to the Chatfield Reallocation. Similarly, the EIS does not look at enhanced water conservation measures, going beyond those already in place, which might have reduced or entirely eliminated the need for additional storage at Chatfield. This is another action that should have been considered by itself or in combination with other actions as a full alternative in the EIS, and the early dismissal and lack of discussion of enhanced conservation measures means that the record prepared by the agency does not include sufficient information for the Court to evaluate the NEPA alternatives claim. Finally, the record is insufficient with respect to the water rights expected to be stored at Chatfield. The information on the participants in the Project included in the FEIS is already out of date, and may continue to change in the future. This is relevant to Denver Audubon's NEPA Informed Decision Making and Public Participation claim, because changes in the water rights to be stored at Chatfield could have dramatic effects on the environmental impacts of the Project, which were inadequately considered by the Corps and not disclosed sufficiently to the public in order to enable their participation. Each of these sets of documents will assist the Court in its review of the NEPA claims raised in this case, and therefore should be used to supplement the record in these critically deficient areas.

Documents Related to Rueter-Hess Reservoir and Project WISE

Because the Corps did not fully evaluate Project WISE and the connections it creates to the Rueter-Hess Reservoir in the Chatfield EIS, the record is deficient with regards to this critical action which should have been evaluated as a full alternative in the EIS. While the documentation that should have been considered by the agency related to Project WISE is voluminous, Denver Audubon has selected a few documents that it believes will enable the Court to more fully evaluate its NEPA Alternatives claim. As the documents discussed below show more fully, Project WISE infrastructure is connecting the South Platte River to the Rueter-Hess Reservoir, making it a viable alternative to Chatfield for the water providers. The primary reason that the Corps provided in the EIS for eliminating Rueter-Hess as an option was that Parker Water and Sanitation District, the operator of Rueter-Hess, has not made any additional capacity available for sale,¹ A.R. 36198, but elsewhere the Corps asserted different justifications such as the purported need for a pipeline to connect Chatfield and Rueter-Hess Reservoir. A.R. 37196 (“no pipeline is currently proposed to connect Chatfield Reservoir to Rueter Hess Reservoir”). The secondary justification is what is addressed by the documents below, which show that existing and planned infrastructure will already enable water to be taken from

¹ Even if this were true, it is not sufficient justification for exclusion of Rueter-Hess as an alternative under NEPA. However, because this argument does not relate to the documents requested to be added to the record, it is not made fully here but rather will be addressed in Denver Audubon’s Opening Brief.

the South Platte River, downstream of Chatfield, to be stored at Rueter-Hess. Thus, this information is important because the documents show that Rueter-Hess should have been carried forward and considered at least as part of a full alternative to storage at Chatfield.

3. Corps, Public Notice Regarding Permit NOW-1997080472-DEN – Section 404 Permit for Rueter-Hess Reservoir

This document, attached as Exhibit 3, is a public notice issued by the Corps on November 28, 2011 related to amendment of the Section 404 permit for Rueter-Hess Reservoir. The document describes how water from Project WISE is proposed to be stored in Rueter-Hess Reservoir using a diversion from the South Platte River near Brighton, connecting through Aurora Water's Prairie Waters Project, and ultimately connecting to Rueter-Hess Reservoir. *See Ex. 6, Figure 1.* Thus this information shows that a new pipeline connecting Chatfield directly with Rueter-Hess is not needed for the water providers to store water at Rueter-Hess.

4. Denver Audubon Letter to Chandler Peter, Corps, regarding Permit for Rueter-Hess Reservoir, Dec. 26, 2011.

This document, attached as Exhibit 4, is a December 26, 2011 letter from Arlene Raskin of Denver Audubon to Chandler Peter of the Corps, commenting on the public notice that was included as Exhibit 3. Although the Corps should already have been aware of the connections between Chatfield and Rueter-Hess and the need to coordinate review of those projects, this letter included a formal request from Denver Audubon for the Corps to fully evaluate Rueter-Hess as an alternative

to the Chatfield Reallocation Project in order to meet water supply needs for the region in the least environmentally damaging way. Ex. 4 at 2. Thus, the Corps was made aware of the connection between the two projects and should have more fully considered Rueter-Hess as at least a partial alternative to increasing the storage capacity at Chatfield.

5. Aurora Water, Denver Water, & South Metro Water Supply Authority, The WISE (Water Infrastructure and Supply Efficiency) Partnership

This document, attached as Exhibit 5, is a summary of Project WISE from its partners themselves, Aurora Water, Denver Water, and the South Metro Water Supply Authority (which includes many of the water providers participating in the Chatfield Reallocation Project as well). This document provides further detail regarding the existing and planned infrastructure that could transport water downstream from Chatfield to Rueter-Hess Reservoir, without the need for construction of additional new infrastructure. Ex. 5 at 2. This document, combined with Exhibit 3, shows that Rueter-Hess should have been evaluated more fully as an alternative as part of the Chatfield Reallocation EIS.

Document Related to Enhanced Conservation Measures

6. Alliance for Water Efficiency and Environmental Law Institute, The Water Efficiency and Conservation State Scorecard: An Assessment of Law and Policies (2012).

This document, attached as Exhibit 6, is a study by two nonprofit organizations which compares water conservation laws and policies across the states. This document is relevant to Denver Audubon's NEPA Alternatives claim

because it shows that, while Colorado currently does well in many areas of water conservation, there are several areas in which Colorado can do more. Specifically, Colorado does not have water consumption regulations for toilets, showerheads, urinals, or clothes washers and mandatory building or plumbing codes, which have been effective in other states to conserve water. Ex. 7 at 45. While this document cannot be used to prove that enhanced water conservation would have been a viable alternative to the Project, it does show that if the Corps had considered enhanced water conservation more closely, it likely could have found information supporting the use of enhanced conservation as an alternative. This information is important for Denver Audubon's NEPA Alternatives claim because it rebuts the conclusory and unsupported assertions in the record that "increased water conservation alone is not adequate to address the purpose and need of the proposed action." A.R. 36193. The record is deficient on this point because even though it refers to *increased* water conservation, the analysis does not ever consider increasing conservation but rather merely documents current conservation measures. *See, e.g.*, A.R. 36188 ("The specific conservation now being implemented by the municipal and agricultural water providers are summarized...").

Document Related to Water Rights Expected to be Stored at Chatfield

7. Chatfield Reservoir Reallocation Project, FAQs

This document, attached as Exhibit 7, is a PDF of the website for the Chatfield Reallocation Project, chatfieldreallocation.org/faqs. The Frequently Asked

Questions section lists the current participants in the project, and a quick comparison to the FEIS shows that the current participants differ quite significantly from the assumptions included in the FEIS. A.R. 36150-51. For example, the Colorado Water Conservation Board was listed for 100 acre-feet of storage in the EIS, A.R. 36150, but now is paying for 6278 acre-feet of storage in the project. Ex. 7. The CWCB plans to sell off its stake in the project to undetermined parties in the future, and the seniority of the water rights to be stored at Chatfield are therefore unknown. As a result, the environmental impacts studied in the EIS may differ dramatically from those which will actually occur, showing that the Corps was not promoting the twin aims of NEPA to ensure informed agency decision making and informed public participation.

This document detailing current participation in the Project should not be added for the purposes of establishing precisely who will participate in the project or what water rights will be stored at Chatfield. Rather, the document is necessary simply to show that the Corps was sweeping a serious problem under the rug by making unjustified assumptions regarding the water rights which would ultimately be stored in the Project. The participants in the project have already changed dramatically as water providers found cheaper and better alternatives to Chatfield and the state was forced to step in to keep the project moving forward. Because the CWCB is paying for such a large proportion of the project, nearly one-third of the storage capacity of the reservoir, the composition of the participants will again

change in the future if CWCB is able to find anyone willing to purchase the storage capacity at Chatfield, with potentially unknown environmental consequences. Thus, the document related to the water rights to be stored at Chatfield should be added to supplement the record on this key issue.

CONCLUSION

In spite of its large volume, the record in this case is deficient in several key areas. Denver Audubon has identified a few documents that were before the agency as well as a sampling of documents that the Corps should have gathered as part of its preparation of the EIS in this case. Denver Audubon requests that these documents be added to both complete and supplement the record in this case in order to enable a thorough and probing review of the claims raised in the petition for review.

Dated June 1, 2015

Respectfully submitted,

/s/ Kevin J. Lynch

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CERTIFICATE OF SERVICE

I certify that on June 1, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such to the attorneys of record.

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