UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

AUDUBON SOCIETY OF GREATER DENVER, Petitioner-Appellant v. UNITED STATES ARMY CORPS OF ENGINEERS, Respondent-Appellee; and CASTLE PINES METROPOLITAN DISTRICT, CASTLE PINES NORTH METROPOLITAN DISTRICT, CENTENNIAL WATER AND SANITATION DISTRICT, CENTER OF COLORADO WATER CONSERVANCY DISTRICT, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, TOWN OF CASTLE ROCK, and COLORADO DEPARTMENT OF NATURAL RESOURCES, Intervenor Respondents-Appellees	Case No. 18-1004

INTERVENOR RESPONDENTS-APPELLEES' RESPONSE TO DENVER AUDUBON'S MOTION FOR INJUNCTION PENDING APPEAL

Intervenor Respondents-Appellees, Castle Pines Metropolitan District, Castle Pines North Metropolitan District, Centennial Water and Sanitation District, Center of Colorado Water Conservancy District, Central Colorado Water Conservancy District, Town of Castle Rock (herein "Water Providers"), and Colorado Department of Natural Resources ("Colorado DNR") (collectively herein, "Intervenors") hereby respond as follows to the Motion for Injunction Pending Appeal ("Motion") filed by Appellant Audubon Society of Greater Denver ("Denver Audubon") on January 8, 2018:

I. INTRODUCTION

Denver Audubon asks the Court to enjoin construction and implementation of the Chatfield Reallocation Project ("Project") pending its appeal of the district court's decision upholding the U.S. Army Corps of Engineers' ("Corps") approval of the Project under the National Environmental Policy Act ("NEPA") and Section 404(b)(1) of the Clean Water Act ("CWA"). An injunction pending appeal is an extraordinary remedy that this Court may grant only if the movant has shown that its right to an injunction is clear and unequivocal.

Denver Audubon has not carried its burden and the Court should deny the Motion. First, it fails to demonstrate that this Court is likely to overturn the district court's decision. Instead, Denver Audubon simply repeats its failed arguments and

hopes for a different result without showing why or how the district court's affirmance of the Corps' determinations is erroneous. Second, Denver Audubon fails to show that it will suffer great and irreparable harm without an injunction. Third, Denver Audubon improperly fails to consider the substantial harms that Intervenors will suffer by an injunction on construction activities to implement the Project. As discussed below, the Water Providers will suffer direct and substantial economic losses from a construction delay and risk being unable to store needed water for municipal, agricultural, and other uses for a period of time if the Project's completion is delayed. Colorado DNR also will suffer non-economic harms, including construction delays and impacts to planned closures at Chatfield State Park and loss of revegetation opportunities. Fourth, Denver Audubon also fails to consider the significant public interest to be served by the Project. The Project is essential for the Water Providers to secure an adequate water supply to meet demands within their service areas. The Project is also part of the State's overall interest in developing the resources of the State for the benefit of the people. These broad public interests outweigh the individual interests of Denver Audubon's members in using and viewing the Park or assuring procedural compliance with NEPA and the CWA.

The Court therefore should deny Denver Audubon's Motion. In the event the Court grants the Motion, Intervenors respectfully request that the Court require a significant security bond from Denver Audubon that recognizes the harms that Intervenors will suffer if injunctive relief is granted. Denver Audubon admits an ability to post a security bond; its statement that it has a "limited" ability to do so is unquantified and too vague to give this Court any guidance.

II. FACTUAL BACKGROUND

The growing population of the Denver metro area exceeds its existing water supply, or will exceed its existing water supply in the near future. *See* Ex. I-1 (excerpts of Final Integrated Feasibility Report/Environmental Impact Statement ("FEIS")), AR036167. This Project helps to fill that gap in water supply and will provide additional water necessary to sustain life in Colorado's semi-arid climate. *Id.* at AR036127 (citing Colorado Water Conservation Board, *2010 Statewide Water Supply Initiative* (*SWSI 2010*)). As more fully discussed in the Corps' response, the Corps approved the reallocation of existing storage space in Chatfield Reservoir, a Corps-owned facility, from joint-use flood control to municipal, industrial, recreational, agricultural and environmental uses after (1) decades of investigation, planning, and analysis undertaken by a range of entities, including the Corps, the United States Fish and Wildlife Service, the Colorado Water

Conservation Board ("CWCB") and Colorado Parks and Wildlife ("CPW") (both divisions of the Colorado DNR), and the Water Providers; (2) specific Congressional authorization, Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4168; Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 116, 123 Stat. 524, 608; and (3) an extensive review process in compliance with NEPA. The Corps also specifically analyzed, under Section 404(b)(1) of the CWA, 33 U.S.C. § 1344(b)(1), activities related to the Project that would involve discharges of fill material into CWA jurisdictional waters—the relocation of recreational facilities at Chatfield State Park and implementation of certain mitigation measures—and determined that the action it was approving was the least environmentally damaging practicable alternative. Final federal approval for the Project occurred four years ago, in 2014.

Final federal approval allowed the Project to move forward, which is an important step in addressing the Denver metro area's need to secure additional water supplies for its existing water supply shortfall and growing population. The Water Providers have paid the costs of designing and implementing the Project and, upon the Project's completion, will be granted legal rights to the reallocated storage space. *See* Ex. I-2, ¶ 4 (Tom Browning affidavit); Ex. I-1, AR036150–036151. The Water Providers are municipal and quasi-municipal corporations and

political subdivisions of the State of Colorado that have pursued the Project as a means to ensure that they have adequate water supplies to provide for rapidly increasing water demands in the Denver metropolitan area and beyond, a goal which harmonizes with the overall purposes of the Project. *See* Ex. I-1, AR036126, AR036153 (FEIS). Intervenors formed the Chatfield Reservoir Mitigation Company ("CRMC") in 2015 to implement the Project. Ex. I-2, ¶ 1 (Tom Browning affidavit).

Denver Audubon challenged the Corps' decision under the Administrative Procedure Act ("APA") by filing suit on October 8, 2014, and arguing that the Corps erred in its NEPA and CWA Section 404 analyses. The Water Providers and Colorado DNR intervened in the case to protect their respective interests. The district court ultimately rejected each of Denver Audubon's arguments, affirming the Corps' actions and finding that the Corps complied with the requirements of NEPA and Section 404(b)(1) of the CWA. *See* Motion, Ex. K (district court order affirming Corps decision). The district court also denied Denver Audubon's motion for injunction pending appeal for failure to show a substantial likelihood of success on appeal. *See* Motion, Ex. L.

Upon receipt of the letters of authorization from the Corps approving CRMC to move forward with construction of the environmental mitigation and

recreational modification activities, CRMC authorized its contractors to begin construction. Area closures and construction work has commenced and will occur in selected areas of the Park during specified and limited periods of time, leaving other portions of the Park undisturbed and open to public use and enjoyment. Ex. I-3, ¶ 12 (Tim Feehan affidavit). Construction work is scheduled to occur during the winter and spring, outside of the peak recreation season in the summer and before peak spring run-off occurs, and will include the relocation of recreational facilities and implementation of a Tree Management Program within the reservoir fluctuation zone. *Id.* ¶¶ 3, 14. Winter construction (both this winter and next) will also involve implementation of compensatory mitigation measures that must occur during the winter season, including the planting of over 60,000 plants that were grown from seeds collected at the Park and which require time to establish before the summer. *Id.* ¶ 13. These plants require care while they establish and grow; if an injunction prohibits this care, then the plants could die and would need to be replaced. *Id.*

Denver Audubon subsequently appealed the district court's decision and now seeks an injunction pending appeal from this Court to stop continued activities at the site.

III. ARGUMENT

An injunction pending appeal is an extraordinary remedy that a court should grant only upon a showing that the movant's right to relief is clear and unequivocal. *See Nken v. Holder*, 556 U.S. 418, 428 (2009); *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

In order to obtain an injunction pending appeal, a party must demonstrate four things: (1) that it is likely to succeed on the merits, (2) that it will be irreparably injured absent the injunction, (3) that issuance of the injunction will not substantially injure the other parties interested in the proceedings, and (4) that the public interest lies in its favor. Fed. R. App. P. 8; 10th Cir. R. 8.1; *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). This analysis bears resemblance to the test for the issuance of preliminary injunctions, meaning opinions addressing preliminary injunctions are relevant in the context of injunctions pending appeal. *See Hilton*, 481 U.S. at 776; *Homans*, 264 F.3d at 1243. As each of the subsections below and the Corps' response demonstrate, Denver Audubon has not carried its burden.

A. Denver Audubon has not shown that this Court is likely to overturn the district court's decision.

In order to obtain an injunction, Denver Audubon must first make a "strong" showing that it is likely to succeed on the merits of the appeal. *Hilton*, 481 U.S. at

776. In an administrative review case such as this, a court applies the same standard as the district court and considers whether the agency's decisions under NEPA and the CWA were arbitrary and capricious under the APA, 5 U.S.C. § 706. *See Diné Citizens Against Ruining Our Env't*, 839 F.3d at 1284; *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1268 (10th Cir. 2004). "An agency's action is entitled to a presumption of validity, and the petitioner challenging that action bears the burden of establishing that the action is arbitrary or capricious." *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010). "As long as the agency provides a rational explanation for its decision, a reviewing court cannot disturb it." *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))

Denver Audubon has not met this burden. In its Motion, Denver Audubon asserts that it is likely to succeed on the merits of this appeal because the Corps (1) failed to comply with its regulations and also "segmented" the Project during its CWA Section 404(b)(1) analysis, and (2) did not comply with the procedural requirements of NEPA. Motion at 11. The district court already rejected these arguments. Yet, Denver Audubon does not cite any fault in the district court's reasoning, application of existing law, or analysis of the record. Instead, Denver

Audubon's Motion simply repeats its arguments on the CWA issue from the case below. Thus, Denver Audubon has not made a "strong" showing of its likelihood of success on the merits.

Denver Audubon is unlikely to convince this Court that NEPA's anti-segmentation rule should apply to the Corps' consideration of alternatives under Section 404(b)(1) of the CWA. The district court already rejected that argument. Motion, Ex. K at 34–35. The district court found that the Corps reasonably conducted its Section 404(b)(1) compliance determination informed by the fact that the reallocation of storage capacity will not itself cause a discharge into Section 404 jurisdictional waters. Practicable alternatives to the activities that *would* involve a regulated discharge (the modification of recreational facilities and environmental mitigation efforts) were fully considered. *Id.* at 36–38 (district court order affirming agency decision). The district court correctly concluded that the "anti-segmentation" rule applicable to NEPA analyses should not be grafted onto the Section 404(b)(1) analysis to enlarge its scope beyond the regulated discharges in this case, and that there is no legal basis for doing so. *Id.* at 37.

Denver Audubon also has not shown a likelihood of proving that the Corps violated NEPA. Denver Audubon states that it "intends to show that the Corps did not comply with the procedural requirements of NEPA," Motion at 11, but offers

no additional argument as to why it is likely to succeed on this issue, *see id.* at 11–14 (discussing only Denver Audubon's CWA argument). The district court affirmed the agency action and rejected each of Denver Audubon's arguments in turn. Motion, Ex. K at 12–30. Denver Audubon cites no fault in the district court's decision—it simply points out that the district court disagreed with Denver Audubon's arguments and reasonably affirmed the Corps' determination. Therefore, it has not carried its burden of proving that this Court will likely overturn the district court's decision.

For the foregoing reasons, Denver Audubon has failed to make a showing—much less a "strong" showing, *Hilton*, 481 U.S. at 776—that it is likely to succeed on the merits of its appeal. The district court correctly denied Denver Audubon's prior motion for injunction pending appeal in that court on this basis. This Court should do the same.

B. Denver Audubon has failed to demonstrate that it will suffer great and irreparable harm without an injunction.

In order to obtain an injunction, Denver Audubon must prove that without an injunction it will suffer "irreparable harm." The alleged harm "must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Relief is not warranted for an asserted harm is not likely to occur

before the court rules on the merits of the case. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009); *see also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Denver Audubon asserts that if its injunction pending appeal is not granted, then it and its members will suffer irreparable harm from three aspects of the Project: (1) noise and other construction impacts, (2) "removal and destruction of habitat," and (3) "the eventual flooding of the Park." Motion at 15. In its view, these effects of the Project "will render specific areas of the Park either unenjoyable or unusable for the organization and its members." *Id.*

Nothing in Denver Audubon's Motion or declarations demonstrates that the alleged harm to Denver Audubon from temporary construction activities will be irreparable or of sufficient magnitude to warrant the extraordinary remedy of injunction. The Motion does not show, for example, how "more skittish species of birds" will be permanently "scare[d] off" from the Park because of construction activities in certain areas, or how those activities will eliminate all birdwatching in the Park so as to necessitate its members to "travel a potentially great distance to view what they previously could in their own backyard." Motion at 16. Area closures, construction machinery, and debris removal will occur in selected areas of the Park and for limited periods of time, leaving other facilities and areas

undisturbed and open to use and enjoyment. Ex. I-3, ¶ 12 (Tim Feehan affidavit). Even assuming some of the debris removal will lead to permanent changes in bird habitat, there is no indication that targeted removal in certain areas as part of the recreational facility relocations and for human and boating safety will wholly "destroy" habitat at the Park and require the birds (and birdwatchers) to relocate far distances. In addition, Denver Audubon complains of possible noise disturbances and asserts that these effects will "diminish or eliminate the ability of Denver Audubon's members to use and enjoy these areas peacefully," Motion at 15, but does not explain how these auditory harms will be permanent.

As for the "eventual flooding of the Park," this occurrence is not new, and Denver Audubon has not explained how it will be harmed. The Project will not "flood" the entire Park. Once the Project is completed, the Corps will raise the water level of Chatfield Reservoir a specified number of feet, up to 5,444 feet above sea level. This higher water level will inundate approximately 587 acres, but it will leave approximately 3,300 land acres of the Park dry and open to public use, as well as 2,094 water acres open to boating and other uses. *See* Ex. I-1 (FEIS), AR036142 (5,378 total Park acres), AR036511 (Project will inundate additional 587 acres), AR036377, Tbl. 4-2 (2,094 total inundated acres under Reallocation Project). Additionally, Denver Audubon fails to mention that historical floods,

including one in the summer of 2015, raised the water levels even higher than the proposed new reservoir elevation (up to 5,448 feet above sea level) and has not explained why or how the Reallocation Project will cause irreparable harm when the 2015 flood and other flood events apparently did not. *See id.* at AR036433; *Water Close to Record At Dam Built After 1965 Denver Flood*, CBS Denver (Jun. 16, 2015), http://denver.cbslocal.com/2015/06/16/water-close-to-a-record-at-dam-built-after-1965-denver-flood/ (last visited Jan. 19, 2018). Denver Audubon thus has not shown that an injunction will actually remedy any harm caused by the "eventual" raising of Chatfield Reservoir's water level. *See also* Ex. I-3, ¶ 4 (Tim Feehan affidavit) (stating that construction is currently scheduled for completion in April 2020).

In short, Denver Audubon has failed to show that it will suffer irreparable harm if this Court does not grant it an injunction pending appeal. In particular, Denver Audubon has failed to prove that any harm to it and its members may experience is sufficiently "great" to warrant the extraordinary remedy of enjoining all construction activities that have been undertaken since the district court entered final judgment affirming the Corps' NEPA compliance and CWA determinations. Denver Audubon submitted six declarations from individuals, some but not all of whom identify as members of Denver Audubon, speaking to their possible harms.

However, it does not indicate how many members it has or how many of those members will be affected by the Project's continued construction activities, facts that are relevant to the "greatness" of its asserted harm.[1] This Court should deny Denver Audubon's Motion based upon its failure to satisfy this prong of the test.

C. The Intervenors will suffer substantial harms if this Court grants Denver Audubon's motion for an injunction pending appeal.

A defendant's or an intervenor's economic and other interests that may be impacted by an injunction may be weighed against another party's claim of environmental harm and can outweigh it. *See Amoco Prod. Co.*, 480 U.S. at 545 (holding that a defendant's $70 million investment in a project outweighed "injury to subsistence resources" that "was not at all probable"); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1231 (10th Cir. 2008).

Denver Audubon ignores substantial harms that Intervenors will suffer from an injunction. Motion at 20. An injunction would cause construction delays that will result in significant economic losses and may prevent the Project from storing additional water for public consumption in coming years. *See* Exs. I-2 & I-3 (Tim Feehan and Tom Browning affidavits). After the Intervenors and their agent,

[1] These facts are also relevant when balanced against the Water Providers' showing that an injunction will cause substantial injury to their interests and to the interests of their hundreds of thousands of tax- and rate-paying residents and water users. *See infra* Sections III.C & D; Ex. I-2, ¶¶ 4–5 (Tom Browning affidavit).

CRMC, received authorizations from the Corps to proceed with the environmental mitigation activities and recreational modification activities, CRMC authorized its contractors to begin this work.

For example, CRMC has begun work to construct the new recreational facilities such as boat ramps, and has scheduled these activities in the winter to minimize disturbances to recreational visitors and target reopening in time for the peak recreational and boating season. Ex. I-3, ¶¶ 4,11, 14 (Tim Feehan affidavit). It also scheduled the delivery and planting of over 60,000 plants at the Park and other prescribed mitigation areas to occur during the fall and spring growing seasons over the next two years. *Id.* ¶ 13. If this Court were to issue an injunction pending appeal, construction windows and plant-growing windows will be missed, potentially causing some of the planted but unattended plants to die and require replacement; the Water Providers will suffer economic losses directly attributable to these delays. *Id.* ¶¶ 7–14 For every day that the Project is further delayed, the Water Providers incur an additional $140,000 in ongoing costs. *Id.* ¶ 8. These delays would also add costs to the Project if they require Intervenors to seek alterations to the mitigation and modification requirements for the Project, which can only be made by approval of the Assistant Secretary of the Army for Civil Works, a process that could take years. Ex. I-2, ¶ 2 (Tom Browning affidavit).

CRMC is required to compensate CPW for any economic harms suffered by CPW as a result of the construction activities associated with the Project. Ex. I-3, ¶ 11 (Tim Feehan affidavit). However, CPW will suffer non-economic harms that include the timing of construction and Park closures, condition of the Park during any construction delay, and loss of vegetation. If an injunction causes CRMC to miss construction windows, then the general public will lose access to recreational amenities in the summer because currently closed areas of the park will remain closed and other construction phases will need to occur in the summer season. *See id.* ¶ 14.

Equally important, the persistent risk of drought in Colorado means that any delay in completing the project also delays the Water Providers' ability to store water at Chatfield Reservoir for use within their service areas and places them at increased risk of facing water supply deficits in future drought years. *See* Ex.I-1, AR036264 (FEIS) ("Drought is a regular feature in Colorado."), AR036172. The Corps' Final Integrated Feasibility Report and Environmental Impact Statement ("FEIS") for the Project recognized that "[t]he drought of 2002 to 2007 emphasized to water providers that, despite increased levels of water conservation measures . . . additional water development activities, including expanding existing surface water storage facilities, are *urgently needed* to provide adequate water for

the growing population during future droughts." *Id.* at AR036172 (FEIS) (emphasis added). Enjoining construction activities will directly cause delays in completion of the Project and raising of the water level at Chatfield Reservoir, which could in turn destroy the Water Providers' opportunity to store water in the months in which completion is delayed.

Colorado DNR also recognizes the urgency of the Project and has invested $136 million in the Project in order to help close the projected water supply gap in the State. Ex. I-4, ¶ 2 (Lauren Ris affidavit). Delaying the Project could defeat its public purpose by preventing additional storage in upcoming years. Delay would also injure the State fisc. Ex. I-4 (Lauren Ris affidavit).

The Water Providers will incur significant economic costs and opportunity-costs relating to their water supply planning if an injunction is issued. These costs would be completely avoidable in the absence of an injunction, and therefore cannot be "discounted" as temporary inconveniences or costs that would simply be delayed. *See* Motion at 7. Denver Audubon argues, citing *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014), that "[a]ny harms suffered by an opposing party are discounted, and therefore, are deemed less substantial when they are minimal due to the temporary nature of the injunction." Motion at 7. In that case, however, the

court was discussing economic *benefits* that the injunction would merely delay, not economic or other *losses* that would directly flow from the injunction. *Id.* at 766.

Hence, there is no merit to Denver Audubon's declaration that the opposing parties "will not suffer substantial harm from the issuance of [an] injunction." Motion at 21. As the foregoing indicates, Intervenors will suffer real and substantial injury if this Court issues an injunction pending appeal.

D. The broad public interest in continuing construction and completing the Project outweigh Denver Audubon's individual interests in recreation and assuring compliance with NEPA and the CWA.

Denver Audubon is incorrect that the public interest in this case turns on a single consideration—general compliance with NEPA and the CWA—that weighs in its favor. *See* Motion at 21. In fact, there are significant and "conflicting public interest values at play in this case." *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1087 (10th Cir. 2004); *see also Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7, 24 (2008).

The Water Providers are all municipal or quasi-municipal corporations and political subdivisions of the State of Colorado that are charged with pursuing the public interest and promoting public health, safety, and welfare by securing a reliable water supply for their residents and customers. Ex. I-2, ¶ 4 (Tom Browning affidavit). Colorado DNR is also a political subdivision of the State of Colorado

that is charged with developing, by appropriate means, the natural resources of the state for the benefit of its people. *See* Colo. Rev. Stat. § 24-33-103 (2017); Ex. I-4, ¶ 3 (Lauren Ris affidavit). In a case such as this, proper consideration of the public interest takes into account the need to build a project to provide water supply for municipalities, districts, and other water providers who depend upon it, and the impact a delay in construction would have on that need. *See Village of Logan v. Dep't of Interior*, 577 Fed. App'x 760, 768 (10th Cir. 2014) (unpublished); *cf. Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1069 (E.D. Cal. 2010). The CWCB identified this Project in its Statewide Water Supply Planning Initiative as one necessary to meet the water supply "gap." Ex. I-1, AR036127 (FEIS) (discussing *SWSI 2010*); *see also* Ex. I-4, ¶ 2 (Lauren Ris affidavit). The Water Providers are relying on the Project in order to provide enough water to people within their service areas in the face of regular and lingering drought conditions. *See* Ex. I-1, AR036172, AR036264; Ex. I-2, ¶ 4 (Tom Browning affidavit).

Congress recognized the important public interests served by the Project when it specifically authorized the reallocation in the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4168, and the Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 116, 123 Stat. 524,

608. While the public may have an interest in assuring compliance with environmental laws such as NEPA and the CWA, that interest does not eliminate other public interests, least of all ones embodied in projects that have been specifically authorized by Congress. *See Amoco Prod. Co.*, 480 U.S. at 546 ("[Congress] expressly declared that preservation of subsistence resources is *a* public interest and established a framework for reconciliation, where possible, of competing public interests.").

Therefore, the public interest in allowing construction of the Project to continue to prevent any delay to its completion and provision of water to users significantly outweighs Denver Audubon's interest in seeking a temporary injunction while this Court considers Audubon's legal arguments. *Valley Cmty. Pres. Comm'n*, 373 F.3d at 1087. This is especially so given that the Project is underway and partially completed, strengthening the public interest in continuing its construction. *Id.* By ignoring these opposing public interests and only discussing one interest that supports its argument, Denver Audubon has not demonstrated that the public interest in this case, on balance, weighs in its favor.

For all of the foregoing reasons, this Court should deny Denver Audubon's Motion.

E. If the Court grants Denver Audubon's Motion, then it should require a bond.

If the Court does grant injunctive relief, then under Fed. R. App. P. 8(a)(2)(E), the "court may condition relief on a party's filing a bond or other appropriate security in the district court." A bond requirement serves two purposes: it provides "a fund for the compensation of an incorrectly enjoined [party] who may suffer from the effects of an incorrect interlocutory order," such as an injunction pending appeal, but it also deters "'rash' applications for interlocutory orders." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1277 (N.D. Iowa 1995); *cf.* Fed. R. Civ. P. 65(c) (requiring a bond to guard against the incurrence of "costs and damages sustained by any party found to have been wrongfully enjoined or restrained").

Intervenors acknowledge that Denver Audubon is a public interest organization and that it has declared that it has a "limited ability to secure a bond." Motion at 23 (citing Karl Brummert Decl. ¶ 3). But an asserted "limited ability to secure a bond" is too vague to tell the Court anything with respect to Denver Audubon's precise capacity to post a bond. It does, however, constitute an admission that it can post a bond of some amount. This Court has discretion to require a bond if doing so promotes the purposes of requiring a bond without

wholly denying Denver Audubon access to judicial review. *Cf. Colo. Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1230–31 (D. Colo. 2007).

As discussed above, Intervenors, who are all political subdivisions of the State of Colorado, will suffer direct economic and other injury if construction operations and completion are delayed. Additionally, delays in project implementation will result in the loss of public access to recreational and other facilities because construction activities and area closures will shift from lower-use winter periods to higher-use summer periods. *See* Ex. I-3, ¶ 14 (Tim Feehan affidavit). This Court should order that Denver Audubon post a bond amount that accounts for Intervenors' potential injuries.

IV. CONCLUSION

As shown above and in the Corps' response to the Motion, Denver Audubon has failed to satisfy the requirements of Fed. R. App. P. 8 and 10th Cir. R. 8.1 for issuance of an injunction pending appeal. This Court therefore should deny Denver Audubon's Motion. However, if this Court determines that an injunction should issue, then it should also require Denver Audubon to post a security bond.

Respectfully submitted this 19th day of January, 2018.

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CERTIFICATES OF COMPLIANCE, SERVICE, DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that this response complies with the type-volume requirements of Fed. R. App. P. 27(d) and Circuit Rule 32 because it contains 4,938 words in 14-point type.

I hereby certify that on this 19th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the appellate CM/ECF system. The parties in this case will be served electronically by that system.

I hereby certify that I have scanned for viruses the Portable Document Format version of the attached document using our current version of Endpoint Protection (January 19, 2018) (v.1.261.39.0).

I further certify that I have not made any privacy redactions in the attached document.

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LIST OF INTERVENORS' EXHIBITS

Exhibit I-1: Excerpts of Final Integrated Feasibility Report/Environmental Impact Statement ("FEIS")

Exhibit I-2: Affidavit of Tom Browning

Exhibit I-3: Affidavit of Tim Feehan

Exhibit I-4: Affidavit of Lauren Ris