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-Appellees.

Case No. 18-1004

Petitioner - Appellant's Reply in Support of Motion for Injunction Pending Appeal

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Introduction

Any harms due to an injunction that the Intervenors have identified in this case are speculative, unrelated, and not substantial. The Corps does not identify *any* harm that it would suffer, and the Intervenors claim unrelated harms such as the $140,000 a day price they agreed to pay for this project. That cost is not the result of this injunction, it is the total price of the project, $171 million, divided by the 640 days that are necessary to complete the work. Actually, this injunction will temporarily prevent the Intervenors from spending this exorbitant amount of money on a project that will generate zero dependable yield. In addition, commencement of the Chatfield Reallocation Project before this case has been fully adjudicated is indicative of the Corps' and Intervenors' underestimation of Denver Audubon's likelihood of success on the merits of its claims. Denver Audubon has demonstrated that it is likely to succeed on the merits of its appeal because the Corps has not complied with federal statutes including the Clean Water Act ("CWA"). Therefore, the court should grant this injunction.

Argument

I. The irreparable harm that Denver Audubon will suffer without an injunction outweighs the unsubstantial harms the Intervenors claim the injunction will cause.

Although the Corps opposes this injunction, it failed to identify any harm that an injunction would cause it. Corps Resp., Doc. No. 01019933187 at 25-26. Because the Corps has an interest in ensuring compliance with the CWA for this project, this injunction is actually in its interest.

The harms claimed by the Intervenors are: (A) speculative and (B) untied to the temporary delay that this injunction would cause. Therefore, because neither the Corps nor the Intervenors will suffer substantial harm because of this injunction, while Denver Audubon will suffer significant and irreparable harms without an injunction, this factor weighs in Denver Audubon's favor.

A. The harms the Intervenors claim that are associated with construction are unrelated to this injunction and are not substantial.

The Intervenors claim that for every day that the Project is delayed they will incur an additional $140,000 in costs, that the delay will cause them to miss construction windows based on their seasonal construction plan and planting windows for 60,000 plants, and the delay would cause Colorado Parks and Wildlife ("CPW") harm that they would be required to compensate CPW for. Intervenors' Resp. Doc. No. 01019933449 at 16-17. Assuming an

injunction would push back construction one year, there is no indication that moving the target completion date for construction from April 2020 to April 2021 would cause any of the stated harms to the Intervenors.

Neither their response nor their affidavits explain how the Intervenors will suffer an additional $140,000 a day in costs should construction be delayed. They calculated this figure by determining the number of working days until their target completion date and then dividing the total cost of the Project, $171 million, by this number.[1] Tim Feehan Aff., Doc. No. 01019933452 at ¶ 3-8. They do not explain how changing their target completion date would cause additional costs. If construction was pushed back one year, the Project could still be completed in 640 working days at a cost of $140,000 per day. Additionally, while the Intervenors claim that the State has invested $136 million in this project, a delay caused by this injunction does not impact this investment. Intervenors' Resp. at 18.

The Intervenors also claim that this injunction would cause them to miss construction windows which may in turn cause harm to CPW because

[1] Intervenors say that completion by this date will allow the water providers to capture Spring 2020 runoff, but the EIS projects that it is more likely than not that the water providers will have any water available to store in a given year. This illustrates one of the major flaws with this project. It will cost $171 million dollars and will generate zero dependable yield. Ex. N-2, AR036926.

the construction plan is designed to minimally interfere with peak recreational times at the Park. Intervenors' Resp. at 16-17. Again, their argument does not explain how a delay in construction would prohibit them from executing that plan. Instead of completing significant portions of the Project this winter, they could complete those same portions next winter. Additionally, the Intervenors could plant the 60,000 plants in the Park during the required growing seasons one year later.

Also, the Intervenors do not submit any evidence as to how much the delay would cost them and thus, the court cannot find that the issuance of an injunction would cause substantial harm. *Weyerhaeuser NR Co. v. Louisiana-Pac. Corp.*, No. 3:13-00805, 2013 WL 5331246, at *11 (M.D. Tenn. Sept. 23, 2013). Even if the delay in a construction project would result in an increase in the eventual costs, those costs cannot be said to be a substantial harm. *Highland Co-op. v. City of Lansing*, 492 F. Supp. 1372, 1382 (W.D. Mich. 1980). Thus, the harms that the Intervenors claim they will suffer are unrelated and unsubstantial.

B. The harms the Intervenors claim will occur as a result of this injunction are speculative.

The Intervenors claim that this injunction would put the water providers at risk of facing supply deficits in drought years. Intervenors' Resp.

at 17. However, this is not only speculative, but also illogical. Due to the junior water rights these water providers hold, the reservoir will only be full three out of ten years. *See* Ex. N-2, AR038272. Therefore, it is extremely unlikely that delaying their ability to store water at Chatfield will impact their supply because there will most likely be no water for them to store during that time period. Ex. N-2, AR036926. Furthermore, there is nothing to indicate that these water providers could not find other ways to store their water during that time period. In fact, many water providers have dropped out of this project to pursue other alternatives. Ex. N-2, AR036152. This also defeats the claim that issuing an injunction could defeat the public purpose of the Project by preventing additional storage from being available in upcoming years. [2]

The Intervenors also argue that being enjoined would add costs if they are required to seek approval for alterations to the mitigation and modification requirements for the Project. *Id*. at 16. However, they give no explanation as to why any delay would require alterations to the mitigation or modification requirements. *Id.* The delay would simply push back their existing plans. Furthermore, any of these unidentified and speculative additional costs claimed by the Intervenors are self-inflicted because they

[2] The purpose of the Project is to increase water availability, not providing additional storage as claimed by the Intervenors. Ex. N-2, AR036153.

made these commitments while litigation was ongoing. Thus, the irreparable harms Denver Audubon will suffer absent an injunction outweigh these speculative, unsubstantial and unrelated harms.

II. Denver Audubon will suffer irreparable harm that cannot be compensated by monetary damages absent an injunction.

The Corps and Intervenors claim that the harm caused by construction is not irreparable because the construction is only temporary and affects a small portion of the Park. Corps Resp., at 23; Intervenors' Resp. at 12. However, while the construction is isolated, Denver Audubon's members use those isolated areas of the Park that are being impacted by the construction such as Plum Creek and the Swim Beach. Pet'r. Mot., Doc. No. 01019926441 at 15. It is these areas, not the undisturbed areas of the Park, which are popular with Denver Audubon's members because they are some of the most beautiful areas in the Park and are excellent for birding. The years of enjoyment and recreation that Denver Audubon's members would lose because of the closures to these areas are irreplaceable. "The irreparable harm standard … is met by showing the quality of the harm is irremediable by a monetary damage award." *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1177 (D. Wyo. 1998). No amount of money could compensate Denver Audubon's members for the enjoyment of the Park during these years that they will never get to

experience. Therefore, Denver Audubon will suffer irreparable harm absent this injunction.

III. Denver Audubon is likely to succeed on the merits of its appeal.

Denver Audubon is likely to succeed on the merits of its appeal, despite the opposing parties' assertions to the contrary for three reasons: (A) the standard of review is de novo; (B) although this is a matter of first impression, the most analogous cases support Denver Audubon; and (C) the Corps' regulations and guidance documents require the Corps to consider the entire project over which the Corps has control.

A. Because the standard of review is de novo, Denver Audubon is likely to succeed on the merits.

Even though the Corps and Intervenors agree that this court should review the denial of its motion for injunction pending appeal de novo, they both rely heavily on the order of the district court denying Denver Audubon's Motion for Preliminary Injunction. *See* Corps Resp. at 9; Intervenors' Resp. at 12. However, when engaging in de novo review "the court of appeals gives no deference to the decision of the district court." *Hoyl v. Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 2009).

B. This is a matter of first impression in which the most analogous cases support a finding that the Corps' segmentation was arbitrary and capricious.

The most analogous case to this case is *Florida Wildlife*. In that case the Corps was asked to issue a 404(b)(1) permit to a Florida county seeking to build a research park development. *Florida Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp.2d 1298, 1318 (S.D. Fla. 2005). When seeking the permit, the county applicant only included a portion of the development in its application. *Id.* at 1305. The Corps determined that this portion had independent utility from the larger project. *Id.* at 1306. However, the court stated that, similar to the situation here, the Corps segmented a portion of the project for the purposes of expediting its 404(b)(1) analysis that was never intended to stand alone. *Id.* at 1318.

The cases the Corps claim to be analogous are in fact quite different. In *Whistler*, the Corps issued a 404(b)(1) permit to a real estate developer seeking to build a high-end neighborhood with homes that had access to the Missouri River. *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1343 (8th Cir. 1994). Although facially that case seems similar, it is distinguishable. There, the court ruled in favor of the Corps because it agreed with the Corps' determination that the developer could complete the project without a permit. *Id.* at 1345-46. More importantly, the party carrying out the larger action was

a private organization, not the Corps itself. *Id.* at 1342. In *Hoosier*, the Petitioners argued that the Corps should have expanded its 404(b)(1) analysis to include the consequences of the larger project. *Hoosier Envtl. Council v. U.S. Army Corps of Eng'rs*, No. 1:11-cv-0202-LJM-DML, 2012 WL 3028014, at *10. However, the larger project was the construction of a portion of an interstate and a previous court held that separating the project into tiers was appropriate due to its size. *Id.* at 8. Furthermore, the court stated that the smaller portion had its own independent purpose. *Id.* at 11.

Unlike the portions of the projects in *Whistler* and *Hoosier*, and similar to the portion of the project discussed in *Florida Wildlife*, the recreational modifications and compensatory mitigation at Chatfield do not have their own separate purpose. The reallocation of storage would not take place without relocating the recreational facilities and the associated compensatory activities. Furthermore, the Corps, not a private party, has control over the larger project.

C. The Corps' regulations and guidance documents mandate that the Corps evaluate the environmental consequences of the entire project over which the Corps has control.

A memorandum of agreement ("MOA") between the EPA and the Corps makes clear that when issuing a 404(b)(1) permit the Corps should avoid discharges into the waters of the United States wherever possible. Robert

Page, *MOA Between Department of the Army and the* EPA (Feb. 6, 1990), https://www.epa.gov/cwa-404/memorandum-agreement. It states that because the CWA regulations state that a discharge may not be permitted if a less environmentally damaging practicable alternative exists, the Corps should always attempt to avoid or minimize discharges associated with a project before considering mitigation. *Id*.

Furthermore, precedent states that when the Corps Regulatory Program issues a 404(b)(1) permit "in cases where the permitted activity is only one part of a larger project, the [Corps'] regulations specify that the Corps has 'control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a federal action." *Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir. 2009). "These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." *Id*.

For this project, the Corps has control and responsibility over the larger project, not a third party, and the portions of the Project that the Corps segmented out for its 404(b)(1) analysis were never intended to stand alone. Therefore, the Corps is required to analyze the environmental impacts of the

larger project just as it would have done if it was permitting the actions of a private party.

Had the Corps performed a 404(b)(1) analysis with this proper scope, it would have complied with the MOA between the EPA and the Corps that requires the Corps to avoid discharges wherever possible. The Corps eliminated that possibility by choosing a preferred alternative to the larger project that necessitated discharges prior to performing its 404(b)(1) analysis. Although this project is being completed by the Civil Works Program and not the Regulatory Program, it makes no sense to impose different standards on the Civil Works program. When performing a 404(b)(1) analysis, why should the Corps have to analyze the environmental consequences of a third party's larger project, and attempt to avoid any discharges that project would require, but not have to do the same for their own larger actions? The Regulatory Program, which issues 404 permits far more often than the Civil Works Program, found the segmentation of this project to be a departure from the norm just as Denver Audubon does and recommended that the Project as a whole be considered for the 404(b)(1) analysis, but its recommendation fell on deaf ears. Ex. N-2, AR044710-11. Because this segmentation violated the Corps' guidance documents and precedents, the Corps' decision was arbitrary and capricious.

IV. Denver Audubon should not be required to post a substantial bond.

This court has discretion to require a movant to post a bond in order to obtain an injunction and to determine the amount of that bond. Fed. R. App. P. 8(a)(2)(E). While admitting that Denver Audubon has limited ability to secure a bond, the Intervenors ask the court to force Denver Audubon to pay a bond of an amount "that accounts for Intervenors' potential injuries", which it suggests are $140,000 per day the Project is delayed. Intervernors' Resp. at 16, 22-23. Securing a bond of this amount would be unfeasible for Denver Audubon. Denver Audubon seeks this injunction to prevent irreparable harm, which is not a rash application and this court should exercise its discretion to only require a nominal bond

Conclusion

For the foregoing reasons and the reasons stated in Denver Audubon's initial motion, the court should enjoin the opposing parties from continuing construction at Chatfield State Park.

Dated: January 24, 2018 Respectfully submitted,

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Date: January 24, 2018 /s/ Kevin J. Lynch

Kevin Lynch