

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

Civil Action No. _____

CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF
WATER COMMISSIONERS,
a municipal corporation of the State of Colorado,

Plaintiff,

v.

BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY
COMMISSIONERS, a body corporate and politic of the State of Colorado, and MATT JONES,
CLAIRE LEVY, AND MARTA LOACHAMIN, in their official capacity as Commissioners.

Defendant.

COMPLAINT

Plaintiff City and County of Denver, Acting By and through its Board of Water Commissioners, a municipal corporation of the State of Colorado (“Denver Water”) brings this action for declaratory and injunctive relief from Defendants’ unlawful attempts to regulate Denver Water’s expansion of Gross Reservoir and Dam, which has been ordered by the Federal Energy Regulatory Commission (“FERC”) and is governed exclusively by federal law.

Denver Water alleges as follows:

NATURE OF THE CASE

1. Denver Water owns and operates the Gross Reservoir Hydroelectric Project (FERC Project No. 2035), a hydropower project regulated by FERC under the Federal Power Act (“FPA”) and consisting of Gross Reservoir and Dam and associated hydroelectric generation facilities.

2. Gross Reservoir and Dam occupy federal land within Boulder County, Colorado, specifically reserved by Presidential Proclamation for hydroelectric power production. *See* Proclamation No. 1062, 36 Stat. 2720 (1910).

3. For the past 67 years, Gross Reservoir and Dam also have supplied water to residents and businesses in the City of Denver and the surrounding areas. Today, more than 1.5 million people, representing over one quarter of Colorado’s population, depend on Denver Water for this vital resource.

4. When Gross Reservoir and Dam were constructed in the early 1950s, it was anticipated that future expansion of the reservoir and dam would be necessary to ensure Denver Water could continue to meet the increasing customer demand for water.

5. In the early 2000s, having confronted droughts, water shortages, wildfires, and other threats to its system, Denver Water began to assess how it could shore up the water supply for its customers, considering a wide range of infrastructure and conservation options that included the expansion of Gross Reservoir and Dam (“Gross Reservoir Expansion Project” or the “Expansion Project”). Denver Water also began to engage with FERC and the U.S. Army Corps of Engineers (“Corps”), the federal agencies responsible for assessing alternatives and conducting environmental analyses under the National Environmental Policy Act (“NEPA”) before deciding whether to issue an FPA hydropower license amendment and Clean Water Act (“CWA”) permit, respectively, for the Expansion Project.

6. Because Gross Reservoir and Dam occupy federal land specifically set aside for hydropower production, they cannot operate without an FPA hydropower license from FERC. FERC’s predecessor, the Federal Power Commission, issued an original license for the

hydropower project in 1951. Any material changes to facilities within the hydropower project boundary require FERC approval.

7. Preparing to apply for an amendment of the hydropower license from FERC to allow for the expansion of the reservoir took over a decade and involved extensive planning and coordination between Denver Water, FERC, the Corps, and other federal and state agencies, including the U.S. Fish and Wildlife Service (“FWS”) and the U.S. Forest Service (“Forest Service”). Denver Water ultimately filed its application for a license amendment with FERC in 2016.

8. In July 2020, after nearly twenty years of planning, inter-agency coordination, development of appropriate mitigation measures, and consideration of public comment, including from Boulder County, FERC issued an Order amending Denver Water’s hydropower license and directing Denver Water to proceed with the Expansion Project. *See City and County of Denver, Colo.*, 172 FERC ¶ 61,063 (2020) (FERC Order attached as Exhibit A). FERC’s 2020 Order requires construction work on the Expansion Project to commence within two years of issuance (*i.e.*, by July 2022) and finish within seven years of issuance (*i.e.*, by July 2027).

9. To meet those deadlines, numerous predicate activities must occur, including execution of a final construction contract; acquisition of property, permitting, and completion of roadway improvements necessary to facilitate construction access to the site; acquisition of building, grading, and other land use permits from Boulder County; acquisition of floodplain permits; approval by FERC of plans governing tree removal, recreation, quarry operations, traffic management, and other environmental and social factors; approval by FERC of final plans, specifications, and supporting design documents for the expanded reservoir at least 60 days prior

to the start of construction; and then dam surface preparation followed by foundation excavation and five years of construction activities. Many of these conditions require extensive consultation with various federal, state, and/or local authorities, and the duration of the construction season each year is constrained by the onset of freezing temperatures at the high-altitude reservoir. Thus, while the FERC Order requires Denver Water to initiate construction by July 2022, Denver Water will not be able to complete construction by July 2027, as also required by the FERC Order, unless it begins construction by no later than April 2022.

10. Gross Reservoir and Dam reside on federal and private land situated within Boulder County. Notwithstanding that FERC's Order requires the Expansion Project to proceed as authorized by FERC as a matter of federal law, Denver Water has attempted to be a good citizen of the County by making good-faith efforts to obtain County permits that would ordinarily be required for such a water development project, including participating in the State of Colorado's "1041 permit process" under Colo. Rev. Stat. § 24-65.1-101.

11. Denver Water's good-faith efforts have included years of engagement with the County, including two attempts to negotiate intergovernmental agreements, thousands of pages of submissions, three rounds of comment and response, and numerous meetings aimed at satisfying the County's process.

12. Unfortunately, Boulder County has used the 1041 permit process to frustrate and prevent Denver Water from proceeding with the Expansion Project. The County has so extended and delayed its review of Denver Water's 1041 application that it has jeopardized Denver Water's ability to timely commence the work necessary to comply with FERC's Order. Left unchecked, Boulder County's assertion of local permitting authority threatens to derail this FERC-authorized,

half-billion-dollar project that took two decades to move through the federal permitting process—a process in which Boulder County participated.

13. For nearly a year, the County has demanded that Denver Water provide an ever-increasing and ever-more-detailed array of studies, reports, and other information regarding the Expansion Project and its impacts. After each new round of information provided, the County has responded by moving the goalposts, identifying new criticisms for Denver Water to overcome, and levying further requests for information about all aspects of the Expansion Project—most of which have previously been analyzed in detail by FERC and other federal agencies.

14. For example, the County demanded additional information to facilitate its own reassessment of, *inter alia*, the purpose and need for the Expansion Project and alternatives to expanding the reservoir—even though those core issues were analyzed extensively by the federal agencies during the NEPA process, which included an evaluation of over 300 alternatives to the Expansion Project. Denver Water has repeatedly informed the County that because FERC and the Corps selected and permitted a specific alternative—namely, the Expansion Project—that is the only alternative that may, and must, go forward.

15. Throughout this year-long cycle, it has become clear that Boulder County does not intend to let the Expansion Project proceed. Indeed, on June 29, 2021, the County sent Denver Water a letter stating that they found that Denver Water’s submission did not satisfactorily respond to the comments provided by County staff and members of the public, a strong indication that the County will not issue a 1041 permit—while nonetheless continuing to delay a final determination.

16. While Denver Water has sought to be a good citizen of the County by undertaking the 1041 process in good faith, Boulder County cannot require it to obtain a 1041 permit as a

precondition for beginning construction on the Expansion Project, as that local permit process is fully preempted by FERC's complete authority over the licensing of hydropower projects under the FPA.

17. The FPA establishes a comprehensive federal scheme for regulating hydroelectric power projects on navigable waters, and gives FERC exclusive authority to regulate such projects. *See* 16 U.S.C. §§ 797, 799, 804 & 806. The FPA accordingly occupies the field of hydropower licensing and regulation, and any contrary or competing state or local regulation that interferes with a FERC order, preventing the fulfillment of its conditions, must give way. *See First Iowa Hydro-Electric Co-op. v. FPC*, 328 U.S. 152, 164 (1946); *California v. FERC*, 495 U.S. 490, 500–02 (1990).

18. Denver Water has therefore brought this lawsuit to obtain a declaration that the 1041 process is preempted by federal law, as well as an injunction that prohibits Boulder County from making any further attempt to assert 1041 permitting authority over the Expansion Project. Denver Water also asks the Court to enjoin the County from refusing to issue subsidiary permits (for example, building or grading permits) or approvals (for example, to improve or enlarge roads accessing the Project site so that construction materials can be safely and efficiently delivered) that the County has represented are dependent on the prior issuance of a 1041 permit.

PARTIES

19. Plaintiff Denver Water is a municipal corporation authorized by the Colorado Constitution and established by the Denver Charter to provide water to the City and County of Denver, Colorado, and surrounding suburbs.

20. Defendant Boulder County, Acting By and Through Its Board of County Commissioners, is a body corporate and politic of the State of Colorado.

21. Defendant Matt Jones is a Commissioner of the Boulder County Board of County Commissioners, and is sued in his official capacity.

22. Defendant Claire Levy is a Commissioner of the Boulder County Board of County Commissioners, and is sued in her official capacity.

23. Defendant Marta Loachamin is a Commissioner of the Boulder County Board of County Commissioners, and is sued in her official capacity.

JURISDICTION AND VENUE

24. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331. This action arises under the Supremacy Clause of the United States Constitution, the FPA, 16 U.S.C. § 791a *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

25. Because Denver Water seeks injunctive relief from 1041 regulation by Boulder County, on the ground that such regulation is preempted under a federal statute—the FPA—it has presented a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

26. Venue is proper in this District under 29 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Denver Water’s claims occurred in this District.

STATEMENT OF THE CASE

I. Legal Background

A. The FPA Gives FERC Sole Authority Over Hydropower Licensing Decision, Including Whether and Under What Conditions the Expansion Project Can Proceed.

27. The FPA provides a comprehensive nationwide licensing, regulatory, and supervisory scheme for hydropower projects.

28. FERC is the federal agency charged with supervising the safe and efficient operation of non-federal hydropower project facilities throughout the United States, including Gross Reservoir and Dam. FERC's authority to do so derives from Part I of FPA, 16 U.S.C. §§ 791a *et seq.*

29. Section 4(e) of the FPA authorizes FERC to:

[I]ssue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam

16 U.S.C. § 797(e).

30. A license granted by FERC under the FPA has a duration of up to 50 years, and is “conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as [FERC] shall prescribe” *Id.* § 799.

31. Licenses may be amended and renewed upon application to and approval by FERC. *Id.* §§ 799, 808.

B. FERC’s Authority Over the Expansion Project Under the FPA Fully Preempts Boulder County’s 1041 Permit Process.

32. The Supreme Court has explained that when a project falls within FERC’s authority under the FPA, state permit requirements necessarily fall by the wayside because: “To require the petitioner to secure” a state permit “would vest in the [state] a veto power over the federal project . . . [which] could destroy the effectiveness of the federal act.” *First Iowa Hydro-Electric Co-op. v. FPC*, 328 U.S. 152, 164 (1946); *see also California v. FERC*, 495 U.S. 490, 500–02 (1990) (reaffirming *First Iowa*’s finding that hydroelectric power projects are governed by Congress’ comprehensive federal regulatory scheme under the FPA, subject only to the limited reservation of authority of the states to determine proprietary rights in water). The Supreme Court therefore held in *First Iowa* that the project proponent did not have to undertake a state permit process that would have allowed the state to assess, *inter alia*, the environmental, human health, and water supply impacts of the proposed project, explaining that such local permit requirements “strike[] at the heart of the present project” and compliance with those state requirements “may well block the federal license.” 328 U.S. at 166-67.

33. Following the Supreme Court’s precedent, courts across the country have held that state permitting requirements cannot be applied to hydropower projects licensed by FERC under the FPA. For example, in *Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 453 (9th Cir. 1993), the Ninth Circuit affirmed that a California state permit process, under which the state had “required a shifting, expanding range of reports and studies, to assure that the project satisfies [its] concerns regarding recreation, aesthetics, archaeology, sport fishing, and cultural resources,” was preempted in regard to the hydropower project at issue because it was an obstacle to the accomplishment of the purposes of the FPA. The Court explained that “the state process itself,

regardless of the results, is preempted,” such that the federal hydropower licensee need not undergo and wait for the results of that process before securing relief from it, because “undue process in itself burdens a project.” *Id.* at 453 & 456; *see also id.* at 454 (“If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others Undue process may impose cost and uncertainty sufficient to thwart the federal determination that a power project should proceed.”).

34. FERC itself has similarly held that “[i]t is well-established that the FPA preempts all state and local law concerning hydroelectric licensing apart from those adjudicating proprietary water rights.” *PacifiCorp*, 115 FERC ¶ 61,194, at P 8 (2006); *see also Public Utility District No. 2 of Grant County, Washington*, 139 FERC ¶ 61,122, at P 9 (2012) (“The FPA ‘occupies the field,’ such that conflicting or duplicative state regulation is improper.”) (quoting *Sayles*, 985 F.2d at 451)).

35. Thus, Colorado’s state law 1041 permitting process, under which Boulder County has demanded a wide and ever-changing range of information from Denver Water regarding the Project’s purpose and need, alternatives, and environmental, aesthetic, public health, traffic, and other impacts, is entirely preempted by the FPA, and Denver Water cannot be required to obtain a 1041 permit before proceeding to begin construction on the Expansion Project. *See Sayles*, 985 F.2d at 451 (affirming summary judgment granting declaratory and injunctive relief to hydropower project licensee because “Congress has occupied the field, and therefore the state lacks the power to do anything but determine proprietary water rights”).

36. Any other regulatory requirements that Boulder County may seek to impose on the Expansion Project, such as building, grading, or road access permits, are also preempted. *See Town of Springfield v. State of Vt. Environmental Bd.*, 521 F. Supp. 243, 249 (D. Vt. 1981) (the FPA “reflect[s] a clear Congressional intent to bring *all aspects of the hydroelectric project* within the purview of the federal regulatory scheme”) (emphasis added); *Public Service Co. of Colorado v. Board of County Com’rs of San Miguel County*, 223 Fed. App’x. 772, 774–75 (10th Cir. 2007) (enjoining county from requiring federal licensee to relocate an access road within a hydroelectric project on the grounds that Congress intended the FPA to preempt any land use regulation affecting a licensed hydropower project).

II. Factual Background

A. Denver Water Undertakes the Gross Reservoir and Dam Expansion Project.

37. Denver Water constructed Gross Reservoir and Dam on federal land specifically reserved for hydroelectric power production under a presidential proclamation issued by President Taft. *See Proclamation No. 1062*, 36 Stat. 2720 (1910). This means that the federal lands occupied by Gross Reservoir and Dam have been withdrawn from uses other than hydropower production and, under the FPA, FERC has exclusive authority to license and regulate activities within the federal power site reservation.

38. Gross Reservoir and Dam are features of the Gross Reservoir Hydroelectric Project, which Denver Water has owned and operated as an FPA licensee since it built the dam and reservoir in the 1950s. *See City & Cty. of Denver, Colo.*, 10 F.P.C. 766 (1951) (FPA license authorizing construction, operation, and maintenance of Project No. 2035).

39. FERC issued a new license on March 16, 2001, permitting Denver Water to operate and maintain the Gross Reservoir Hydroelectric Project for a period of 40 years. *See City and County of Denver, Colo.*, 94 FERC ¶ 61,313, *on reh'g*, 95 FERC ¶ 61,222 (2001) (2001 License Order).

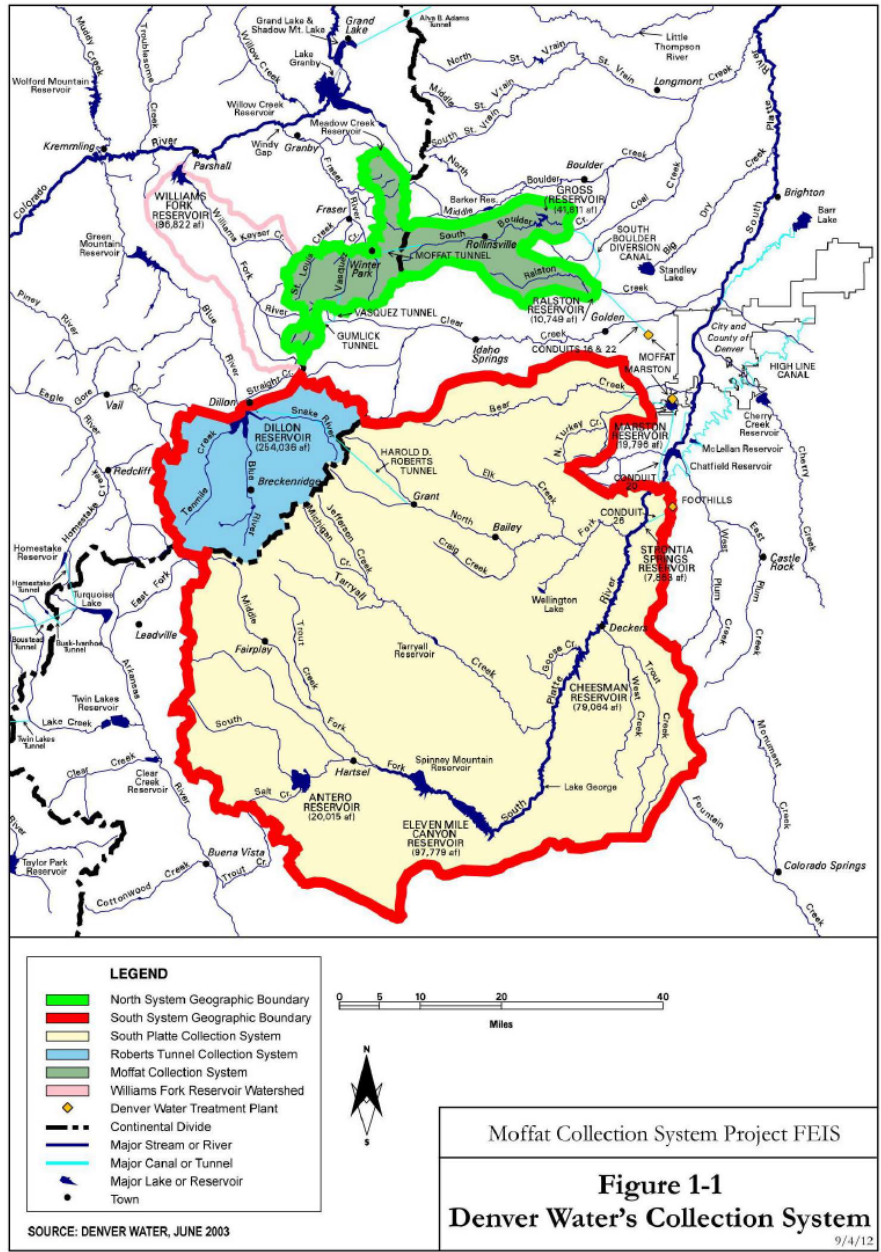
40. Gross Reservoir and Dam are located on South Boulder Creek in Boulder County, Colorado, and occupy federal land within the Roosevelt National Forest that is reserved for hydropower production under FERC's oversight and otherwise administered by the Forest Service.

41. The design of Gross Reservoir and Dam contemplated two phases of construction, so that it could be expanded to meet future water needs.

42. Denver Water finished construction of the first phase of Gross Reservoir and Dam in 1954, and under the license issued by FERC, operates a 7,598-kW hydroelectric facility, 340-foot dam, and the 418-acre Gross Reservoir.

43. Gross Reservoir and Dam also serve as an integral part of the Denver Water system, which since 1918 has provided drinking water to the people of Denver and neighboring communities and presently serves more than 1.5 million people—over one quarter of Colorado's population.

44. This water system consists of two geographically distinct and separate water collection and treatment systems, a North System and a South System, operated in coordination with one another. The boundaries of the North and South Systems are depicted below:



45. The North System, also called the “Moffat Collection System,” diverts water from the Williams Fork and Fraser Rivers and conveys it through the trans-mountain Moffat Tunnel to South Boulder Creek. Gross Reservoir stores that water, along with native flows entering South Boulder Creek and smaller tributaries, and releases water for delivery to the Moffat Water Treatment Plant and communities to Denver’s north and west.

46. The South System collects water from Denver Water's South Platte collection system and the trans-mountain Roberts Tunnel collection system, which consists of Dillon Reservoir and the Roberts Tunnel located near Dillon, Colorado.

47. Ninety percent of Denver Water system's total water storage capacity, and eighty percent of its entire supply, depend on the unimpeded operation of the South System. These constraints diminish the system's reliability, resiliency to emergencies, and operational flexibility needed to meet customer demands under a variety of conditions.

48. Due to the imbalance of the North and South Systems, and storage constraints in the North System, the overall system is vulnerable to disasters and extreme events that could disrupt or restrict use of the South System. For example, in 2002, in the middle of a severe drought, a large wildfire (the Hayman Fire) in the publicly owned watersheds that provide most of Denver Water's supply required Denver Water to cease operations on the South System and rely on the North System to meet customer demands.

49. The system imbalance also renders Denver Water's raw water customers vulnerable in the event of a water shortage in the North System.

50. Without further improvement, the North System risks running out of water in a single dry year because current water demands exceed its available supply under drought conditions.

51. In order to increase the reliability, flexibility, and resiliency of its supply system, meet future customer demand, and address related issues, Denver Water decided to undertake the Gross Reservoir Expansion Project, in which it has invested almost two decades of planning and

preparation, including engagement with FERC, the Corps, FWS, the State of Colorado, and Boulder County.

52. The Expansion Project is the successor to a previous project that Denver Water had proposed in the early 1980s. At that time, Denver Water proposed providing additional storage in the South System by building the Two Forks Dam at the confluence of the north and south forks of the South Platte River.

53. After a multi-year review process and substantial investment in the Two Forks project by Denver Water, the U.S. Environmental Protection Agency vetoed the proposed Two Forks Dam in 1990 because it concluded that Denver Water should pursue other, less environmentally damaging alternatives. Leading up to the veto, environmental groups opposed to the Two Forks project published their own alternatives analysis and concluded that a better, less damaging alternative would be to expand the existing dam at Gross Reservoir.

54. Building on this history, the Gross Reservoir Expansion Project aims to address Denver Water's needs by expanding Gross Reservoir's current storage volume of 41,811 acre-feet ("AF") to 119,000 AF and increasing the height of Gross Dam from 340 to 471 feet. Additional storage will be filled only in average and above-average runoff years and will be used during droughts or system emergencies. The completed Expansion Project will provide an average of 18,000 AF/year of water during a four-year drought, increase hydropower generation by 16.5%, and add a 5,000 AF Environmental Pool for the Cities of Boulder and Lafayette to store water for use in enhancing South Boulder Creek aquatic habitat.

B. FERC Issues an Order Authorizing the Expansion Project After Years of Careful Consideration and Regulatory Review by Multiple Federal and State Agencies.

55. In 2003, Denver Water initiated federal NEPA review, 42 U.S.C. § 4321 *et seq.*, and began exploring alternatives to meet its needs. At that time, it was not yet known whether expanding Gross Reservoir and Dam would be the selected alternative, so it was not yet clear that a hydropower license amendment would be needed from FERC. All alternatives, however, implicated the Corps' jurisdiction under Section 404 of the CWA, 33 U.S.C. § 1344. The Corps therefore was designated as the lead agency under NEPA, and Denver Water applied for a Section 404 permit in 2009.

56. Denver Water and the federal agencies anticipated that a FERC license amendment would be needed if the expansion of Gross Reservoir and Dam ultimately became the chosen alternative. This is because the Expansion Project necessarily alters facilities within the FERC-designated boundary of the Gross Reservoir Hydroelectric Project and covered by the terms of the FERC-issued license. *See* 2001 License Order. Without FERC's review and approval, the Expansion Project could not proceed.

57. For that reason, FERC has been engaged since the very first steps of the permitting process. FERC was formally designated as a cooperating agency under NEPA, 40 C.F.R. § 1501.6, so that it could participate fully in the required environmental analyses and rely on them to support its decision to amend the hydropower license, should that step ultimately prove necessary, *see id.* § 1501.11 (authorizing tiering).

58. During the NEPA process, the Expansion Project was selected by the federal agencies as the preferred and least environmentally damaging practicable alternative. On

November 25, 2016, Denver Water filed an application with FERC to amend its license for the Gross Reservoir Hydroelectric Project to raise Gross Dam and enlarge Gross Reservoir.

59. On July 16, 2020, FERC issued an Order granting Denver Water’s amendment to its license and directing it to move forward with the Expansion Project, extending the hydropower license term by ten years, and requiring Denver Water to begin construction on the raised dam within two years and complete construction within seven years. *See* Ex. A; *see also* *Save the Colo. v. Semonite*, No. 18-cv-03258-CMA, 2021 WL 1210374, at *3 (D. Colo. Mar. 31, 2021) (ruling that the FPA’s jurisdictional provision governs judicial review of all claims against the Expansion Project, including claims challenging analyses that other federal agencies conducted, but that FERC participated in and relied upon to issue its Order).

60. FERC’s Order also authorized Denver Water to undertake additional construction activities, including operating an onsite quarry, upgrading hydropower project facilities, and modifying hydropower project operations. *See* Ex. A ¶ 56. The Order amended the list of hydropower project works included in the license, amended certain license articles, and required Denver Water to undertake a host of environmental mitigation measures. *See* Ex. A ¶¶ 55, 61, & Appendix A at A-12—A-14.

61. The FPA requires FERC to evaluate every aspect of a licensed project, including various implications that the project may have on the environment and all activities within the license area, such as recreation. As such, FERC not only performed its own environmental analysis, but also participated in, reviewed, and incorporated into the record for its decision environmental analyses prepared by the Corps and FWS. FERC then expressly relied upon those agency processes and decisions to determine whether it should approve the Expansion Project and

whether any modifications to Denver Water's proposed action were necessary. *See* Ex. A ¶¶ 19, 29, 36, 42–43.

62. For instance, FERC participated in and relied on the products of the Corps' NEPA process, including the Final Environmental Impact Statement and Record of Decision (decisions issued in April 2014 and July 2017, respectively), as well as the underlying ESA analyses, which were necessary preconditions to any dredge-and-fill activities in navigable waters related to dam construction. *See* Ex. A ¶ 17. The Corps' NEPA analysis spanned more than 14 years, during which time the Corps and FERC reviewed the effects of enlarging the North System and amending Denver Water's FPA license. *Id.* Likewise, FERC and the Corps communicated in the same fashion with FWS during its ESA analysis. *See* Ex. A ¶ 32.

63. The Corps' NEPA process was subject to public notice and comment, and Boulder County participated in that process by expressing its opposition to the Expansion Project in comments filed in 2008, 2010, and twice in 2014 (attached as Exhibits B, C, & D (attaching 2014 comments to motion to intervene before FERC)). The Corps properly responded to all comments filed by Boulder County during the NEPA process. *See* U.S. Army Corps of Eng'rs, Environmental Impact Statement – Moffat Collection System Project, <https://www.nwo.usace.army.mil/Missions/Regulatory-Program/Colorado/EIS-Moffat/>. Boulder County's criticism of the project only grew as time went on.

64. Pursuant to NEPA, FERC also conducted its own Supplemental Environmental Assessment (issued February 2019) to ensure that all aspects of the Expansion Project were fully considered. *See* Ex. A ¶ 19 n. 19; FERC, Final Supplemental Environmental Assessment for Hydropower License, Gross Reservoir Hydropower Project—FERC Project No. 2035-099 (Feb.

2019), <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15159679>. Tiering back to the Corps' earlier NEPA analysis, FERC evaluated the effects of quarry operations and other construction elements and proposed modifications to recreational facilities. This extra review yielded a finding of no significant impact by FERC.

65. Pursuant to Section 4(e) of the FPA, 16 U.S.C. § 797(e), FERC's Order granting Denver Water's license amendment imposed conditions on the Expansion Project, some of which replace conditions included in the existing license. *See* Ex. A ¶ 42.

66. The amended license conditions include requirements to commence construction of the Expansion Project within two years of the Order's issue date, *i.e.*, by July 2022, and to complete construction within seven years, by the year 2027. *See* Ex. A ¶ 70.

67. In addition to its participation in the Corps' NEPA process, Boulder County intervened in the FERC proceedings. In its motion to intervene before FERC, Boulder County claimed that, among other things, Denver Water had not substantiated the need for the Expansion Project. FERC noted such comments in its Order (*e.g.*, *id.* ¶ 21), but concluded that the Corps had adequately addressed the need for the Expansion Project in its analysis (*id.* ¶ 22 n.25).

68. Boulder County also criticized Denver Water's analysis of the Expansion Project's effects on various environmental and social factors, such as transportation and tree removal. In response, FERC's Order required Denver Water to prepare plans covering a variety of subjects, including (*inter alia*) transportation management, tree removal, recreation management and monitoring, and quarry operations and reclamation. FERC's Order required Denver Water to first provide Boulder County and other agency or governmental stakeholders with a 30-day comment period on the draft plans and then submit the plans for FERC's final approval by July 16, 2021.

Compliance with this submittal deadline is critical so that FERC can review and approve the plans in time for Denver Water to begin the preconstruction activities necessary to meet the FERC Order's July 16, 2022 deadline to start construction on the Expansion Project (Ex. A at 29).

69. Despite its criticisms of the Expansion Project before FERC, Boulder County declined to exercise its right to seek rehearing of FERC's Order, a necessary precondition to appeal FERC's order to federal court. 16 U.S.C. § 825l(a)–(b). Thus, FERC's Order became final and no longer subject to judicial review on August 17, 2020.

70. In addition to the federal approvals Denver Water received from FERC, the Corps, and FWS, during the pendency of the federal review process, Denver Water also obtained several state permits and approvals. These included the approval of Denver Water's Fish and Wildlife Mitigation Plan in 2011 from Colorado Parks and Wildlife and the Colorado Water Conservation Board, and a CWA Section 401 State Water Quality Certification obtained in 2016 from the Colorado Department of Public Health and Environment, which found that the Expansion Project would result in a net benefit to water quality on both sides of the Continental Divide. Boulder County participated and had ample opportunity to express its views and have them considered by the decisionmakers in these public processes, which were subject to notice and comment.

C. After Denver Water Spent Years Engaging in a Good-Faith Dialogue Regarding Boulder County's 1041 Permitting Process, the County Sought to Block the Expansion Project.

71. Over the course of nearly two decades, Denver Water diligently pursued and obtained all federal and state permits required of it, processes in which Boulder County had the opportunity to—and did—participate. But now, through its local “1041 process,” Boulder County is attempting to prevent the Expansion Project from proceeding and block Denver Water's ability

to comply with the FERC Order's mandate that construction start by mid-2022 and end by mid-2027 (which will be impossible if Denver Water cannot commence construction in time), as well as the deadlines and conditions imposed by the Corps' CWA Section 404 permit. The delay and uncertainty imposed by Boulder County threatens to derail the Expansion Project through increased costs, expiration of previously obtained permits, complication of construction and engineering logistics, and other factors critical to the success of a dam-raise project of this size and complexity.

72. Colorado House Bill 1041, also known as the Areas and Activities of State Interest Act or H.B. 1041, and now codified at Colo. Rev. Stat. § 24-65.1-101, was enacted in 1974 for the purpose of addressing issues surrounding land-use planning in Colorado. The statute delegates specific authority to local governments to regulate, through established criteria, a variety of development activities with guidance from the state, *i.e.*, the "1041 process."

73. Pursuant to H.B. 1041, Boulder County generally has the authority to require project proponents within its jurisdiction to participate in its "1041 process." The process requires submission of a permit application; review of the application by Boulder County staff and referral agencies; a hearing and recommendation from the Boulder County Land Use Planning Commission; and a hearing and final decision from the Boulder County Board of County Commissioners. Boulder County must notice a hearing within 30 days of receiving a 1041 application. CRS § 24-65.1-501(2)(a).

74. For many years, Denver Water has attempted in good faith to engage Boulder County about its 1041 authority. To be a good citizen, Denver Water was willing to undertake

significant work and expense to secure and comply with a 1041 permit even while believing that no such permit could lawfully be required.

75. Just as Denver Water has successfully done with numerous other federal, state, and municipal agencies and governmental units—including Grand County, whose streams will provide most of the water to fill the expanded reservoir—Denver Water sought early coordination with Boulder County to address its concerns and avoid a protracted 1041 process. Denver Water began this outreach to Boulder County almost a decade ago, in 2011.

76. In 2012, Denver Water and Boulder County staff reached an agreement on the conditions for a 1041 permit, which would have taken the form of an inter-governmental agreement as an alternative to the 1041 process. Unfortunately, despite their staff's recommendation to approve the agreement, the Boulder County Board of County Commissioners refused to approve it for political reasons.

77. Before Denver Water submitted its 1041 application, Denver Water and Boulder County also engaged in litigation regarding the zoned land exemption to the County's authority under 1041. Specifically, in light of prior zoning decisions by the County, Denver Water contended that the Expansion Project is exempt from the 1041 process.

78. Even with litigation pending, however, Denver Water continued in good faith to prepare a 1041 application and attempted to file it in 2019. Boulder County refused to process the application, insisting that Denver Water give up its right to judicial review to obtain timely processing of the application.

79. On December 27, 2019, the Colorado District Court for Boulder County decided that the Boulder County Board of County Commissioners did not exceed its authority in

determining that the Expansion Project does not qualify for the zoned-land exemption provision in H.B. 1041.

80. Denver Water appealed the state court’s decision, but when FERC issued its license amendment order setting the construction deadlines for the Expansion Project, Denver Water concluded that it no longer could afford to wait for an appellate court decision. Denver Water had no choice but to voluntarily relinquish its appeal so that Boulder County would begin processing the 1041 application.

81. Without conceding that Boulder County had the authority to require it to do so, Denver Water submitted its 1041 application to Boulder County on September 21, 2020.

82. Despite Denver Water’s good faith efforts to complete the 1041 process, Boulder County has continued to use administrative means to delay and derail the Expansion Project.

83. Indeed, instead of complying with the statutory mandate to notice a hearing within 30 days of receipt of an application, Boulder County continuously deemed the 1041 application “incomplete” and granted itself unlimited amounts of time to request additional information.

84. For example, on December 23, 2020, about two months after Denver Water submitted its 1041 application, Boulder County provided its first round of comments on Denver Water’s application (attached as Exhibit E). *See* Declaration of Nicholas A. DiMascio ¶ 6 (“DiMascio Decl.”). In its comments, the County explained that “the originally submitted materials generally address the application requirements.” Ex. E at 1. Nevertheless, staff found that “significant additional information is necessary before the application can be considered complete.” *Id.* Among other things, the County asked for “specifics related to less environmentally damaging alternatives” and updated data regarding the purpose and need for the Expansion Project.

Id. The County also requested new field surveys to evaluate the impacts of the Expansion Project on fish, wildlife, and plants. *Id.* at 125. Several County agencies also asserted that the application should be rejected because no expansion of Gross Reservoir could meet the County’s standards of approval. *E.g., id.* at 58–60, 131–33.

85. But as Denver Water has explained to the County, the Corps permitted, and FERC *ordered that Denver Water construct*, the selected alternative that forms the basis of the 1041 application. At this point, consideration of other alternatives or new data regarding the need for the Expansion Project is moot. Indeed, the County even references alternative conservation measures the *Corps* eliminated from consideration (Ex. E at 2), seeking to have Denver Water revive them. But Boulder County had every opportunity to participate in the federal alternatives analysis that already occurred—and it did so by submitting comments critical of the Expansion Project to the federal agencies. Boulder County’s disagreement with the result of the federal process does not give it the authority to override FERC’s decision.

86. The County’s first set of comments on Denver Water’s 1041 application also conveyed that the County would not sign an application for an access permit required from the Colorado Department of Transportation (“CDOT”) unless and until the 1041 permit was granted. This access permit covers improvements to the main construction access to the site and must be submitted to CDOT by the County. The County’s refusal to participate in this process jeopardizes Denver Water’s ability to acquire the necessary property and complete road improvements in time to comply with the construction deadlines in FERC’s Order.

87. In response to the County’s comments, Denver Water explained that it must “respectfully decline” to accede to certain demands “for new studies or additional analyses ...

because they seek reconsideration of determinations” the Corps and FERC already made, “and to which Denver Water must adhere.” Exhibit F.1 (Ltr. from Denver Water to Boulder County Cmty. Permitting & Planning at 2 (Feb. 19, 2021)). But Denver Water did provide extensive responses to other questions and requests, including by submitting over 100 pages of responses to technical comments and questions, proposals to address the County’s concerns, and over a dozen additional exhibits. Exhibit F.2.

88. Denver Water’s new exhibits included notes from five meetings it held in January and February 2021 with County agencies to discuss their concerns about the Expansion Project and attempt to identify solutions. Exhibits F.3–F.7. These meetings represent just a fraction of the community engagement that has occurred over the past several years, including numerous meetings with County staff and an extensive public outreach campaign.

89. Denver Water also provided Boulder County a schedule showing when the County should expect to receive drafts of the plans required by FERC’s Order, including a tree removal plan, recreation management and monitoring plans, quarry operations and reclamation plans, and a traffic management plan. Ex. F.8. FERC’s Order provides Boulder County with a 30-day comment period on those plans before Denver Water submits them for FERC’s final approval on or before July 16, 2021. Denver Water informed Boulder County that it would respond to its comments on issues covered by those plans according to the process and timeline set by FERC’s Order. Denver Water also explained that it needed final approval of its 1041 application from Boulder County by August 2021 so that it could complete the preconstruction activities necessary to comply with the construction deadlines in FERC’s Order. Exs. F.1, F.8 (detailing schedule for remaining permitting, preconstruction, and construction activities).

90. Two months later, on April 8 2021, Boulder County sent Denver Water a second round of comments on its application. The County attempted to justify its demands to reassess the need for the Expansion Project and conduct a new alternatives analysis by responding that the 1041 process is “separate” from the federal process. Exhibit G (Ltr. from Boulder County Cmty. Planning & Permitting to Denver Water at 1 (dated April 6, 2021, but transmitted April 8, 2021)); DiMascio Decl. ¶ 15. Despite Denver Water’s extensive responses to the first set of comments, Boulder County continued to claim that “the current application submittal does not address the identified issues or provide enough information to constitute a complete application.” Ex. G at 2.

91. Instead of working with Denver Water to develop mitigation measures, conditions of approval, or other terms that Denver Water *could* implement, Boulder County again refused to deem the application complete, claiming that Denver Water had provided deficient information on aspects of the Expansion Project neither Boulder County nor Denver Water could change, or that are to be addressed in the plans subject to FERC’s final approval—not Boulder County’s authority.

92. Denver Water responded to the County in April 2021, reiterating that many issues of concern had already been addressed, considered, and decided by the relevant federal agencies as a precursor to FERC’s Order and/or would be covered in the plans required by FERC’s Order. Exhibit H (Ltr. from Denver Water to Boulder County Cmty. Permitting & Planning (Apr. 28, 2021)). Nevertheless, Denver Water again provided additional information to the County regarding many other technical issues raised in the County’s April 8 letter and comments and reiterated that the County should provide its comments on the draft plans required by FERC’s Order. Denver Water also continued to stress the need for a final decision on its application no later than August 2021. *Id.* at 1.

93. By June 2021, Denver Water had supplied the County with drafts of all the plans required by FERC's Order, and the County's 30-day comment period on those plans had expired.¹ Boulder County wrote to Denver Water on June 8, 2021, and acknowledged receipt of all the information Denver Water had supplied, but it still asserted that the application was "incomplete" and provided yet another round of comments identifying purported deficiencies in the application. The County asked Denver Water to indicate whether it would provide the additional information requested or whether the County should evaluate the application as submitted. Exhibit I (Ltr. from Boulder County Cmty. Planning & Permitting to Denver Water at 2 (dated June 1, 2021, but transmitted June 8, 2021)); DiMascio Decl. ¶ 17.

94. On June 21, 2021, Denver Water responded, explaining that it had already provided the County with extensive information in support of its application and requested the County calendar the application for a public hearing and final decision by the County Commissioners no later than August 2021. Denver Water noted that, because the County had not yet calendared the application for a public hearing, Denver Water was becoming increasingly concerned that a final approval would not be forthcoming by August 2021, in time to complete other preconstruction processes necessary to comply with the construction deadlines in FERC's Order. Exhibit J (Ltr. from Denver Water to Boulder County Cmty. Planning & Permitting (June 21, 2021)).

95. On June 29, 2021, Boulder County informed Denver Water in a letter that Denver Water had "failed to supply satisfactory responses to the referral agencies' response letters," but stopped short of formally finding that the application is complete, further drawing out the process.

¹ Denver Water filed the plans on July 14, 2021 for FERC's review and final approval.

The June 29 letter thus indicates that the County ultimately will decline to issue a 1041 permit—but also that the County will take through the fall, if not longer, to issue a decision, thereby preventing Denver Water from timely commencing work on the Expansion Project in compliance with FERC’s Order. Exhibit K (Ltr. from Boulder County Cmty. Planning & Permitting to Denver Water (June 29, 2021)). In the past, Boulder County has taken more than seven months to move a disputed 1041 permit application from a notice of hearing to a final decision.

96. Continuing to participate in the 1041 process into the fall would be futile given Boulder County’s position and actions to date. Indeed, two of the three currently sitting Boulder County Commissioners—Claire Levy and Marta Loachamin—already have stated publicly that they oppose the Expansion Project and desire to stop it, even though they are supposed to sit as impartial, quasi-judicial officers during the 1041 process. When added to Boulder County’s long history of opposing the Expansion Project through the federal process, Boulder County’s conduct over the past year indicates that continuing the 1041 process into the fall would result only in further delay and uncertainty, which poses an unacceptable risk of derailing the Expansion Project given the critical preconstruction tasks that must take place in the coming months.

97. Boulder County has also repeatedly informed Denver Water that, without the 1041 permit, Denver Water cannot obtain the transportation, grading, and building permits also required to construct the Expansion Project.

98. In all these ways, Boulder County is attempting to use its purported permitting authority to undermine the Expansion Project and prevent Denver Water from initiating construction by summer 2022 and completing construction by summer 2027, as required by

FERC's Order. Boulder County is, in essence, using the 1041 process to attempt to veto the expansion of a federally licensed hydropower project.

FIRST CLAIM FOR RELIEF

(Declaratory Relief, 28 U.S.C. § 2201 — Federal Preemption)

99. The Plaintiff repeats and re-alleges the foregoing paragraphs.

100. The Supremacy Clause of the U.S. Constitution provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land.” U.S. Const. art. VI.

101. Gross Reservoir and Dam occupy federal lands reserved for hydropower production, and the FPA expressly vests FERC with the exclusive authority to review all aspects of a hydroelectric project, ensure that they comply with all applicable statutory obligations, and determine whether to license the project or not, and with what conditions and requirements. *See* 16 U.S.C. § 791a *et seq.*

102. FERC exercised this exclusive authority when it issued its July 2020 Order amending Denver Water's license and directing Denver Water to proceed with the Expansion Project.

103. As such, the FPA preempts any attempt by Boulder County to exercise regulatory authority over the Expansion Project. Boulder County's exercise of such authority impermissibly intrudes on FERC's exclusive jurisdiction as delineated by the FPA. *See First Iowa Hydro-Electric Co-op. v. FPC*, 328 U.S. 152, 164 (1946); *see also California v. FERC*, 495 U.S. 490, 500–02 (1990).

104. As a result, Boulder County lacks legal authority to regulate the Expansion Project.

105. Denver Water has been, and will be, irreparably injured by Boulder County's application of the 1041 process to the Expansion Project so as to impede Denver Water's ability to comply with FERC's Order, which mandates that Denver Water expand Gross Reservoir and Dam in accordance with certain specified conditions; begin construction on that Expansion Project by July 2022; and complete construction by July 2027. Denver Water also has been and will be irreparably injured by the County's refusal to issue ancillary building, grading, and road work permits unless and until it issues a 1041 permit.

106. The requested declaratory relief, which the Court may grant pursuant to 28 U.S.C. § 2201, will prevent further injuries caused by Boulder County's violation of federal law.

SECOND CLAIM FOR RELIEF

(Injunctive Relief, 28 U.S.C. § 2202 — Federal Preemption)

107. Plaintiff repeats and realleges the foregoing paragraphs.

108. The Supremacy Clause of the U.S. Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land." U.S. Const. art VI.

109. Gross Reservoir and Dam occupy federal lands reserved for hydropower production, and the FPA expressly vests FERC with the exclusive authority to review all aspects of a hydroelectric project, ensure that they comply with all applicable statutory obligations, and determine whether to license the project or not, and with what conditions and requirements. *See* 16 U.S.C. § 791a *et seq.*

110. FERC exercised this exclusive authority when it issued its July 2020 Order amending Denver Water’s license and directing Denver Water to proceed with the Expansion Project.

111. As such, the FPA preempts any attempt by Boulder County to exercise regulatory authority over the Expansion Project. Boulder County’s exercise of such authority impermissibly intrudes on FERC’s exclusive jurisdiction as delineated by the FPA.

112. As a result, Boulder County lacks legal authority to regulate Denver Water’s Expansion Project.

113. Denver Water has been irreparably injured by Boulder County’s assertion of 1041 permitting authority and other efforts to impede Denver Water’s ability to construct the Expansion Project in compliance with FERC’s Order. If left unchecked, Boulder County’s assertion of 1041 permitting authority will prevent Denver Water from starting construction by July 2022 and completing construction by July 2027, as required by FERC’s Order. The delay and uncertainty caused by Boulder County’s assertion of 1041 authority also threatens to derail the Expansion Project due to increased costs, expiration of already obtained permits, complication of construction and engineering logistics, and other factors critical to the success of a dam-raise project of this size and complexity. Absent an order from this Court directing the County to cease its application of the 1041 process to the Expansion Project, and to proceed to issue any necessary permits for road work, building, and grading activities required for the Expansion Project as though a 1041 permit had issued, Denver Water will continue to be irreparably harmed—as will the citizens of Denver and surrounding municipalities who depend on Denver Water to ensure the water supply for the coming decades, even during times of drought, natural disaster, or public emergency.

114. The requested injunctive relief, which the Court may grant pursuant to 28 U.S.C. § 2202, will prevent further injuries caused by Boulder County’s violation of federal law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully seeks the following relief:

1. A declaration that the FPA and FERC’s July 17, 2020 Order preempt Boulder County’s exercise of regulatory authority over the Expansion Project under Colo. Rev. Stat. § 24-65.1-101, and further preempts any other claimed statutory, regulatory, or common-law authority to the extent Boulder County attempts to regulate any aspect of the Expansion Project addressed in FERC’s Order.
2. Injunctive relief preventing Boulder County from utilizing its 1041 process to exercise regulatory authority over the Expansion Project, and requiring the County to proceed to process and issue any additional or ancillary permits or approvals needed for Denver Water to begin construction as though a 1041 permit had issued.
3. Any and all such relief as the Court may deem appropriate.

DATED: July 14, 2021

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