

# Gross Reservoir Expansion Project NEPA Litigation Overview

Date: March 21, 2024





# Agenda

- Gross Reservoir Expansion Project Overview
- Environmental Review Process
- Project Status
- Litigation
  - Procedural History
  - Claims and Parties' Positions
    - Clean Water Act
    - National Environmental Policy Act
    - Endangered Species Act
    - Mootness

# Gross Reservoir Expansion Project Overview



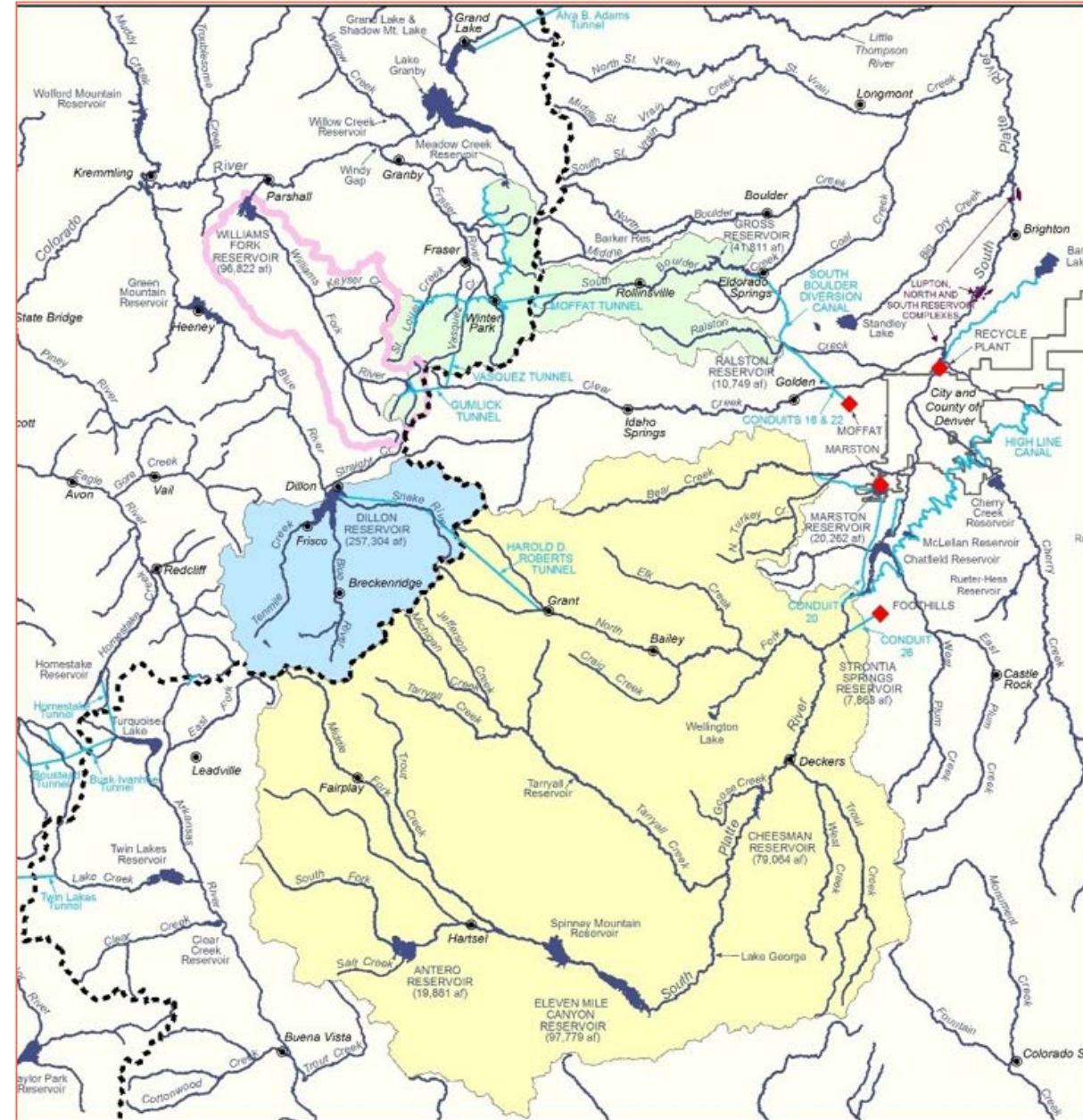
# Denver Water's System and Customers

- 1.5 million people (1/4 of Colorado's population)
- Use less than 2% of water consumed in Colorado
- Water supply comes from both the South Platte and Colorado rivers
- 4000 square miles of watershed area
- More than 3000 miles of pipe
- 20 dams, 12 reservoirs, and 4 treatment plants



# Collection System

- System is imbalanced
  - 20% collected in North System
  - 10% of storage in North System





# Environmental Review Process



# Environmental Review Process

- US ACE was identified as “lead agency” with EPA and FERC as cooperating agencies
- NEPA “scoping” process initiated in 2003
  - Identified 4 interrelated needs: (1) reliability; (2) reduction of vulnerability; (3) flexibility; and (4) additional firm yield
  - “In a severe drought, even in a single, severe dry year, the Moffat Water Treatment Plant... is at significant level of risk of running out of water.”
- Overall project purpose: “to develop 18,000 acre-feet of new, firm yield to the Moffat Treatment Plant and raw water customers upstream of the Moffat Treatment Plant pursuant to Denver Water’s commitment to its customers”



# Environmental Review Process – cont.

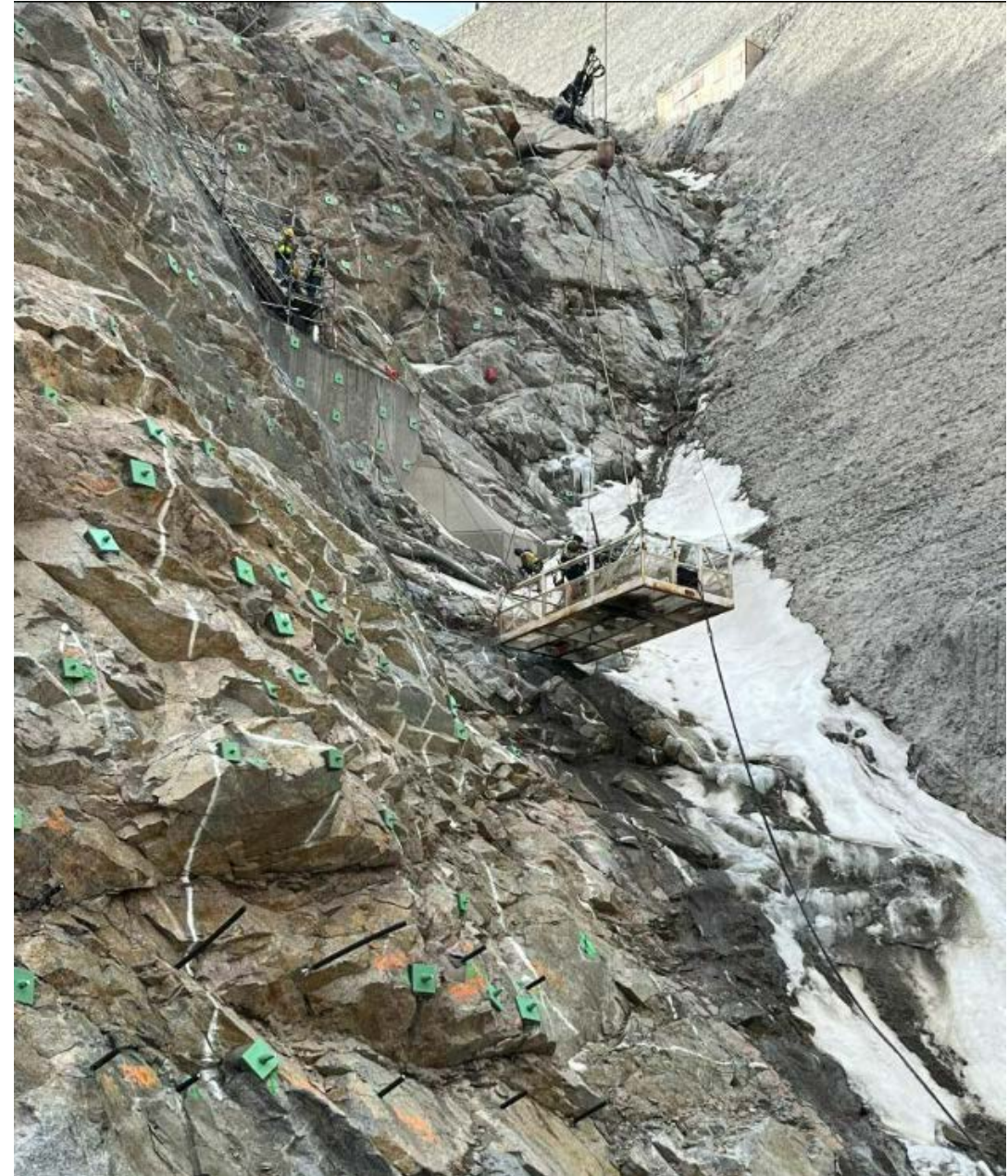
- Alternatives analysis
  - Screened 300+ water supply and infrastructure components
  - Led to 34 alternatives
  - Six primary alternatives further developed through EIS process
    - “No Action” did not include expansion of Gross Reservoir
    - 4 alternatives included smaller expansions
    - Preferred alternative = GRE Project
- Final EIS issued in 2014
- Record of Decision issued in 2017 – concluded that less than 2 acres of wetlands would be impacted by fill material
- FERC issued supplemental EA and then License in July 2020
  - Required construction to start by 2022 and finish by 2027



# Gross Reservoir Expansion Project Status

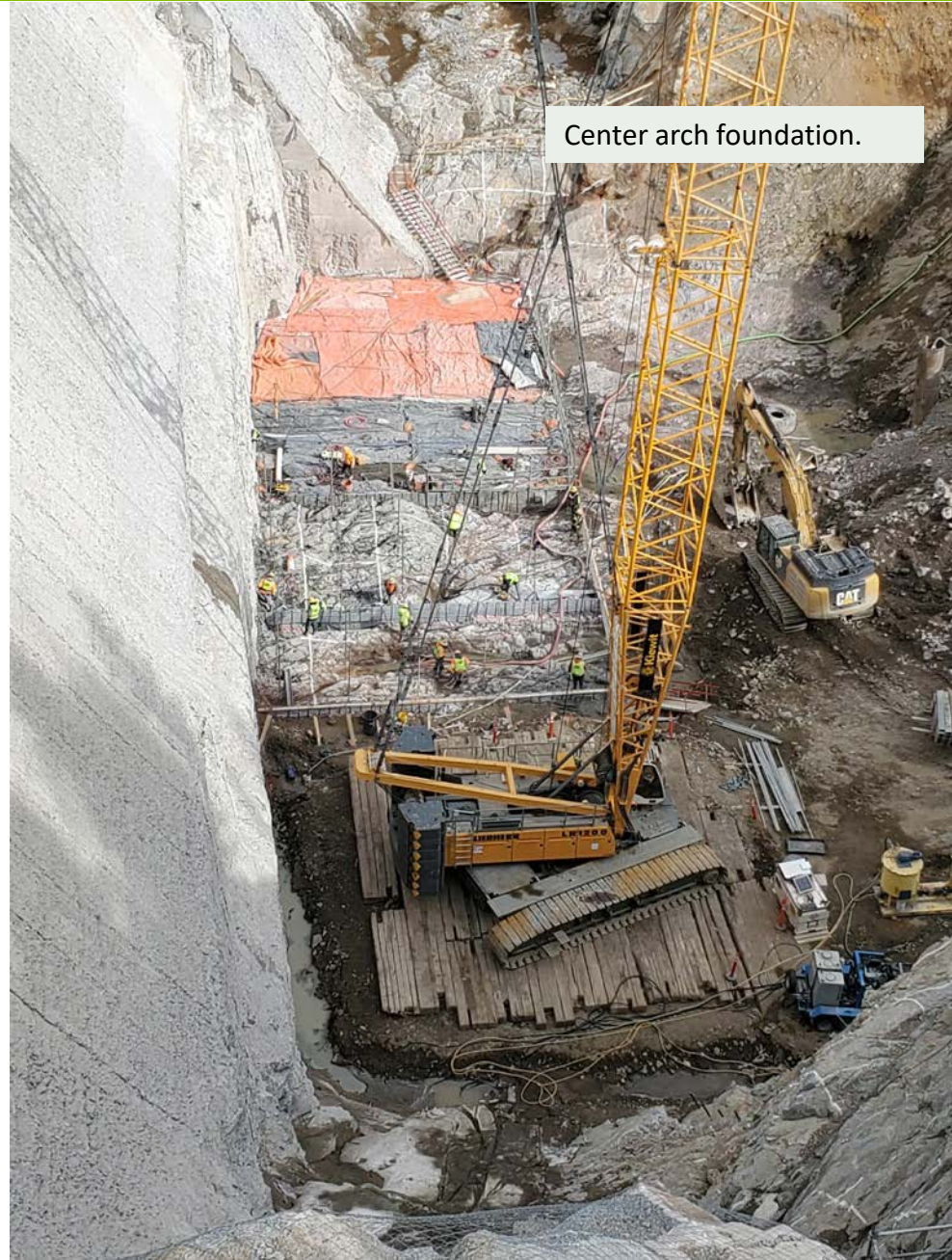








Center arch foundation.





# Litigation





# Litigation Procedural History

- Petitioners submitted ESA Notice Letter in August 2018
- Denver Water urged the US ACE to reinstate consultation to incorporate additional monitoring
- Petitioners filed complaint in December 2018
- In April 2020 FWS concluded that green lineage trout are not properly classified as ESA threatened greenback; withdrew BiOp
- August 2020 – DOJ and Denver Water filed motion to dismiss
- March 2021 – Court granted MTD
- April 2021 – Petitioners appealed to 10<sup>th</sup> Circuit
- September 2022 – 10<sup>th</sup> Circuit reversed and remanded for consideration of the merits

# Litigated Issues – NEPA

## ➤ Was the statement of purpose and need unduly restrictive?

STC's Position	Federal Agencies/Denver Water
<ul style="list-style-type: none"> <li>An agency may not formulate the purpose and need statement so narrowly that it can be accomplished by only one alternative</li> </ul>	<ul style="list-style-type: none"> <li>US ACE followed NEPA and its own regulations in defining the project purpose and need</li> </ul>
<ul style="list-style-type: none"> <li>Denver Water “stacked the deck” and circumscribed the range of alternatives by combining multiple independent needs into one</li> </ul>	<ul style="list-style-type: none"> <li>It was proper for US ACE to consider these multiple factors because they were interrelated, not independent needs</li> </ul>
<ul style="list-style-type: none"> <li>Analysis should have focused on the “basic purpose” of providing a supplemental water supply rather than including other factors</li> </ul>	<ul style="list-style-type: none"> <li>Agencies have considerable discretion in formulating purpose and need, and US ACE properly gave “substantial weight” to Denver Water’s goals and objectives</li> </ul>



# Litigated Issues – CWA (“LEDPA”)

- Alternatives analysis – “Practicable alternatives” are those that are “capable of being done” considering costs, technology, and logistics in light of the project purposes

STC’s Position	Federal Agencies/Denver Water
<ul style="list-style-type: none"> <li>US ACE may NOT issue a permit if there is a practicable alternative that would have less adverse impacts on the aquatic ecosystem, so long as it does not have other significant adverse environmental consequences</li> </ul>	<ul style="list-style-type: none"> <li>US ACE fully evaluated six alternatives representing a reasonable range of options, as required by both NEPA and the CWA</li> </ul>
<ul style="list-style-type: none"> <li>US ACE failed to demonstrate that non-wetland disturbing options were unavailable to satisfy each individual project need</li> </ul>	<ul style="list-style-type: none"> <li>US ACE properly screened out options that (1) didn’t meet the purpose and need, (2) were impracticable, and/or (3) had more significant wetland/environmental impacts</li> </ul>

# Litigated Issues – NEPA/CWA

- Did US ACE independently and properly validate Denver Water's demand projections?
- Did US ACE account for climate change adequately?



# Litigated Issues - ESA

- Did the US Fish and Wildlife Service improperly “delist” the green lineage cutthroat trout?



# Litigated Issues - Mootness

Denver Water's Position	STC's Position
<ul style="list-style-type: none"> <li>Article III “[m]ootness usually results when a plaintiff has standing at the beginning of a case, but, due to intervening events, loses one of the elements of standing during litigation[.]” All fill authorized by Section 404 permit is complete and cannot be undone.</li> </ul>	<ul style="list-style-type: none"> <li>Denver Water has not met the “heavy burden” of demonstrating mootness.</li> </ul>
<ul style="list-style-type: none"> <li>Prudential mootness arises “if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits....” The Dam’s previous gravity-based structure has been altered such that the only design proven capable of restoring the Dam to permanent stability is the new arch structure approved by FERC.</li> </ul>	<ul style="list-style-type: none"> <li>Dam construction is far from complete, and the court could still provide relief to petitioners, including prohibiting Denver Water from filling the enlarged reservoir or ordering additional mitigation.</li> </ul>



# Discussion

