

Gross Reservoir and Dam Expansion/Federal Preemption: Denver Water Lawsuit Challenges Boulder County Regulatory Authority



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The City and County of Denver, acting by and through its Board of Water Commissioners (“Denver Water”) filed a Complaint in the United States District Court for the District of Colorado addressing what it alleges are Boulder County’s:

. . . 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.

The Gross and Reservoir and Dam (“Gross Reservoir”) is described to be a component of the Gross Reservoir Hydroelectric Project which is owned and operated by Denver Water and regulated by the FERC under the Federal Power Act (“FPA”). The Gross Reservoir is stated in the Complaint to have supplied water to residents and businesses in the City of Denver and its surrounding areas for 67 years. 1.5 million people are stated to be dependent upon Denver Water.

The FERC’s jurisdiction over the Gross Reservoir is stated to be due to the fact that it occupies federal land specifically set aside for hydropower production. As a result, Denver Water states that Gross Reservoir cannot operate without an FERC license. Gross Reservoir was originally issued a license in 1959.

Material changes to the Gross Reservoir within the hydropower project are stated to require FERC approval.

Denver Water argues in the Complaint that nearly 20 years of planning, inter-agency coordination, development of appropriate mitigation measures, and public comment have been undertaken regarding expansion of the Gross Reservoir. Further, the FERC is stated to have issued an Order amending Denver Water’s hydropower license in July 2020 directing the utility to proceed with the expansion. Such Order is stated to require construction work on the expansion to commence within two years of issuance and finish within seven years of issuance.

Land use permits from Boulder County are apparently needed to be acquired to proceed with the expansion. It argues that it has attempted to undertake good-faith efforts to obtain the Boulder 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.

The Complaint alleges that Boulder County has utilized the 1041 permit process to “frustrate and prevent” Denver water from proceeding with the expansion.

Denver Water argues that because the FPA establishes a comprehensive federal scheme for regulating hydroelectric power projects on navigable waters, FERC is given exclusive authority to regulate such projects. As a result, it alleges that any contrary or competing state or local regulation that interferes with a FERC order, preventing the fulfillment of its conditions, is preempted.

Denver Water seeks a declaration that:

- The 1041 process is preempted by federal law
- An injunction prohibiting Boulder County from making any further attempts to assert 1041 permitting authority over the expansion
- Enjoins Boulder County from refusing to issue subsidiary permits or approvals

A copy of the Complaint can be downloaded [here](#).