Municipal Water Projects and Local Land Use Regulations:

H.B. 1041 Review of the Gross Reservoir Expansion Project

October 23, 2021

DENVER WATER

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

Presentation Overview

- Water Projects & Planning in Colorado
- The Gross Reservoir Expansion Project
- H.B. 1041 – Areas & Activities of State Interest
- Common Concerns & Policy Questions

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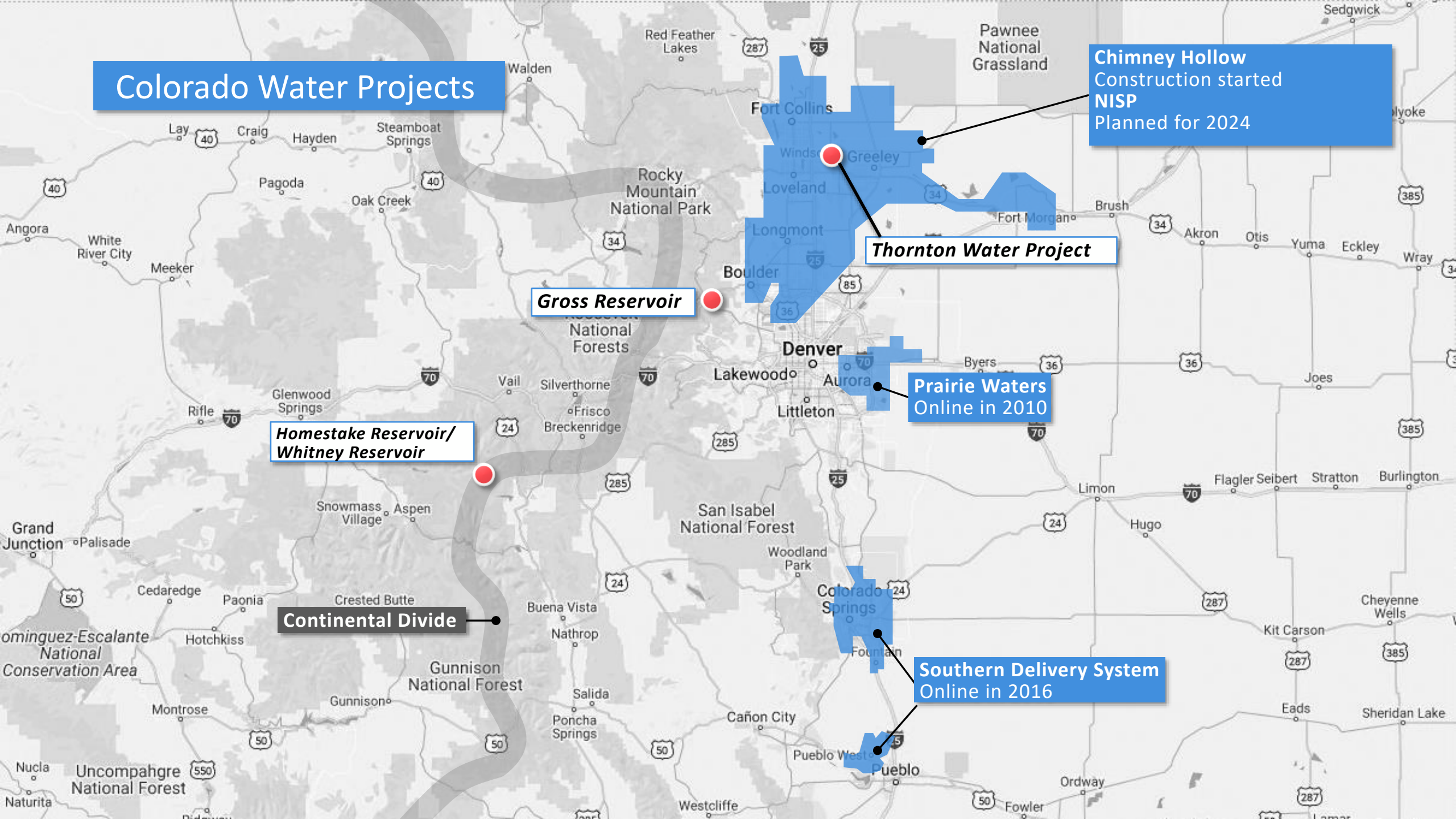
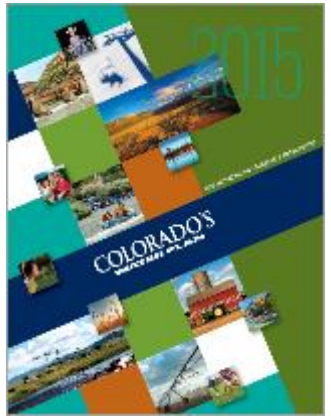
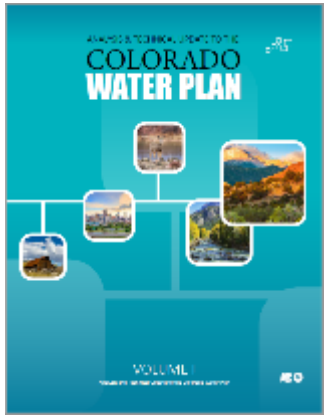
Water Projects and Planning in Colorado

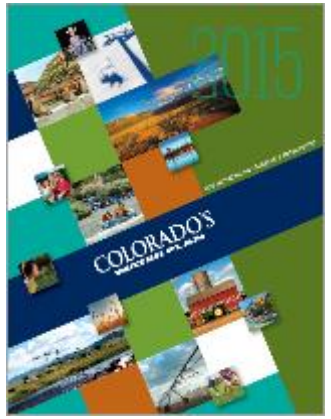

Colorado Water Projects
Chimney Hollow
Construction started
NISP
Planned for 2024
Thornton Water Project
Gross Reservoir
Prairie Waters
Online in 2010
Homestake Reservoir/
Whitney Reservoir
Continental Divide
Southern Delivery System
Online in 2016
Red Feather Lakes
Walden
Pawnee National Grassland
Fort Collins
Greeley
Loveland
Longmont
Boulder
Rocky Mountain National Park
Denver
Lakewood
Aurora
Littleton
Brush
Fort Morgan
Akron
Otis
Yuma
Eckley
Wray
Sedgwick
Lay
Craig
Hayden
Steamboat Springs
Pagoda
Oak Creek
Angora
White River City
Meeker
Rifle
Glenwood Springs
Vail
Silverthorne
Frisco
Breckenridge
Byers
Joes
Limon
Flagler
Seibert
Stratton
Burlington
Hugo
Snowmass Village
Aspen
San Isabel National Forest
Grand Junction
Palisade
Cedaredge
Paonia
Crested Butte
Hotchkiss
Buena Vista
Nathrop
Woodland Park
Colorado Springs
Fountain
Cheyenne Wells
Kit Carson
Eads
Sheridan Lake
Gunnison National Forest
Gunnison
Montrose
Salida
Poncha Springs
Cañon City
Pueblo West
Pueblo
Ordway
Fowler
Westcliffe
Nucla
Naturita
Uncompahgre National Forest
ominguez-Escalante National Conservation Area



Colorado's Water Plan



As the state conserves, Colorado must also develop additional storage to meet growing needs and face the changing climate. Tomorrow's storage projects will increase the capacity of existing reservoirs, address a diverse set of needs, and involve more partners. New storage projects will be increasingly innovative, and will rely on technologies such as aquifer storage and recharge. In addition, water managers will need to be more agile in responding to changing conditions, so that storage can be more rapidly added to Colorado's water portfolio while maintaining strong environmental health. To do this, we must address a broken permitting system that currently produces uncertainty and fosters mistrust among all stakeholders.



2019 Technical Update

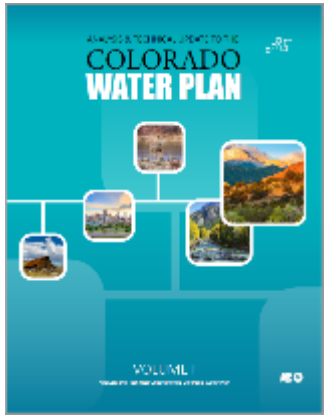
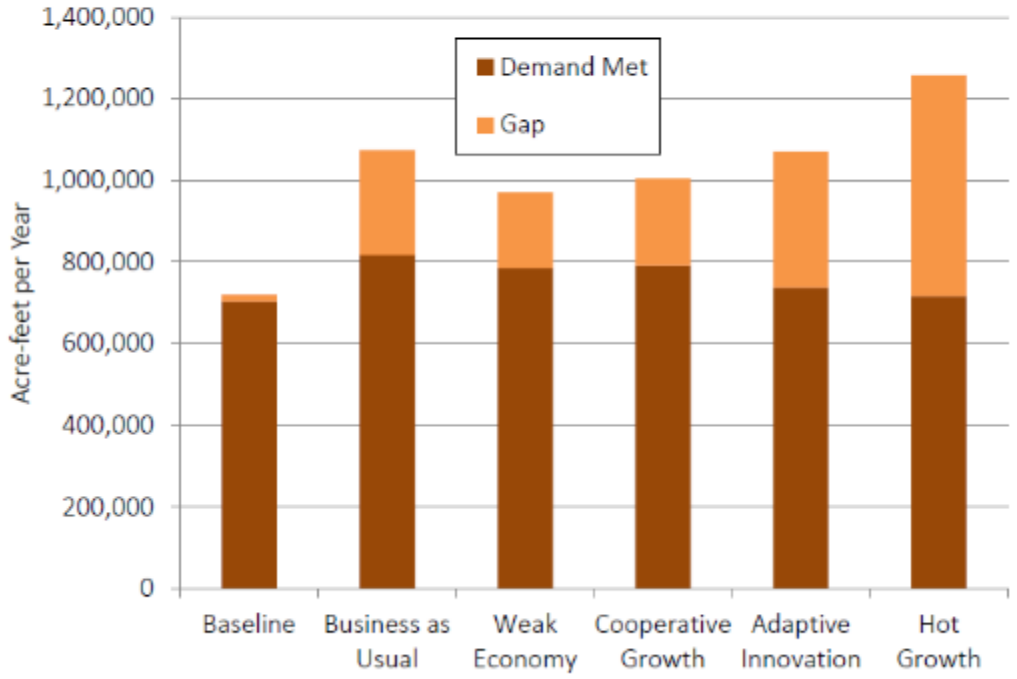


Figure 4.8.20 Projected Maximum Annual M&I Diversion Demand, Demand Met, and Gaps in the South Platte Basin



Local concerns: Common Themes

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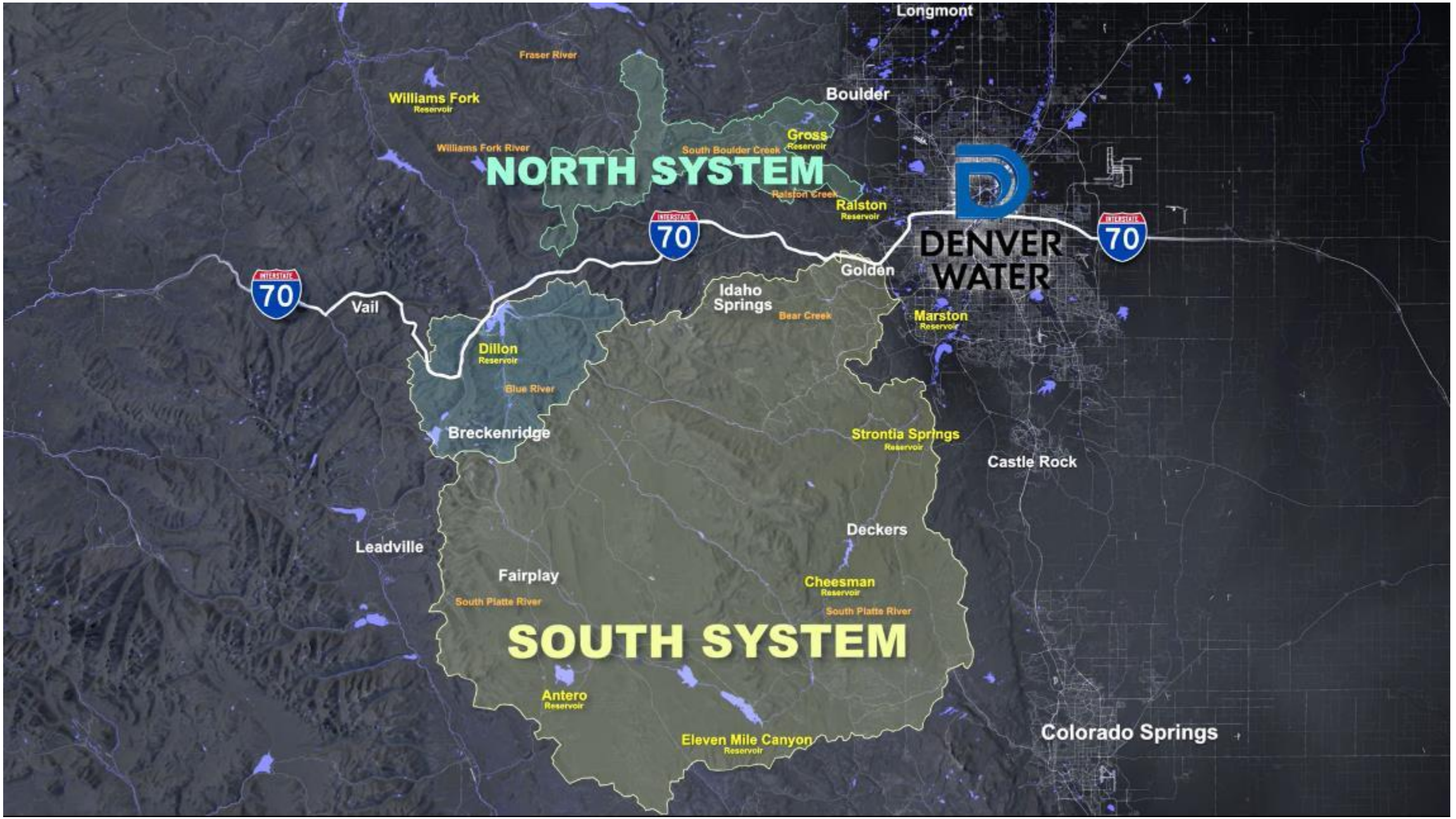
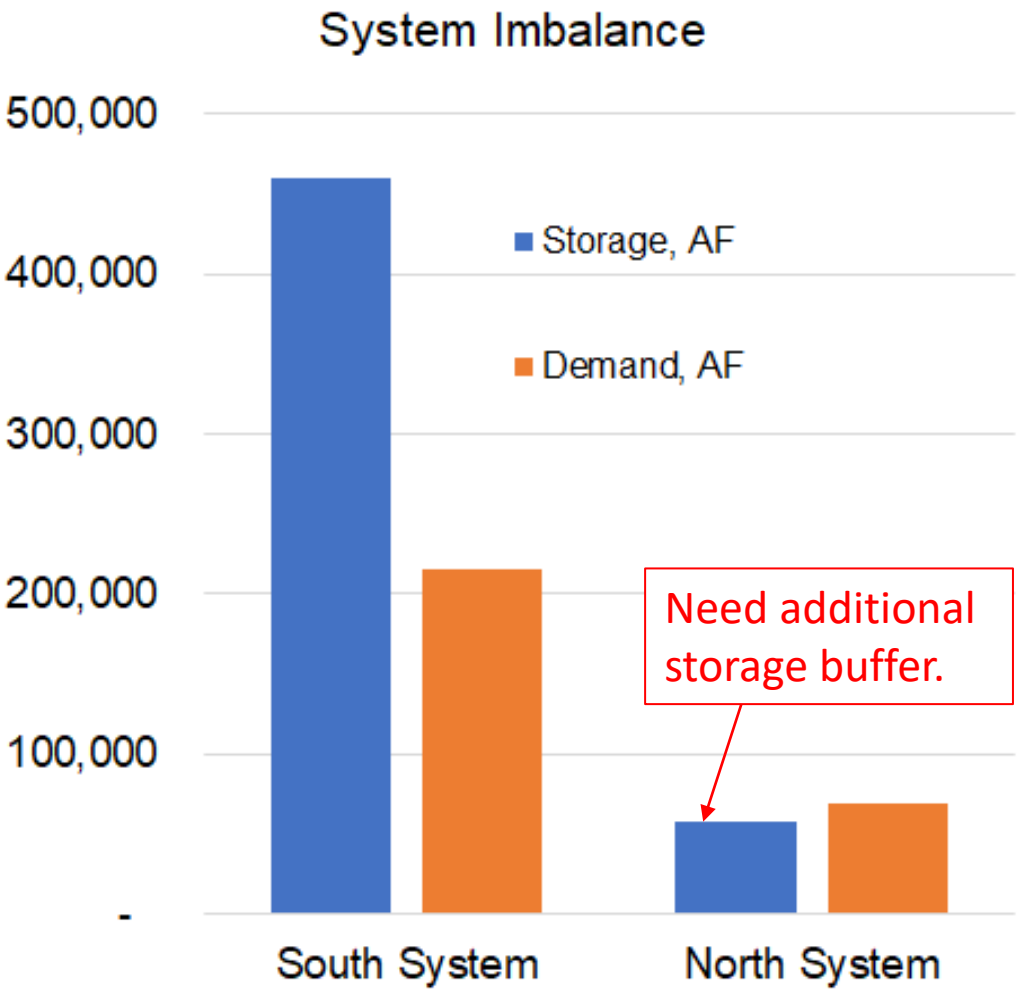
The Gross Reservoir Expansion Project


Longmont
Fraser River
Williams Fork
Reservoir
Boulder
Gross
Reservoir
Williams Fork River
South Boulder Creek
NORTH SYSTEM
Ralston Creek
Ralston
Reservoir
INTERSTATE
70
DENVER
WATER
INTERSTATE
70
INTERSTATE
70
Golden
Idaho
Springs
Bear Creek
Marston
Reservoir
Vail
Dillon
Reservoir
Blue River
Breckenridge
Strontia Springs
Reservoir
Castle Rock
Deckers
Leadville
Fairplay
Cheesman
Reservoir
South Platte River
South Platte River
SOUTH SYSTEM
Antero
Reservoir
Eleven Mile Canyon
Reservoir
Colorado Springs

Why Gross Reservoir Expansion?



System imbalance

- 25-30% of water supply in north system
- Only 10% of our storage

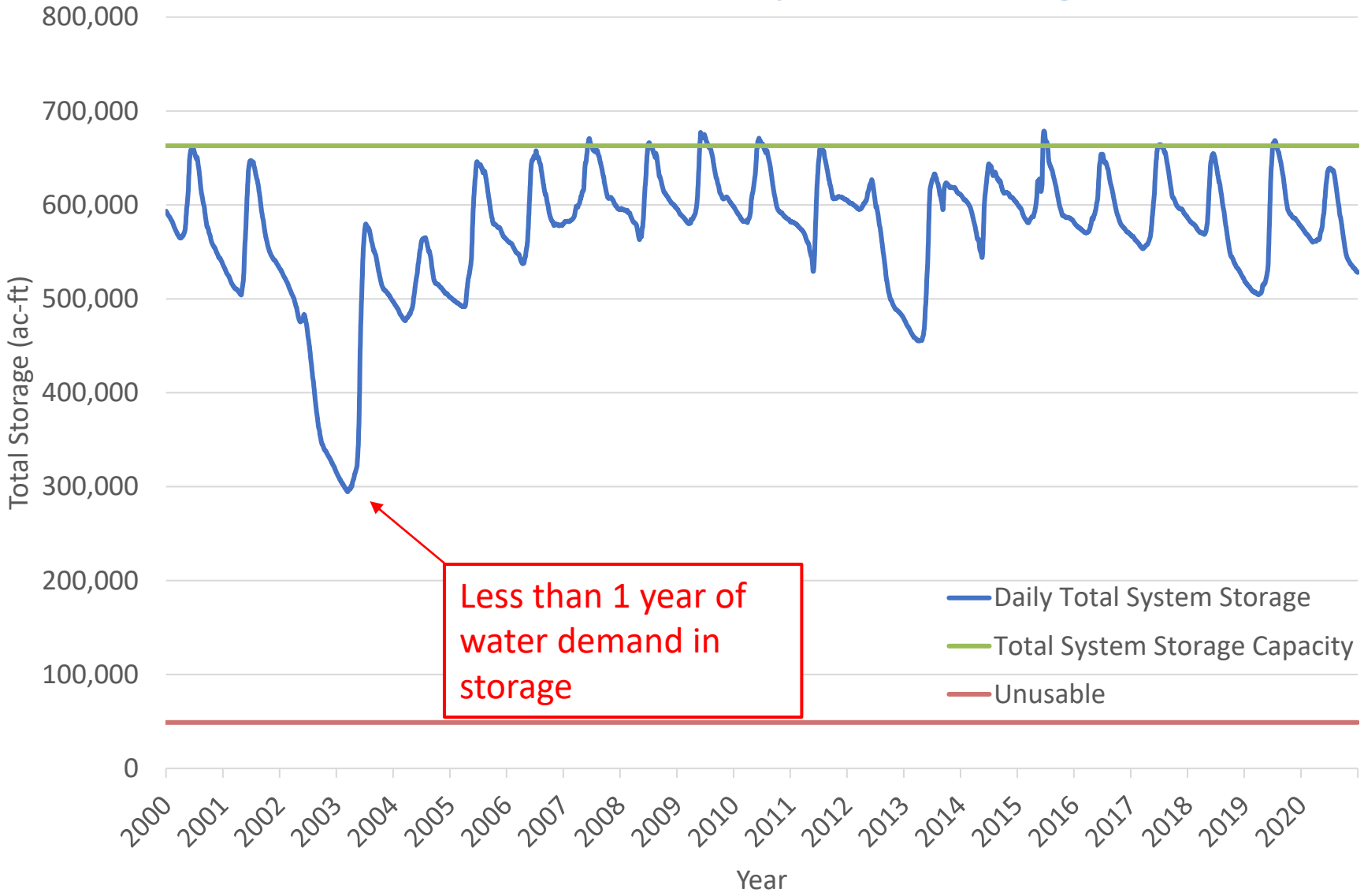
Increase overall system storage

- Seasonal fluctuations
- Annual fluctuations
- Climate Change

Reliability/Redundancy

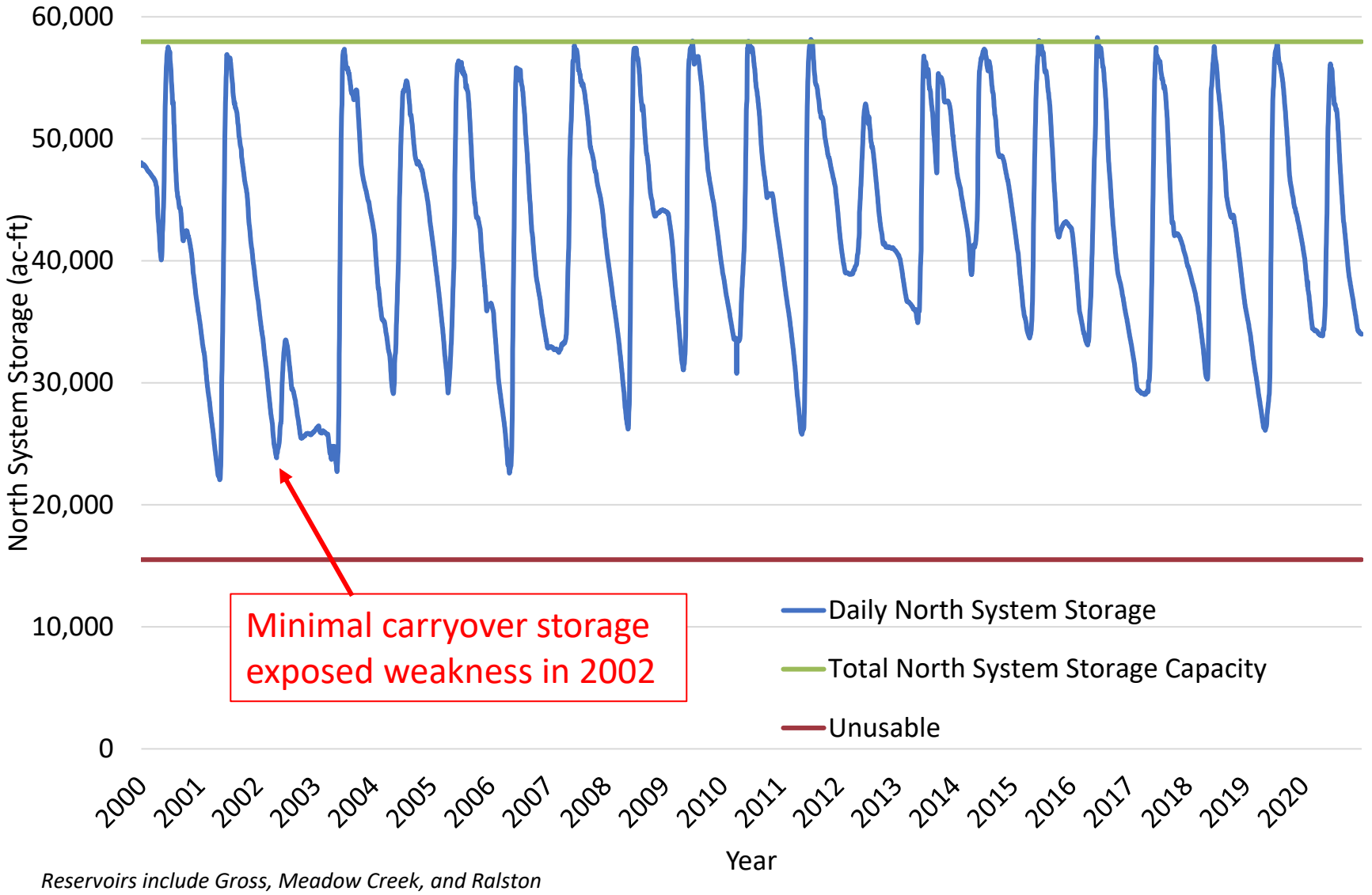
- Maintenance
- Emergencies
- Wildfire / watershed

Denver Water Total System Storage



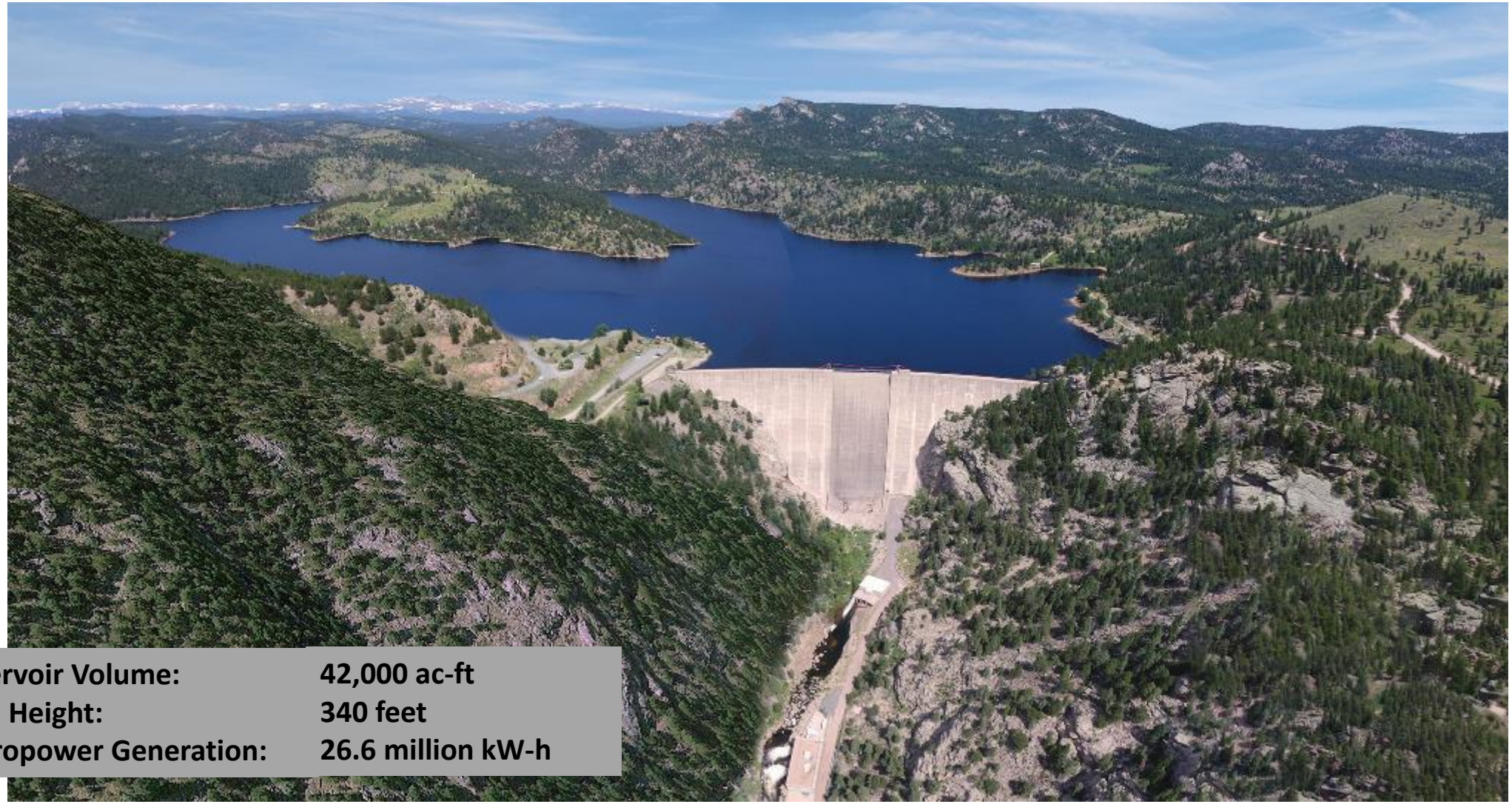
Reservoirs include Antero, Chatfield, Cheesman, Dillon, Eleven Mile, Gross, Marston, Meadow Creek, Ralston, Strontia Springs and Williams Fork

Denver Water North System Storage



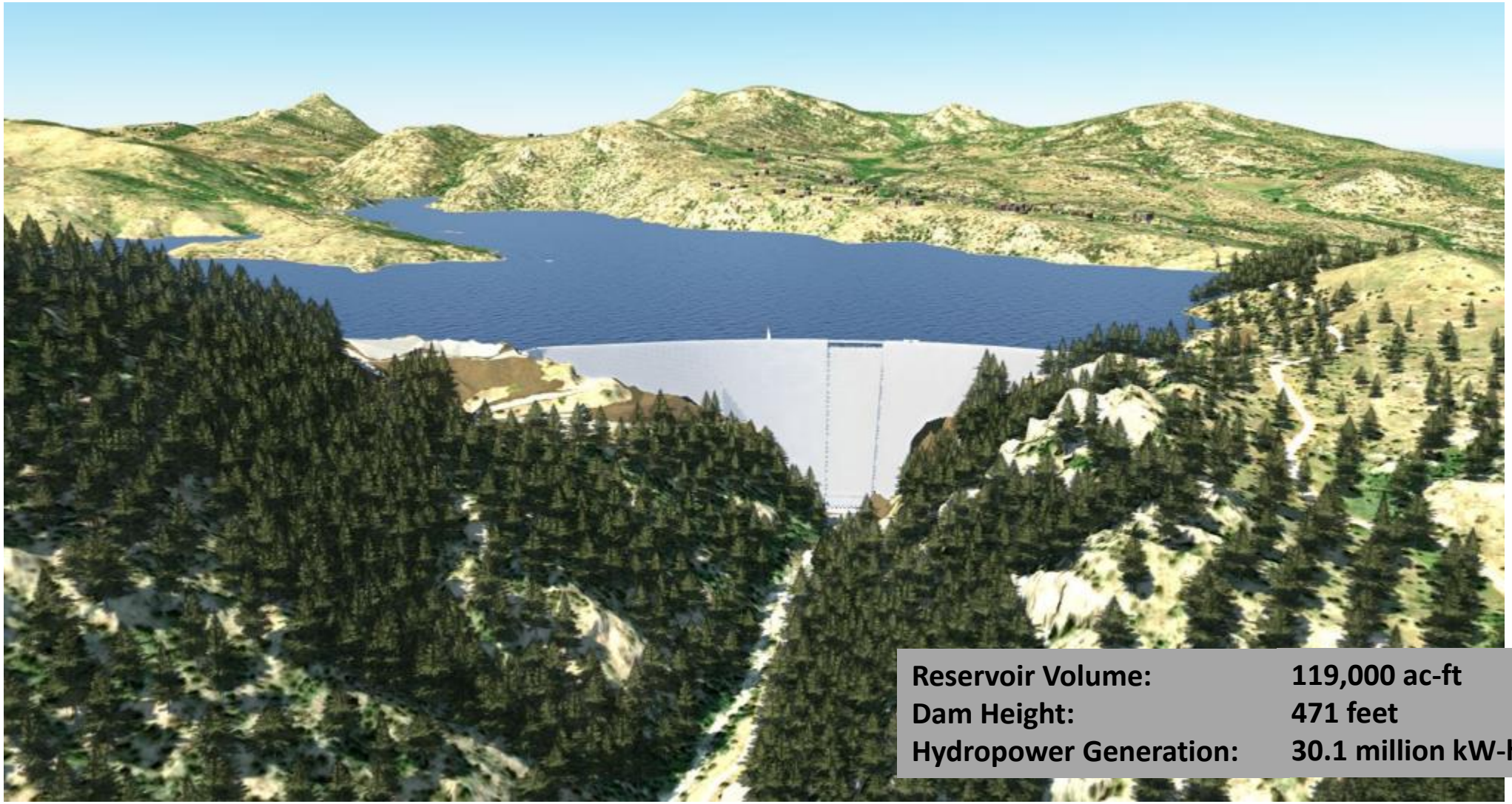
Reservoirs include Gross, Meadow Creek, and Ralston

Project Description - Existing



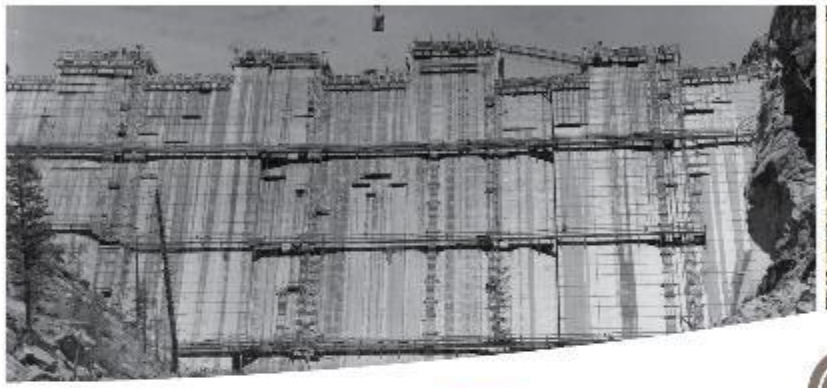
Reservoir Volume:	**42,000 ac-ft**
Dam Height:	**340 feet**
Hydropower Generation:	**26.6 million kW-h**

Project Description - Planned



Reservoir Volume:	**119,000 ac-ft**
Dam Height:	**471 feet**
Hydropower Generation:	**30.1 million kW-h**

GROSS RESERVOIR EXPANSION PROJECT TIMELINE



1954

Gross Dam Construction Completed

Infrastructure to and from Gross Reservoir designed for an enlargement.

1990

Two Forks Dam veto

Expansion of Gross Reservoir proposed as alternative by environmental groups.

1997

Denver Water Integrated Resource Plan

Water planning for the next 50 years.

2002

Denver Water experiences stress in the south system due to severe drought, Hayman Fire and significant rain events

2003 – 2017

2013: Colorado River Cooperative Agreement (CRCA).

2015: Learning By Doing Initiated.

2016: Received State 401 Water Quality Certification.

2017: U.S. Army Corps of Engineers Record of Decision (ROD) & 404 Permit.

2018 – 2021

2018: Opened Public Information Yurt. Began final dam design.

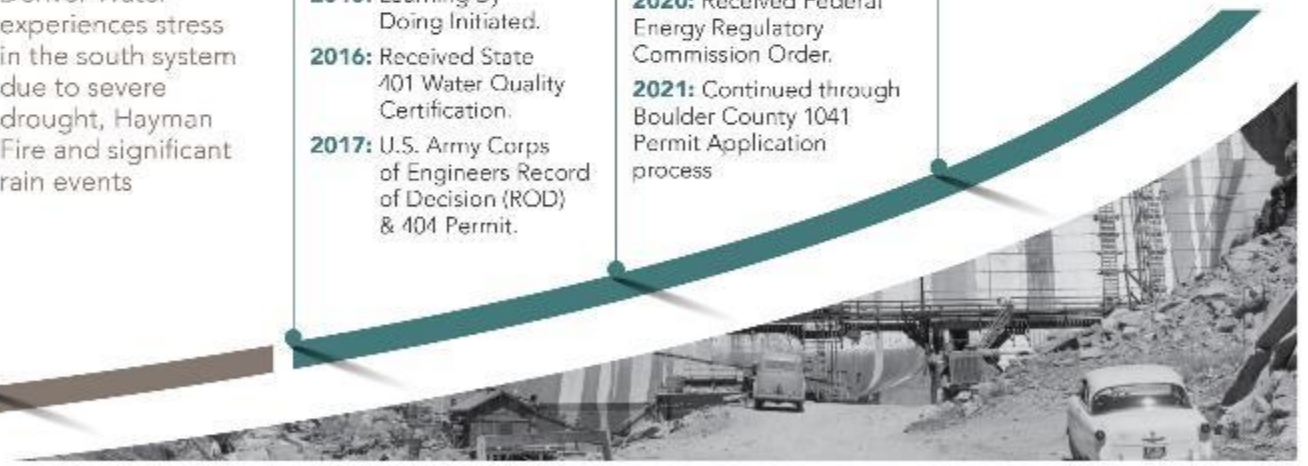
2019: Completed Fraser Flats, Williams Fork and South Boulder Creek stream restoration projects.

2020: Received Federal Energy Regulatory Commission Order.

2021: Continued through Boulder County 1041 Permit Application process

2022-2027

Quarry operations, dam construction, tree removal and site reclamation



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www.grossreservoir.org

Revised: 07-2021

Alternatives Analysis & Comment Process

303 water sources/infrastructure components + **29** storage sites

34 project alternatives screened for costs

14 project alternatives screened for environmental impacts

5 alternatives carried forward into EIS

Alternatives Analysis & Comment Process

- Surface Water
- Water Quality
- Channel Morphology
- Groundwater
- Geology
- Soils
- Vegetation
- Riparian and Wetland Areas
- Wildlife
- Special Status Species
- Noise

2009 – Draft EIS

Comment and Response

2014 – Final EIS

Comment and Response

2017 – Corps Record of Decision

Comment and Response

2019 – Supplemental EA

Comment and Response

2020 – FERC Order

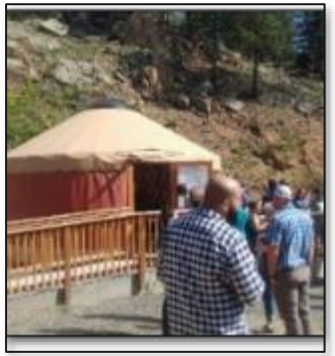
- Aquatic Biological Resources
- Transportation
- Air Quality
- Recreation
- Land Use
- Visual Resources
- Cultural/Historical/ Paleontological Resources
- Socioeconomics
- Hazardous Materials
- Climate Change

Living Our Values

Along the way, we'll contribute more than $30 million to projects that improve Colorado's environment.

Environmental Pool: a 5,000 acre-foot (AF) pool of water in the reservoir, that will increase South Boulder Creek stream flows during low-flow periods.

Learning by Doing: A groundbreaking collaborative effort to maintain and restore the aquatic environment in Grand County.



Community Outreach: Listening to the community and adjusting the project.

Colorado River Cooperative Agreement: Partnering with West Slope entities to ensure smart water future.

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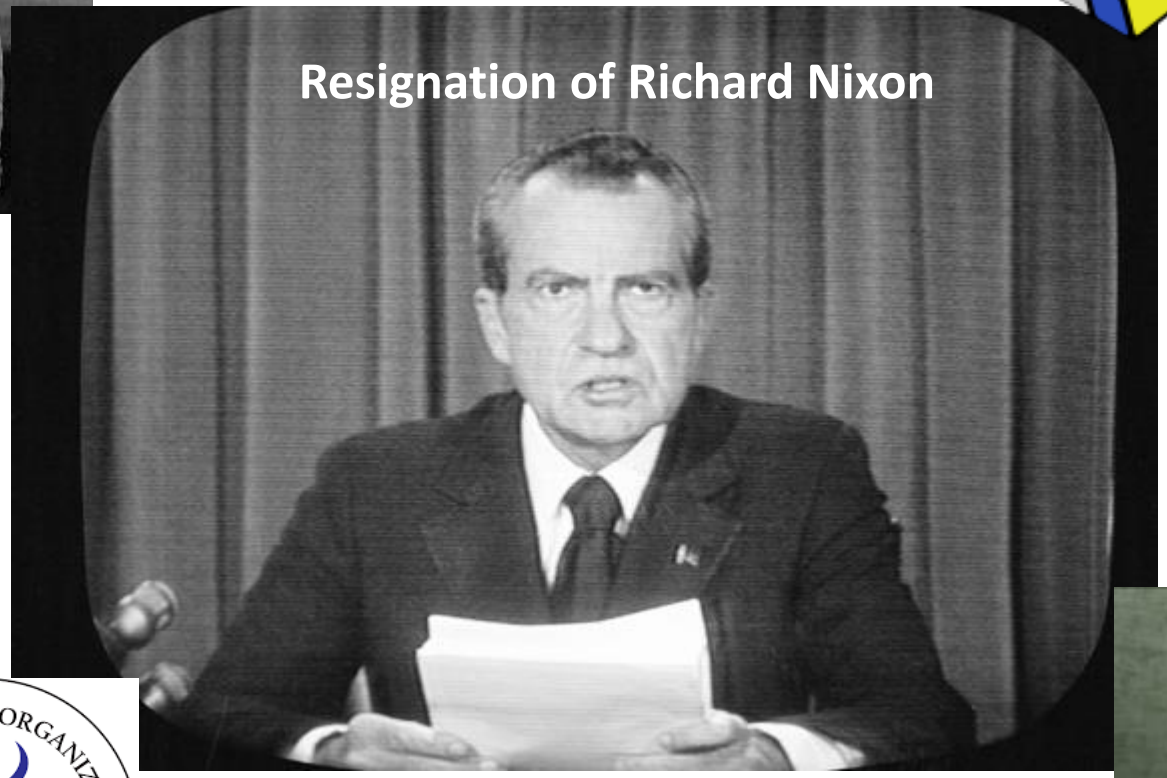
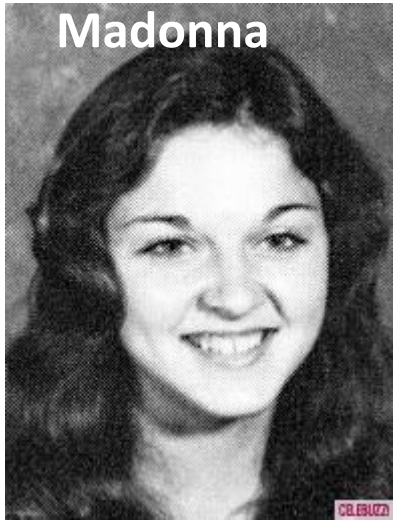
H.B. 1041 – Areas and Activities of State Interest

Events of 1974





H.B. 1041 – Statutory Text
C.R.S. Title 24, Article 65.1

- "[L]and use, land use planning, and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state."

- Areas of state interest:
  - Mineral resources areas
  - Natural hazard areas
  - Areas containing historical, natural, or archaeological resources
  - Areas around key facilities

- Activities of state interest:
  - Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems
  - Efficient utilization of municipal and industrial water projects
  - Site selection and construction of major facilities of a public utility
  - Site selection and development of new communities

H.B. 1041 – Statutory Text
C.R.S. Title 24, Article 65.1

Criteria for Administration:

- "New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of adjacent communities."
- "Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated within the financial and environmental capacity of the area to sustain such growth and development."
- "Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water."

Areas & Activities of *State* Interest?

American Law Institute, Model Land Development Code

Aimed to "balance the need for expanded state participation in the control of land use against a policy that this participation be directed toward only those decisions involving important state or regional interests, while retaining local control over the great majority of matters which are only of local concern."

State Land Planning Agency designates areas & activities of state interest

Local land development agencies decide whether to issue permits

Local decisions could be appealed to a State Land Adjudicatory Board

Caselaw / Challenges to 1041

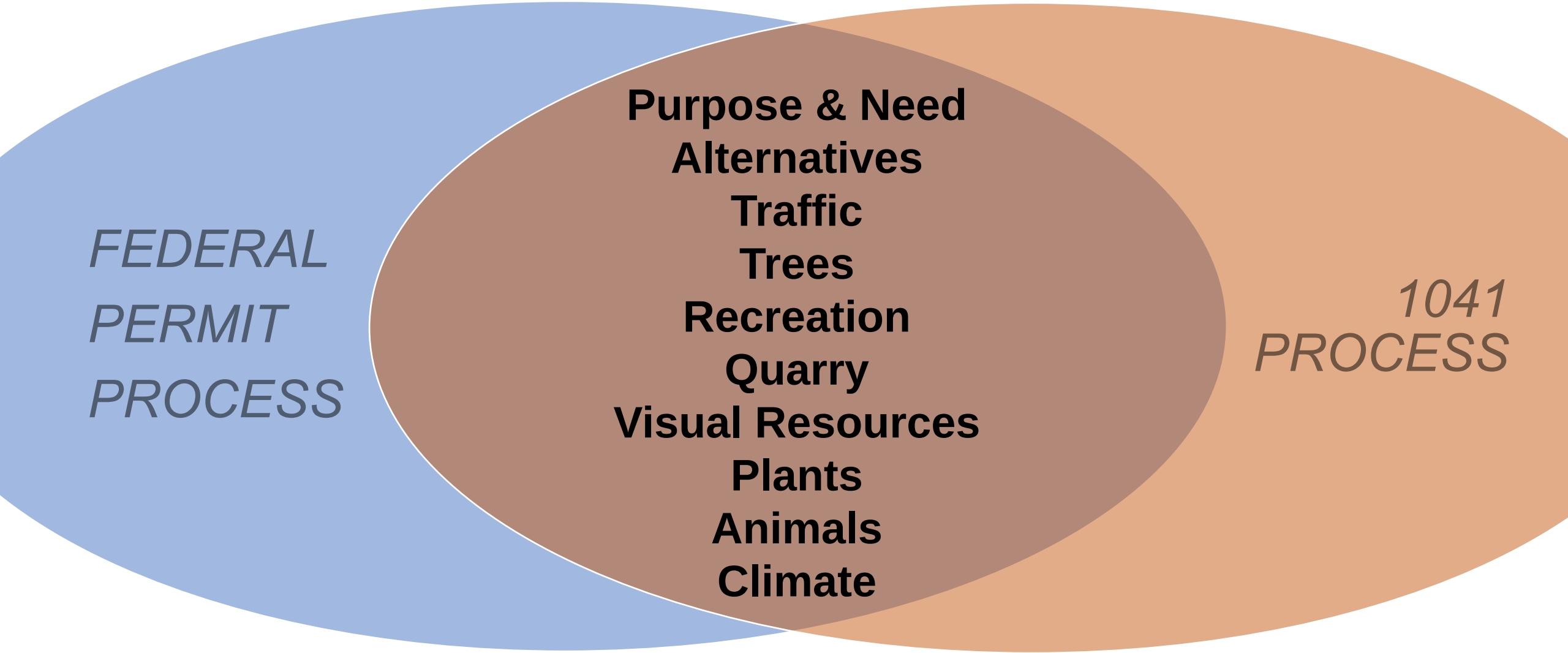
- ***City and County of Denver v. Board of County Commissioners***, 782 P.2d 753, 760 (Colo. 1989) (H.B. 1041 was not an unconstitutional delegation of legislative authority to local governments and did not infringe on Denver Water's exercise of home rule powers).
- ***City of Colorado Springs v. Eagle County***, 895 P.2d 1105, 1115 (Colo. App. 1994) (record contained evidence to support County's decision that the project would degrade wetlands and interfere with recreation and scenic values, and these approval criteria were not unconstitutionally vague).
- ***Bd. of Cty. Comm'rs v. Gartrell Inv. Co., LLC***, 33 P.3d 1244, 1248 (Colo. App. 2001) (Douglas County's 1041 regulations exceeded the County's authority because the 1041 law does not include "annexation" as an activity of state interest).
- ***Dep't of Transp. v. City of Idaho Springs***, 192 P.3d 490, 492 (Colo. App. 2008) (1041 not impliedly repealed or preempted by Title 43 transportation planning process).
- ***City of Thornton v. Bd. of County Comm'rs of Larimer County***, No. 2019CV30339 (Larimer County District Court, Feb. 15, 2021) (Board exceeded its authority and abused its discretion in several respects, but 1041 denial upheld)

Department of Local Affairs 2015 Land Use Survey

Table 11: Frequency of 1041 Regulations Used by Counties

1041 Regulations	Frequency
Site Selection/Construction of Major Facilities of a Public Utility	43%
Mineral Resource Areas	37%
Site Selection/Construction of Major New or Expanded Domestic Water/Sewer Treatment Systems	37%
Natural Hazard Areas	35%
Areas around key facilities in which development may have a material effect upon the key facility or surrounding community (e.g., airports, major public utilities, arterial highway interchanges, mass transit facilities, etc.)	33%
Efficient Utilization of Municipal/Industrial Water Projects	33%
Historical, Natural or Archaeological Resource Areas	31%
Site Selection/Development of Solid Waste Disposal Sites	30%
Site Selection of Arterial Highways/Interchanges/Collector Highways	24%
Site Selection/Development of New Communities	24%
Site Selection of Airports	20%
Site Selection of Rapid/Mass Transit Facilities	19%
Use of Geothermal Resources for Commercial Production of Electricity	9%
Conduct of Nuclear Detonations	4%

1041 Review of the GRE Project



Common Concerns About the 1041 Process

- Ambiguity in triggering standards
- IGA in lieu of 1041: Staff negotiate but commissioners reject
- Timing: Statute says 30 days to notice hearing; actually much longer
- Duplication of prior processes: Water Court and Federal
- Substantive standards of approval: Broadly worded; “no harm”
- Elected decision makers, not subject-matter experts
- No appeal to state or regional agency
- Judicial review: Very deferential standard

Policy Implications / Questions

- How can the state water planning process better integrate with local review of individual water projects under 1041?
- Are there any limits on a community's power to regulate another jurisdiction's water projects?
- Is there a threshold whereby regulation becomes a *de facto* ban?
- Should there be a weighing of the need for/benefits of a water project against project impacts?
  - If so, who should perform that analysis?
- Is there a better approach to providing those impacted by a project a voice in whether and how it proceeds than the current 1041 law?

Discussion