

USACE Regulatory Program: Uncertainty in Permit Decisions - Challenges & Strategies

Instream Flow Council
FLOW 2015 Conference
April 29, 2015
Portland, OR

Chandler J. Peter
Technical Specialist
Regulatory Division
Fort Worth District



US Army Corps of Engineers
BUILDING STRONG®



Disclaimer

- The views and opinions expressed are those of the author and do not necessarily represent those of the US Army Corps of Engineers



USACE Regulatory Program

- Have specific & generally limited authorities to regulate various activities
 - ▶ Sections 9 & 10 of the Rivers & Harbors Act of 1899
 - ▶ Section 404 of the Clean Water Act
 - ▶ Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972

- Goals
 - ▶ Protect Navigation and the Aquatic Environment
 - ▶ Render Fair and Reasonable Decisions
 - ▶ Provide for Efficient Decision Making



Limits w/ Regulatory Permit Process

- Annually, Regulatory Program evaluates >70,000 actions ranging in size & complexity
 - ▶ Number of projects impacting water flow can be very small %
 - ▶ Involve case-by-case evaluation w/ balancing considerations
 - ▶ Larger projects can warrant more detailed analysis
- Watershed or system-level analyses not the norm



Limits w/ Regulatory Permit Process

- Process designed for input to guide analysis
 - ▶ Public & agency notification/scoping input are critical influences on NEPA, Public Interest Review & 404(b)(1) analyses
- Limited information requirements to initiate process (33 CFR 325)
 - ▶ Normally do not have substantial data/information at outset
 - ▶ Issues/comments greatly affect considerations & evaluation



Limits w/ Regulatory Permit Process

- Variation occurs w/ each permit relative to level of analysis, methods, long term requirements, etc. – even if projects similar
 - ▶ Some permit actions may involve operational aspects of the proposed features (e.g., dams) - most do not (33 CFR 325.3(a)(5) & 40 CFR 230.77)
 - ▶ Can be differing focus areas regionally
- No certainty that topics relevant to in-stream flows will be addressed (evaluated or conditioned)



Potential Permit Areas of Uncertainty

- Process
- Project Need
- Alternatives
- Resource Conditions & Impacts
 - ▶ Hydrology
- Mitigation



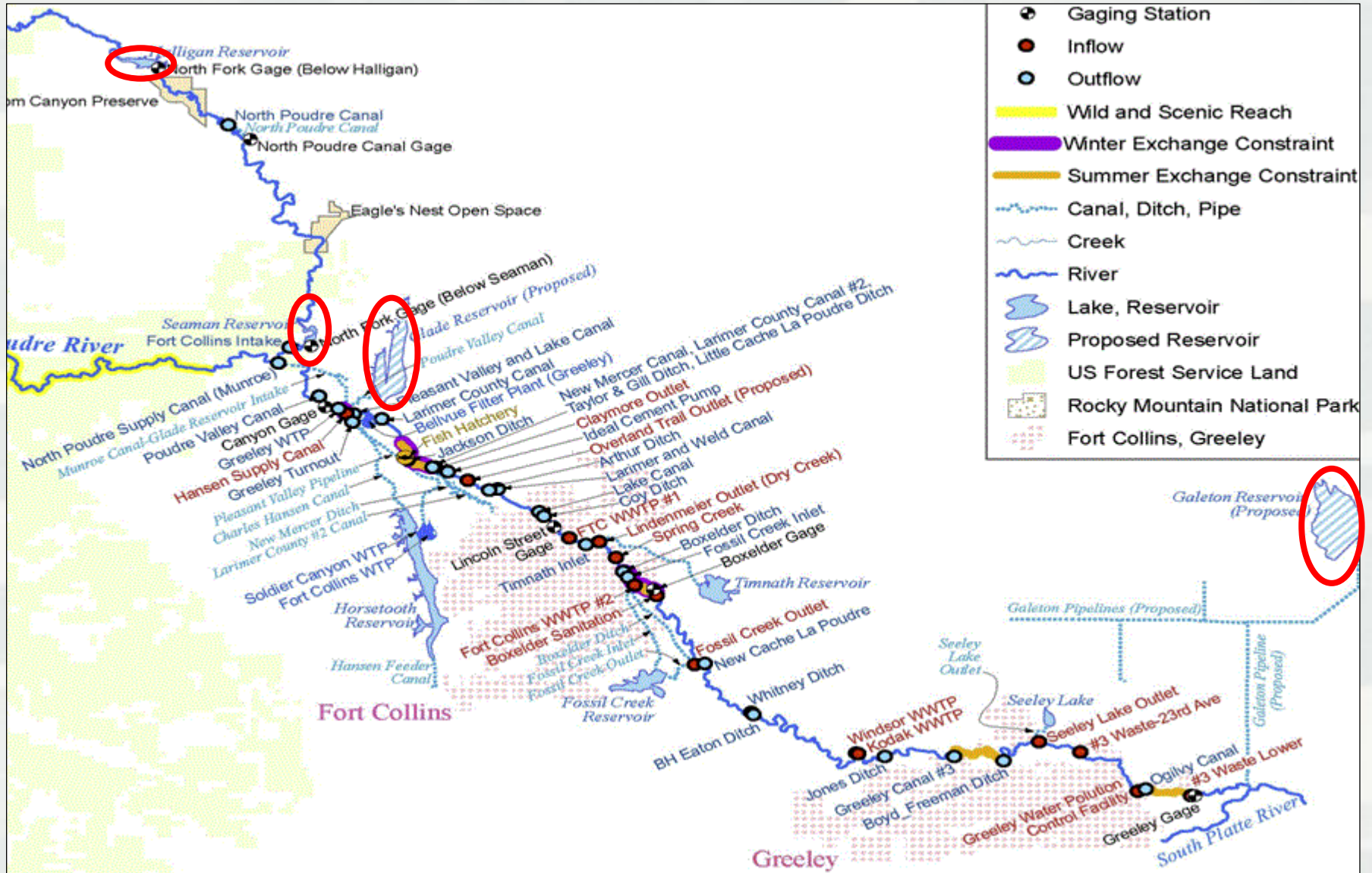
Case Example - Poudre River Basin



Source: USGS

Thomas McKay | The Denver Post

Case Example - Poudre River Basin



To Collaborate or Not Collaborate?

- USACE proposed use of collaborative approach for all actions
 - ▶ No applicant agreed to engage (initially)
- Proceeded with what was thought to be appropriate level of analysis in Draft EIS
 - ▶ Surprise, surprise, surprise
- Major learning experience



Front Loaded Strategies

- Special Area Management Plans (SAMP)
 - ▶ Basin or watershed level focused on aquatic ecosystem concerns & development for 404 permits
- SVP (or similar processes) for specific projects
 - ▶ <http://www.sharedvisionplanning.us>
 - ▶ Can involve NGOs, public, academe
- Programmatic efforts (EISs)
 - ▶ CEQ's 12/2014 guidance
 - ▶ Engaging state water plan/processes to leverage for anticipated permit actions



Post-Permit Process Strategies

“When we devise operating rules for reservoirs we are inherently dealing with situations of risk and considerable uncertainty as to the performance of designed systems”

USACE Guidelines for Risk & Uncertainty Analysis in Water Resources Planning
IWR Report 92-R-1



Post-Permit Process Strategies

- Operations Plan for authorized project
 - ▶ Based on relevant hydrological modeling
 - Water rights vs. resource effects – “river whole vs. river flow”
 - ▶ Effects analysis, mitigation & pertinent permit conditions all tied to it
 - ▶ Developed throughout review process & needs to be part of permit special conditions



Post-Permit Process Strategies

- Multi-agency agreements incorporated in permit
 - ▶ Federal, state & local levels
- Cooperative Agreements
 - ▶ State water right, game & fish, WQ agencies
 - ▶ Conservation districts
 - ▶ Adaptive management?
- Can resolve issues during evaluation stage, ensure concerns addressed & targets met/kept



The image features a classic Looney Tunes ending screen. It consists of a series of concentric circles in shades of red and black, creating a tunnel-like effect that draws the eye toward the center. In the middle of this pattern, the phrase "That's all Folks!" is written in a white, elegant cursive font. The text is slightly tilted and positioned over a dark blue circular area that serves as the focal point of the design.

That's all Folks!