

To: Larimer County Board of County Commissioners
Cc: Rob Helmick, Senior Planner, Larimer County

From: Save The Poudre

Re: Larimer County must use a 1041 permit process to evaluate and regulate the proposed Northern Integrated Supply Project because state precedent demands it and Larimer County's IGA process is "unconstitutionally vague.

March 29, 2018

Dear Commissioners and Mr. Helmick:

On behalf of Save the Poudre, I am writing to object to Larimer County's use of an Intergovernmental Agreement ("IGA") process to evaluate the Northern Integrated Supply Project ("NISP") instead of the required 1041 process. The reasons for this objection are outlined below.

According to the State of Colorado website, an IGA "is made between two or more governments in cooperation to solve problems of mutual concern."¹ Typically, governments use IGAs for cooperative planning, development review, resource sharing, joint planning commissions, building inspection services, and more.²

The purpose of NISP is to provide domestic water to communities in the Front Range. The vast majority of the water will be used in areas outside of Larimer County, including Dacono, Eaton, Erie, Evans, Firestone, Fort Lupton, Fort Morgan, Frederick, Lafayette, Severance, Windsor, Morgan County, Weld County, and the Left Hand Water District—all of which are outside of Larimer County.³ Larimer County itself is not a participant in NISP.⁴ Nor is Larimer County in the business of providing domestic water to residents of the county. As such, the provision of water to communities outside of Larimer County is not a matter of mutual concern with the NISP developer, Northern Colorado Water Conservancy District and Larimer County. Further, Larimer County has no significant partnership role in the planning, development, or financing of NISP. As such, it is completely inappropriate for Larimer County to use the IGA process for evaluating the NISP proposal. Instead, Larimer County must use a 1041 process in the Larimer County Code, as it has for other water pipelines serving communities outside of Larimer County. Larimer County's use of two different legal processes to evaluate

¹ <https://www.colorado.gov/pacific/dola/intergovernmental-agreements-igas>

² Id.

³ NISP Fact Sheet, p. 2, attached hereto.

⁴ Id.

similar water projects that predominately serve communities outside of Larimer County is arbitrary and capricious.

Also, the Larimer County Code's IGA provisions fail to provide objective criteria upon which to evaluate an IGA and therefore convey unfettered discretion to the Commissioners. As such, the IGA provisions in the Code are unconstitutionally vague, violate due process, and should not be relied upon to evaluate the NISP project.

More specifically, the Larimer County Code directs that water supply and pipeline projects are "matters of state interest" that should be evaluated under the Code's 1041 provisions.⁵ The 1041 provisions require submission of an application, provide for public review and comment on the application, and require a quasi-judicial determination on the application by the County.⁶ The 1041 regulation also mandate criteria upon which a water project should be evaluated.⁷

In contrast, the IGA provisions fail to require an application process, fail to ensure full public participation, and fail to contain objective criteria for judging a project. More specifically, no permit application is required for a project proceeding under an IGA.⁸ The project proponent may avoid the 1041 process simply by making a "request" to the County.⁹ The Code gives the County unfettered discretion in approving this "request" and contains no criteria for approval of the request.¹⁰ In addition, the IGA Code provisions allow the project proponent to convert its IGA application to a 1041 application -- and back again -- willy nilly, without any objective criteria for evaluating which process is the most appropriate.¹¹ The decision of which process to use lies solely in the hands of the project proponent and Larimer County without identifying any objective criteria for the decision and can be converted at any time. Most importantly, the IGA process exempts the project proponent from strict compliance with the 1041 criteria and instead only requires the applicant to meet the "purpose and intent" of section 14, a term that is left undefined by the Code.¹² These vague IGA provisions give Larimer County unfettered discretion in both approving an IGA (versus a 1041 permit application) and in applying the 1041 criteria to an IGA project. Worse yet, although the IGA provisions contain a public hearing requirement, the thumb has already been placed on the scale in favor of approving the IGA because "the provisions of [the IGA] have been determined to be acceptable to the applicant and the county" before hearing any evidence in the public hearing.¹³ These provisions would force the citizens of Larimer County to guess which process would be employed, and how the 1041 criteria would be applied. The

⁵ Larimer County Code Section 14.4 (J) and (K).

⁶ Larimer County Code Sections 14.9.

⁷ Larimer County Code Section 14.10.

⁸ Larimer County Code Section 14.8 (A).

⁹ Id.

¹⁰ Id.

¹¹ Larimer County Code Section 14.8 (B).

¹² Larimer County Code Section 14.8(A)(2).

¹³ Larimer County Code Section 14.8(A)(3).

IGA provisions fail to provide fair warning of when a 1041 application is required versus an IGA and what criteria would apply. These provisions make a mockery of the public hearing process and the County's duty to evaluate matters of state interest in an independent quasi-judicial manner.

Further, in the last two years, the Northern Integrated Supply Project proposal has changed dramatically to include a massive new pipeline across northern Larimer County (currently proposed on Douglas Road) in addition to multiple dams and pump stations as well as the Glade Reservoir. Northern Water calls this pipeline the "refined conveyance"¹⁴, and as such the massive new pipeline adds to the necessity that NISP must be regulated by Larimer County using the 1041 process.

In addition, in 2009, Larimer County adopted 1041 powers in response to the "Greeley Pipeline" and the extreme controversy it generated.¹⁵ Further, in 2012, Larimer County proposed expanding the 1041 powers specifically to address NISP.¹⁶ Using 1041 powers to regulate water projects – dams, reservoirs, pipelines – is a common and accepted practice in the state of Colorado with many legal precedents, including but not limited to:

- The Boulder County Commissioners rejected an IGA process¹⁷ for the proposed Gross Dam expansion ("Moffat Collection System Project"), and are expecting Denver Water to apply for a 1041 permit for the project.¹⁸
- Grand County used a 1041 permit process to regulate the "Windy Gap Firing Project".¹⁹
- Eagle County used a 1041 permit process to regulate the "Homestake II" diversion project.²⁰
- Pueblo County used a 1041 permit process to regulate the "Southern Delivery Supply Project".²¹
- Larimer County is using a 1041 permit process for the "Thornton Pipeline" which proposes to put a pipeline down Douglas Road, in the exact same place as NISP.

In summary, the IGA provisions in the Larimer County Code are unconstitutionally vague, lack objective criteria for evaluating an IGA, confer unfettered discretion on the Commissioners, and otherwise violate notions of due process. The vagueness doctrine is

14

<http://www.northernwater.org/docs/NISP/MapsDocuments/NISP%20Overview%202016.pdf>

¹⁵ <https://www.coloradoan.com/story/news/local/2014/10/10/battle-greeley-water-pipeline-heads-court/17056247/>

¹⁶ http://www.reporterherald.com/ci_20260976/larimer-county-may-adopt-1041-powers

¹⁷ <http://c1n.tv/boulderchannel1/boulder-county-commissioners-reject-agreement-with-denver-water-board-on-the-proposed-gross-reservoir-expansion/>

¹⁸ <https://www.bouldercounty.org/property-and-land/land-use/planning/denver-water-gross-reservoir/>

¹⁹ <https://co.grand.co.us/DocumentCenter/View/1369>

²⁰ <http://www.coloradoriparian.org/water-projects-and-colorados-1041-regulations/>

²¹ <http://www.coloradoriparian.org/water-projects-and-colorados-1041-regulations/>

rooted in due process and prohibits laws that are in terms so vague that persons of common intelligence must necessarily guess as to their meaning and differ as to their application.²² In this case, Larimer County's IGA regulations are vague and violated due process and the Colorado Constitution. As such, Larimer County must require the NISP proposal to be evaluated under the County's 1041 regulations rather than the unconstitutionally vague IGA provisions.²³ If the Commissioners were to approve an IGA for the NISP proposal, it would be vulnerable to challenge because the IGA regulations are facially unconstitutional, as well as unconstitutional as applied to NISP. Further yet, there is considerable legal precedent in the state of Colorado that 1041 permits are the appropriate legal permitting process for projects exactly like NISP.

Larimer County must require the Northern Colorado Water Conservancy District to submit a 1041 application for its NISP proposal. Please respond to this letter in writing and state under which process the NISP proposal will proceed.

Save The Poudre requests that we be placed on the County's public notice email list for all permit applications, MOUs, IGA's, hearings, or other information related to the NISP proposal. Please send all such notifications to Gary Wockner at gary.wockner@savethepoudre.org.

Sincerely,



--

Gary Wockner, PhD, Director
Save The Poudre: Poudre Waterkeeper
PO Box 20, Fort Collins, CO 80522
970-218-8310

²² *Watso v. Colo. Dep't of Soc. Servs.*, 841 P.2d 299, 309 (Colo. 1992).

²³ *Beaver Meadows v. Board of County Commissioners, Larimer County*, 709 P.2d 928, 938 (Larimer County's land use decision reversed because its Code had "insufficient standards and safeguards to ensure that county action...will be rational and consistent and that judicial review of that action will be available and effective" citing *Cottrell v. City & County of Denver*, 636 P.2d 703, 709 (Colo. 1981).