

<p>Larimer County District Court 201 La Porte Ave, Suite 100 Fort Collins, CO 80521</p> <hr/> <p><b>NO PIPE DREAM CORPORATION, SAVE RURAL NOCO CORPORATION, SAVE THE POUFRE Plaintiffs</b></p> <p>v.</p> <p><b>LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS, COMMISSIONER TOM DONNELLY, in his official capacity as a Larimer County Commissioners. COMMISSIONER STEVE JOHNSON, in his official capacity as a Larimer County Commissioners. NORTHERN INTEGRATED SUPPLY PROJECT WATER ACTIVITY ENTERPRISE. Defendants.</b></p>	<p><b>COURT USE ONLY</b></p>
<p>Michael Foote Foote Law Firm LLC 357 S. McCaslin Blvd., Suite 200 Louisville, CO 80027 303-519-2183 <a href="mailto:mjbfoote@gmail.com">mjbfoote@gmail.com</a> Counsel for No Pipe Dream Corporation</p> <p>Mike Chiropolos Chiropolos Law 3325 Martin Drive Boulder, CO 80305 <a href="mailto:mike@chiropoloslaw.com">mike@chiropoloslaw.com</a> Counsel for Save Rural NoCo Corporation</p> <p>John M. Barth, Attorney at Law P.O. Box 409 Hygiene, CO 80533 (303) 774-8868 (fax and phone) <a href="mailto:barthlawoffice@gmail.com">barthlawoffice@gmail.com</a> Counsel for Save the Poudre</p>	<p>Case Number: 2020CV30800 Division</p>

Plaintiffs No Pipe Dream Corporation, Save Rural NoCo Corporation, and Save the Poudre (collectively, “Plaintiffs”) bring this First Amended Complaint under Colorado Rule of Civil Procedure 106(a)(4) and Colorado Rule of Civil Procedure 57 against the Defendants Larimer County Board of County Commissioners (“Board”), Tom Donnelly, in his official capacity as a member of the Board, Steve Johnson, in his official capacity as a member of the Board, and Northern Integrated Supply Project Water Activity Enterprise (“Northern”). This First Amended Complaint seeks declaratory rulings from this Court that: 1) the Board exceeded its jurisdiction and/or abused its discretion in approving Northern’s 1041 land use application for the Northern Integrated Supply Project (“NISP”) requiring vacature, reversal, and/or remand pursuant to Colo.R.Civ. Pro. 106(a)(4); and, 2) Commissioners Donnelly and/or Johnson acted unconstitutionally in their actual participation and votes to approve the NISP 1041 application because of their public bias evidenced in their decade-long public support, advocacy, and endorsement of NISP, and/or other conflicts of interest, requiring vacature, reversal, and/or remand. Defendant Northern is the applicant/recipient of the NISP 1041 permit from the Board and is being named as a Defendant. In support, Plaintiffs state the following.

#### **NATURE OF THE CASE**

1. This is an action under Colo.R.Civ.Pro. 106(a)(4) and Colo.R.Civ.Pro. 57 seeking vacature/reversal of the Board’s decision, declaratory relief, injunctive relief, and/or remand.

2. Colo.R.Civ.Pro. 106(a)(4) provides that a district court has jurisdiction to review whether any governmental body exercising quasi-judicial functions has exceeded its jurisdiction or abused its discretion. Plaintiffs' challenge the Board's quasi-judicial approval of the NISP 1041 application.

3. Colo.R.Civ.Pro. 57 confers to district courts the jurisdiction to declare rights, status, and other legal relations whether or not further relief is or could be claimed. Plaintiffs bring an "as applied" constitutional due process challenge to Commissioner Donnelly and/or Johnson's actual participation as quasi-judicial officers in the NISP 1041 land use proceeding and votes to approve the NISP 1041 application and seek a ruling that such participation and/or votes violated the Larimer County Land Use Code ("LUC"), the Colorado Constitution, and case law establishing quasi-judicial due process requirements.

### **JURISDICTION AND VENUE**

4. NISP is a proposed water conveyance pipeline and water storage reservoir project to be located, in large part, in unincorporated Larimer County, Colorado.

5. Northern submitted a 1041 land use application for NISP with Larimer County.

6. The Board, including Commissioners Donnelly and Johnson, participated as quasi-judicial officers in the NISP 1041 land use proceeding and voted to approve the land use application.

7. Tom Donnelly and Steve Johnson presently serve as County Commissioners of Larimer County.

8. The Board issued its Findings and Resolution on October 27, 2020, which

constitute the Board's final administrative action on the NISP land use application.

9. The original Complaint was timely filed pursuant to Colo.R.Civ.Pro. 106(b).

10. Jurisdiction is proper in this Court pursuant Colo.R.Civ.Pro. 106(a)(4) and 57.

11. Venue is proper before this Court pursuant to Colo.R.Civ.Pro. 98(a) because this is an action affecting real property in Larimer County, Colorado.

12. Plaintiffs have standing to bring these claims because Plaintiffs and/or their members are Larimer County residents many of whom live in close proximity to the proposed project and will be adversely impacted by unwanted noise, dust and other air pollution, traffic, water pollution, property damage, loss of property, diminution of property value or loss of appreciation, diminishment of quiet enjoyment of property, and/or loss of recreational, aesthetic, and ecological values and interests. Plaintiffs and/or their members' constitutional due process rights were violated by Commissioner Donnelly and/or Johnson's actual participation as quasi-judicial officers in the NISP 1041 process, and votes approving the NISP 1041 application. These injuries are causally connected to the Board's approval of the NISP 1041 permit, as well as Commissioner Donnelly and/or Johnson's actual participation and/or votes as quasi-judicial officers over the NISP 1041 land use application. The injuries complained of by Plaintiffs can be remedied by orders from this Court: reversing and/or vacating the NISP 1041 permit; declaring that the Board exceeded its jurisdiction and/or abused its discretion pursuant to Colo.R.Civ.Pro. 106(a)(4) in issuing the NISP 1041 permit; declaring that Commissioners Donnelly and/or Johnson's actual participation and/or votes approving

the NISP 1041 application as quasi-judicial officers violated Plaintiffs' and/or their members' due process rights, including the right to a fair and impartial proceeding; and granting injunctive relief.

### **THE PARTIES**

13. The Board is an elected body of Larimer County that is empowered to process 1041 applications. Larimer County Land Use Code ("LUC") §§ 14.8 and 14.10.

14. The Board issued Findings approving the NISP 1041 permit on October 27, 2020.

15. As of the date of filing this First Amended Complaint, Defendant Tom Donnelly was a Commissioner on the Board, which is the governing body of a political subdivision of the State of Colorado with a principal address at 200 West Oak, Suite 2200, Fort Collins, Colorado.

16. Mr. Donnelly actually participated in the quasi-judicial 1041 proceedings, and voted to approve the NISP 1041 application.

17. As of the date of filing this First Amended Complaint, Defendant Steve Johnson was a Commissioner on the Board, which is the governing body of a political subdivision of the State of Colorado with a principal address at 200 West Oak, Suite 2200, Fort Collins, Colorado.

18. Mr. Johnson actually participated in the quasi-judicial 1041 proceedings, and voted to approve the NISP 1041 application.

19. Northern is the NISP 1041 permit applicant/recipient.

20. Plaintiff No Pipe Dream Corporation ("NPD") is a Colorado nonprofit membership corporation based in Larimer County, Colorado. NPD's purpose is to

protect citizens from the intense adverse impacts of multiple proposed water pipeline and reservoir projects in Larimer County, including but not limited to NISP.

21. Plaintiff Save Rural NoCo Corporation (“Save NoCo”) is a Colorado nonprofit membership corporation based in Larimer County, Colorado. Save NoCo’s purpose is to protect existing land, water, and communities in rural northern Colorado from harmful development through research and public education.

22. Save the Poudre (“STP”) is a Colorado nonprofit membership corporation based in Larimer County, Colorado. STP’s mission is to protect and restore the Cache la Poudre River of Northern Colorado, including in Larimer County.

23. Plaintiffs’ members live, own homes, buildings, and/or properties along the NISP pipeline route, or in close proximity thereto, and in proximity to the dam, forebay, reservoir, and appurtenances and would be adversely impacted by construction and operation of NISP and its water conveyance pipelines.

24. Plaintiffs’ members recreate, fish, bird, boat, run, bike, and find physical and psychological rejuvenation and solace in and along the Cache la Poudre River and would be adversely impacted by the construction and operation of NISP.

25. NISP would adversely impact the Plaintiffs’ members by imposing unwanted noise, traffic, dust, and other air pollution, water pollution, reduced property values and/or diminished appreciation, property damage, loss of property, recreational harm, diminishment of quiet enjoyment of property, and aesthetic injury on the owners and occupants of the properties and/or residents of Larimer County.

26. Plaintiffs and/or their members’ due process rights were violated by Commissioner Donnelly and Johnson’s bias, decade long advocacy, support and

endorsement of NISP and actual participation as quasi-judicial officers, and votes approving the NISP 1041 permit application.

### **STATEMENT OF FACTS AND LAW**

27. The land use law applicable to lands located in unincorporated Larimer County is set forth in the Larimer County Land Use Code (“LUC”).

28. The LUC requires 1041 land use approval for the construction and operation of water conveyance pipelines, reservoirs, roads, and appurtenances in unincorporated Larimer County. LUC §14.4.J. & K.

29. The LUC grants the Board the sole authority to render quasi-judicial decisions with regard to 1041 requests. LUC §§ 14.8 & 14.10.

30. The criteria for approving a 1041 permit application include, but are not limited to:

1. The proposal is consistent with the master plan and applicable intergovernmental agreements affecting land use and development.
2. The applicant has presented reasonable siting and design alternatives or explained why no reasonable alternatives are available.
3. The proposal conforms with adopted county standards, review criteria and mitigation requirements concerning environmental impacts, including but not limited to those contained in this Code.
4. The proposal will not have a significant adverse affect on or will adequately mitigate significant adverse affects on the land or its natural resources, on which the proposal is situated and on lands adjacent to the proposal.
5. The proposal will not adversely affect any sites and structures listed on the State or National Registers of Historic Places.
6. The proposal will not negatively impact public health and safety.
7. The proposal will not be subject to significant risk from natural hazards including floods, wildfire or geologic hazards.
8. Adequate public facilities and services are available for the proposal or will be provided by the applicant, and the proposal will not have a significant adverse effect on the capability of local government to provide services or exceed the capacity of service delivery systems.
9. The applicant will mitigate any construction impacts to county roads, bridges and related facilities. Construction access will be re-graded and re-vegetated to minimize environmental impacts.

10. The benefits of the proposed development outweigh the losses of any natural resources or reduction of productivity of agricultural lands as a result of the proposed development.

11. The proposal demonstrates a reasonable balance between the costs to the applicant to mitigate significant adverse affects and the benefits achieved by such mitigation.

12. The recommendations of staff and referral agencies have been addressed to the satisfaction of the county commissioners.

LUC Section 14.10.D.

31. Defendants Donnelly and Johnson were both first elected as Larimer County Commissioners in November 2008.

32. Defendants Donnelly and Johnson were first sworn in as Larimer County Commissioners in January 2009.

33. Within approximately 2 months of their swearing in, on March 25, 2009 Northern met with Commissioners Donnelly and Johnson to discuss NISP. Exhibit 1, p. 1 hereto.

34. Consistently over the past 10 years, Defendants Donnelly and Johnson have been public supporters and/or endorsers of NISP. Exhibit 4 hereto.

35. Repeatedly over the past 10 years, Defendants Donnelly and Johnson have attended rallies and provided public advocacy, support, and endorsement of NISP at events that were organized by the 1041 permit applicant Northern. Exhibit 5 and 6 hereto.

36. Defendants Donnelly and Johnson have made other public statements expressing their support and/or endorsement of NISP in their official capacities as Larimer County Commissioners. Exhibit 7 hereto.

37. Since at least 2011, Defendants Donnelly and Johnson have allowed Northern to list their names as Larimer County Commissioners that support and/or endorse NISP. Exhibit 4 hereto.



38. On June 30, 2009, Northern hosted a “Farmers for NISP Rally.” Exhibit 2, p. 4 of pdf hereto. The speaker list for the event included the following: “Steve Johnson/Tom Donnelly, Larimer County Commissioners.” *Id.*

39. Northern’s August 2009 “Water News” publication stated that “Larimer County Commissioner Tom Donnelly and his Weld County counterpart Doug Rademacher expressed their commissions’ respective support...” of NISP at the Farmers for NISP Rally. *Id.* at p. 2 of pdf.

40. Within 6 months of being sworn into his initial term as Larimer County Commissioner, Donnelly publicly expressed his support of NISP. Exhibit 2 hereto.

41. On December 22, 2009 Northern prepared a “NISP Public Affairs Internal Meeting” memorandum identifying a strategy to “identify and meet with key people” including at the top of the list “Steve Johnson, Tom Donnelly” for the purpose of obtaining their “support/endorsements.” Exhibit 3, p. 3 hereto

42. Northern maintained a public list of “NISP Support/Endorsements” which it would publicly disseminate in print and/or email newsletters. Consistently from at least 2011-2019, Northern listed “Tom Donnelly, Larimer County commissioner”, “Steve Johnson, Larimer County commissioner” and/or “Larimer County Commissioners” on its “NISP Support/Endorsement” list. Exhibit 4 hereto.

43. On or about May 19, 2011 Commissioner Tom Donnelly again spoke in support of NISP at another business rally hosted by Northern called “Water, Jobs and the Economy.” Exhibit 5, p. 2 hereto.

44. Commissioner Steve Johnson was also present at the May 19, 2011 business rally. *Id.* at pp. 5 and 6 of pdf.

45. Northern introduced Commissioners Donnelly and Johnson at the May 19, 2011 business rally and thanked them for “their continued support of NISP.” *Id.* at p. 4 of pdf.

46. On September 4, 2015 Northern issued an “eNEWS” statement claiming that “Larimer County Commissioners Support NISP.” Exhibit 6, p. 1 hereto. On that same day, Brian Werner, a Northern employee, sent the September 4, 2015 eNEWS publication to Commissioner Johnson and stated, “Thanks again for your support” to which Commissioner Johnson replied, “we appreciated the mention!” *Id.* at p. 3.

47. On October 27, 2016 Commissioner Donnelly posted to his “Tom Donnelly, Larimer County Commissioner” Facebook page a photograph of his speaking at the “Farmers For NISP” rally. Exhibit 7 hereto.

48. On August 14, 2019 Commissioner Donnelly was exchanging text messages about NISP with Northern’s Public Information Officer Jeff Stahla in which Donnelly states “You guys are getting ready to blow this deal...” and “Northern has no idea what is in store for them if they let this slide into the next boards term.” Exhibit 8 hereto.

49. On or about February 14, 2020 Northern filed a 1041 land use application with Larimer County for NISP. On April 17, 2020 Plaintiffs’ sent a written letter to the County identifying reasons that Northern’s 1041 permit application was incomplete.

50. In a March 27, 2020 publicly available email, Commissioner Johnson stated that Plaintiff Save the Poudre has “lost ALL credibility with me” with regards to the NISP 1041 application. Exhibit 9 hereto.

51. Commissioners Donnelly and Johnston are term limited and their final term ends on or about January 12, 2021.

52. Plaintiffs and their members participated in all aspects of the administrative 1041 permitting process including, but not limited to, providing oral testimony, submitting emails to the Planning Commission and Board, and submitting formal written comment letters. All the alleged deficiencies raised in this First Amended Complaint with regard to Northern's 1041 permit application were previously raised in Plaintiffs' written or oral public comments or in written or oral comments raised by other members of the public.

53. The Board approved the NISP 1041 permit on October 27, 2020 with Commissioners Donnelly and Johnson voting in favor and Commissioner Kefalas voting against. Exhibit 10, pp. 1 and 21 hereto.

54. The LUC states that Commissioners must avoid any conflict of interest and that all official actions "must represent unconflicted loyalty to the interest of the citizens of the entire county." LUC § 2-71.

55. The LUC requires that a Commissioner recuse himself or herself from any quasi-judicial decision if he or she "believe[s] they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision." LUC § 2-67(10). This requirement necessarily encompasses disclosure of any actual or apparent conflicts, and failure to disclose is grounds for remand of the challenged decision.

56. Article XXIX(1)(c) of the Colorado Constitution requires that local governments "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated."

57. A quasi-judicial decision must provide for due process and adhere to fundamental principles of fairness. *Churchill v. University of Colorado at Boulder*, 285 P.3d 986, 1006 (Colo. 2012 *en banc*); *see also Canyon Area Residents v. Bd. of Cnty Comm'rs*, 172 P.3d 905, 908 (Colo. App. 2006).

58. The nearly decade-long public endorsement, support, and advocacy for NISP by Commissioners Donnelly and Johnson has created a justifiable impression Plaintiffs and/or their members that Commissioners Donnelly and Johnson did not have un-conflicted loyalty to the interests of the citizens of the county with regard to the NISP 1041 application, did not make fair and impartial quasi-judicial decisions with regard to NISP proceedings, and violated the public trust in serving as quasi-judicial officers and in approving the NISP 1041 permit.

59. Under Colo.R.Civ.Pro. 106(a)(4), when the Board performs quasi-judicial functions, the district court may review whether the Board “exceeded its jurisdiction or abused its discretion.”

60. The Larimer County Land Use Code Section 14.4 J & K designates the siting, development, and/or construction of new domestic water lines and new water storage reservoirs as requiring a 1041 approval from the County.

61. The siting and construction of a new water storage reservoir includes “all appurtenant uses, structures and facilities, roads, parks, parking, trails and other uses which are developed as part of the water storage reservoir.” LUC §14.4(K).

62. The siting and construction of NISP involves a re-routing of State Highway 287 and the development of a new road to Glade Reservoir and a new park-and-ride facility.

63. The Board exceeded its jurisdiction and/or abused its discretion by processing Northern's incomplete 1041 permit application.

64. The Board exceeded its jurisdiction and/or abused its discretion by denying Plaintiffs' due process rights as a result of its arbitrary departure from its previous 1041 policy allowing Plaintiffs and the public to combine their public comments into an extended group presentation. The Board did not allow Plaintiffs or the public to make a group presentation and instead limited all speakers to 3 minutes. The Board placed no limitations of time or otherwise on Northern's public hearing presentations, which lasted hours and allowed for group presentations.

65. The Board exceeded its jurisdiction and/or abused its discretion by finding that relocating Highway 287 is not part of the 1041 permit application and/or should not be considered by the Board in evaluating the NISP 1041 application.

66. The Board also exceeded its jurisdiction or abused its discretion by failing to adequately evaluate the impacts of construction and operation of the access road to Glade Reservoir and the park and ride facility.

67. The Board exceeded its jurisdiction or abused its discretion by failing to require a presentation of reasonable siting and design alternatives to Glade Reservoir.

68. The Board exceeded its jurisdiction or abused its discretion by accepting Northern's explanation for why no reasonable alternatives are available to NISP and Glade Reservoir.

69. The Board exceeded its jurisdiction or abused its discretion by failing to require a presentation of reasonable siting and design alternatives to the relocation of Highway 287.

70. The Board exceeded its jurisdiction or abused its discretion by accepting Northern’s explanation for why no reasonable alternatives are available to the relocation of Highway 287.

71. The Board exceeded its jurisdiction or abused its discretion by failing to require a presentation of reasonable siting and design alternatives for all of the pipeline routes.

72. The Board exceeded its jurisdiction or abused its discretion by accepting Northern’s explanation for why no reasonable alternatives are available to all of the proposed pipelines and their routes.

73. The Board exceeded its jurisdiction or abused its discretion by finding the NISP water supply will be “reliable” because the NISP project relies on junior water rights, did not adequately evaluate the impact of drought and climate change, and Northern does not possess South Platte River exchange agreements to effectuate NISP.

74. The Board’s Findings conclude that NISP will help “preserve tens of thousands of irrigated farm acres” through “water sharing arrangements rather than buy-and-dry.” The Board exceeded its jurisdiction and/or abused its discretion because there is no evidence in the record that water sharing agreements exist to effectuate NISP. Instead, Northern is purchasing land and water to effectuate NISP that will result in buy-and dry. Further, Northern does not possess South Platte River exchange agreements to effectuate NISP and/or preserve tens of thousands of irrigated farm acres.

75. The Board exceeded its jurisdiction and/or abused its discretion by finding that NISP will not have a significant adverse effect on the land and will maintain and enhance the diversity of wildlife species because NISP will flood an entire valley and

eliminate acres of important wildlife habitat which is unmitigated.

76. The Board exceeded its jurisdiction and/or abused its discretion by finding that impacts to water quality and quantity in the Poudre River are significantly mitigated and are not significantly adverse. NISP will not mitigate adverse impacts to water quality or quantity at all times.

77. The Board exceeded its jurisdiction or abused its discretion by finding that NISP will maintain sufficient peak flows for substrate cleaning and sediment flushing in the Poudre River. The peak flows for substrate cleaning and sediment flushing are inadequate to avoid violations of water quality standards and adverse habitat and wildlife impacts.

78. The Board exceeded its jurisdiction or abused its discretion by finding that NISP full range of negative impacts caused by water diversions on wetlands, riparian forest, and riparian habitat along the Poudre River corridor are in compliance with the Larimer County Land Use Code.

79. The Board exceeded its jurisdiction or abused its discretion by arbitrarily accepting a faulty “Purpose and Need” statement in the Army Corps Environmental Impact Statement process requiring a regional project rather than smaller, less environmentally damaging, local projects.

80. The Board exceeded its jurisdiction or abused its discretion by accepting the faulty “Screening Criteria” in the Army Corps Environmental Impact Statement process which arbitrarily screened out cheaper, easier, or more local alternatives.

81. The Board exceeded its jurisdiction or abused its discretion by incorrectly accepting the Army Corps Final Environmental Impact Statement’s preferred alternative

as the Least Environmentally Damaging Practicable Alternative.

82. The Board exceeded its jurisdiction or abused its discretion by incorrectly accepting a faulty water demand analysis in the Army Corps Environmental Impact Statement process.

83. The Board exceeded its jurisdiction or abused its discretion by incorrectly accepting the NISP FEIS which failed to meet a primary objective for any EIS concerning water quality in the mainstem Poudre River; failed to describe the water quality environment of the Poudre River that will be potentially impacted; and failed to describe and measure the water quality impacts, including but not limited to impacts on water temperature, of the proposed project on the Poudre River.

84. The Board exceeded its jurisdiction or abused its discretion by incorrectly accepting NISP's negative economic and recreation-days impacts to the new Poudre River Whitewater Park in downtown Fort Collins.

85. The Board exceeded its jurisdiction or abused its discretion by finding that climate change emissions caused by the project were evaluated and accounted for in the federal review process.

86. The Board exceeded its jurisdiction or abused its discretion by finding that NISP will use water sharing agreement in lieu of a buy-and dry approach. There is no evidence in the record of the existence of any water sharing agreements at the time the Board issued its Findings.

87. The Board exceeded its jurisdiction or abused its discretion by finding that the recommendations of staff and referral agencies have been sufficiently addressed.

88. The Board exceeded its jurisdiction or abused its discretion by failing to impose written conditions into the Findings that mitigate the impacts to County residents,



the environment, wildlife, and the Cache la Poudre River.

89. Paragraph 9 of the Findings states that Northern changed from the intergovernmental agreement process to the quasi-judicial 1041 permit process. The Board exceeded its jurisdiction or abused its discretion to the extent paragraph 9 of the Findings reaches a legal conclusion that the LUC's 1041 intergovernmental agreement process is *not* a quasi-judicial process.

90. On page 7, paragraph 1 of the Findings, the Board concludes that the proposal is consistent with the comprehensive/master plan affecting land use development. The Board exceeded its jurisdiction or abused its discretion because the construction of Glade Reservoir will not respect the environment and sensitive areas, maintain an un-fragmented land pattern, use the natural terrain and avoid changes to prominent landforms; protect cultural and historic resources, protect public health from the trichloroethylene ("TCE") groundwater plume at the site; and, protect the public and local residents from wildfire.

91. Page 7, paragraph 1 of the Findings states that "[the City of] Fort Collins noted some concerns about its natural areas." In response, the Findings states, "there will be minimal long-term impacts to these areas." The Board exceeded its jurisdiction or abused its discretion because the evidence in the record shows that there will be long term permanent and detrimental impacts to Fort Collins natural areas.

92. Page 7 of the Findings states that the pipeline "routes avoid homes and other substantial improvements on private property." The Board exceeded its jurisdiction or abused its discretion because the evidence in the record shows that the pipeline routes will not avoid homes and other substantial improvements on private property and instead

will adversely impact private property, values, and quiet enjoyment of private property.

93. The Board exceeded its jurisdiction or abused its discretion because the Board denied a 1041 permit for the Thornton Water Project which involved very similar impacts which the Board determined did not meet the LUC 1041 criteria. Exhibit 11 hereto. The Board's decision approving the NISP project cannot be reconciled with its Thornton Water Project ("Thornton") 1041 decision because the impacts from NISP are similar to, but far greater than, those of the Thornton Water Project.

94. The Board exceeded its jurisdiction or abused its discretion by approving a pipeline "corridor" for NISP, but denying a pipeline corridor for Thornton.

95. The Board exceeded its jurisdiction or abused its discretion by approving the NISP application despite the lack of information about cumulative impacts of irrigated farmland, but denied the Thornton 1041 permit with the same deficiencies.

96. The Board exceeded its jurisdiction or abused its discretion by approving the NISP application despite the lack of any presentation of reasonable siting alternatives to Glade Reservoir, the relocation of Highway 287, and the pipeline route but denied the Thornton 1041 permit application that contained more alternatives than were presented by Northern.

97. The Board exceeded its jurisdiction or abused its discretion by approving a the NISP application despite the significant impacts to the quality of life of county residents (noise, visual, use of properties, traffic), but denied the Thornton 1041 permit application with the same impacts.

98. The Board exceeded its jurisdiction or abused its discretion by approving a the NISP 1041 application despite a pipeline corridor that prevents private property

owners from reasonably understanding all impacts to their property, but denied the Thornton 1041 permit with the similar deficiencies.

100. The Board exceeded its jurisdiction or abused its discretion by approving a the NISP application despite the fact that the adverse affects to the county are greater than Thornton's adverse affects, but denied the Thornton 1041 permit application because the Board's balancing of the impacts did not meet the code criteria.

101. The Board exceeded its jurisdiction and/or abused its discretion by failing to consider co-location of the NISP and Thornton pipelines.

102. The Board exceeded its jurisdiction and/or abused its discretion by concluding that the NISP 1041 application was consistent with the comprehensive plan and by failing to apply the operational master plan/comprehensive plan.

103. The Board also exceeded its jurisdiction or abused its discretion by relying on purported recreational benefits of Glade Reservoir when the administrative record does not support such benefits.

104. The Board also exceeded its jurisdiction or abused its discretion by finding that NISP will not negatively impact public health and safety when the administrative record documents numerous negative impacts, including but not limited to wildfire, air pollution, Atlas Missile Silo groundwater pollution, climate change, geologic faults, flooding, water pollution, water quality degradation, including but not limited to an increase in E. coli bacterial pollution in the Cache la Poudre River.

105. The Board also exceeded its jurisdiction or abused its discretion by failing to analyze the adverse impacts of the various NISP pump stations (air pollution, noise pollution, visual pollution, greenhouse gas emissions, wildlife impacts, compliance with

County zoning, etc.).

106. The Board also exceeded its jurisdiction or abused its discretion for the reasons stated in Plaintiffs' comment letters and oral testimony before the Board, as well as for the reasons stated by any other person or entity during County's NISP 1041 application proceedings.

107. Based on information and belief, from at least 2016 to the present, Joseph Patrick Donnelly has been a Project Manager/Water Resources Engineer with Northern Colorado Water Conservancy District. Northern Colorado Water Conservancy District is a participant, the developer, and proponent of NISP through Defendant Northern Integrated Supply Project Water Activity Enterprise. Joseph Patrick Donnelly lives in Berthoud, Colorado and is the nephew of Commissioner Tom Donnelly. Throughout the NISP 1041 permit application quasi-adjudicatory process, Commissioner Tom Donnelly did not publicly disclose that his nephew Joseph Patrick Donnelly was employed by Northern Colorado Water Conservancy District.

**CLAIM FOR RELIEF 1- RULE 106(a)(4)**

(Request for Declaratory Relief, Injunctive Relief, Vacature)

108. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

109. Colo.R.Civ.Pro. 106(a)(4) provides that a district court has jurisdiction to review whether any governmental body exercising quasi-judicial functions has exceeded its jurisdiction or abused its discretion.

110. For the reasons stated herein, the Board exceeded its jurisdiction and/or abused its discretion in issuing its October 27, 2020 Findings approving the NISP 1041

permit application.

111. There is no other plain, speedy and adequate remedy otherwise provided by law for review of the Board's October 27, 2020 Findings.

112. Plaintiffs request an order from this Court pursuant to Colo.R.Civ.Pro. 106(a)(4) declaring that the Board exceeded its jurisdiction and/or abused its discretion in issuing its October 27, 2020 Findings, vacating the Findings, and/or granting other relief the Court deems appropriate.

113. In the alternative to the Rule 57 claim presented below, Plaintiffs bring their "as applied" constitutional due process bias claim pursuant to Rule 106(a)(4). In the event of such alternative claim, Plaintiffs incorporate herein by reference paragraphs 114-120 below.

#### **CLAIM FOR RELIEF-RULE 57**

(Request for Declaratory and Injunctive Relief)

114. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

115. Colo.R.Civ.Pro. 57(a) confers to district courts the jurisdiction to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

116. Plaintiffs bring an "as applied" constitutional challenge under Colo.R.Civ.Pro. 57 to Commissioner Donnelly and/or Johnson's actual participation as quasi-judicial officers the Board NISP proceedings and/or to their votes approving the NISP 1041 permit. By participating in the NISP quasi-judicial proceedings, Defendants Donnelly and/or Johnson fell below the "constitutional floor" for guaranteeing a fair process before a fair tribunal. *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010).

117. Colo.R.Civ.Pro. 106(a)(4) is limited to situations where a governmental body exercises its quasi-judicial function. The Board's October 27, 2020 Findings do not contain findings of fact, conclusions of law, or otherwise contain an administrative record regarding whether Commissioners Donnelly and Johnson had unconstitutional bias requiring recusal at the commencement of the quasi-judicial hearing. Therefore, review under Colo.R.Civ.Pro. 106(a)(4) is unavailable with regard to Plaintiffs' as applied due process claim.

118. A judgment or decree by the Court, if rendered or entered on these Rule 57 issues, would end the uncertainty, insecurity, and controversy with respect to the rights, status, or other legal relations between the parties regarding whether Donnelly and Johnson's actual participation in the on the NISP quasi-judicial hearing and votes to approve the 1041 permit application violated Plaintiffs' constitutional rights.

119. The Plaintiffs have suffered and will continue to suffer harm as a result of Commissioner Donnelly and/or Johnson's actual participation and vote(s) to approve the NISP 1041 permit.

120. In the alternative to this Rule 57 claim, Plaintiffs bring their "as applied" constitutional due process bias claim pursuant to Rule 106(a)(4).

WHEREFORE, the Plaintiffs respectfully request that this Court:

a) Rule 106 Claim: DECLARE that the Board exceeded its jurisdiction and/or abused its discretion in issuing its October 27, 2020 Findings; and, REVERSE, VACATE AND/OR REMAND the Findings.

b) Rule 57 Claim: DECLARE that Defendant Donnelly and/or Johnson's actual participation as quasi-judicial officers in the NISP 1041 permit application proceeding

violated Plaintiffs' constitutional due process rights to a fair and impartial quasi-judicial adjudicator of the NISP 1041 permit application; iv) Defendant Donnelly and/or Johnson's votes approving the NISP 1041 permit application and/or October 27, 2020 Findings violated Plaintiffs' constitutional due process rights to a fair and impartial quasi-judicial adjudicator of the NISP 1041 permit application; and, REVERSE, VACATE, AND/OR REMAND the October 27, 2020 Findings.

d) Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 11th day of January 2021.

/s/ John M. Barth  
John M. Barth  
Attorney at Law  
P.O. Box 409  
Hygiene, CO 80533  
[barthlawoffice@gmail.com](mailto:barthlawoffice@gmail.com)  
303-774-8868 telephone and fax  
Counsel for Save the Poudre

Michael Foote  
Foote Law Firm LLC  
357 S. McCaslin Blvd., Suite 200  
Louisville, CO 80027  
303-519-2183  
[mjbfoote@gmail.com](mailto:mjbfoote@gmail.com)  
Counsel for No Pipe Dream Corporation

Mike Chiropolos  
Chiropolos Law  
3325 Martin Drive  
Boulder, CO 80305  
[mike@chiropoloslaw.com](mailto:mike@chiropoloslaw.com)  
Counsel for Save Rural NoCo Corp.

## **EXHIBITS TO FIRST AMENDED COMPLAINT**

1. March 26, 2009 Memo Ciruli to Werner
2. Water News August 2009
3. December 22, 2009 NISP Memo
4. NISP List of Endorsements
5. Business Rally 2011 documents
6. September 4, 2015 eNews
7. October 27, 2016 Donnelly Facebook Post
8. Donnelly text messages with Northern
9. March 27, 2020 Johnson email
10. October 27, 2020 NISP Findings and Resolution
11. Thornton Findings and Resolution.

### **CERTIFICATE OF DELIVERY**

I hereby certify that on this 11<sup>th</sup> day of January 2021, a true and correct copy of the foregoing **First Amended Complaint Under Colo.R.Civ.Pro. 106(a)(4) and Rule 57 and all 11 exhibits thereto** were filed via Colorado Courts E-filing System.

/s/ John M. Barth  
John M. Barth