

<p>Larimer County District Court 201 La Porte Ave, Suite 100 Fort Collins, CO 80521</p> <hr/> <p><b>SAVE THE POUUDRE</b></p> <p><b>Plaintiff</b></p> <p>v.</p> <p><b>LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS; John Kefalas, in his official capacity; Kristin Stephens, in her official capacity; Jody Shadduck-McNally, in her official capacity; and,</b></p> <p><b>CITY OF THORNTON</b></p> <p><b>Defendants.</b></p>	<p><b>COURT USE ONLY</b></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:</p> <p>Division</p>

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**COMPLAINT UNDER COLO.R.CIV.PRO. 106(A)(4)**

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Plaintiff Save the Poudre brings this Complaint under Colorado Rule of Civil Procedure 106(a)(4) against the Defendants Larimer County Board of County Commissioners (“Board”), John Kefalas, in his official capacity as a member of the Board, Kristin Stephens, in her official capacity as a member of the Board, Jody Shadduck-McNally, in her official capacity as a member of the Board (collectively

referred to herein as the “Board”), and the City of Thornton (“Thornton”), the 1041 land use permit applicant and recipient. This Complaint seeks declaratory rulings from this Court that the Board exceeded its jurisdiction and/or abused its discretion in approving Thornton’s 1041 land use application for the Thornton Water Project requiring vacature, reversal, and/or remand pursuant to Colo.R.Civ. Pro. 106(a)(4). Defendant Thornton is the applicant/recipient of the 1041 permit from the Board and is being named as a Defendant. In support, Plaintiff states the following.

### **NATURE OF THE CASE**

1. This is an action under Colo.R.Civ.Pro. 106(a)(4) seeking vacature/reversal, declaratory relief, injunctive relief, and/or remand of the Board’s June 18, 2024 1041 land use decision for the first phase of the Thornton Water Project.

2. The Thornton Water Project involves diversion of natural stream flows from the Cache la Poudre River upstream of the City of Fort Collins, collection and conveyance of those flows in a 42” steel water pipeline, and construction and operation of a pump station to convey those water flows to Thornton’s Wes Brown Water Treatment plant some 70 miles away from the original point of water diversion.

3. This first phase of the Thornton Water Project is capable of conveying 40 million gallons of water per day or 14,000 acre-feet of water per year from the Cache la Poudre River to the City of Thornton. Additional contemplated phases of the Thornton Water Project may involve construction and operation of two additional water conveyance pipelines in Larimer County.

4. In the 1980's, Thornton purchased the agricultural water shares at issue from farms and ranches in Larimer County and then converted those water shares from agricultural use to municipal use.

5. All of the water that is the subject of the Thornton Water Project will forever be removed from Larimer County and the Cache la Poudre watershed.

6. Under the Larimer County Land Use Code ("LUC") anyone proposing a new water conveyance pipeline must first obtain a 1041 land use permit from Larimer County.

7. A 1041 land use permit application may only be approved if the applicant has satisfactorily demonstrated that the proposed project, including all mitigation measures proposed by the applicant, complies with the applicable criteria set forth in Article 10 of the LUC. If the proposal does not comply with the applicable criteria, the permit shall be denied unless the Board determines that reasonable conditions can be imposed on the permit that will enable the permittee to comply with the criteria.

8. Thornton submitted a 1041 land use permit application to Larimer County on or about December 4, 2023.

9. The Larimer County 1041 land use process involves, *inter alia*, a quasi-judicial determination by the Board on a 1041 permit application.

10. 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.

11. Through this action, Plaintiff challenges the Board's June 18, 2024 quasi-judicial approval of the Thornton 1041 land use application pursuant to Colo.R.Civ.Pro. 106(a)(4).

### **JURISDICTION AND VENUE**

12. The Thornton Water Project is a proposed water diversion and conveyance system to be located, in significant part, in unincorporated Larimer County, Colorado.

13. On or about December 4, 2023 Thornton submitted a 1041 land use application for the Thornton Water Project to Larimer County.

14. The Board adjudicated Thornton's 1041 permit application as a quasi-judicial body and voted to approve the 1041 permit.

15. The Board signed its Findings and Resolution on June 18, 2024, which constitute the Board's final quasi-judicial action on the Thornton 1041 land use application.

16. This Complaint is timely filed pursuant to Colo.R.Civ.Pro. 106(a) because it was filed within 28 days of the Board's final quasi-judicial action on Thornton's 1041 application.

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

18. 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.

19. Plaintiff has standing to bring these claims because Plaintiff and/or its members are Larimer County residents many of whom live in close proximity to the proposed project and will be adversely impacted by unmitigated harm to the Cache la Poudre River, 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 or impairment of recreational, aesthetic, and ecological values and interests. These injuries are causally connected to the Board's approval of the Thornton 1041 permit and these injuries would not occur but for the Board's approval. The injuries complained of by Plaintiff and its members can be remedied by orders from this Court reversing and/or vacating the Thornton 1041 permit and declaring that the Board exceeded its jurisdiction and/or abused its discretion pursuant to Colo.R.Civ.Pro. 106(a)(4) in issuing the Thornton 1041 permit.

### **THE PARTIES**

20. The Board is an elected body of Larimer County that is empowered to process 1041 applications. LUC § 10.8.2 G.2

21. The Board signed its Findings approving the Thornton 1041 permit on June 18, 2024.

22. Defendant Board 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. John Kefalas, Kristin Stephens, and Jody Shaddock-McNally were members of the Board at all relevant times and approved the June 18, 2024 Findings.

23. Thornton is the 1041 permit applicant/recipient.

24. 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.

25. Plaintiff's members live, own homes, buildings, and/or properties along the Thornton pipeline route, or in close proximity thereto, and would be adversely

impacted by construction and operation of the Thornton Water Project.

26. Plaintiff's members recreate, fish, bird watch, swim, wade, canoe, kayak, 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 the Thornton Water Project.

27. The Thornton Water Project would adversely impact the Plaintiff's members by imposing inadequately mitigated harm to the Cache la Poudre River, 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.

#### **HISTORICAL BACKGROUND**

28. Initially Thornton applied for a 1041 permit with Larimer County in 2018.

29. The LUC in effect at the time of Thornton's initial 2018 1041 application addressed 1041 issues in Section 14 ("Areas and Activities of State Interest"). Section 14.10 of the 2018 LUC contained twelve 1041 criteria applicable to the siting and development of domestic water pipelines, among other requirements. The twelve criteria included, but were not limited to: "the proposal is consistent with the master plan" (§14.10 D.1.); "the applicant has presented reasonable siting and design alternatives or explained why no reasonable alternatives are available" (§14.10 D.2.); "The proposal conforms with adopted county standards, review criteria, and mitigation requirements concerning environmental impacts, including but not limited to those contained in Section 8 of this Code" (§14.10 D.3.); and, "The proposal demonstrates a reasonable

balance between the costs to the applicant to mitigate significant adverse affects and the benefits achieved by such mitigation” (§14.10 D.11.).

30. In 2018 Larimer County also had a Master Plan that was in effect at the time of Thornton’s initial 1041 application.

31. The then-sitting members of the Larimer County Board of County Commissioners held public hearings in 2018 and 2019 on the initial Thornton 1041 permit application.

32. On March 19, 2019 the then-sitting Larimer County Board of County Board Commissioners issued a unanimous Findings and Resolution denying the Thornton 1014 application for its failure to meet 7 of the 12 then-existing criteria for approval. Commissioner Kefalas was a member of the Board at that time and voted to deny the Thornton 1041 permit application.

33. The March 19, 2019 Findings and Resolution contained the following reasons, *inter alia*, for denying Thornton’s initial 1041 permit application:

i. “The Board cannot conclude that Thornton’s proposal is consistent with the Master Plan.”

ii. “The Board finds Thornton failed to present reasonable siting alternatives.”

iii. “The Board is not convinced that mitigation, including avoidance, seasonal limitations or prohibitions on activities is adequate.”

iv. “The Board further finds that other alternative routes may result in fewer adverse impacts to the County which would reduce or equal the costs of mitigating impacts to the CR 56 Route or Douglas Route.”

34. Thornton challenged the March 19, 2019 Findings and Resolution in Larimer County District Court. Plaintiff Save the Poudre was granted intervention in the District Court case and submitted briefing supporting the denial of Thornton's initial 1041 permit application. In an Order dated February 15, 2021, the District Court entered an Order affirming the denial of Thornton's initial 1041 permit application.

35. Thornton appealed the District Court's February 15, 2021 Order to the Colorado Court of Appeals. Save the Poudre filed briefs in the appeal seeking to affirm the decision of the District Court. In an unpublished opinion dated September 1, 2022 the Court of Appeals affirmed the denial of Thornton's initial 1041 permit application.

36. On November 6, 2023 the Board adopted a revised and amended LUC and in doing so, *inter alia*, expanded the criteria for approval of 1041 applications as well as imposing other new 1041 requirements.

37. On July 17, 2019, the County adopted a revised Comprehensive Plan, which replaced the Master Plan, establishing a new framework for land use decision-making.

38. The Board applied the November 6, 2023 version of the LUC and the July 17, 2019 Comprehensive Plan in issuing the 2024 Findings granting Thornton's 1041 permit application.

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

39. The land use law applicable to lands located in unincorporated Larimer County is set forth in the November 6, 2023 Larimer County Land Use Code.

40. The applicable Section 10.8.1 of the LUC states that construction and operation of water conveyance pipelines, reservoirs, roads, and appurtenances in



unincorporated Larimer County requires a 1041 permit.

41. The applicable LUC grants the Board the sole authority to render quasi-judicial decisions with regard to 1041 requests. LUC § 10.8.2 G.2.

42. Plaintiff and/or Plaintiff's members participated in all aspects of the 1041 quasi-judicial land use permitting process including, but not limited to, providing oral testimony, submitting emails to the Larimer County Planning Commission and Board, and submitting formal written comment letters. All the alleged deficiencies raised in this Complaint with regard to Thornton's 1041 permit application were previously raised in Plaintiff's written or oral public comments or in written or oral comments raised by other parties, persons, and/or members of the public.

43. During the hearing process, the Board departed from established practice and procedure by refusing to allow Save the Poudre and citizens to make any presentations exceeding 3 minutes in length. In previous 2019 hearings on the initial Thornton 1041 application, citizens were allowed to pool time and make legal and technical presentations exceeding 3 minutes in length. In 2024, Thornton was the only non-Larimer County party allowed to make presentations exceeding 3 minutes in length.

44. The Board did not require Thornton to present an alternative utilizing the Cache la Poudre River as a conveyance. Instead, the Board accepted Thornton's explanation regarding why such an alternative was not available.

45. The Board did not require Thornton to present an alternative using alternative water diversion locations. Instead, the Board accepted Thornton's explanation regarding why such an alternative was not available.

46. The Board approved the Thornton 1041 permit on June 18, 2024.

## **THE BOARD EXCEEDED ITS JURISDICTION/ABUSED ITS DISCRETION**

47. The Board exceeded its jurisdiction and/or abused its discretion by denying Plaintiffs' and/or their Plaintiffs' members 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 Thornton's public hearing presentations, which lasted hours and allowed for group presentations.

48. The Board exceeded its jurisdiction or abused its discretion because the Findings and/or Thornton did not adequately consider or present reasonable siting and design alternatives, including but not limited to a failure to present an alternative using the Cache la Poudre River as a water conveyance, as required by LUC § 10.9.1.C.

49. The Board exceeded its jurisdiction or abused its discretion by accepting Thornton's explanation for why no reasonable alternatives, including a Cache la Poudre River conveyance alternative, were available or feasible as required by LUC § 10.9.1.C.

50. The Board exceeded its jurisdiction or abused its discretion because the Findings and/or Thornton failed to present reasonable siting and design alternatives for the commencement of the pipeline at alternative water diversion locations, as required by LUC § 10.9.1.C.

51. The Board exceeded its jurisdiction or abused its discretion by accepting Northern's explanation for why no reasonable water diversion location alternatives were available as required by LUC § 10.9.1.C.

52. The Board exceeded its jurisdiction or abused its discretion because the alternative approved in the Findings was not “the best alternative available based on consideration of consistency with the Comprehensive Plan, Land Use Code, need, existing technology, cost, and impact to the site and surrounding properties” as required by LUC § 10.9.1.C.

53. The Board arbitrarily allowed the Thornton to “buy [water] and dry [land]” despite its previous Finding for the Northern Integrated Supply Project (“NISP”) in which it concluded that NISP will help “preserve tens of thousands of irrigated farm acres” through “water sharing arrangements rather than buy-and-dry.”

54. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project do not, “to the greatest extent possible, ... mitigate any impacts to the environment and natural resources” and instead will “significantly degrade the environment or natural resources” contrary to the requirements of as required by LUC § 10.9.1.E.

55. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project will “exacerbate or worsen climate change” by allowing additional significant future development in the City of Thornton contrary to the requirements of LUC § 10.9.1.E.

56. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project does not “mitigate impacts on rivers, streams and wetlands to the greatest extent possible, including following a mitigation hierarchy to first avoid impacts to resources of the highest value, second minimize the impacts that are unavoidable and finally mitigate the impacts that occur” as required by LUC § 10.9.1.F.

57. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project “will have a significant impact on natural resources of statewide importance...” contrary to the requirements of LUC § 10.9.1.I.

58. 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.

59. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project do not “implement the vision and policies of the Larimer County Comprehensive Plan” as required by LUC § 10.1.2.A.

60. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project do not “plan for and regulate the construction, expansion, and operation of matters of state interest to facilitate the planned and orderly use of land...” as required by LUC § 10.1.2.H.

61. The Board exceeded its jurisdiction and/or abused its discretion because the Findings and/or Project do not “regulate development in a manner consistent with legitimate environmental concerns” as required by LUC § 10.1.2.K.

62. The Board exceeded its jurisdiction or abused its discretion because the Findings and/or planning, design, and operation of the Project will not “reflect principles of resource stewardship and conservation, which is characterized by but not limited to: energy efficiency, recycling or reuse, adaptive management, and conservation or mitigation strategies for forests, water, soil, and other applicable natural assets” as required by LUC § 10.9.1(Q).

63. The Board exceeded its jurisdiction or abused its discretion because the

“the benefits, in terms of physical improvements, enhanced services, or environmental impacts, of the proposed project” do not “outweigh the losses of any natural resources or reduction of productivity of agricultural lands as a result of the proposed development” as required by LUC § 10.9.1(T).

64. The Board exceeded its jurisdiction or abused its discretion because the Board previously 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. The Board’s 2024 Findings approving the Thornton Water project cannot be reconciled with its previous decision denying the Thornton Water Project and thus is arbitrary and an abuse of discretion.

65. The Board exceeded its jurisdiction or abused its discretion by approving a the Thornton application despite the significant impacts to the quality of life of county residents (noise, visual, use of properties, traffic) which resulted in the Board’s previous but denial of the prior Thornton 1041 permit application with the same impacts.

66. The Board exceeded its jurisdiction or abused its discretion by approving a the Thornton application despite the fact that the adverse affects to the county are greater or equal to the adverse affects under Thornton’s previous application, because the Board’s balancing of the impacts did not meet the code criteria.

67. The Board exceeded its jurisdiction and/or abused its discretion by failing to require complete co-location of the Northern Integrated Supply Project (“NISP”) pipeline.

68. The Board exceeded its jurisdiction and/or abused its discretion by finding that “[w]ater diversion and water rights...are beyond the scope of this 1041 review.”

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

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

(Request for Declaratory Relief, Injunctive Relief, Vacature)

70. Plaintiff incorporates all of the foregoing allegations as if set forth herein.

71. 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.

72. For the reasons stated herein, the Board exceeded its jurisdiction and/or abused its discretion in issuing its June 18, 2024 Findings approving the Thornton 1041 permit application.

73. There is no other plain, speedy and adequate remedy otherwise provided by law for review of the Board's June 18, 2024 Findings.

74. Plaintiff requests 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 June 18, 2024 Findings, vacating the Findings, and/or granting other relief the Court deems appropriate.

WHEREFORE, the Plaintiff respectfully requests that this Court:

DECLARE that the Board exceeded its jurisdiction and/or abused its discretion in issuing its June 18, 2024 Findings; and, REVERSE, VACATE AND/OR REMAND the Findings; and/or Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 12th day of July 2024.

/s/ John M. Barth  
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**CERTIFICATE OF DELIVERY**

I hereby certify that on this 12th<sup>th</sup> day of July 2024, a true and correct copy of the foregoing **Complaint Under Colo.R.Civ.Pro. 106(a)(4)** was filed via Colorado Courts E-filing System.

/s/ John M. Barth  
John M. Barth