

<p>Larimer County District Court 201 La Porte Ave, Suite 100 Fort Collins, CO 80521</p> <hr/> <p>NO PIPE DREAM CORPORATION, SAVE RURAL NOCO CORPORATION, SAVE THE POUFRE Plaintiffs</p> <p>v.</p> <p>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.</p>	<p>COURT USE ONLY</p>
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PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs No Pipe Dream Corporation, Save Rural NoCo Corporation, and Save the Poudre (collectively, “Plaintiffs”) move this Court to issue a preliminary injunction prohibiting Larimer County Commissioners Tom Donnelly and Steve Johnson (“Commissioners”) from participating in upcoming quasi-judicial public hearings on Defendant Northern Integrated Supply Project Water Activity Enterprise’s (“Northern”) 1041 land use application for the Northern Integrated Supply Project (“NISP”) scheduled to commence August 17, 2020.

Plaintiffs’ counsel consulted with Larimer County Attorney Jeannine Haag and Northern’s counsel Bennett Raley before filing this Motion. Northern stated it would likely oppose this Motion and the Commissioners declined to recuse themselves from the upcoming August 17, 2020 quasi-judicial hearings. *See*, Exhibit 22 hereto.

I. PROCEDURAL BACKGROUND

Plaintiffs have filed a complaint under Colo.R.Civ.Pro. 57 seeking declaratory relief that Commissioners Donnelly and Johnson’s decade-long public endorsement and public support of NISP displays impermissible bias in favor of the 1041 land use application which violates Plaintiffs’ due process rights to a fair quasi-judicial hearing on the application. Plaintiffs’ complaint also seeks injunctive relief prohibiting the Commissioners from participating in any public hearings adjudicating the NISP project under either Larimer County Land Use Code (“LUC”) Section 14.8 or 14.10.

The Larimer County Board of Commissioners (“Board”) has scheduled quasi-judicial hearings on Northern’s 1041 land use application for August 17, 2020, August

24, 2020 and August 31, 2020.¹ The Board is scheduled to deliberate and render a decision on the NISP 1041 application on September 2, 2020.²

II. STATEMENT OF FACTS

1. The Northern Integrated Supply Project, a water storage and supply project proposed by Northern Integrated Supply Project Water Enterprise, is one of the largest construction projects to ever be proposed for Larimer County.

2. NISP involves the construction of two new water storage reservoirs, a reservoir forebay, several water conveyance pipelines, several water diversions structures on the Cache la Poudre River, a public park and recreation area at Glade Reservoir, as well as relocation of a 7-mile stretch of U.S. Highway 287.³

3. NISP will generate noise, dust, truck traffic, air pollution and other adverse impacts on Larimer County residents during its 8-year construction period.⁴

4. NISP will also cause permanent adverse impacts to the Cache la Poudre River and Larimer County residents including, but not limited to: loss of private property to easements and/or eminent domain, adverse impacts from a new permanent public park and recreation area, traffic, and aesthetic injury.⁵

5. Northern will not commence construction on Glade Reservoir until 2023 and the pipeline in 2024.⁶ Construction will continue through 2029.⁷

¹ <https://www.larimer.org/planning/NISP-1041>

² *Id.*

³ Exhibit 1 hereto (Northern's 2/21/2020 cover letter to its NISP land use application) and Exhibit 2 hereto (Project description).

⁴ Exhibit 3 hereto (Affidavit of Dettenwanger); Exhibit 4 hereto (Affidavit of Feldman); and Exhibit 5 hereto (Affidavit of Wockner).

⁵ *Id.*

⁶ Exhibit 2, p. 21 (Project description).

⁷ *Id.*

6. Operation of the pipelines will not occur until 2030.⁸
7. Northern has yet to acquire all of the federal, state and/or local permit approvals required to commence construction of NISP, including not having acquired a federal Clean Water Act Section 404 dredge and fill permit, 33 U.S.C. § 1344.⁹
8. Northern has not yet acquired the water agreements to complete NISP.¹⁰
9. Because of the lack of water agreements, Northern is not currently in a position to deliver all of the water it has promised to project participants.¹¹
10. Northern has not yet acquired all of the easements necessary to begin construction of the proposed pipelines and appurtenances.¹²
11. Immediately after the Commissioners were first elected in 2008, Northern began a strategy to secure their public endorsement and support for NISP.¹³
12. In January 2009, Northern conducted a “briefing” with “new commissioners Tom Donnelly and Steve Johnson.” “Questions related to NISP were also addressed.” *Id.*
13. In December 22, 2009 Northern’s strategy was to “meet with key people,” including “Steve Johnson and Tom Donnelly” to obtain “Support/endorsement.”¹⁴
14. Northern’s strategy was successful.¹⁵
15. From 2011 through 2019 Commissioners Donnelly and Johnson publicly supported and endorsed NISP.¹⁶

⁸ *Id.*

⁹ Exhibit 2, p. 24 (Project description).

¹⁰ Exhibit 6 hereto (NISP water rights article).

¹¹ *Id.*

¹² Exhibit 7 hereto, p. 7 (Evaluation criteria).

¹³ Exhibit 8 hereto (NISP Update Memo 3/26/2009).

¹⁴ Exhibit 9 hereto, p. 3 (Northern December 22, 2009 memo).

¹⁵ Exhibit 10 hereto (List of Endorsements and Supporters 2011-2019).

16. In addition to allowing Northern to list them as supporters and endorsers of NISP, both the Commissioners attended and spoke at “rallies” organized by Northern to generate support for NISP.¹⁷

17. More specifically, Northern hosted a “Farmers for NISP Rally” on June 30, 2009 in which both Commissioner Donnelly and Johnson are listed as speakers.¹⁸

18. At the Farmer’s rally, “Larimer County Commissioner Tom Donnelly and his Weld County counterpart Doug Rademacher expressed their commissions’ respective support...”¹⁹

19. In October of 2016, during his reelection campaign, Donnelly posted a photo of himself to his Facebook page speaking at the “Farmers for NISP” and advocating for “increased water storage.”²⁰

20. On May 19, 2011 Northern hosted another “Business Rally for NISP” at the Larimer County Conference Center at the Ranch in Loveland.²¹

21. Both Commissioners Donnelly and Johnson attended the May 2011 “Business Rally for NISP.”²² According to Commissioner Johnson, “[a]ttendees were urged to contact their local officials and express support for NISP.”²³

22. Commissioner Donnelly again spoke at the “Business Rally for NISP” and discussed “the benefits of NISP to their...constituents.”²⁴ Commissioner Donnelly stated

¹⁶ *Id.*

¹⁷ Exhibit 11 hereto (NISP 2009 farmer rally) and Exhibit 12 (NISP 2011 business rally).

¹⁸ Exhibit 11.

¹⁹ Exhibit 11, p. 2 of pdf.

²⁰ Exhibit 13 hereto (Donnelly Facebook post).

²¹ Exhibit 12 hereto.

²² Exhibit 12, pp. 4-6 of pdf.

²³ *Id.* at p. 6.

²⁴ Exhibit 12, p. 2 of pdf.

that “NISP is essential to capture water that is sent downstream each year, most of it during the spring runoff.”²⁵ He also stated, “In 2010, the North Platte River Basin saw 600,000 acre-feet of water flowing out of the state,” he said. “We lost it.”²⁶

23. During the introduction of Commissioners Donnelly and Johnson at the “Business Rally for NISP” Northern specifically stated that “[w]e appreciate their continued support of NISP.”²⁷

24. In a July 24, 2019 Larimer County Commissioners Work Session, Commissioner Donnelly stated, “NISP will be probably one of the most important-the most important longest lasting legacies that any of you will enjoy as your tenure as board members here. And so the gravity of that is felt by the members of this board as well.”²⁸

25. In its September 4, 2015 “eNews” Northern declared that “Larimer County Commissioners Endorse NISP” and quoted Commissioner Johnson as stating, “[w]e believe NISP to be very important to the future of Northern Colorado...”²⁹

26. In an email of that same date (September 4, 2015), Northern wrote to Commissioner Johnson stating “[t]hanks again for your support” in which Johnson replied, “we appreciate the mention!”³⁰

27. On August 14, 2019 Commissioner Donnelly was exchanging text messages with Jeff Stahla, Northern’s Public Information Officer both of who were

²⁵ *Id.*

²⁶ *Id.*

²⁷ Exhibit 12, p. 4 of pdf.

²⁸ Exhibit 14 hereto, p. 4 (transcript of July 24, 2019 work session). See also, <https://www.larimer.org/bocc/commissioners-meetings/internet-broadcasts-commissioners-meetings#/ws/>

²⁹ Exhibit 15 hereto (Northern eNews 9/4/15 and email).

³⁰ *Id.* at p. 3.

present at the Larimer County Courthouse.³¹ Texting about NISP, Commissioner Donnelly warned that “Northern has no idea what is in store for them if they let this slide into the next boards term,” to which Stahla agreed.³² Commissioner Donnelly also texted that “I’m serious when I tell you that you have to do a better job on the recreational stuff to get Johnson support,” to which Stahla replied “Agree.”³³

28. Plaintiff Save the Poudre has been the primary local organization consistently opposing NISP since it was first formally proposed.³⁴

29. In publicly available email correspondence dated on March 27, 2020, Commissioner Johnson stated that Save the Poudre has “lost ALL credibility with me.”³⁵

30. The Larimer County Land Use Code (“LUC”) requires 1041 land use approval for the construction and operation of water conveyance pipelines and/or reservoirs in unincorporated Larimer County.³⁶

31. Northern initially sought approval for NISP pursuant to an IGA by entering into a Memorandum of Understanding (“MOU”) in 2016.³⁷

32. The MOU specifically allowed Northern to elect “at any time to proceed under the 1041 permit application and review provisions” rather than IGA approval.³⁸

33. Further, the LUC also allows an IGA party to “elect[] at any time to proceed under the permit provisions of this regulation.” Exhibit 18 (LUC § 14.8.B).

³¹ Exhibit 16 hereto (Donnelly text messages with Stahla).

³² *Id.*

³³ *Id.*

³⁴ Exhibit 5 p. 3, ¶ 13 (Wockner Declaration).

³⁵ Exhibit 17 hereto (Johnson 3/27/2020 email).

³⁶ Exhibit 18 hereto (LUC §§14.4.J. & K).

³⁷ Exhibit 19 hereto (MOU).

³⁸ *Id.* at p. 3, ¶ 5.

34. On November 14, 2019 Northern informed the Board that it was “electing to immediately begin the 1041 Permit process for the NISP Project.”³⁹

35. Both Commissioners Donnelly and Johnson are term-limited and may not run for another term as Larimer County Commissioners.

36. Commissioners Donnelly and Johnson’s seats on the Board will be filled in the upcoming general election on Tuesday November 3, 2020.

37. The Commissioners’ terms as Larimer County Commissioners end in January 2021 when two newly elected Commissioners will be seated.

STATEMENT OF LAW

The LUC confers sole responsibility to the Board to render decisions on 1041 projects under Section 14.10 of the Land Use Code. Exhibit 18 (LUC §14.10). “The three factors which must exist in order to find that an inferior tribunal has acted in a judicial or quasi-judicial capacity are: ‘1) A state or local law requiring that the body give adequate notice to the community before acting; 2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and 3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law.’” *Cherry Hills Resort Development Co., v. City of Cherry Hills Village*, 757 P.2d 622, 624 (Colo. 1988 *en banc*). Under Colorado law, a local government’s land-use determinations are considered quasi-judicial for the purposes of judicial review. *Margolis v. Dist. Court, In & For Arapahoe Cty.*, 638 P.2d 297, 305 (Colo. 1981).

³⁹ Exhibit 20 hereto (Northern’s November 14, 2019 letter to Larimer County).

The exercise of quasi-judicial action is conditioned on the observance of traditional procedural safeguards against arbitrary governmental action. *Cherry Hills*, 757 P.2d at 625. Under the Larimer County Code, public hearings under Sections 14.10 are quasi-judicial because they require public notice, public hearing, and the application of code criteria to the facts of a specific project or proposal. Exhibit 18 hereto.

Those serving in quasi-judicial capacities are presumed to act with integrity, honesty, and impartiality. *Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983). A quasi-judicial proceeding violates due process if the presumption of honesty and integrity is overcome by a showing of a conflict of interest on the part of the decision-maker. *Id.* What constitutes a conflict of interest reflects different policy considerations based on the context. *City of Manassa*, 235 P.3d at 1055. Such conflicts arise where the decision-maker has a personal, financial, or official stake in the outcome of the matter, *Scott*, 672 P.2d at 227–28, or when the decision-maker’s interest “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Caperton*, 556 U.S. at 884.

Section 2-67(10) of the LUC states:

A member of the board of county commissioners who, in their sole opinion, believe they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision in a legislative or quasi-judicial decision, will recuse themselves from the discussion and decision. Any recusal will be made prior to any board discussion of the issue and the board member will leave the room for the remainder of the discussion of the issue.

Exhibit 21 hereto (LUC § 2-67).

The terms “conflict of interest,” “fair,” and “impartial” are not defined in the LUC. A “conflict of interest” is a “real or seeming incompatibility between one's private interests and one's public or fiduciary duties.” *Conflict of Interest*, BLACK'S LAW

DICTIONARY (11th ed. 2019). “Fair” means “[c]haracterized by honesty, impartiality, and candor; just; equitable; disinterested” or “[f]ree of bias or prejudice”. *Fair*,

BLACK’S LAW DICTIONARY (11th ed. 2019). “Impartial” means “[n]ot favoring one side more than another; unbiased and disinterested; unswayed by personal interest.”

Impartial, BLACK’S LAW DICTIONARY (11th ed. 2019).

Another provision of the LUC states:

Members of the board of county commissioners must represent unconflicted loyalty to the interests of the citizens of the entire county. This accountability supersedes any conflicting loyalty such as that to any advocacy or interest groups, or membership on other boards or staffs. This accountability also supersedes the personal interest of any board member acting as an individual consumer of the county government’s services. Members of the board of county commissioners must avoid any fiduciary conflict of interest, ex-parte communication or nepotism conflicts.

Exhibit 22 hereto (LUC § 2-71(1), (2)).

Although not directly applicable to quasi-judicial officers, the Code of Judicial Conduct prescribes the instances in which a judge must disqualify himself from a case. *See* C.J.C.R. 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned...”).

It’s a longstanding principle that a fundamentally fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). The U.S. and Colorado Constitutions also provide the “Constitutional floor” for the right to a fair hearing before a fair tribunal. *See City of Manassa v. Ruff*, 235 P.3d at 1057. When a commissioner acts as a quasi-judicial decision-maker, as is the case here, “the fundamental protections of neutrality and fairness [] apply.” *Id.* The Due Process Clause of the Colorado Constitution protects people from a deprivation of “life, liberty or property, without due process of law.” COLO. CONST. art. II, § 25. The fundamental

protections of neutrality and fairness provided by the Due Process Clause apply to decision-makers acting in quasi-judicial capacities. *City of Manassa*, 235 P.3d at 1057; *Scott*, 672 P.2d at 227. That requirement of fairness and neutrality “in adjudicative proceedings entitles a person to an impartial and disinterested decision-maker.” *City of Manassa*, 235 P.3d at 1056.

In *City of Manassa*, the Colorado Supreme Court adopted the test under *Caperton*. Under that test, the decision-maker must recuse him or herself when “a direct, personal, substantial, pecuniary interest” exists in a case before that decision-maker. *Caperton*, 556 U.S. at 876. Thus, the decision-maker cannot have an interest in the outcome based on the circumstances and relationships involved. See *In re Murchison*, 349 U.S. at 136. Yet, it’s not necessary for the Court to determine whether the decision-maker is *in fact* influenced by those circumstances or relationships; instead, due process requires an objective inquiry into whether under all the circumstances “would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” *Caperton*, 556 U.S. at 879, 885 (citing *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)). Thus, the Court “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Id.* at 881.

“The ultimate due process question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *City of Manassa*, 235 P.3d at 1057 (internal quotations omitted) (citing *Caperton*, 556 U.S. at 129). County commissioners may not “clearly

express[] opinions in advance on a matter which, as they well knew, they would be called upon to decide.” *Booth v. Trustees of Town of Silver Plume*, 474 P.2d 227, 229 (Colo. App. 1970).

The elements of proof for a preliminary injunction are: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) no plain, speedy, and adequate remedy at law; (4) the preliminary injunction will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982); *Gitlitz v. Bellock*, 171 P.3d 1274 (Colo. App. 2007).

ARGUMENT

Plaintiffs’ motion for preliminary injunction should be granted and Commissioners Donnelly and Johnson should be prohibited from participating in the upcoming quasi-judicial hearing scheduled to commence on August 17, 2020.

(a) *Plaintiffs have a reasonable probability of success on the merits.*

There is no genuine dispute that Commissioners Donnelly and Johnson are biased in favor of approving NISP.⁴⁰ Since at least 2011, Donnelly and Johnson have publicly supported and endorsed NISP. Johnson and Donnelly have attended several public “rallies” in support of NISP. Donnelly has given speeches at the “rallies” in support of NISP. Johnson and Donnelly have allowed Northern to issue newsletters and press releases stating that the Larimer County Commissioners support and/or endorse NISP. Further, Commissioner Donnelly considers approval of NISP as part of his “legacy” as a

⁴⁰ Exhibits 8 to 16 hereto.

Board member.

Bias in favor of a quasi-judicial land use application is grounds for a due process violation. *Booth*, 474 P.2d at 229; *Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114 (1984); *Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, 128 A.2d 342 (1957); *Keen v. Dane County Bd. of Supervisors*, 676 N.W.2d 154 (Ct.App. 2003); *Marris v. City of Cedarburg*, 498 N.W.2d 842 (1993); *Daly v. Town Plan and Zoning Commission of Town of Fairfield*, 191 A.2d 250 (1963); *Lage v. Zoning Bd. of Appeals of Town of Madison*, 172 A.2d 911 (1961); *Hendel Family Trust v. Oldsaybrook Zoning Bd. of Appeals*, 1994 WL 116265 (Conn.Super. Ct. 1994); *Ferguson v. Zoning Bd. of Appeals of Ridgefield*, 269 A.2d 857 (C.P. 1970);

Not only are Donnelly and Johnson biased in favor of NISP, Johnson recently revealed his public bias *against* NISP's primary opponent by publicly stating that Save the Poudre "lost ALL credibility with me."⁴¹ Animosity towards a party in a quasi-judicial hearings is also grounds for unconstitutional bias. *Clark v. City of Hermosa Beach*, 56 Cal. Rptr.2d 223 (2nd Dist. 1996); *Town of Woodbury v. Taylor*, 1993 WL 544630 (Conn. Super. Ct. 1993); *Johnson v. Stafford Planning and Zoning Com'n*, 1993 WL 28877 (Conn. Super. Ct. 1993); *Ripley County Bd. of Zoning Appeals v. Rumpke of Indiana, Inc.* 663 N.E.2d 198 (Ind. Ct. App. 1996). Commissioner Johnson's statement that Save the Poudre had "lost ALL credibility" with him before hearings even began call into question Mr. Johnson's ability to be a fair and impartial "judge" of the 1041 proposal in which Save the Poudre will actively participate and on which the Commissioners sit in a quasi-judicial capacity.

⁴¹ Exhibit 17 (Johnson 3/27/2020 email).

In summary, there is a reasonable probability that Donnelly and Johnson have unconstitutional bias in favor of NISP and against its opponents.

(b) ***There is a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief.***

Allowing Commissioners Donnelly and Johnson to decide Northern's 1041 application in a quasi-judicial capacity will cause irreparable injury to Plaintiffs' due process rights. Larimer County residents have a reasonable basis for concluding that Commissioners Donnelly and Johnson are biased against the citizens and groups who oppose the project and in favor of NISP. Allowing the Commissioners to adjudicate the 1041 application will pose a real, immediate, and irreparable injury to those due process rights that can be prevented by a preliminary injunction.

Further, allowing the Commissioners to adjudicate, and presumably approve Northern's 1041 application, will enshrine the Board's procedures and decision with a "presumption of regularity and validity which attaches to proceedings conducted by administrative agencies." *Hadley v. Moffat County School Dist. RE-1*, 681 P.2d 938, 944 (Colo. 1984)(citing *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 47 (1926)). Any reviewing court could also give deference to many of the Board's factual findings and legal conclusions in a final decision on Northern's 1041 permit application. *Abbott v. Bd. of County Comm'rs*, 895 P.2d 1165, 1167 (Colo. App. 1995). After a quasi-judicial decision by the Board, Plaintiffs remedy would be to appeal the decision under Colo.R.Civ.Pro. 106(a)(4). Under that provision, plaintiffs have the significant burden of proving that the Board's decision was arbitrary and capricious under a highly deferential standard of review. Colo.R.Civ.Pro. 106(a)(4). In summary, allowing the Board to

adjudicate Northern's 1041 permit application will cause irreparable harm to Plaintiffs now and in the future.

The danger of irreparable harm is immediate because the Board hearings are scheduled to begin on August 17, 2020 and the Board will render its decision on September 2, 2020.

(c) ***There is no plain, speedy, and adequate remedy at law***

A declaratory judgment and injunctive relief under Colo.R.Civ.Pro 57 is the only plain, speedy and adequate legal remedy available to Plaintiffs to prevent adjudication of the NISP 1041 application by Commissioners Donnelly and Johnson.

(d) ***Granting of a preliminary injunction will not disserve the public interest***

Plaintiffs bring this case in the public interest. Plaintiffs' members are residents, taxpayers, and homeowners in Larimer County that would be adversely impacted by adjudication, construction, and operation of NISP in a manner that fails to meet the fair and impartial standard.⁴² Thus, Plaintiffs' request for preliminary injunction is in furtherance of the public's interest of fairness and due process. Importantly, the two Commissioners who have endorsed NISP constitute an absolute majority of the three-member Commission. Thus, their two votes will decide the application.

(e) ***The balance of equities favors the injunction***

Issuance of a preliminary injunction will not harm Defendants. Commissioners Donnelly and Johnson do not have any legal or equitable right to adjudicate NISP. Further, a short delay in the adjudication of NISP will not harm Northern. Northern does not currently have all federal permit approvals to begin construction of NISP. In fact,

⁴²Exhibits 3, 4, and 5 (Affidavits of Dettenwanger, Feldman, and Wockner).

Northern will not commence construction of NISP until 2023 under the current schedule. Actual water deliveries would not occur until 2030 were the project to be approved and constructed according to schedule. As such, neither Defendant will be harmed by the requested preliminary injunction, which will only be in place for several months.

In contrast, the equities greatly favor Plaintiffs' request for issuance of a preliminary injunction. Unless a preliminary injunction is issued, Plaintiffs' due process rights will be violated beginning August 17, 2020—the date of the first Board quasi-judicial hearing on Northern's 1041 application. The only way to prevent this due process violation is the issuance of a preliminary injunction.

The equities balance in favor of Plaintiffs.

(f) ***The injunction will preserve the status quo pending a trial on the merits.***

Finally, a preliminary injunction will preserve the status quo. The status quo is that Commissioners Donnelly and Johnson have yet to participate in a quasi-judicial hearing on Northern's 1041 application. A preliminary injunction will preserve that status quo. In contrast, without a preliminary injunction, the Board's August 17, 2020 quasi-judicial hearing will proceed, breaking with the status quo. That raises the likelihood that prior to leaving office in January 2021, Commissioners Donnelly and Johnson will issue findings approving the NISP permit application that disregard evidence and testimony presented by Larimer County residents who oppose the project and defer to the evidence and testimony presented by Northern, the proponent. These Commissioners' emphatic public support for NISP also raises the specter that they could disregard requests for mitigation measures that would reduce impacts, as required by the

Land Use Code or make procedural decisions going to “completeness” and other issues to keep the application “on track” even if substantive deficiencies are identified that could require an amended application that ultimately results in the newly elected Commissioners participating in deciding the matter after being seated in January 2021.

CONCLUSION

“[J]ustice must satisfy the appearance of justice.” *In re Murchinson*, 349 U.S. at 136. Allowing the Commissioners to adjudicate Northern’s 1041 application would force Plaintiffs to work “against a ‘stacked deck’” denying them of the fair and impartial hearing they are entitled to. *Booth*, 474 P.2d at 229. For the reasons stated herein, Plaintiffs request that the Court issue a preliminary injunction prohibiting the Commissioners from participating the upcoming quasi-judicial proceedings related by NISP set to commence August 17, 2020.

Respectfully submitted this 26th day of June 2020.

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EXHIBIT LIST

Exhibit

1. NISP 1041 cover letter 2/21/2020.
2. NISP project description.
3. Affidavit of John Dettenwanger.
4. Affidavit of Barry Feldman.
5. Affidavit of Gary Wockner.
6. NISP water rights article 2019.
7. NISP 1041 criteria evaluation.
8. NISP update memo 3/26/2009.
9. Northern memo 12/22/2009.
10. NISP list of endorsements/supporters.
11. NISP Farmer Rally 2009.
12. NISP Business Rally 2011.
13. Donnelly Facebook post.
14. Transcript of Board work session 7/24/2019.
15. Northern e News 9/4/2015 and email.
16. Donnelly text messages with Northern.
17. Johnson's email of 3/27/2020.
18. LUC Section 14.
19. Memorandum of Understanding between Northern and Larimer County.
20. Northern 1041 permit letter 11/14/2019.
21. LUC Sections 2-67 and 2-71.
22. Letter from Jeannine Haag June 26, 2020.

CERTIFICATE OF DELIVERY

I hereby certify that on this 26th day of June 2020, a true and correct copy of the foregoing **Plaintiffs' Motion for Preliminary Injunction and all exhibits thereto** was filed via Colorado Courts E-filing System and was served by email to Defendants' legal counsel.

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