Larimer County District Court 201 La Porte Ave, Suite 100 Fort Collins, CO 80521 **NO PIPE DREAM CORPORATION,** **SAVE RURAL NOCO CORPORATION,** **SAVE THE POUDRE** **Plaintiffs** v. **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.**	**COURT USE ONLY**
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PLAINTIFFS' REPLY TO DEFENDANT NORTHERN'S RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION.

Commissioners Donnelly and Johnson "cannot be both an advocate and an impartial decision maker" on the Northern Integrated Supply Project ("NISP"). *Keen v. Dane County Bd. of Supervisors,* 676 N.W.2d 154, 161 (Wis. Ct.App. 2003). Plaintiffs' Motion for Preliminary Injunction ("PI Motion") presents overwhelming factual evidence that Commissioners Donnelly and Johnson have coordinated with Northern, the 1041 permit applicant, to endorse, support, and advocate for NISP, the single largest construction project in Larimer County history. PI Motion, Exhibits 3-17. In their Responses, the Defendants completely fail to contest the facts presented by Plaintiffs that the Commissioners have displayed pervasive pattern of unconstitutional bias in favor of NISP that began as soon as they took office in 2009, which continues to this day. The Defendants present no evidence, testimony, affidavits, or exhibits contesting the Commissioners' unquestioned advocacy for NISP. Further evidence of bias by Commissioner Johnson has even emerged since the filing of Plaintiffs' PI Motion.

Instead of contesting the facts, Northern's Response offers nothing more than speculation, unsupported conspiracy theories, irrelevant legal citations, and desperate dispersions against Larimer County's third commissioner. Notably, the Defendant Commissioners did ***not*** join in, or otherwise support, Northern's Response to the PI Motion.

Northern has ***not*** petitioned for the recusal of the third Larimer County Commissioner John Kefalas from participating in the 1041 hearing. But that doesn't stop Northern from collaterally dragging Commissioner Kefalas through the mud by insinuating (without proving) that an editorial written by Kefalas a decade ago (2011), while serving as the representative for Fort Collins House District 52 in the Colorado State Legislature, suggests bias in the context of Northern's 1041 application. Northern's Response fails to disclose the important legal

distinction between: 1) the pervasive bias in favor of NISP displayed by Donnelly and Johnson ***throughout the past decade and while serving INSIDE the proceeding as County Commissioners knowing they would be quasi-judicial officers over the land use application;*** versus, 2) a single editorial written by Kefalas as a State House Representative in 2011- 7 years before even becoming a county commissioners, OUTSIDE of the County proceeding, who is required to take positions on issues of state interest in his district and without any reasonable expectation that he would be serving as a quasi-judicial officer over the land use application.

Nevertheless, even if Northern eventually moves to recuse Commissioner Kefalas (and therefore implicitly concedes that Commissioners Donnelly and Johnson must also be recused) a quorum of Commissioners will be available to hear Northern's 1041 application beginning January 2021. Because neither the Commissioners nor Northern are prejudiced by the requested preliminary relief, the Court should issue the preliminary junction requested by Plaintiffs.[1]

A. Johnson's bias in favor of NISP and against Plaintiffs continues.

It has been the practice of the Board of County Commissioners to provide an equitable amount of time for opponents of a land use application to make group presentations to the Board during quasi-judicial proceedings. For example, during the similar 2018 Thornton Water Pipeline 1041 application hearing, Commissioner Johnson granted Plaintiffs No Pipe Dream and Save the Poudre 20 minutes each to make a group presentation explaining why Thornton's application failed to meet the County's 1041 criteria. Exhibit 23 hereto. Commissioner Johnson is now breaking with this Board practice for the NISP 1041 hearing. Exhibit 24 hereto. Commissioner Johnson is prohibiting any group presentation from Plaintiffs and is limiting all

[1] In Rule 57 as-applied challenges, courts have jurisdiction to determine constitutionality "under the circumstances in which the [defendant] has acted ***or proposes to act.***" *Qwest Services Corp. v. Blood,* 252 P.3d 1071, 1085 (2011)(emphasis added).

presentations to 3 minutes in length. *Id.* In contrast, the County staff and Northern will be allowed the entire evening of August 17, 2020 to make their presentations in support of NISP with no time limitations. See, https://www.larimer.org/planning/NISP-1041. County staff and Northern will also be allowed unlimited time to present rebuttal and/or Q&A at the September 2, 2020 hearing, but no public testimony will be allowed. *Id.* Northern's 1041 application is thousands of pages in length and cross-references a federal Final Environmental Impact Statement that is likewise thousands of pages in length. As Commissioner Johnson knows, any attempt by the Plaintiffs to summarize deficiencies with the NISP 1041 application in 3 minutes or less is utterly futile.[2] But apparently that's exactly the point of Johnson's new rules.

Commissioners Donnelly and Johnson are also applying a different set of *ex parte* communication rules for NISP. Northern argues that it is entitled to have private *ex parte* communications with the Commissioners. Northern Response, p. 8. The County previously took the opposite position in the Thornton 1041 Pipeline application.

In 2017, the Commissioners prevented Larimer County citizens from referencing or discussing the Thornton pipeline during open public meetings. Exhibit 25 hereto. In support of the Board's gag order, Larimer County Attorney Jeannine Haag stated that "ex-parte communications" from Larimer County citizens about the Thornton Pipeline project could "taint their decision." *Id*. The County's rules for administrative hearings also state that "[t]he BCC cannot take comments regarding matters that are scheduled or likely to be scheduled for consideration at a future quasi-judicial proceedings, such as hearings for land use…[a]ll comments about these matters must be made at a future hearing to ensure fairness and

[2] The creation and enforcement of inequitable rules by a quasi-judicial hearing officer are grounds for recusal. *Johnson v. Stafford Planning and Zoning Com'n,* 1993 WL 28877 *11-*12 (Conn.Super.Ct. 1993);

impartiality to all interest parties." *See,* https://www.larimer.org/bocc/commissioners-meetings/administrative-matters/rules-procedures-public-comment.

Now Commissioners Donnelly and Johnson completely dispense with *ex parte* communication rules when applied to NISP. Since becoming Commissioners in 2009, Donnelly and Johnson have conducted repeated and pervasive *ex parte* communications with Northern for the express purpose of joint advocacy for the project. These *ex parte* communications have continued through the end of 2019 when Commissioner Donnelly warned Northern that it was "getting ready to blow ***this deal…***[and that] Northern has no idea what is in store for them if they let this slide into the next boards term" (emphasis added). PI Motion Exhibit 16. Worse yet, on April 10, 2020 Plaintiffs sent a Colorado Open Records Act ("CORA") request to the Commissioners requesting, *inter alia,* "[a]ll … correspondence (***including…text messages***) from January 1, 2016 to date in any way related to…NISP between any Larimer County Commissioner and any employee…of Northern…"). Exhibit 26 hereto (emphasis added). Commissioner Donnelly failed to produce the responsive August 14, 2019 text message. PI Motion Exhibit 16. Instead, Plaintiffs obtained the document from Northern through a similar CORA request. There are only two explanations for Commissioner Donnelly's failure to comply with the requirements of CORA—either he failed to conduct a good faith search of documents responsive to the CORA request or he intentionally withheld the documents. Either way, it raises the question: what other *ex parte* communications has Commissioner Donnelly failed to produce to Plaintiffs regarding NISP?

If citizens' comments on the Thornton pipeline in a single open public meeting constitute *ex parte* communications, then Commissioner Donnelly and Johnson's ***private*** and pervasive decade long communications with Northern for the express purpose of advocating for

NISP unquestionably amount to unconstitutional *ex parte* communications "tainting" the upcoming quasi-judicial hearing even before it starts. PI Motion, Exhibits 8-12 & 16. At best, Commissioners Donnelly and Johnson's new rules for NISP are an arbitrary and capricious departure from established Board practice and procedure. At worst, the Commissioners' actions represent a further example of their personal bias in favor of NISP and against its opponents.

B. Plaintiffs have due process rights to a fair and unbiased hearing.

Northern argues that Plaintiffs do not have any constitutional rights to a fair and unbiased quasi-judicial public hearing on its land use application. Northern Response, pp. 4-6. To the contrary, quasi-judicial processes must provide for due process, including unbiased and fair hearings. *Canyon Area Residents v. Bd. of Cnty Comm'rs,* 172 P.3d 905, 908 (Colo. App. 2006). Courts have recognized that deprivation of civil liberties are injuries over which the judicial system has jurisdiction." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) (citing *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1058 (Colo. 1980). To meet the legally protected interest prong turns on "whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Id.* "A statutory or constitutional right to a non-arbitrary exercise of discretion… is all that is needed for a legally protected interest." *Id*. at 857. Plaintiffs have that in LUC § 2-71 and LUC § 2-67(10). Plaintiffs' PI Motion, Exhibit 21.

Given the evidence submitted by the Plaintiffs, any reasonable observer must concur Commissioners Johnson and Donnelly have prejudged this matter and will vote to approve the NISP 1041 application regardless of what the members of the public present during their three-minute segments. That is the very antithesis of a fair and unbiased quasi-judicial process.

Citing a series of civil rights cases under 42 U.S.C. § 1983, Northern argues that Plaintiffs must couple its Rule 57 procedural due process claim with a compensable property right. Northern misleads the Court. This is not a civil rights case seeking compensatory damages under 42 U.S.C. § 1983. Northern fails to cite any binding case law stating that plaintiffs must couple a state law constitutional Rule 57 claim with a compensable property right.[3] Further, the 42 U.S.C. § 1983 cases cited by Northern suggest the opposite, namely that Rule 57 provides a remedy without the need to couple the due process claim with a property right. *Hillside,* 58 P.3d at 1031; *Whatley*, 77 P.3d at 802-803. Northern has failed to produce binding legal authority requiring Plaintiffs to couple the Rule 57 constitutional claim with a corresponding property right.

C. Plaintiffs have proven a likelihood of success on the merits.

Northern argues that Plaintiffs have not produced adequate evidence of bias. Northern's Response, pp. 6-9. To the contrary, the evidence presented by Plaintiffs shows that both Donnelly and Johnson have worked under the direction of Northern to advocate for NISP. Some courts have determined that to prevail on a claim of bias violating fair hearing requirements, plaintiffs need only establish an unacceptable probability of bias on the part of those who have actual decision-making power over their claims. *Nasha L.L.C. v. City of Los Angeles,* 22 Cal.Rptr.3d 772, 780 (2nd Dist. 2004).

At the request and direction of Northern, the Commissioners issued public statements, spoke at rallies, allowed their names to be disseminated as "supporters," and otherwise

[3] Nevertheless, Plaintiffs' members have such compensable property rights. As proposed in Northern's 1041 application, the proposed pipeline will require a easement across Barry Feldman's property. PI Motion, Exhibit 4, p. 2, ¶8. Northern must obtain such a easement either consensually or by eminent domain. Either way, Mr. Feldman, who has a due process right to a fair hearing, must be compensated for damage to the property right.

advanced the interests of the 1041 permit applicant. These displays of bias have been pervasive and ongoing for nearly a decade—from the time Donnelly and Johnson were first sworn in as Commissioners in 2009 through 2019. PI Motion Exhibits 8-17. Worse yet, in late 2019 Donnelly was privately sending *ex parte* text messages warning that Northern was "getting ready to blow ***this deal…***[and that] Northern has no idea what is in store for them if they let this slide into the next boards term." (emphasis added).[4] PI Motion, Exhibit 16. Donnelly's own words prove that he had a "deal" with Northern to get NISP approved while he was still in office. At the same time, Johnson was publicly disparaging the main opponent of NISP saying that they "have lost ALL credibility with me." PI Motion, Exhibit 17.[5] A decade of public advocacy in support of NISP combined with a complete dismissal of the project's critics amounts to an unmistakable display of bias. It's hard to imagine a more egregious set of facts. And the coup de grace is the fact that the two Commissioners constitute an unstoppable quorum of the Board ready to rubber-stamp Northern's 1041 application.

Plaintiffs have presented overwhelming evidence of calculated and pervasive decade-long bias in favor of NISP. Notably absent from the Defendants' PI Motion Response briefs is any evidence, testimony, affidavits, or exhibits contesting this bias. Plaintiffs have proven a reasonable likelihood of success on the merits. In fact, Plaintiffs' evidence is uncontested.

D. Issuing an injunction would advance the public interest.

Northern cites three nearly 100-year old legal decisions for the proposition the Commissioners are "sworn to represent the people of the county through their term's end."

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[4] Such ex parte communications with the permit applicant require recusal. *Eacret v. Bonner County,* 86 P.3d 494, 500-501 (2004).

[5] Disparagement of a party to a quasi-judicial proceeding is grounds for recusal. *Clark v. City of Hermosa Beach,* 48 Cal.App. 4th 1152, 1173 (2nd Dist. 1996); *Johnson v. Stafford Planning and Zoning Com'n,* 1993 WL 28877 *12 (Conn.Super.Ct. 1993); *Shannondale, Inc. v. Jefferson County Planning and Zoning Con'n,* 485 S.E.2d 438, 444 (1997).

Northern Response, p. 9. These century old decisions involve challenges to whether commissioners "were properly seated in office" not whether they should be recused for bias.

Northern's argument also ignores that the Commissioners' duty to represent the people of the County comes with qualifications. The Commissioners have a duty to "represent ***unconflicted loyalty*** to the interest of the citizens of the entire county" and recuse themselves if "they have a conflict of interest or for any other reason believes that they cannot make a ***fair and impartial*** decision." Exhibit 21 to Plaintiffs' PI Motion (LUC § 2-71 and LUC § 2-67(10)(emphasis added). Plaintiffs don't want just any representation, they want un-conflicted, fair, and impartial representation in quasi-judicial hearings. Because the Commissioners' behavior falls far short of these standards the Court can, and must, step in. Once the Commissioners chose to put their "thumb on the scale" in favor of the permit applicant, they knowingly forfeited the right to adjudicate the NISP 1041 application. The public interest is not advanced by denying local citizens a fair hearing on the largest construction project ever to occur in Larimer County. PI Motion, Exhibit 3, p. 3, ¶ 11; Exhibit 4 p. 3, ¶ ¶ 11 & 13; Exhibit 5, p. 4 ¶¶ 16-18 (sic).

E. The balance of the equities heavily favors granting an injunction.

Plaintiffs seek a preliminary injunction to protect and preserve their due process constitutional right to a fair and unbiased quasi-judicial hearing. None of the Defendants have presented facts proving overriding prejudice or harm from the issuance of a preliminary injunction. None of the Defendants have proven that Donnelly and Johnson must participate in a quasi-judicial hearing. None of the Defendants have proven that the quasi-judicial hearing must commence on August 17, 2020.

Instead, Northern asks the Court to balance the equities in its favor based on pure speculation. Northern speculates that Commissioner Kefalas must be recused, yet Northern has not petitioned for such relief. Northern then speculates that Plaintiffs will seek recusal of the new Commissioners sworn in this coming January 2001. Again, Northern's arguments are pure speculation completely devoid of any supporting evidence or testimony. In contrast, the harms to the citizens of Larimer County are real, substantial, irreparable, immediate and supported by unchallenged evidence. PI Motion, Exhibit 3, p. 3, ¶ 11; Exhibit 4 p. 3, ¶ ¶ 11 & 13; Exhibit 5, p. 4 ¶¶ 16-18 (sic). In weighing the undisputed factual evidence, the balancing of the equities overwhelmingly favors issuance of the injunction.

Further, Kefalas' ten-year old opinion on NISP while serving ***outside the proceeding*** as a State House Representative for Fort Collins is easily distinguishable from Donnelly and Johnson's decade long campaign in support of NISP while serving ***inside the proceeding*** as County Commissioners. *Keen v. Dane County Bd. of Supervisors,* 676 N.W.2d at 161 (a board member "cannot be both an advocate and an impartial decisionmaker…").

Northern then speculates that the Court may not be able to address the merits of this case prior to January 2021. Again, Northern's speculation is unsupported by facts or evidence. First, it was Northern's decision to delay submission of its 1041 permit application to the County until the year 2020. There is no reason Northern could not have submitted its application sooner, but chose to wait until the final months of the Commissioners' terms. Finally, Rule 57 allows this Court to "order a speedy hearing of an action for declaratory judgment and may advance it on the calendar." Rule 57(m). Northern's speculative argument is not supported by fact or law.

F. Plaintiffs simply seek to maintain the status quo.

The status quo is that Commissioners have yet to conduct any quasi-judicial hearings on Northern's 1041 application. Plaintiffs' PI Motion seeks to maintain that status quo. A denial of the PI Motion amounts to a violation of Plaintiffs' rights to a fair and unbiased hearing. Northern's repeated mischaracterization of the law must also be rejected. Constitutional issues are resolved by Rule 57, not Rule 106. *Roofing and Sheet Metal, Inc. v. City and County of Denver*, 831 P.2d 451, 454 (Colo.1992) ("an administrative agency has 'no jurisdiction to pass on constitutional challenges…such issues must be raised before a district court in a declaratory judgment action).'" *See also, Yakutat Land Corp. v. Langer,* 2020 CO 30 (Colo. 2020)(constitutional challenges should be brought under Rule 57). Rule 57 is preventative and Plaintiffs need not wait until their due process rights have been violated to seek a declaratory judgment. *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 440 P.2d 287, 290 (1968); *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85, 92-93 (1980)(allowing pre-enforcement challenges to government action). Preventative relief is a proper matter for declaratory judgment. *San Luis Power & Water Co., v. Trujillo,* 26 P.2d 537, 540 (1933). See also, the dissent in *Widder v. Durango School District*, 85 P.3d 518, 536 (Colo. 2004).

CONCLUSION

Commissioners Donnelly and Johnson "cannot be both an advocate and an impartial decisionmaker" on NISP. *Keen,* 676 N.W.2d at 161. In 2009, both Commissioners chose to become advocates of NISP while also serving as Commissioners. The Commissioners bias in favor of NISP continued throughout their entire three terms, and continues to this day. By choosing to be advocates over unbiased decision makers, the Commissioners forfeit their right to adjudicate NISP.

Plaintiffs request that the Court GRANT their Motion for Preliminary Injunction. In the alternative, Plaintiffs request that the Court hold an evidentiary hearing and resolve the Motion prior to the August 17, 2020 quasi-judicial hearing.

Exhibit List

Exhibit 23 Johnson July 5, 2018 email on Thornton 1041 hearing procedures

Exhibit 24 Johnson/Threewitt July 21, 2020 emails on NISP 1041 procedures

Exhibit 25 10/27/2017 Independent article on Thornton ex parte communications

Exhibit 26 Plaintiffs' April 10, 2020 CORA request

Respectfully submitted this 24th day of July 2020.

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CERTIFICATE OF DELIVERY

I hereby certify that on this 24th day of July 2020, a true and correct copy of the foregoing **Plaintiffs' Reply to Northern's Response in Opposition to Motion for Preliminary Injunction** was filed via Colorado Courts E-filing System and was served by email to Defendants' legal counsel.

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