

# No Pipe Dream Association

Presentation to Larimer County Board of County Commissioners on City of Thornton's 1041 Application related to Thornton Northern Project by John Barth, Attorney on behalf of No Pipe Dream Association.

January 28, 2019

# **“Poudre River runs nearly dry through Fort Collins” 6/29/18- Coloradoan**

- “The Poudre River set record lows on Wednesday and Thursday as **heavy diversions drew the river nearly dry** through Fort Collins.”
- **"There's almost nothing there,"** said Northern Water spokesman Brian Werner, who admitted he had to double check that Thursday morning's levels were correct. **"On a hot day like this, fish don't live."**
- The Poudre River Alternative will help address lack of flow in the river.

# Overarching guidance to the Board

- The Master Plan states, “Larimer County will not support future transfers of existing water resources out of the County without consideration of the impacts on present and future land uses including agriculture.” ES-16-s1.

# What is the Board's Role on Thornton's 1041 Application?

- Board website: “Larimer’s three-member Board of County Commissioners is the main policy-making body in the County and ***works to represent the interest of the citizens of Larimer County*** at local, state and national levels.”
- Master Plan purpose: “to ***maintain and enhance our county’s quality of life*** and to be fundamentally ***fair to all our citizens*** and to respect their individual rights.”

# Standard of Review & Criteria

- Section 14.10.B states: **A 1041 permit application may be approved only when the applicant has satisfactorily demonstrated that the proposal...complies with all of the applicable criteria set forth in this section 14. If the proposal does not comply with all the applicable criteria, the permit shall be denied...** LUC §14.10(B).
- Section 14.10(D)(2) states that a 1041 applicant can either present a range of “**reasonable siting and design alternatives**” from which the Board can choose, or the applicant can present a **single alternative** and explain “**why no reasonable alternatives are available.**”
- Section 14.10(D)(3) requires “[t]he [1041] proposal **conform[] with adopted county standards [and] review criteria...contained in this Code.**”
- Section 14.10.D. 10 & 11 require “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” 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.”

# Summary of LUC Requirements

- **Thornton bears the burden of proving** that its proposal **complies with the criteria in Section 14.10** of the LUC, which include “adopted **county standards...contained in this Code**”
- Since Thornton is again only presenting a single preferred alternative (County Road 56 Alternative), **it must prove that no other alternative is reasonable or available.**
- **Zoning requirements** are “adopted county standards” contained in the LUC. See LUC § 4.
- If Thornton fails to meet its burden of proving compliance with criteria and standards of the LUC, the Board **must deny** the permit application.

# What can Board regulate under 1041?

## (Colorado case law)

- Colorado's 1041 law “allows both state and local governments to **supervise land use** which may have an **impact on the people** of Colorado **beyond the immediate scope of the land use project.**” City County of Denver v. Bd. of County Comm'rs, 782 P.2d 753 (Colo. 1989) Colorado Supreme Court En Banc.
- “**The existence of previously decreed water rights does not provide an exemption for the developer from regulation under the Land Use Act.**” City & County of Denver , 782 P.2d at 760.
- “[t]he cit[y]’s entitlement to take the water from the ...River..., while a valid property right, **should not be understood to carry with it absolute rights to build and operate any particular water diversion project.**” Colorado Springs v. Board of County Commissioners of Eagle County, 895 P.2d 1105, 1116 (Colo. App. 1994).

# What can Board regulate under 1041?

## (Federal case law)

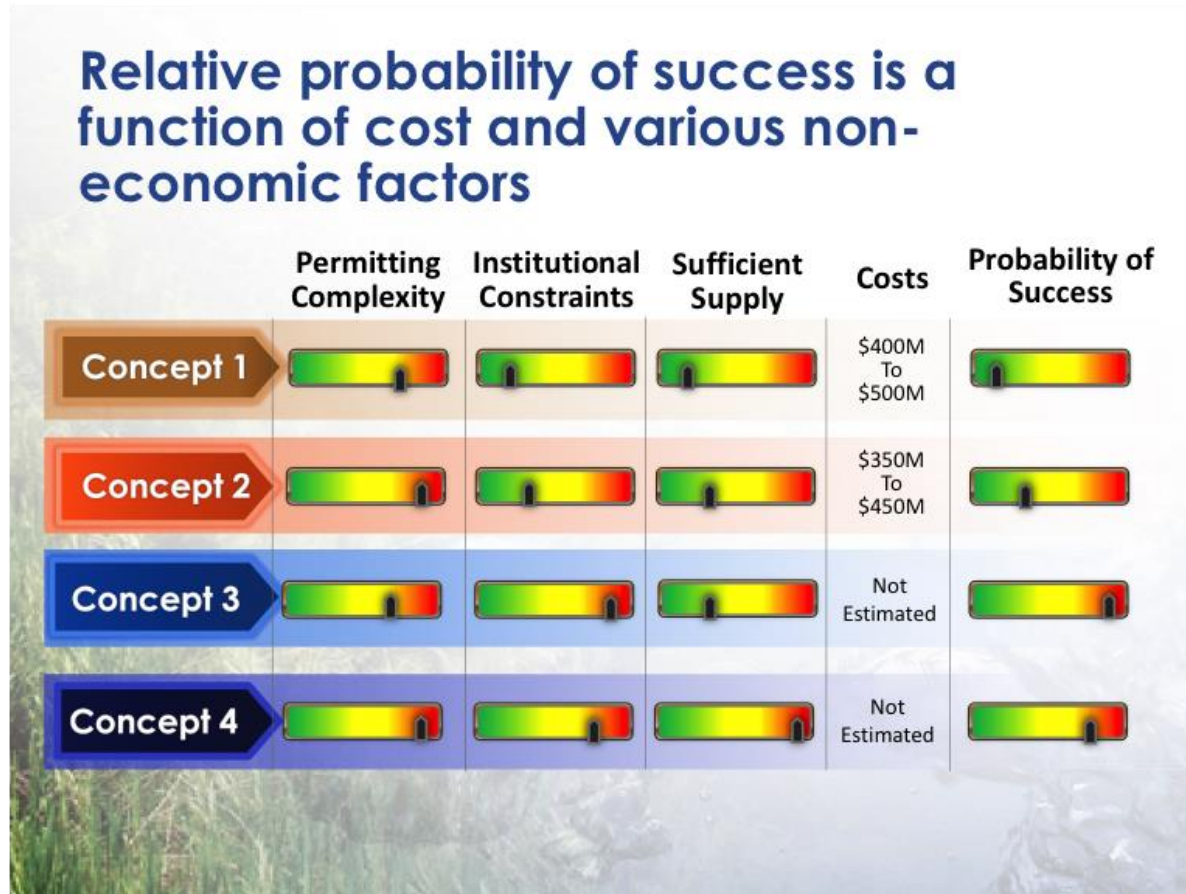
- “Although Article XVI, § 6 of the Colorado Constitution confers a right to divert and appropriate unappropriated water of the state **this right is not absolute. The manner and method of appropriation of water may be reasonably regulated.**”
- “...the water entitlement **does not carry with it absolute rights of access to build and operate**.”  
*City & County of Denver*, 517 F.Supp. 155 (D. Colo. 1981).



# The Poudre River Alternative is “reasonable and available”

- Thornton’s application does not allow the Board to choose from a range of alternatives.
- Thornton’s application has not proven that the Poudre River Alternative is unreasonable or unavailable.
- The Board can advance the Poudre River Alternative by denying’s Thornton’s application and informing Thornton that the Poudre River Alternative is reasonable and available.

# Poudre River Alternative (Concept 2) is both reasonable and available.



# Poudre River Alternative is Preferred by Community thus Simplifying Permitting Complexity

Community Scoring\* of Interests for Each Delivery Concept

	Douglas Road	Poudre River	Larimer County Canal	Shields Street	CR 56
Agriculture	2	5	4	2	3
Conveyance & Alignment Alternatives	1	5	3	1	3
Construction	1	5	4	1	4
Environment	1	5	3	2	3
Process	1	5	3	1.5	4
Quality of Life	1	5	3	1	4
Water Supply	2	5	3	2	3.25
Co-location	maybe	no	no	yes	yes

1 = Does not meet the interests at all  
 2 = Does not meet the interests well  
 3 = Neutral

4 = Meets the interests well  
 5 = Meets the interests very well

# What are Thornton's Arguments Opposing the Poudre River Alternative

- Would require an unlawful **change in the point of diversion** of its water shares from the Poudre River.
- Would unlawfully diminish water **quality** when compared to LCC withdrawal location;
- unlawfully diminish water **quantity** as the water flows down the River.

# A Downstream Diversion is Legally Reasonable and Available

- Colorado Revised Statutes Section 37-87-102(4) states: “[t]he owners of any reservoir **may conduct the waters** legally stored therein **into and along any of the natural streams of the state...and may take the same out again at any point desired...**”
- Thornton water decree 96CW1116 states, “Thornton may divert water under its Northern Project water rights and return such water to the Cache la Poudre River through return structures with measuring devices...” ¶15.2.2., and;
- “as decreed in the Northern Project Decree, Thornton may divert water from the Cache la Poudre River at nine locations (the “Poudre points of diversion”): the Larimer County Canal (“LCC”), Jackson Ditch, Thornton Pump Station No. 1, New Cache la Poudre Canal (also known as Greeley No. 2 Canal), Thornton Pump Station No. 2, Larimer & Weld Irrigation Canal, Boxelder Ditch, Fossil Creek Reservoir Inlet, and the Ogilvy Ditch.” ¶14.2.1.

# Downstream diversion is reasonable, available, and can be regulated.

- C.R.S. §37-87-102(4) allows Thornton to take its water out of the Poudre River **“at any point desired” below the LCC head gate.**
- Decree 96CW1116 allows return of diverted water to the Poudre and diversion it at 9 downstream locations.
- “[t]he cit[y]’s entitlement to take the water from the ...River..., while a valid property right, **should not be understood to carry with it absolute rights to build and operate any particular water diversion project.**” 895 P.2d at 1116.
- “Although Article XVI, § 6 of the Colorado Constitution confers a right to divert and appropriate unappropriated water of the state this right is not absolute. **The manner and method of appropriation of water may be reasonably regulated.**” 517 F.Supp. at 207.
- **“the existence of previously decreed water rights does not provide an exemption for the developer from regulation under the Land Use Act;** so long as the regulations do not serve to undermine these established water rights, they are a valid exercise of authority.” 782 P.2d 760.

# Thornton has no legal right to water quality at the LCC head gate

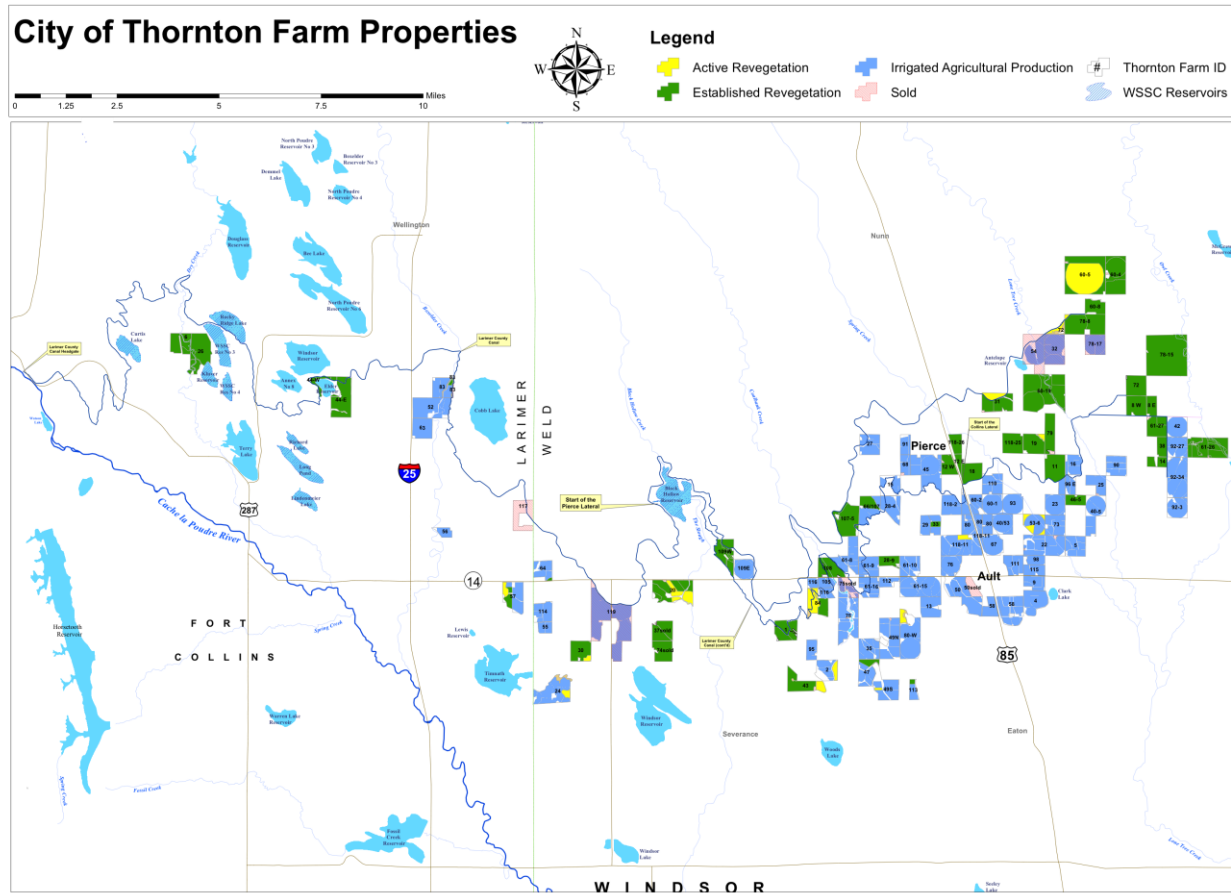
- In A.B. Cattle Co. v. U.S., 589 P.2d 57, 58 (Colo. 1978) the Colorado Supreme Court found that the owner of a decreed water right does **not** include **the right to receive water of such quality as has historically been received under that decreed water right.**
- Colorado Revised Statute § 37-80-120(3) states, “[a]ny substituted water shall be of a **quality** and continuity **to meet the requirements of use to which the senior appropriation has normally been put**”

# Thornton has no legal right to water quality at the LCC head gate

- “Thornton acquired approximately 100 farms comprising over 21,000 acres on which the majority of the acquired shares had been historically used for irrigation.” *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 20 (Colo. 1996 en banc).
- Thornton did not acquire its water shares at the LCC head gate. It acquired its water shares from farms in Weld County.
- Thornton’s water shares have never been protected from pollution by a pipeline. They have always been conveyed by surface water (the Poudre River and LCC).



# Thornton's Farms



Last updated 5/14/2018  
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# Thornton is, at most, entitled to degraded water quality at its farms

- Thornton's own water quality analysis and presentations admit the following:
- "Water flowing along the LCC degrades due to inflows as well as geologic features along the canal";
- "TDS and other constituents increase measurably east of the reservoirs";
- Geologic features as well as inflows into the ditch influence water quality";
- "Water treatment complexity (e.g., GAC, membranes) will increase as well as overall cost)";
- "If water is delivered through lower parts of Larimer County Canal, it degrades due to inflows from residential and agricultural activities. Pollutants include: sediment; oil and grease from motor vehicles; pesticides and nutrients from lawns and gardens; viruses, bacteria, and nutrients from pet waste and septic systems; road salts; heavy metals from roof shingles, motor vehicles, and other sources."

# Thornton Purchased Water Quality in the LCC at Highway 85 in Weld County

Table 1. Measured Water Quality in the Larimer County Canal

Parameter (ppm, unless specified)	Larimer County Canal at Poudre (May-Sep)		Larimer County Canal at Reservoir 3 (May-Sep)		Larimer County Canal at CR 56 (May-Sep)		Larimer County Canal up Black Hollow (May-Sep)		Larimer County Canal at Hwy 85 (May-Sep)	
	Range	Average	Range	Average	Range	Average	Range	Average	Range	Average
Conductivity, uS/cm	45 - 118	87	70 - 441	211	146 - 594	375	193 - 836	373	208 - 852	394
pH, STD	7.61 - 8.50	8.03	7.94 - 8.59	8.37	7.49 - 8.42	8.04	7.55 - 9.07	8.42	7.37 - 9.48	8.41
Dissolved Oxygen	8.4 - 10.0	9.2	4.1 - 10.2	8.2	7.5 - 9.4	8.5	4.9 - 11.6	8	5.8 - 11.6	8.1
Turbidity, NTU	0.2 - 14.1	4.5	4.4 - 16.4	9.7	14.6 - 45.2	23.8	6.0 - 39.8	24.4	7.8 - 145.9	50.1
Alkalinity	19 - 40	30	25 - 57	40	37 - 59	50	95 - 107	101	95 - 106	101
Total Hardness	32 - 68	50	34 - 188	92	70 - 202	145	232 - 286	259	232 - 278	255
TDS	52	52	53 - 278	157	149 - 389	254	143 - 562	265	113 - 566	267

# Thornton's returned water will be more polluted than LCC at Highway 85

- In the December 1986 Thornton/WSSC agreement, Thornton has agreed to water quality standards for “returned water” to the WSSC system.
- Thornton agreed that its “returned water” must be of a quality “suitable for its historic uses.”
- Under the agreement, Thornton’s returned water can reach TDS levels of 1,000 mg/l, which is representative of the water quality of its “historic uses.”
- The TDS water quality concentrations of Thornton’s returned water will be almost **4 times more polluted** (1,000 mg/L) than the TDS concentrations in the Larimer County Canal at Highway 85 (267 mg/L ) and almost **20 times more polluted** than the Poudre River water at the LCC head gate (52 mg/L).
- Thornton wants to remove clean water from Larimer County and return water more highly polluted than existed historically.

# Thornton's water quantity has always been diminished by surface flow

- Thornton's water shares have always been delivered by surface flow (the Poudre River and LCC/WSSC system).
- Thornton's water shares have never been protected from flow diminishment by a pipeline.
- The LCC/WSSC system experiences water quantity diminishment (in flow and evaporation) as does the Poudre River.
- Thornton has not proven that any water loss resulting from the Poudre River Alternative would be unreasonable when compared to the water loss historically experienced when its water shares flowed in the LCC/WSSC system to farms in Weld County.
- Thornton's own analysis showed that the Poudre River Alternative provided an adequate supply of water to the City.
- Thornton has not met its burden of proving that water losses associated with the Poudre River Alternative render it unreasonable or unavailable.

# **Additional Problems with Thornton's 1041 application**

- Application **illegally segments** significant aspects of larger TNP.
- Application fails to include pump station and **fails to comply with zoning requirements.**

# Illegal Segmentation of the Thornton Northern Project

- The Thornton Northern Project (TNP) is a large water delivery project including **two parallel** water lines, **multiple** pump stations, storage tanks, and return flow lines (when will these be built?).
- The TNP would deliver clean water from the Cache la Poudre River in Larimer County to Thornton and pipe polluted water from the South Platte River into Larimer County.
- The “components of Thornton’s water supply and of Thornton’s water system are operated together as an **integrated project** or system” (2015 Water Court Ex. 1)

# Map of TNP (Exhibit 6)



EXHIBIT 1



# What structures are excluded from the TWP 1041 application?

- The pump station at WSSC Reservoir #4.
- The second parallel water line.
- The return flow pipelines from the South Platte River to Larimer County watersheds
- Additional pump station(s) & storage tanks
- The impacts to Larimer County from these additional structures will be significantly greater than those from the TWP.

# What Larimer County impacts are excluded from the 1041 application?

- Additional future water withdrawals from the Poudre.
- Impacts to property owners from WSSC pump station (noise, pollution, zoning, traffic).
- Impacts to property owners from second parallel water line (eminent domain).
- Impacts to property owners from return flow lines and pump station(s) (eminent domain).
- Impacts to water quality from South Platte River return flows (impairment).
- Impacts to agricultural lands from “drying up” (dust, weeds, habitat loss).

# **Illegal Segmentation of the Thornton Northern Project**

- The Thornton Water Project (TWP) 1041 application is a small subcomponent of the larger TNP.
- Thornton Water Project 1041 application only addresses a single water pipeline from WSSC Reservoir #4 to Thornton.
- No other TNP structures are included in the 1041 application.
- The TNP is a single integrated system, but its 1041 application is not a single integrated application.

# Thornton's TWP 1041 application is an illegal segmentation of the TNP

- The purpose of the State 1041 law and County LUC is to examine **all** impacts from large projects.
- Thornton's permitting strategy is to avoid a comprehensive assessment of all impacts by segmenting the TNP in smaller projects thereby denying Larimer County the comprehensive impact assessment guaranteed by Colorado's 1041 law.

# Pump Station cannot be approved

- “They get what they ask for...they don’t get anything more...” Rob Helmick, May 16, 2018, Planning Commission.
- “The source water pump station [at WSSC #4 Reservoir] is not part of this 1041 permit application”. Thornton’s January 5, 2018 cover letter to its application.
- Since Pump station is not part of the 1041 application, it cannot be approved as part of the 1041 application.
- Proposed parcel is **zoned FA (Farming)**.
- A pump station is **not an approved use in FA zoning**.
- A pump station **is not eligible for site plan review** in FA zoning.
- Board must find that the pump station cannot be approved through this 1041 application. The pump station fails to meet county zoning requirements. **Parcel must either be re-zoned or pump station must be relocated.**

# FA Zoning Requirements §4.1.1

## Utilities: radio, mobile radio, TV

- 4.1.1. - FA-Farming.
- A. Principal uses:
- Agricultural**
1. Agricultural labor housing (S)
  2. Apiary (R)
  3. Commercial poultry farm (S)
  4. Equestrian operation (PSP/MS/ S)—See [section 4.3.1](#)
  5. Farm (R)
  6. Feedyard (S)
  7. Fur farm (S)
  8. Garden supply center (S)
  9. Greenhouse (R)
  10. Livestock veterinary clinic/hospital (MS/ S)—See [section 4.3.1](#)
  11. Packing facility (R)
  12. Pet animal facility (MS/ S)—See [section 4.3.1](#)
  13. Pet animal veterinary clinic/hospital (MS/ S)—See [section 4.3.1](#)
  14. Sod farm, nursery (R)
  15. Tree farm (R)
- Residential**
16. Group home (R)
  17. Group home for the aged (R)
  18. Group home for developmentally disabled (R)
  19. Group home for the mentally ill (R)
  20. Single-family dwelling (R)
  21. Storage buildings and garages (R)—See [section 4.3.2](#)
- Institutional**
22. Cemetery (S)
  23. Child/elderly care center (S)
  24. Church (MS/ S)—See [section 4.3.4](#)
  25. Community hall (MS/ S)—See [section 4.3.4](#)
  26. Hospital (S)
  27. School, nonpublic (S)
  28. State-licensed group home (S)
- Recreational**
29. Country club (S)
  30. Golf course (S)
- Accommodation**
31. Bed and breakfast (MS/ S)—See [section 4.3.6](#)
  32. Seasonal camp (S)
- Industrial**
33. Mining (S)
  34. Oil and gas drilling and production (R)
  35. Small solar facility (R/PSP)
  36. Small wind energy facility (MS)
- Utilities**
37. Commercial mobile radio service (SP/ S)—See [section 16](#)
  38. Radio and television transmitters (S)
- S= Use by Special Review  
SP=Use by Site Plan Review  
R= Use by right  
MS=Use by Minor Special Review  
PSP=Public Site Plan Review

# Summary

- Thornton's application fails to prove that there are no other reasonable and available alternatives.
- Thornton's application is an illegal segmentation of the TNP.
- The Board may not approve the pump station through this 1041 application or through site plan review because it does not comply with zoning standards

# There are other unconsidered alternatives

- No Pipe Dream continues to support the Poudre River Alternative.
- There are other alternatives that are available, reasonable, and that Thornton will not allow the Board to choose from.



# Questions?

