City of Thornton

Civic Center
9500 Civic Center Drive
Thornton, Colorado 80229-4326

City Attorney's Office
(303) 538-7210
FAX (303) 538-7427
www.cityofthornton.net

February 4, 2019

Via email: bocc@larimer.org

Commissioner Donnelly
Commissioner Johnson
Commissioner Kefalas
200 West Oak Street, Suite 2200
Fort Collins, CO 80521

Via email: jeanninehaag@larimer.org

Jeannine S. Haag, Esq.
Larimer County Attorney
P.O. Box 1606
Fort Collins, CO 80522

Via email: rhelmick@larimer.org

Robert Helmick
Senior Planner
Community Development Department
200 West Oak Street, Suite 3100
P.O. Box 1190
Fort Collins, CO 80521

Re: REBUTTAL STATEMENT OF LEGAL POINTS IN SUPPORT OF THE THORNTON WATER PROJECT AREAS AND ACTIVITIES OF STATE INTEREST (1041) PERMIT APPLICATION BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO FILE NO: 18-ZONE2305

Dear Commissioners Donnelly, Johnson, and Kefalas, Ms. Haag and Mr. Helmick:

Under the Larimer County Code, Section 12.4.3.E., the city of Thornton (Thornton) is permitted to respond to any evidence or testimony presented by the public. Accordingly, in addition to the rebuttal that Thornton plans to present at the continuation of the 1041 Permit Application hearing on February 4, 2019, please accept this Rebuttal Statement of Legal Points submitted by Thornton for its 1041 Permit Application for a domestic water transmission line. Thornton requests that this Rebuttal Statement, be included in the record that is before the Board of County Commissioners of Larimer County (County or Board) in considering Thornton's 1041 Permit Application.

Thornton is requesting a 1041 permit to conduct an activity of state interest as authorized by C.R.S. § 24-65.1-101 *et seq.* (1041 Act) and Sections 12 and 14 of Part II of the Larimer County Land Use Code (LUC). The activity of state interest involves the siting and development of a new domestic water transmission line that is contained within new permanent easements greater than 30 feet. LUC 14.4.J.

The issue before the Board is whether Thornton's pipeline project, originating from the Water Supply and Storage Company's (WSSC) Reservoir #4 through unincorporated

Larimer County, satisfactorily demonstrates compliance with the 12 expressed criteria in Larimer County's 1041 regulations. *See* LUC 14.10. D. 1-12. The evidence presented to the Board in Thornton's application and in testimony demonstrates that Thornton has met all 12 criteria and a 1041 permit should be granted. The County's staff report also finds that the pipeline proposal meets the 12 criteria and recommends approval of a permit, subject to 43 conditions. Staff report included in the January 28, 2019 Board Agenda at 15 (Staff Report).

This letter is written in rebuttal to certain legal issues raised by various persons and entities as part of the 1041 hearing process for a permit for Thornton's pipeline project. These include No Pipe Dream (NPD) letter dated January 22, 2019 and e-mail dated January 30, 2019; Save the Poudre (STP) memo dated January 21, 2019; Penny Hillman (Hillman) letter dated January 22, 2019; and Ryan Donovan (Donovan) letter dated January 27, 2019. Thornton has addressed other legal issues as well as certain of the same issues raised in the above referenced materials in prior letters and testimony, including Thornton's June 29, 2018, July 31, 2018, and January 18, 2019 letters. Thornton will not repeat the information presented in those letters in detail here, but does incorporate its letters herein and directs attention to those letters for further information.

1. USE OF THE NATURAL STREAMS TO CARRY WATER UNDER THE UPSTREAM STORAGE STATUTE, C.R.S. § 37-87-102(4), DOES NOT RELIEVE THORNTON FROM OBTAINING A CHANGE DECREE IN WATER COURT EVEN IF THE COUNTY HAD AUTHORITY TO REQUIRE THORNTON TO CHANGE ITS POINT OF DIVERSION.

As explained in Thornton's June 29, 2018 letter at 9-10 and its July 31, 2018 letter at 4-5, Thornton's Consolidated Case Nos. 86CW401, 86CW402, 86CW403, and 87CW332, District Court, Water Division 1 (March 9, 1998), (Consolidated Decree) a copy of which was attached to Thornton's June 29, 2018 letter as Exhibit B and is incorporated herein by reference, requires that the point of diversion of its WSSC and Jackson Ditch Company (JDC) water rights will not be changed. That diversion point is the headgate of the Larimer County Canal. However, NPD and STP assert that pursuant to C.R.S. § 37-87-102(4) Thornton can nevertheless convey its water shares down the Poudre River and withdraw that water at any point desired. NPD at 9, STP at 4. NPD and STP misunderstand what this statute allows and then misapply it to Thornton's decreed water rights to come to this incorrect conclusion.

C.R.S. § 37-87-102(4) allows owners of reservoirs to release water and use the natural streams to convey water to a downstream point – so long as there is no material injury to other water rights and appropriate evaporation and transit losses are paid on that water as assessed by the State Engineer. As a shareholder in WSSC, Thornton's WSSC shares are direct flow water rights which are diverted at the Larimer County Canal by WSSC. Then as a shareholder in WSSC, under its Consolidated Decree and by contractual agreement with WSSC Thornton can store Thornton's changed shares in certain of the WSSC reservoirs. However, Thornton's Consolidated Decree and its agreement with WSSC

continue to require that the point of diversion for its water rights be the Larimer County Canal. Accordingly, Thornton is not permitted to use this statute to defy its decree and bypass the Larimer County Canal in order to run its water down the Poudre and withdraw it at any point it desires as claimed by NPD and STP. In order for Thornton to run its water down the Poudre and withdraw it at a different location, as suggested by NPD and STP, Thornton would need to go back to water court for a change decree to seek an alternate point of diversion. As previously explained in Thornton's June 29, 2018 letter, this 1041 permitting process cannot be used as a means of "modifying or amending existing laws or court decrees with respect to determination and administration of water rights." C.R.S. § 24-65.1-106(1)(b).

To the extent that NPD and STP otherwise assert that C.R.S. § 37-87-102(4) trumps the need to obtain a change decree, NPD at 9, STP at 4, the Colorado Supreme Court disagrees. In *Trials End Ranch, L.L.C. v. Colorado Division of Water Resources*, 91 P.3d 1058 (Colo. 2004) *Trials End* advanced a similar argument to that made by NPD and STP; that a water right owner could use the natural streams to carry water decreed to be diverted at a particular point and then take it out at an alternate downstream point without obtaining a change in point of diversion decree. The Court held that even though statutes, including C.R.S. § 37-87-102(4), authorize the use of natural streams as a conduit those statutes "have no bearing on the taking of water from, and immediate return of it to, a natural surface stream." *Id.* at 1062. Accordingly, the Court required the water right owner to obtain a change decree if it wanted to divert at an alternate point of diversion.

Consequently, C.R.S. § 37-87-102(4) on its face does not permit Thornton to use the Poudre River to convey its water shares down the river and withdraw that water at any point desired, at least without going back to water court for a change decree, which the Board has no authority to require through the 1041 permitting process.

2. NO PIPE DREAM'S ASSERTION THAT THIS BOARD HAS AUTHORITY TO REQUIRE THORNTON TO CHANGE ITS POINT OF DIVERSION UNDER ITS 1041 REGULATIONS IS NOT SUPPORTED BY THE CASES IT CITES.

a. NPD Wrongly Relies on a Case Reversed by The 10th Circuit Court of Appeals, *Bergland*, to Assert That This Board Has The Power to Require Thornton to Change its Point of Diversion.

On pages 9 and 10, NPD cites *City & County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981) for various pronouncements by the Colorado federal district court on the applicability of Grand County's 1041 and federal land use regulations and Colorado water law as it relates to Denver's Williams Fork Project. However, the 10th Circuit's opinion vacated the applicability of the district court's pronouncements relied on by NPD when it reversed the district court's holding that Grand County's regulations applied to Denver's Williams Fork Project. *City & County of Denver v. Bergland*, 695 F.2d. 465, 485 (10th Cir. 1982) (As a matter of federal law, there is no basis for the application of Grand County's

regulations to Denver's Williams Fork Project.). Accordingly, the pronouncements that NPD relies upon by the federal district court regarding Colorado state law or county regulations cannot be relied upon in support of NPD's assertion that this Board has the power to require Thornton to change its point of diversion.

The *Bergland* case dealt with a grant by the United States Forest Service (USFS) to Denver of a right of way for Denver's Williams Fork Project. A dispute arose about that right of way and Denver sued the federal government. The federal government responded that Denver had to comply with the Federal Land Policy Management Act (FLPMA) and the National Environmental Protection Act (federal law) and re-apply for the right of way previously granted. Grand County intervened and asked the federal court to declare that as a matter of state law its 1041 regulations applied to the Williams Fork Project. Although the District Court held that Grand County's 1041 regulations applied to the project as a matter of state law, the 10th Circuit reversed that holding entirely. The 10th Circuit limited itself to analysis and application of federal law to the question of the right of way the USFS had granted to Denver.

The 10th Circuit, after identifying that Denver's Blue River decree did not prevent the USFS from challenging a grant of right of way that it had previously made to Denver for the project, held that the FLPMA had no application to the right of way granted to Denver by the USFS. As a result the 10th Circuit also held that the claim made by Grand County that its 1041 regulations applied to Denver's project as a matter of state law because FLPMA [federal law] required Denver to obtain a new right of way "cannot support the application of Grand County's regulations." 695 F.2d. at 484. Further, the 10th Circuit held that "[a]s a matter of federal law, there is no basis for the application of Grand County's regulations to Denver's Williams Fork Project. We need not, and do not, decide whether those regulations may apply as a matter of Colorado law." *Id.* at 485.

In short, NPD has cited no authority to support its claim that this Board has authority to require Thornton to change its decreed point of diversion under its 1041 regulations for permitting a water pipeline project pursuant to LUC 14.4.J.

b. Colorado Law Does Not Allow The Board to Require That Thornton Change The Point Of Diversion Decreed by The Water Court in Permitting a Water Pipeline Project Under 1041 Regulations.

NPD is also wrong in asserting that any Colorado appellate court has held that 1041 regulations authorize this Board to require that Thornton change the point of diversion decreed by the water court in permitting a water pipeline project. NPD at 10. To the contrary, Thornton has previously provided the County with the scope and authority of 1041 Act codified in C.R.S. § 24-65.1-101 *et seq.*, and pointed out that this state law and the County's regulations under Section 14.4.J, of the Land Use Code prevent it from requiring a change in point of diversion in permitting a water pipeline project. Thornton's

June 29, 2018 letter at 3-11. County Staff concurs in this result and has found and concluded that:

> Most importantly, however the County's 1041 regulations address the location of pipelines with easements. *They do not address (or apply) to county approval for conveyance of water through rivers or canals.*

Staff Report at 7 (emphasis added).

In any event, Thornton will briefly address NPD's case citations. NPD's citation from *City of Colorado Springs v. Board of County Com'rs of County of Eagle*, 895 P.2d 1105, 1116 (Colo. App. 1994) that a water owner's entitlement to water does not carry a right to build and operate a water project is: first, premised on language taken from the reversed portion of the *Bergland* case discussed above; and second, relates to the cities' argument that a limited portion of Eagle County's 1041 regulations were not applicable to its application. In context, NPD's citation cannot be read that the Court was passing on a question it did not have before it, and did not say that the challenged wetlands regulations granted Eagle County the authority to require the cities to change their point of diversion.

NPD's citation for its proposition that this Board has the authority under its 1041 regulations to require that Thornton change the point of diversion from *City and County of Denver By and Through Board of Water Com'rs v. Board of County Com'rs of Grand County*, 782 P.2d 753 (Colo. 1989) also fails. First, NPD's alleged quote from this case is nowhere found in the case. Rather it is a quote from *County of Eagle*, 895 P.2d 1105 at 1115 *supra*, discussed above. But even in the context of the *County of Eagle* case, it is simply a pronouncement by the Court that a water right did not exempt the cities from applicability of Eagle County's 1041 regulations. The Court was in no way stating that Eagle County had the right to require that the cities change the point of diversion of their decreed water rights. What the *Grand County* Court did state is that "section 24-65.1-106 expresses the legislature's intent that local government regulations *not undermine the property rights, constitutional rights or water rights of those to whom the regulations apply*." *Grand County* at 765. (Emphasis added).

Simply put, NPD is wrong that the District Court's decision in *Bergland* "support[s] change to a water diversion project resulting from a 1041 application". NPD at 9. The 10th Circuit reversed the District Court's opinion on the applicability of 1041 regulations and left it to Colorado courts to determine the scope and extent of 1041 regulations.

3. THE QUALITY OF A WATER RIGHT IS AN ESSENTIAL COMPONENT OF A WATER RIGHT AND IS RECOGNIZED BY THORNTON'S CONSOLIDATED DECREE; AND IS PROTECTED UNDER COLORADO LAW AND BY THE WATER COURT.

a. Water Quality is a "Stick in The Bundle" of a Colorado Water Right And Thornton's Consolidated Decree Recognizes That Thornton Purchased High Quality Water For its Municipal Supply.

NPD at 14 and Donovan at 2 assert that Thornton has no legal right to any particular quality of water. Contrary to these assertions, Colorado has long held that water quality is one of the "sticks in the bundle" of a water right. The property right to use water in Colorado is a "usufructuary right" (*Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982)) and one of the bundle of sticks that is a Colorado water right includes water of a quality suitable for the uses made of the resource. *See*, *Game & Fish Comm'n v. Farmers Irrigation Co.* 426 P.2d 562, 566 (Colo. 1967) (water right holders entitled to damages for pollution and contamination of their drinking water supply). *Accord*, Hutchins, Wells A., *Water Rights Laws in the Nineteen Western States*, Vol. 1, 1971, p. 442, 448, "Right of Property, Quality of water - (1) As a general principle, the appropriator is entitled to the flow of water in the stream to his diversion works in such *state of natural purity* as to substantially fulfill the purpose for which his appropriation is made. If not protected in this particular, the usefulness of this water right may be depreciated or even destroyed. The necessity for the rule is *self-evident*." (Emphasis added).

NPD and Donovan rely on *A.B. Cattle Co. v. U.S.*, 589 P.2d 57 (Colo. 1978) for the proposition that Thornton is not entitled to any degree of water quality. NPD at 14; Donovan at 2. This reliance is misplaced. First, the water at issue being provided to the Bessemer ditch by the United States was a substitute supply pursuant to C.R.S. § 37-80-120. There has been no evidence presented that the senior WSSC water rights, and by extension Thornton's *pro rata* share interest, are being provided a substitute supply out of the Poudre River from an upstream reservoir of a degraded quality. Second, *A.B. Cattle* stands for the narrow proposition that there is no constitutional right in Colorado to receive dirt as part of an appropriation. *Id.* at 61. Thus, both factually and legally, the case is inapposite to the question of what quality of water Thornton is entitled to from the WSSC system. *A.B. Cattle* does not alter Colorado law which protects senior appropriators in the quality of water appropriated.

Moreover, Thornton has presented evidence of and testified extensively before the Board that the quality of the water available through the WSSC system was the primary factor in its purchase and change of WSSC shares to municipal use. This evidence remains unchallenged. Indeed, contrary to the Donovan statement that Thornton's Consolidated Decree is "absent of any finding that Thornton is entitled to any water quality standard" Donovan at 2, Thornton's Consolidated Decree finds just that:

> The project's continuing purpose is to provide adequate supplies of *high quality raw water to the City by changes of agricultural water rights* . . . .

Consolidated Decree, Finding of Fact at p.5., ¶ 9 (emphasis added). And again:

> [Thornton's] need is not only for more water, but also for water of a *quality suited for municipal purposes.*

Consolidated Decree, Finding of Fact at p.13., ¶ 13. (Emphasis added).

Accordingly, Thornton does have a legally protected property right under Colorado law to the quality of water it purchased in the WSSC system.

b. The Quality of a Water Right is Determined at The Point of Diversion And Water Courts Have Authority to Protect Quality.

i. Thornton is entitled to the water quality diverted by WSSC at the Larimer County Canal headgate as a WSSC shareholder, by contract with WSSC, and pursuant to its Consolidated Decree.

Without citation to any authority, NPD at 10-12; Donovan 3, assert that the quality of the water that Thornton is entitled to is determined at the farm headgate. This assertion is wrong. There are several fundamental tenants of water law that are important to understand in gaging this assertion. First, shares of stock in a mutual ditch company represent water rights. *Shigo, LLC v. Hocker*, 338 P.3d 421, 426 (Colo. App. 2014) (citing *Jacobucci v. Dist. Court*, 541 P.2d 667, 672 (1975)). Second, ownership of shares in a ditch company, such as WSSC, carries with it "the exclusive right to use the corporation's water on a pro-rata basis according to the number of shares owned." *Left Hand Ditch Co. v. Hill*, 933 P.2d 1, 3 (1997). Third, Colorado law is specific that the point of diversion of a water right is an essential element of the water right. *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1148 (Colo. 2001) ("Water rights are decreed to structures and *points of diversion. Dallas Creek Water Co.*, 933 P.2d [27] at 38 [Colo. 1997]. . . . Priority, *location of diversion at the source of supply*, and amount of water for application to beneficial uses are the essential elements of the appropriative water right. *People ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1252 n. 17 (Colo.1996)."). (Emphasis added). There is no dispute that Thornton is a shareholder in WSSC and that the point of diversion of WSSC water is at the Larimer County Canal.

Thornton's shares in WSSC represent water rights. Thornton's ownership of those shares allow it the exclusive right to use the corporation's water on a pro-rata basis. There is no legal requirement that Thornton take the water represented by its shares at any particular place in the ditch. Indeed, the water rights represented by shares may be moved to different locations within the ditch, generally only subject to the approval of the ditch

company itself. Accordingly, Thornton, as a WSSC shareholder is legally entitled to the benefit of the quality of water diverted by WSSC under its decrees from the Poudre River at the point of diversion, the Larimer County Canal. Further, as previously evidenced, Thornton has a contract with WSSC and a decree entitling it to take delivery of its share water not at the farm headgates, but at WSSC Reservoir #4 for subsequent delivery to Thornton. One of the primary purposes of Thornton's contract with WSSC and of its decree regarding the location of storage of its water shares is for the purpose of preserving the quality of water diverted by WSSC at the Larimer County Canal headgate. Accordingly, Thornton does have a legally protected property right under Colorado law to the quality of water diverted at the WSSC headgate and that quality is not determined at a down ditch farm headgate.

Finally, NPD at 12 cites to C.R.S. § 37-80-120(3). This is the upstream storage statute discussed in Section 3.a. above, which is wholly inapplicable to the question of the quality of water to which Thornton is entitled. This statute provides the criteria that the state engineer has to apply to make a determination of whether a junior upstream reservoir will be allowed to store water out of priority. The state engineer can only approve such out of priority storage if he finds that the junior reservoir owner can promptly provide to the downstream senior storage right water to which that senior appropriator is entitled upon demand. The statute provides that the water that the junior upstream reservoir owner provides to the senior storage right must be of a quality and continuity to meet the requirements of the senior storage right. *Id.* NPD does not provide evidence of any such operation. Even if this statute were applicable, WSSC (and as a shareholder of WSSC, Thornton) would be the senior storage appropriator entitled to the statutory protection of the quality of water historically enjoyed at the headgate of the Larimer County Canal.

ii. The water courts have jurisdiction over the quality component of a Colorado water right.

Without citation to any authority, Donovan at 2 asserts that "the Water Court does not have jurisdiction over matters related to water quality" and that "water quality matters are within the sole jurisdiction of the Water Quality Control Commission." These assertions are wrong both under Colorado statute and case law.

First, the Water Quality Control Act (WQCA) which governs the authority of the Water Quality Control Commission *expressly* preserves the water court's authority over the question of injury to senior appropriators and the appropriate remedies for such injuries regarding water quality. C.R.S. § 25-8-104(1) of the WQCA explicitly provides:

> No provision of this article shall be interpreted so as to supercede, abrogate, or impair rights to divert water and to apply water to beneficial uses in accordance with sections 5 and 6 of article XVI of the constitution of the state of Colorado, compacts entered into by the state of Colorado, or the provisions of articles 80 to 93 of title 37,

> C.R.S., or Colorado court determinations with respect to the determination and administration of water rights. Nothing in this article shall be construed, enforced, or applied so as to cause *or result in material injury to water rights*. The general assembly recognizes that this article may lead to dischargers choosing consumptive types of treatment techniques in order to meet water quality control requirements. Under such circumstances, the discharger must comply with all of the applicable provisions of articles 80 to 93 of title 37, C.R.S., and shall be obligated to remedy any material injury to water rights to the extent required under the provisions of articles 80 to 93 of title 37, C.R.S. *The question of whether such material injury to water rights exists and the remedy therefor shall be determined by the water court.* (Emphasis added).

The Colorado Supreme Court interpreting this statute in *In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs.*, 44 P.3d 1019, 1030 (Colo. 2002) held: "Despite the General Assembly's assignment of water quality issues to the [Water Quality Control Commission], the language of the WQCA *clearly expresses a legislative intent for water quality issues to remain within the purview of the water court as set forth in the [Water Rights and Determination and Administration Act].*" (Emphasis added). In that case Thornton asserted that the quality of the substitute source of supply that Denver would provide to Thornton would injury Thornton's water rights. The Water Court held that "[i]f the substitute supply of water provided by Denver's Augmentation plan *renders the water supply Thornton receives unsuitable* for Thornton's normal use of water *in comparison to the water it would otherwise receive at its point of diversion* if Denver's Augmentation Plan had not been instituted, *Thornton's property right in the use of its water is impaired by the substitute supply.*" (Emphasis added). See also, *Game & Fish Comm'n.* 426 P.2d 562, 566 *supra.* (water right holders entitled to damages for pollution and contamination of their drinking water supply).

Accordingly, the legislature has not granted water quality matters to the sole jurisdiction of the WQCC and Water Courts continue to have power to adjudicate water quality issues as set forth in the Water Rights and Determination and Administration Act.

4. APPLICABILITY OF RIGHT OF WAY STATUTES ARE NOT PART OF LARIMER COUNTY'S 1041 CRITERIA.

The Hillman letter January 22, 2019, questions whether Thornton's 1041 application for its water pipeline project complies with certain Colorado right of way statutes: C.R.S. §§ 37-86-102, 103, 105, and 106. Hillman at 1. These statutes allow for the exercise of eminent domain for water conveyance projects and set certain parameters for a person or entity to exercise such power. Larimer County's 1041 criteria for the siting and design of a pipeline project do not address the applicability of these statutes to a project subject to a 1041

permit. Rather, Larimer County's 1041 criteria seek pipeline alignments, such as presented in Supplement 3, to be as least impactful to the community as possible within reason.

But even if these statutes were applicable in this process, as part of the 1041 process, Thornton has committed to negotiate with land owners for rights of way on private land and will only use eminent domain as a last resort. Larimer County is assisting with the effort to avoid eminent domain by allowing the use of County right of way for the pipeline where there may be private property owners unwilling to sell in proposing Condition #8 which provides:

> The City shall be required to, for those reaches of the alignment that are parallel to a County road, to locate the pipeline within the ROW unless an easement for the pipeline can be obtained from a willing seller outside of the ROW. This limitation does not apply to appurtenances and when there are unreasonable physical challenges to pipeline construction in the ROW as determined by the Larimer County Engineer.

Staff Report at 12. Consequently, whether these statutes are applicable or not, they should not be considered under this 1041 process.

5. THE 96CW1116 DECREE IS A BACK-UP MECHANISM TO ALLOW AN EXCHANGE OF WATER UNTIL A PIPELINE IS CONSTRUCTED PURSUANT TO THORNTON'S CONSOLIDATED DECREE.

Thornton's decree in 96CW1116 was discussed on January 28, 2019 at NPD Slide at 13 and in NPD's e-mail dated January 30, 2019. This decree does not have any bearing on Thornton's 1041 application for a pipeline project. Simplistically, this decree was adjudicated a back-up mechanism to allow the exchange of some of Thornton's water rights from its Clear Creek and South Platte water rights to the Poudre River and from the Poudre River to Thornton *until* construction of the pipeline project identified in Thornton's Consolidated Decree.

As set forth as a Finding of Fact and Judgment and Decree of the Water Court, the 96CW1116 Decree was never intended to substitute for construction of the pipeline project applied for here:

> 15.5.1. The Northern Project Decree changed WSSC and JDC water rights owned by Thornton so as to include municipal use of the water within the Thornton water service area. The Northern Project Decree provides that such water, as well as waters diverted under the decrees applicable to Cases No. 86CW401, 402 and 403, can be delivered to Thornton through a pipeline from the WSSC system (the "TNP pipeline"). *Thornton has made it clear that it does not intend to*

> *abandon the use of that pipeline by obtaining this Decree*, which allow the delivery of Northern Project water to Thornton by exchange. The exchanges of Northern Project water decreed herein provide an alternative way of delivering Thornton's Northern Project water to Thornton *until the TNP pipeline is constructed.*" (Emphasis added).

96CW1116 decree at 17.

Thornton has already stated the legal reasons that the Board does not have authority under 1041 to consider a "down the Poudre" option, see Thornton June 29, 2018 letter *et seq*. In addition, use of this decree under the idea that Thornton take its water down the Poudre is not a reasonable siting and design alternative to a pipeline project for which Thornton has filed its 1041 application. This is for the same reasons that Thornton presented in its evaluation of the down the Poudre at the December 17, 2018 hearing. These include that down the Poudre: 1) is not acceptable to WSSC under the 1986 Agreement; 2) does not eliminate the risk to the Thornton community from poor quality water; 3) does not meet the purpose and need of the project; 2) does not meet Thornton's water quality need; and 4) does not provide the quantity of water needed by Thornton. The Staff Report at 7 confirms these findings regarding the river and canal concepts.

CONCLUSION

Thornton has met Larimer County's 12 criteria for the pipeline project originating at the WSSC Reservoir #4 through unincorporated Larimer County in compliance with Larimer County's 1041 Code. Larimer County Staff thoroughly reviewed Thornton's 1041 Application for a water transmission pipeline under Colorado law and the County's 12 review criteria and recommended that the Board approve a 1041 permit, subject to a number of conditions to avoid and mitigate impacts of the pipeline project.

Thornton respectfully requests that the Board accept the recommendation of Staff and approve the 1041 Application, subject to the conditions included by Staff in the Staff Report at 11-15, as modified in the Staff submission on February 4, 2019.

Sincerely,

Luis A. Corchado
City Attorney

Joanne Herlihy
Senior Assistant City Attorney