

DISTRICT COURT, YUMA COUNTY, STATE OF COLORADO 310 Ash Street, Suite L Wray, CO 80758	DATE FILED: June 23, 2023 4:23 PM FILING ID: 6C1C6C14E5C94 CASE NUMBER: 2023CV30008
Plaintiff: COLORADO LIVESTOCK ASSOCIATION, a Colorado nonprofit corporation, v. Defendants: STATE OF COLORADO; JARED POLIS, in his official capacity as Governor of Colorado; JOSEPH M. BARELA, in his official capacity as Executive Director of the Colorado Department of Labor and Employment; and SCOTT MOSS, in his official capacity as Director of the Division of Labor Standards and Statistics, Colorado Department of Labor and Employment	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorneys for Colorado Livestock Association: Christopher P. Carrington, #37004 Ruth M. Moore, #39422 Richards Carrington, LLC 1444 Blake Street Denver, Colorado 80202 Phone Number: 303-962-2690 E-mail: <i>chris@richardscarrington.com</i> <i>ruth@richardscarrington.com</i>	Case No. 2023CV_____ Division __
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF	

The Colorado Livestock Association (“CLA”), through undersigned counsel, hereby submits its Complaint for Declaratory and Injunctive Relief as follows:

PARTIES

1. Plaintiff CLA is a Colorado nonprofit corporation whose purpose is to serve as the voice of Colorado’s livestock industry. CLA’s members are cattle and sheep feeders, cow/calf producers, dairy farmers, swine operations, and agribusiness industry partners. CLA works on behalf of its members in the regulatory and legislative arenas in Colorado.

2. CLA brings this action on behalf of itself and its members who would otherwise have standing to sue in their own right. CLA's members include agricultural employers and property owners engaged in the livestock industry whose right to exclude persons from their property is subjected to a *per se* taking by the statute at issue in this lawsuit. Protecting the property interests of CLA's members against such invasions is germane to CLA's purpose. Neither the claims asserted, nor the relief requested, requires the participation of individual members of CLA in the lawsuit.

3. Defendant State of Colorado enacted the statutory access provision, section 8-13.5-202(1)(b), that is being challenged in this lawsuit as an unconstitutional taking without just compensation.

4. Defendant Jared Polis is named as a Defendant in his official capacity as Governor of Colorado. In his official capacity, the Governor is Colorado's supreme executive officer responsible for ensuring that the laws are faithfully executed and is the embodiment of the State of Colorado for litigation purposes.

5. Defendant Joseph M. Barela is named as a Defendant in his official capacity as Executive Director of the Colorado Department of Labor, which enforces section 8-13.5-202(1)(b) pursuant to section 8-13.5-204.

6. Defendant Scott Moss is named as a Defendant in his official capacity as the Director of Labor Standards and Statistics with the Colorado Department of Labor and Employment, which enforces section 8-13.5-202(1)(b) pursuant to section 8-13.5-204.

7. Although not a defendant to this action, the Attorney General of the State of Colorado is being served with a copy of the proceeding and is entitled to be heard pursuant to C.R.S. section 13-51-115 because the challenged access statute is alleged to be constitutional.

JURISDICTION AND VENUE

8. The Court has jurisdiction over this action pursuant to C.R.S. sections 13-51-105 and section 13-51-112.

9. Venue is proper pursuant to C.R.C.P. 98(a). This action affects real property of one or more CLA members situated in Yuma County, Colorado, among others.

OVERVIEW

10. This Complaint challenges the statutory access provision found at C.R.S. section 8-13.5-202(1)(b) because it constitutes a *per se* taking, without compensation, of the right of agricultural employers and property owners to exclude uninvited persons from real property owned or controlled by agricultural employers.

11. The uncompensated taking violates both the state and federal constitutions. This Complaint seeks declaratory and injunctive relief against the unconstitutional uncompensated takings committed by section 8-13.5-202(1)(b).

CONSTITUTIONAL TAKINGS LAW

12. Both the federal and the Colorado constitutions contain Takings Clauses that prohibit the government from taking private property without just compensation.

13. The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, provides:

[N]or shall private property be taken for public use, without just compensation.

14. The Takings Clause of article II, section 15, of the Colorado Constitution provides:

Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

15. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the United States Supreme Court held that an access provision that “appropriates a right to invade [an agricultural business’s] property ... constitutes a *per se* physical taking.”

Id. at 2072. An access provision is a *per se* physical taking because it “appropriates for the enjoyment of third parties the owners’ right to exclude.” *Id.*

16. The *Cedar Point Nursery* decision involved a California regulation that granted labor union organizers a right of access to agricultural employers’ property to meet with employees. The Supreme Court held that this was a *per se* physical taking requiring just compensation under the Fifth and Fourteenth Amendments. *Id.* at 2069, 2072-74.

17. The Supreme Court held that an access provision cannot be regarded as a mere regulatory restriction on the use of property. *Id.* at 2072. To the contrary, “the right to exclude is ‘universally held to be a fundamental element of the property right.’” *Id.* at 2072. It is not “an empty formality, subject to modification at the government’s pleasure.” *Id.* at 2077. It cannot be “balanced away.” *Id.* at 2077.

18. The Supreme Court further explained that “[t]he fact that a right to take access is exercised only from time to time does not make it any less a physical taking.” *Id.* at 2075. Additionally, “[t]he fact that the regulation grants access only to [a specified class of persons] and only for a limited time does not transform it from a physical taking into a use restriction.” *Id.* at 2075.

KSP ACCESS PROVISION

19. On June 25, 2021, two days after *Cedar Point Nursery* was decided, Colorado enacted the challenged statutory access provision.

20. The challenged provision, C.R.S. section 8-13.5-202(1)(b), is referred to herein as the “KSP Access Provision.” The KSP Access Provision provides:

An employer shall not interfere with an agricultural worker’s reasonable access to key service providers at any location during any time in which the agricultural worker is not performing compensable work or during paid or unpaid rest and meal breaks, and with respect to health-care providers during any time, whether or not the agricultural worker is working.

21. A “key service provider” in this statute is defined as “a health care provider; a community health worker, including a promotora; an education provider; an attorney; a legal advocate; a government official, including a consular representative; a member of the clergy; and any other service provider to which an agricultural worker may need access.” C.R.S. § 8-13.5-201(7).

22. An agricultural employer who denies a “key service provider” access to “any location” under the KSP Access Provision, including property that the agricultural employer owns or controls, is liable for (i) \$10,000 or “actual damages,” whichever is greater; (ii) an injunction requiring the agricultural employer to provide the access; and (iii) an attorney fee award. C.R.S. § 8-13.5-204(2).

23. By its terms, the KSP Access Provision takes away agricultural employers’ right to exclude numerous persons from “any location” on property owned or controlled by agricultural employers.

24. The State of Colorado has not paid just compensation for this taking nor initiated eminent domain proceedings to do so.

DECLARATORY RELIEF

25. Declaratory relief is appropriate pursuant to the Uniform Declaratory Judgments Law, § 13-51-101 *et seq.* Provisions within the Uniform Declaratory Judgments Law, § 13-51-106, and its implementing rule, C.R.C.P. 57(b), each provide:

Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.

26. There is an existing legal controversy that can be effectively resolved by a declaratory judgment.

27. CLA and its members assert that the KSP Access Provision imposes a *per se* physical taking requiring just compensation under both the United States Constitution and the Colorado Constitution.

28. The State of Colorado has not paid any compensation related to the KSP Access Provision and denies that just compensation is required.

INJUNCTIVE RELIEF

29. A permanent injunction is appropriate when (1) a party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.

30. First, on the merits, *Cedar Point Nursery* establishes that the KSP Access Provision constitutes a *per se* physical taking that is unconstitutional in the absence of just compensation.

31. Second, irreparable harm will result unless the injunction is issued. The Colorado Constitution, article II, section 15, requires that just compensation be paid before disturbing property or divesting proprietary rights of the owner. No adequate remedy at law can remedy a failure to abide by this constitutional requirement. No adequate remedy at law can remedy the continuous and repeated property intrusions that will occur in the absence of an injunction. No remedy other than an injunction against the KSP Access Provision can address the exposure to enforcement and liability that agricultural employers face if they assert their fundamental property right to exclude.

32. Third, the threatened injury to agricultural employers and property owners that an injunction will avert necessarily outweighs the harm that an injunction may cause to the Defendants. In contrast, Defendants are not harmed by being enjoined from maintaining and enforcing an unconstitutional statute.

33. Fourth, the injunction, if issued, will not adversely affect the public interest. The public interest is served by enjoining the Defendants from maintaining and enforcing an unconstitutional statute that invades fundamental property rights.

FIRST CLAIM FOR RELIEF

34. Plaintiff CLA incorporates the allegations of the foregoing paragraphs as though fully set forth here.

35. The KSP Access Provision constitutes a *per se* taking of the right of agricultural employers and property owners to exclude uninvited persons from property owned or controlled by agricultural employers. *See Cedar Point Nursery*, 141 S. Ct. at 2072-74.

36. The State has erroneously denied that the KSP Access Provision constitutes a *per se* taking. Based upon its erroneous denial, the State has not paid or offered just compensation, has not initiated eminent domain proceedings, and has not repealed the KSP Access Provision.

37. A declaratory judgment is therefore necessary and proper to establish that the KSP Access Provision constitutes a *per se* physical taking of each affected agricultural employer's and property owner's right to exclude persons from their property.

SECOND CLAIM FOR RELIEF

38. Plaintiff CLA incorporates the allegations of the foregoing paragraphs as though fully set forth here.

39. The Constitutions of both the United States and Colorado prohibit the government from taking private property without just compensation.

40. Through the KSP Access Provision, the State of Colorado has committed physical takings of private property without just compensation. *See Cedar Point Nursery*, 141 S. Ct. at 2072-74.

41. The *per se* physical takings committed by the KSP Access Provision, without compensation, are unconstitutional under the Takings Clauses of both the United States Constitution and the Colorado Constitution.

42. The State has erroneously denied that the takings committed by the KSP Access Provision, without compensation, are unconstitutional. Based upon its erroneous denial, the State has not paid or offered just compensation and has not repealed the KSP Access Provision.

43. A declaratory judgment is therefore necessary and proper to establish that the *per se* physical takings committed by the KSP Access Provision, without just compensation, are unconstitutional under both the Takings Clause of the United States Constitution, amendment V, and the Takings Clause of the Colorado Constitution, art. II, § 15.

THIRD CLAIM FOR RELIEF

44. Plaintiff CLA incorporates the allegations of the foregoing paragraphs as though fully set forth here.

45. The Takings Clause of the Colorado Constitution, article II, section 15, prohibits the State from disturbing property or divesting proprietary rights of the owner before just compensation has been paid.

46. The State has not paid just compensation but erroneously maintains that the KSP Access Provision is constitutional, lawful, valid, effective, and enforceable. Despite not having paid for this *per se* physical taking, the State maintains that “key service providers” are entitled to the access conferred by the KSP Access Provision and that agricultural employers cannot interfere with physical intrusions by “key service providers” under the KSP Access Provision.

47. A declaratory judgment is therefore necessary and proper to establish that the KSP Access Provision violates the Takings Clause of the Colorado Constitution, art. II, section 15, and is unconstitutional, unlawful, invalid, ineffective, and unenforceable because it disturbs property and divests proprietary rights of the property owner before just compensation has been paid.

FOURTH CLAIM FOR RELIEF

48. Plaintiff CLA incorporates the allegations of the foregoing paragraphs as though fully set forth here.

49. The KSP Access Provision purports to authorize uninvited persons to access property owned or controlled by agricultural employers when such access would otherwise constitute a trespass, nuisance, or other unlawful infringement of property rights of agricultural employers and property owners.

50. Because the KSP Access Provision is unconstitutional, unlawful, invalid, ineffective, and unenforceable, it cannot justify or excuse any action by uninvited persons that would otherwise be a trespass, nuisance, or other unlawful infringement of the property rights of agricultural employers and property owners.

51. A declaratory judgment is therefore necessary and proper to establish that the KSP Access Provision cannot justify or excuse any action by uninvited persons that would otherwise be a trespass, nuisance, or other unlawful infringement of the property rights of agricultural employers and property owners.

FIFTH CLAIM FOR RELIEF

52. Plaintiff CLA incorporates the allegations of the foregoing paragraphs as though fully set forth here.

53. The Takings Clause of the Colorado Constitution, article II, section 15, prohibits the State from disturbing property or divesting proprietary rights of the owner before just compensation has been paid.

54. Enjoining the KSP Access Provision until just compensation has been paid is necessary to give effect to article II, section 15, of the Colorado Constitution.

55. A permanent injunction should therefore issue prohibiting Defendants from enforcing the KSP Access Provision when the State of Colorado has not paid just compensation.

SIXTH CLAIM FOR RELIEF

56. Plaintiff CLA incorporates the allegations of the foregoing paragraphs as though fully set forth here.

57. The KSP Access Provision commits a *per se* physical taking without compensation.

58. The State's unconstitutional taking cannot be remedied in actions at law for money damages brought by all of the numerous aggrieved agricultural employers and property owners whose right to exclude is unconstitutionally taken by the KSP Access Provision.

59. Actions at law for money damages would not adequately remedy the continuous and repeated property intrusions that will occur in the absence of an injunction.

60. Actions at law for money damages would not adequately remedy the exposure to enforcement and liability that agricultural employers will repeatedly face if they assert their fundamental property right to exclude uninvited persons from property owned or controlled by agricultural employers.

61. A permanent injunction should therefore issue prohibiting Defendants from enforcing the KSP Access Provision.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff CLA prays for judgment from this Court as follows:

1. A declaratory judgment that the KSP Access Provision constitutes a *per se* physical taking of each affected agricultural employer's and property owner's right to exclude persons from their property;

2. A declaratory judgment that the *per se* physical takings committed by the KSP Access Provision, without just compensation, are unconstitutional under both the Takings Clause of the United States Constitution, amendment V, and the Takings Clause of the Colorado Constitution, art. II, § 15;

3. A declaratory judgment that the KSP Access Provision violates the Takings Clause of the Colorado Constitution, art. II, § 15, and is unconstitutional, unlawful, invalid, and unenforceable because it disturbs property and divests proprietary rights of the property owner before just compensation has been paid;

4. A declaratory judgment that the KSP Access Provision cannot justify or excuse any action by uninvited persons that would otherwise be a trespass, nuisance, or other unlawful infringement of the property rights of agricultural employers and property owners;

5. A permanent injunction prohibiting Defendants from enforcing the KSP Access Provision;

6. An award of Plaintiff's costs of suit; and

7. Any further relief the Court deems just and proper.

Respectfully submitted this 23rd day of June, 2023.

RICHARDS CARRINGTON, LLC

By: /s/Christopher P. Carrington
Christopher P. Carrington, #37004

By: /s/Ruth M. Moore
Ruth M. Moore, #39422

Attorneys for Colorado Livestock Association

Original signatures on file at the offices of Richards Carrington, LLC pursuant to C.R.C.P. 121 §1-26(7).