

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
C.R.S. § 1-40-107(2), Appeal from the Title Board

IN THE MATTER OF THE TITLE AND BALLOT TITLE
AND SUBMISSION CLAUSE FOR PROPOSED
INITIATIVE 2007-2008 #17 (CONCERNING
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION)

Petitioners: DOUGLAS KEMPER AND STUART A.
SANDERSON, Registered Electors of the State of Colorado

v.

Respondents: RICHARD G. HAMILTON and
PHIL DOE, Proponents.

and

Title Board: WILLIAM A. HOBBS, DANIEL CARTIN, and
DANIEL DOMENICO.

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FILED IN THE
SUPREME COURT

JUL 16 2007

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

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Case No. 07SA201

PETITIONERS' OPENING BRIEF

TABLE OF CONTENTS

ISSUES PRESENTED..... 1

STATEMENT OF THE FACTS 1

STATEMENT OF THE CASE..... 4

SUMMARY OF ARGUMENT 5

LEGAL ARGUMENT 6

 I. The Initiative Violates the Single Subject Requirement..... 6

 A. Initiative #17 exempts all funds allocated to, or generated by, the Department from each of TABOR’s requirements, thus modifying TABOR’s effect on State government. 9

 1. As with amending multiple TABOR provisions, exempting the Department from all TABOR requirements constitutes multiple subjects. 10

 2. Exempting the Department from TABOR would alter taxing, spending and revenue limitations throughout State government, thus constituting a separate subject. 13

 B. Initiative #17 supplants the powers of the Governor and Senate to appoint and confirm certain governmental officers..... 15

 C. The trust responsibilities given to the Department, combined with the explicit preemption of all conflicting Constitutional provisions, make unnecessary substantive changes to laws affecting property rights. 18

 1. The trust responsibilities created by Initiative #17 would increase the State’s control over land and water, contrary to legally recognized and constitutionally protected private property rights. This separate purpose constitutes a separate subject from the creation of the Department..... 19

 2. Initiative #17 changes environmental laws in ways that are unconnected to the creation of the Department..... 22

 II. The Title does not Fully Express Initiative #17’s True Intent and Meaning..... 25

 A. The Titles fail to disclose substantive changes to Colorado law. 26

B. The Titles do not disclose that passage of Initiative #17 will strip the Governor and the Senate of powers of appointment and consent..... 26

C. The Titles set by the Board contain a catch phrase..... 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

<i>Aspen Wilderness Workshop, Inc., v. Colorado Water Conservation Board</i> , 901 P.2d 1251 (Colo. 1995).....	21
<i>Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board</i> , No. 93SC740, slip op. at 19 (Colo. June 19, 1995).....	21
<i>Brotman v. E. Lake Creek Ranch, L.L.P.</i> , 31 P.3d 886 (Colo. 2001).....	21
<i>Campbell v. Orchard Mesa Irr. Dist.</i> , 972 P.2d 1037 (Colo. 1998).....	10
<i>City of Aurora v. Acosta</i> , 892 P.2d 264 (Colo. 1995).....	19
<i>Ill. Cent. R. Co. v. Illinois</i> , 146 U.S. 387 (1892).....	20
<i>In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43</i> , 46 P.3d 438 (Colo. 2002).....	7, 8, 11, 14, 18, 22
<i>In re Amend TABOR #25</i> , 900 P.2d 121 (Colo. 1995).....	12
<i>In re Ballot, Ballot Title, and Submission Clause, and Summary for 1999-2000 #258(A)</i> , 4 P.3d 1094 (Colo. 2000).....	28
<i>In re Title, Ballot Title, Submission Clause, and Summary for 1996-6</i> , 917 P.2d 1277, 1281 (Colo. 1996).....	27
<i>In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund</i> , 913 P.2d 533 (Colo. 1996).....	18
<i>In re Proposed Initiative "Public Rights in Water II"</i> , 898 P.2d 1076 (Colo. 1995).....	6, 14
<i>In re Proposed Initiative 1996-4</i> , 916 P.2d 528 (Colo. 1996).....	12
<i>In re Title and Ballot Title and Submission Clause for 2005-2006 #55</i> , 138 P.3d 273 (Colo. 2006).....	6
<i>In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228</i> , 3 P.3d 1 (Colo. 2000).....	27

<i>In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255, 4 P.3d 485 (Colo. 2000)</i>	7
<i>In re Title, Ballot Title and Submission Clause for 2005-2006 #74, 136 P.3d 237 (Colo. 2006)</i> . 7, 12	
<i>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256, 12 P.3d 246 (Colo. 2000)</i>	6
<i>In re Title, Ballot Title, and Submission Clause and Summary for 2005-2006 #75, 138 P.3d 267, (Colo. 2006)</i>	18
<i>In re Title, Ballot Title, and Submission Clause, and Summary for 1997-98 # 30, 959 P.2d 822 (Colo. 1998)</i>	11
<i>In re Title, Ballot Title, and Submission Clause, and Summary for 1999-2000 #29, 972 P.2d 257 (Colo. 1999)</i>	26
<i>MacRavey v. Hamilton (Public Rights in Waters II), 898 P.2d 1076 (Colo. 1995)</i>	21
<i>MacRavey v. Hufford, 917 P.2d 1277 (Colo. 1996)</i>	21
<i>MacRavey v. Swingle, 877 P.2d 321 (Colo. 1994)</i>	21
<i>People v. Emmert, 597 P.2d 1025 (Colo. 1979)</i>	20
<i>Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993)</i>	11, 14
<i>U.S. v. Ill. Cent. R. Co., 154, U.S. 225 (1894)</i>	20
Constitutional Provisions	
Colo. Const. Art. II, Sec. 3.....	22
Colo. Const. Art. IX, Sec. 10.....	21
Colo. Const. Art. IX, Sec. 9.....	16
Colo. Const. Art. X, Sec. 20.....	3, 4, 6, 8, 9, 10, 11, 13
Colo. Const. Art. XVI, Sec. 5.....	20
Colo. Const. Art. XXVII, Sec. 6.....	16

Statutes

C.R.S. § 1-40-102 25

C.R.S. § 1-40-106 4, 25

C.R.S. § 1-40-106.5 6, 18

C.R.S. § 1-40-107 1, 4, 5

C.R.S. § 24-32-2603 16

C.R.S. § 24-75-201 9

C.R.S. § 25-15-302 16

C.R.S. § 25-16.5-104 16

C.R.S. § 25-7-102 24

C.R.S. § 25-7-109 24

C.R.S. § 25-8-102 23

C.R.S. § 25-8-201 16

C.R.S. § 25-8-205 23

C.R.S. § 33-33-106 16

C.R.S. § 37-60-104 16

Other Authorities

Black’s Law Dictionary 1052 (7th ed. 1999)..... 7

Executive Order B 011 00, August 31, 2000 17

Gregory J. Hobbs, Jr. and Bennett W. Raley, Water Rights Protection in Water Quality Law, 60
U. Colo. L. Rev. 841, 855-56 (1989)..... 20

Laws 2005, Ch. 192, § 1 16

Merriam-Webster’s Ninth New Collegiate Dictionary (1984) 7, 28

ISSUES PRESENTED

1. Whether proposed Initiative 2007-2008 #17 violates the single subject requirement because it would substantively change Colorado law in ways that voters likely would not anticipate in considering an initiative that creates a new Department of Environmental Conservation.
2. Whether Initiative 2007-2008 #17's Title, Ballot Title and Submission Clause are misleading and may create public confusion such that the effect of a "yes" or "no" vote will be unclear.

STATEMENT OF THE FACTS

Richard Hamilton and Phil Doe ("Proponents") have proposed Initiative 2007-2008 #17 ("Initiative #17"), which would add a new Article XXX of the Colorado Constitution creating a new Department of Environmental Conservation (the "Department"). Initiative #17 transfers several listed State government divisions, boards, commissions, and programs to the Department. (Section 3(2))¹ In addition, Initiative #17 allows the executive committee of the General Assembly's Office of Legislative Council to transfer any other Colorado agency,

¹ For the Court's convenience, citations to the text of Initiative #17 will state the relevant section of the Initiative within parentheses.

division, program, office or board to the newly created Department. (Section 3(2)(m))

Initiative #17 creates the Board of Commissioners of the Colorado Department of Environmental Conservation (the “Commissioners”) and provides for election of the Commissioners. (Section 1) Additionally, Initiative #17 vests the management responsibilities for the Department with an executive director who serves at the pleasure of the Commissioners. (Section 4)

Initiative #17 allows the Commissioners to appoint members or officers of several listed boards as well any other board determined by the Executive Committee of the Office of Legislative Council to be appropriate. (Section 7(2)(d)) Unlike the current process for appointment of many of the listed boards, “[a]ppointment to any board, commission, council or advisory group of a member or officer by the Board of Commissioners of the Colorado Department of Environmental Conservation shall not be subject to any manner of legislative confirmation.” (Section 7(2)(d)(XII)).

The Department may be allocated money from the general fund as well as collect fees for operation of the Department. (Section 8) Furthermore, Initiative #17 exempts the Department and its funds from all TABOR requirements by

providing that “[n]o manner of fiscal regulation contained within Section 20 of Article X of the Colorado Constitution . . . shall apply to the operation, funding, reserves or expenditures of the Colorado Department of Environmental Conservation.” (Section 8(3)).

Initiative #17 also would change substantive Colorado law. Section 7(1) of Initiative #17 states that:

[T]he Colorado Department of Environmental Conservation, shall have, as priority, the responsibilities to steward and protect the public ownership and public conservation values in land, waters, public resources, and wildlife. Conflict between economic interest and conservation stewardship responsibilities to, and for, the public’s resources and resource conservation values shall be resolved in favor of public ownerships and public values.

Furthermore, “[s]hould conflict with other Colorado constitutional provisions arise hereafter, provisions within Article XXX shall be held dominant over other, previous constitutional provisions.” (Section 2).

The title set by the Ballot Title Board (“Board”) for Initiative #17 reads as follows:

An amendment to the Colorado constitution concerning the creation of a new department of environmental conservation, and, in connection therewith, establishing an elected board of commissioners

to supervise the department; specifying the department's duties and powers and declaring that conflict between economic interests and conservation stewardship shall be resolved in favor of public ownership and public values; transferring certain existing governmental programs and entities to the department, including the great outdoors Colorado program; transferring to the board of commissioners the authority to appoint members of certain boards and commissions relating to those programs and entities; vesting procedural management responsibility for the department in an executive director, subject to supervision by the board of commissioners; identifying revenue sources for the department; and exempting the department from the fiscal limits contained in section 20 of article X of the Colorado constitution.

The ballot title submission clause as designated and fixed by the Board is substantially the same as the title, except that it begins with the phrase “shall there be,” and ends with a question mark.

STATEMENT OF THE CASE

The Board conducted a public meeting pursuant to C.R.S. § 1-40-106(1) on June 6, 2007, at which time it designated and fixed a title, ballot title and submission clause (collectively referred to herein as the “Titles”) for Initiative #17. Petitioners Kemper and Sanderson, registered electors of the State of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on June 13, 2007. The Motion for Rehearing was heard at the next regularly scheduled meeting of the Board, on June 20, 2007. At the rehearing, the Board, by majority vote, denied

Petitioners' objections. Petitioners seek review of the final action of the Board pursuant to C.R.S. § 1-40-107(2) with regard to the issues set forth below.

SUMMARY OF ARGUMENT

Initiative # 17 has multiple subjects because, in addition to creating a new Department, it: (1) modifies TABOR's impact on State government by exempting the Department from all of TABOR's requirements; (2) removes the authority of the Governor to appoint certain officials, and the General Assembly's authority to confirm such appointments; and (3) creates trust responsibilities for State government that conflict and preempt Constitutional provisions protecting private property rights and statutes governing environmental protection. These subjects lack a necessary connection to the stated purpose of creating the new Department.

Even if Initiative #17 contains a single subject, the Titles set by the Title Board do not fairly express the true intent and meaning of Initiative #17 because they do not disclose that Initiative #17 would make substantive changes to Colorado law with respect to private property rights and limit the Governor's and the General Assembly's powers. Furthermore, the phrase "conservation stewardship" constitutes an impermissible catch phrase because it creates prejudice in favor of the initiative without informing voters of the proposal's meaning.

LEGAL ARGUMENT

I. The Initiative Violates the Single Subject Requirement.

Initiative #17 violates the single subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5. A proposed initiative violates the single subject requirement when it “relate[s] to more than one subject and . . . [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 253 (Colo. 2000) (quoting *In re Proposed Initiative “Public Rights in Water II,”* 898 P.2d 1076, 1078-79 (Colo. 1995)).

To ensure that an initiative contains a single subject, this Court must “examine sufficiently an initiative’s central theme, as expressed, to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme.” *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 279 (Colo. 2006). An initiative encompassing several distinct purposes under a broad theme will not satisfy the single subject requirement. *Id.* at 278. The danger associated with a broad general theme containing multiple subjects is the “voter surprise and fraud occasioned by

the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002* #43, 46 P.3d 438, 442 (Colo. 2002).

To evaluate whether or not an initiative encompasses a single subject, the Court should first look to the text of the proposed initiative. *In re Title, Ballot Title and Submission Clause for 2005-2006* #74, 136 P.3d 237, 239 (Colo. 2006). Initiatives spelling out implementation details do not violate the single-subject requirement if the procedures specified in detail have a “necessary and proper relationship to the substance of the initiative.” *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000* #255, 4 P.3d 485, 495 (Colo. 2000). A connection is “necessary and proper” if it is “appropriate and well adapted to fulfilling an objective.” BLACK’S LAW DICTIONARY 1052 (7th ed. 1999). “Necessary” describes an object that is “logically unavoidable . . . absolutely needed: required.” MERRIAM-WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 790 (1984). Similarly, to be “proper”, such language must be “strictly limited to a specified thing, place or idea [or] marked by suitability, rightness, or appropriateness.” *Id.* at 943. As such, details in an initiative must not only be logically connected to the central theme of the initiative, but must be logically unavoidable in completing the specified objective. Requiring each initiative to

contain only necessary and proper subparts ensures that each objective depends upon its own merits for passage. *In re 2001-2002 #43*, 46 P.3d at 440. The subject of the initiative should be capable of being clearly expressed in the initiative's title.
Id.

While the stated purpose of Initiative #17 is to create the Department, and to establish the Department's governance, powers and duties, the Initiative contains at least the following distinct subjects and purposes:

1. Section 8(3) would exempt the Department from all restrictions of TABOR (as Article X, Section 20 of the Colorado Constitution is more commonly known), including all taxing, revenue, spending and reserve limitations, and would modify TABOR's application to State government.
2. The Initiative would substantially alter the manner and procedure by which officials are appointed to serve on certain State boards, councils and commissions, removing the General Assembly's confirmation power over such appointments.
3. Section 7 of Initiative #17 would alter substantive Colorado law by imposing trust responsibilities while preempting all

other Constitutional and statutory provisions found to conflict, including those Constitutional provisions that protect private property rights in water and land.

These objectives are unrelated and unnecessary to the stated purpose of Initiative #17.

A. Initiative #17 exempts all funds allocated to, or generated by, the Department from each of TABOR's requirements, thus modifying TABOR's effect on State government.

Initiative #17 contemplates that the Department's operating funds will be generated by departmental fees, revenues and licenses, in addition to funds allocated to the Department by the General Assembly from the State's general fund (presumably as defined by C.R.S. § 24-75-201). (Section 8) Initiative #17 then exempts the Department's operation, funding, reserves, and expenditures from all of the TABOR restrictions contained in Article X, Section 20 of the Colorado Constitution. This complete exemption from TABOR has no necessary connection to the formation of the Department, and constitutes at least one additional subject because the exemption from TABOR itself constitutes multiple subjects, and such an exemption would alter spending and revenue limitations on State government.

1. As with amending multiple TABOR provisions, exempting the Department from all TABOR requirements constitutes multiple subjects.

TABOR was enacted to restrain the growth of government and to prevent the State (and local governments) from increasing taxes and spending above specified limits without voter approval. Colo. Const. Art. X, Sec. 20(1); *Campbell v. Orchard Mesa Irr. Dist.*, 972 P.2d 1037, 1039 (Colo. 1998). Among the requirements and limitations TABOR imposes on spending and revenue collection are:

1. requiring prior voter approval for any new tax, tax rate increase, the extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to the State (Colo. Const. Art. X, Sec. 20(4)(a));
2. requiring prior voter approval for the creation of any debt or “multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever” where adequate cash reserves are not irrevocably pledged and held for payment (Colo. Const. Art. X, Sec. 20(4)(b));

3. limiting the maximum annual percentage change in the State's fiscal year spending to inflation plus the applicable percentage change in population (Colo. Const. Art. X, Sec. 20(7)(a) and (b)); and
4. restricting the revenue the State may retain as a reserve. *See* Colo. Const. Art. X, Sec. 20(7)(d); *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 12 (Colo. 1993) ("not only does [TABOR] attempt to limit the amount that the State spends, it also attempts to limit the amount that the State does not spend, but collects, and keeps in reserve.").

This Court has repeatedly held that initiatives that pertain to different TABOR requirements, or that seek to amend multiple TABOR provisions, violate the single subject requirement. *See, e.g. In re 2001-02 # 43*, 46 P.3d at 447 (holding that an initiative to repeal TABOR contained multiple subjects); *In re Title, Ballot Title, and Submission Clause, and Summary for 1997-98 # 30*, 959 P.2d 822 (Colo. 1998) (holding that an initiative that sought to both amend TABOR by reducing certain tax revenues and to require specific language in TABOR ballot questions contained multiple subjects); *In re Proposed Initiative*

1996-4, 916 P.2d 528 (Colo. 1996) (holding that an initiative that sought to repeal portions of TABOR relating to spending limits, elections, local responsibility for State mandated programs, and emergency reserves contained multiple subjects); *In re Amend TABOR #25*, 900 P.2d 121 (Colo. 1995) (holding that an initiative that proposed to make both procedural and substantive changes to TABOR violated the single subject requirement).

This Court determined in 2006 that proposed initiative #74, which sought to impose an expiration date on all governmental actions for which TABOR requires voter approval, contained multiple subjects because it would place time limits on 1) tax measures; 2) public debt authorizations; and 3) voter-approved relief from spending limits. *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 242 (Colo. 2006). The Court reasoned that “[w]hile either or both tax or debt limitations may be attractive, the voters would also be limiting prospectively the duration of all future ballot issues designed to provide relief from [TABOR’s] wholly independent spending caps. Certainly, the voters are entitled to have each of these separate subjects considered upon its own merits.” *Id.* at 242. Similarly, here, Initiative #17 would exempt the Department from tax limitations, public debt authorization, and spending limits. (Section 8(3)) Voters should be entitled to consider the merits of any waivers from TABOR’s requirements as they

pertain to the Department, instead of having several different exemptions contained within one initiative whose central purpose is to create the Department.

2. Exempting the Department from TABOR would alter taxing, spending and revenue limitations throughout State government, thus constituting a separate subject.

Initiative #17 would exempt monies provided to the Department from the State's general fund from TABOR's spending and revenue limitations. (Section 8(3)) Accordingly, funds that are currently expended on the divisions and boards being consolidated into the Department would be removed from the State budget that is subject to TABOR's taxing, spending and revenue collection limitations. By excluding these expenditures from TABOR's limitations, Initiative #17 would allow the State to collect and spend monies beyond TABOR's current limitations.

TABOR, by its terms, applies to fiscal activities of a "district," meaning "the state or any local government, excluding enterprises." Colo. Const. Art. X, Sec. 20(2)(b) (emphasis added). Thus, TABOR applies to the State as a whole, and the only State activities excluded from TABOR are those of "enterprises" as defined in TABOR, Colo. Const. Art. X, Sec. 20(2)(d). Initiative #17 would effectively amend TABOR by adding the entire Department to this exclusion, whether or not it qualifies as an enterprise. (See also Section 2 (dictating that if conflicting with

other, previous constitutional provisions, Initiative #17's provisions "shall be held dominant.")) Any changes to revenue collection within the Department would affect the State's ability to spend and retain revenue collected elsewhere. *See Interrogatories on S.B. 93-74*, 852 P.2d at 15 ("[I]nsofar as revenues generated by limited gaming might tend in a given year to violate the spending limits imposed by [TABOR], the General Assembly may comply with [TABOR] by decreasing revenues collected elsewhere, or if that is impossible after the fact, the General Assembly may comply with [TABOR] by refunding the surplus to taxpayers".)

Furthermore, the executive committee of Legislative Council would have unrestricted authority to move additional boards and divisions to the Department, allowing it further discretion to skirt TABOR's restrictions. (*See* Section 3(2)(m)) Such a provision exemplifies the practice of "log rolling" by which proponents attempt to gain support from "various factions which may have different or even conflicting interests." *In re 2001-2002 #43*, 46 P.3d at 441 (quoting *In re Proposed Initiative on "Public Rights in Water II,"* 898 P.2d 1076, 1079 (Colo. 1995)). Here, the proponents attempt to appeal to not only those who support centralization of environmental functions of the State government, but also those who support loosening the spending restrictions on State government.

B. Initiative #17 supplants the powers of the Governor and Senate to appoint and confirm certain governmental officers.

Section 7(2)(d) of Initiative #17 would give the Commissioners the power to appoint members or officers to the following boards, commissions, councils, groups and programs:

1. State Board of the Great Outdoors Colorado Trust Fund;
2. Hazardous Waste Commission;
3. State of Colorado Board of Land Commissioners;
4. Colorado Land Use Commission;
5. Colorado Natural Areas Council;
6. Pollution Prevention Advisory Board;
7. State of Colorado Emergency Planning and Community Right to Know Council;
8. Colorado Water Conservation Board;
9. Colorado Water Quality Control Commission; and
10. Wildlands and Urban Interface Wildlife Working Group.

Initiative #17 would remove the legislature's confirmation power over each of the named appointments. (Section 7(2)(d)(XII)) Additionally, the executive committee of the legislative council could designate any other board, program or

office to be transferred to the Department, and thereby to have its members or officers appointed unilaterally by the Commissioners. (Section (7)(2)(d)(XI))

Currently, the Governor appoints at least one member of:

1. State Board of the Great Outdoors Colorado Trust Fund (Colo. Const. Art. XXVII, Sec. 6);
2. Solid and Hazardous Waste Commission (C.R.S. § 25-15-302(1));
3. State of Colorado Board of Land Commissioners (Colo. Const. Art. IX, Sec. 9);
4. Colorado Natural Areas Council (C.R.S. § 33-33-106);
5. Pollution Prevention Advisory Board (C.R.S. § 25-16.5-104(1));
6. Colorado Emergency Planning and Community Right to Know Council (C.R.S. § 24-32-2603(1)(a));
7. Colorado Water Conservation Board (C.R.S. § 37-60-104); and
8. Colorado Water Quality Control Commission (C.R.S. § 25-8-201(1)(a)).

Most of these appointments must be made with the consent of the Senate. The statute authorizing the Colorado Land Use Commission was repealed as of June 1, 2005 (Laws 2005, Ch. 192, § 1). The Wildlands and Urban Interface Wildlife

Working Group was formed by Executive Order of Governor Owens, which provides for sunset of the working group “upon submission of its report to the Governor on May 1, 2001.” *Executive Order B 011 00*, August 31, 2000 (included within the Appendix attached hereto).

By removing the Governor’s authority to appoint members to at least eight different boards, councils and commissions, Initiative #17 not only would reorganize the executive branch of State government and create new powers and duties in the Department, but also would remove powers currently vested in the Governor and the Senate for appointment and confirmation of certain appointed State officers. Furthermore, by specifically giving the Commissioners the power to appoint members to a commission and a working group that no longer exist, Initiative #17 would create confusion as to the powers and duties of the Land Use Commission and Wildlands and Urban Interface Wildlife Working Group that the Commissioners would be constitutionally obligated to appoint. This delegation of confirmation authority to the Commissioners, superseding and removing current powers of the Governor and General Assembly, has no logical connection with Initiative #17’s purpose of creating the Department.

- C. The trust responsibilities given to the Department, combined with the explicit preemption of all conflicting Constitutional provisions, make unnecessary substantive changes to laws affecting property rights.**

While this Court may not address the merits of a proposed initiative or suggest how it might be applied if enacted, it must “sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.” *In re 2001-02 #43, 46 P.3d at 443*. In determining whether an initiative complies with the single-subject requirement, the Court should employ the usual rules of statutory construction, including reading all words and phrases in context and construing them according to the rules of grammar and common usage. *In re Title, Ballot Title, and Submission Clause and Summary for 2005-2006 #75, 138 P.3d 267, 271 (Colo. 2006)*. Thus, this Court should ascertain an initiative’s intent and meaning from its plain language. C.R.S. § 1-40-106.5(1)(e)(II); *In re 2005-2006 #75, 138 P.3d at 271*.

In construing an initiative’s language, each clause is presumed to have a specific purpose. *In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund, 913 P.2d 533, 542 (Colo. 1996)*. The Court should favor a

construction that will give effect to each word, rather than one that will render some words useless. *City of Aurora v. Acosta*, 892 P.2d 264, 267 (Colo. 1995).

Initiative #17 transfers existing boards and commissions to the Department. Additionally, it modifies substantive law with respect to private property rights and environmental regulation. These substantive changes to Colorado law are so unconnected to the creation of the Department that voters would be surprised to learn that the authority of these existing boards and commissions would change based upon the substantive provisions concealed within Initiative #17.

1. The trust responsibilities created by Initiative #17 would increase the State's control over land and water, contrary to legally recognized and constitutionally protected private property rights. This separate purpose constitutes a separate subject from the creation of the Department.

Initiative #17 states that the Department “shall have, as priority, the responsibilities to steward and protect the public ownership and public conservation values in lands, waters, public resources, and wildlife.” (Section 7(1)) This section creates trust responsibilities previously foreign to Colorado law, resulting in a substantive change that is not logically connected to the creation of a new Department.

This Court has previously examined assertions of a “public trust” doctrine, whereby the State would hold its navigable waters and lands underneath them in trust for the people, declining to apply such a doctrine to water rights within Colorado due to the express protection of private property rights contained in Article XVI of the Colorado Constitution. *People v. Emmert*, 597 P.2d 1025, 1029-30 (Colo. 1979) (holding that Colo. Const. Art. XVI, Section 5 does not impose a public trust but protects private property rights in appropriation of Colorado waters and ownership of adjoining lands); *see also Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (recognizing and defining the public trust doctrine), *aff’d by, U.S. v. Ill. Cent. R. Co.*, 154, U.S. 225 (1894). Imposition of a public trust doctrine would adversely impact existing water rights established under the prior appropriation doctrine. *See* Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 855-56 (1989). By creating trust responsibilities, dictating that any conflicts shall be resolved to favor such responsibilities, and preempting any contrary provisions in Article XVI of the Constitution, the plain language of the Initiative would establish a public trust doctrine contrary to current Colorado law.² *See Emmert*, 597 P.2d at 1029-30.

² Richard Hamilton, a proponent of the measure at issue here, has previously proposed a series of initiatives that

For similar reasons, this Court generally has declined to use the phrase “public trust” in characterizing the responsibilities of State departments, boards and agencies.³ In deciding *Aspen Wilderness Workshop, Inc., v. Colorado Water Conservation Board*, 901 P.2d 1251 (Colo. 1995), the Court examined responsibilities of the Colorado Water Conservation Board (“CWCB”)⁴ in appropriating instream flow water rights based on C.R.S. § 37-92-102(3). The Court initially released an opinion characterizing these responsibilities as “burdened with a public trust.” *Id.*, No. 93SC740, slip op. at 19, 20, 24 (Colo. June 19, 1995) (included in the Appendix attached hereto). However, in modifying its opinion in response to petitions for rehearing, the Court deleted all references to a “public trust,” instead referring to the CWCB’s “unique statutory responsibilities.” *Id.*, 901 P.2d at 1259, 1261, 1263. Initiative #17’s imposition of “trust” duties would undo the Court’s careful statement of the law in its final opinion in *Aspen Wilderness Workshop*, constitutionally broadening the statutory duties of the

would expressly adopt a “public trust doctrine” in the Colorado Constitution provisions governing water, Art. XVI, Section 5. See *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *MacRavey v. Hamilton (Public Rights in Waters II)*, 898 P.2d 1076 (Colo. 1995); *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994).

³ The exception to this general rule is for state school lands, for which the Colorado Constitution specifically creates a public trust for the benefit of the public schools. Colo. Const. Art. IX, Sec. 10(1); *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 892 (Colo. 2001).

⁴ The CWCB is one of the agencies that Initiative #17 would transfer to the new Department of Environmental Conservation. (See Section 3(1)(b) and 3(2)(h))

CWCB and other agencies to incorporate “public trust” elements not previously assigned to these agencies by the General Assembly or recognized by this Court.

These public trust duties would increase the State’s control over land and water, in opposition to legally recognized and constitutionally protected private property rights. Article II, Section 3 of the Colorado Constitution recognizes that all persons have “natural, essential and inalienable rights,” including the right “of acquiring, possessing and protecting property.” The plain language of Initiative #17 would vest the new Department with stewardship and trust responsibilities that sometimes conflict with such private property rights, while dictating that in any conflict, the private property rights must yield. Such far-reaching impacts on constitutionally protected rights are not necessarily connected to the formation of the Department; rather, they reflect a separate purpose and separate subject “coiled in the folds” of the measure. *See In re Title for Initiative 2001-2002 #43*, 46 P.3d at 442.

2. Initiative #17 changes environmental laws in ways that are unconnected to the creation of the Department.

Not only would the trust responsibilities created in Initiative #17 change current private property rights that have long been recognized and protected in Colorado, but they would change environmental laws in ways that are not needed

to create a new Department. Section 7(1) of Initiative #17 requires that any conflict between “economic interest and conservation stewardship responsibilities . . . be resolved in favor of public ownerships and public values.” This requirement would invalidate several current laws governing the management of water quality and air quality, and is unrelated to the purpose of creating the Department.

In enacting the Colorado Water Quality Control Act, the General Assembly stated that it intended the Act to be construed to ensure that the water quality benefits of pollution control measures have a reasonable relationship to the economic and environmental impacts of such measures. C.R.S. § 25-8-102(5). Before any final action (other than an enforcement action) is taken, the economic reasonableness of the action must be considered. *Id.* In furtherance of this goal, the Water Quality Control Commission is directed to consider the economic feasibility of treatment techniques required when promulgating water quality control regulations. C.R.S. § 25-8-205.

Similarly, in regulating air pollution, the General Assembly resolved to use “all available practical methods which are . . . economically reasonable” to reduce, prevent and control air pollution in Colorado, while directing that the benefits of pollution control measures bear a reasonable relationship to the economic impacts

of such measures. C.R.S. § 25-7-102. Thus, in the Air Quality Control Commission's authorization to promulgate emission control regulations, the commission is required to consider the "economic, environmental, and energy costs of compliance with such emission control regulation." C.R.S. § 25-7-109(1)(b)(VII). Initiative #17's direction that stewardship must outweigh economic impacts of environmental regulations is in direct conflict with current controlling statutes.

Given the diverse divisions and boards being consolidated into the Department, and the range of duties and responsibilities charged to these entities and the Department, the Initiative's policy mandate to "have, as priority, the responsibilities to steward and protect the public ownership and public conservation values in lands, waters, public resources, and wildlife" will affect separate and distinct governmental activities and issues, including issues pertaining to hazardous waste, pollution prevention, water conservation, wildlife issues and oversight of the local government permitting process regarding matters of statewide concern. (*See* Section 7(1)) Because this policy directive applies to separate and distinct aspects of State government, it necessarily encompasses multiple subjects.

While the people of Colorado may choose to minimize the consideration of economic impacts in water or air quality regulations, either through their elected officials or by power of initiative, such policy determination is not necessary to creating the Department. Its inclusion in this initiative is likely to surprise voters. It thus constitutes a subject that is separate and distinct from the primary purpose of Initiative #17 – to create a Department of Environmental Conservation.

II. The Title does not Fully Express Initiative #17's True Intent and Meaning.

In addition to the unrelated subjects and purposes contained within Initiative #17, the Titles set by the Board do not fully express its true intent and meaning. The title should be "a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative." C.R.S. § 1-40-102(10). In setting titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear."

A. The Titles fail to disclose substantive changes to Colorado law.

The Titles fixed by the Board summarize Initiative #17 as “concerning the creation of a new Department of Environmental Conservation, and in connection therewith, . . . transferring certain existing governmental programs and entities to the Department.” Because existing governmental programs and entities are transferred to the Department, it is reasonable for the voter to assume that such programs would remain the same but under new management. As further discussed above, however, the trust responsibilities given to the Department would substantially alter private property rights and environmental statutes. Nothing in the Titles indicates that the Initiative makes substantive changes to existing private property rights and substantive law.

B. The Titles do not disclose that passage of Initiative #17 will strip the Governor and the Senate of powers of appointment and consent.

The goal of setting a title is to capture the proposal in plain, understandable, succinct language which will enable the voter to make an informed choice. *In re Title, Ballot Title, and Submission Clause, and Summary for 1999-2000* #29, 972 P.2d 257, 266 (Colo. 1999). The Titles set by the Board state that in connection with the creation of the Department, Initiative #17 transfers “to the board of

commissioners the authority to appoint members of certain boards and commissions relating to those programs and entities.” This implies that the power is transferred from some similar body, and does not clearly state that Initiative #17 removes the power to appoint such officers from the Governor, or that Initiative #17 specifically precludes “any manner of legislative confirmation” for such appointments. (Section 7(2)(d)(XII)) Without such clarification, it is likely that voters would be surprised by the fact that the Governor is no longer entitled to appoint, nor the Senate to confirm, certain executive officers. This is the type of confusion that the Titles should avoid.

C. The Titles set by the Board contain a catch phrase.

A catch phrase is a series of words that could form the basis of a campaign slogan for or against any proposed constitutional amendment. *In re Title, Ballot Title, Submission Clause, and Summary for 1996-6*, 917 P.2d 1277, 1281 (Colo. 1996). The existence of a catch phrase is determined in the context of contemporary political debate. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000).

The Titles set by the Board for Initiative #17 contain a catch phrase. The Titles contain the phrase “conservation stewardship.” In the context of current

political debate, “conservation” is generally understood to include the management of natural resources to prevent exploitation, destruction, or neglect. *See* MERRIAM-WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 279 (1984). Similarly, “stewardship” is commonly understood to incorporate management of a resource with regard to the rights of others. *See Id.* at 1157. Thus, the connotation that not promoting conservation or stewardship of natural resources is bad, makes the use of “conservation stewardship” a catch phrase that appeals to voters’ emotions but does not assist in the understanding of the purpose of the proposed initiative. *In re Ballot, Ballot Title, and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000) (determining that a catch phrase “encourage[s] prejudice in favor of the issue and, thereby, distract[s] voters from consideration of the proposal’s merits.”). The fact that the phrase “conservation stewardship” is used in the initiative text does not prevent it from being a catch phrase. *Id.* at 1110. Accordingly, even if this Court finds that Initiative #17 encompasses a single subject, it should remand this matter to the Board to set Titles that accurately reflect the true intent and meaning of Initiative #17 by disclosing its impacts and removing the catch phrase.

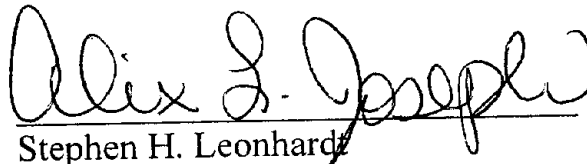
CONCLUSION

The Initiative violates the single subject requirement in that it contains three separate subjects. Accordingly, the Board erred by setting a title and its action should be reversed. In the alternative, the Titles should be modified so that they express the true intent and meaning of the Initiative and do not contain a catch phrase.

Respectfully submitted this 16th day of July, 2007.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was served on this 16th day of July, 2007, as follows:

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