| SUPREME COURT, STATE OF COLORADO<br><br>Colorado Supreme Court<br>101 West Colfax Avenue, Suite 800<br>Denver, Colorado 80202 | Supreme Court Case No:<br>2012 SA 22<br><br>FILED IN THE<br>SUPREME COURT<br><br>FEB - 6 2012 |
|---|---|

Original Proceeding Pursuant to § 1-40-107(2), C. R. S. (2011)
Appeal from the Ballot Title Board

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

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In the Matter of the Title, Ballot Title, and Submission Clause for the Proposed Initiative 2011 – 2012 # 45.

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**Petitioner**:

Douglas Kemper, as a registered elector of the State of Colorado,

**v.**

**Respondents:**

Richard G. Hamilton and Phillip Doe, Proponents,

**and**

**Title Board:**

William A. Hobbs, Jason Gelender, and Daniel Domenico

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# OPENING BRIEF OF THE RESPONDENTS PHILLIP DOE AND RICHARD G. HAMILTON

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## Table of Contents



## Table of Authorities

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*(**N. B.** Included in AUTHORITIES are citations accessed in the sponsor's RESPONSE to the CRS 1-40 "review and comment" MEMORANDUM from Legislative Council / the Office of Legislative Legal Services , November 29, 2012).*

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## I. STATEMENT OF THE ISSUES

November 17, 2011, initiative proponents (hereafter, sponsors) submitted the following proposed amendment to the Colorado constitution to the Colorado Legislative Council and the Office of the Colorado legislative Legal Services:

**Colorado Initiative 2011 – 2012 # 45**

INITIATIVE TO AMEND ARTICLE XVI, SECTION 6, OF THE COLORADO CONSTITUTION

Be it Enacted by the People of the State of Colorado,
In the constitution of the state of Colorado, **amend** section 6 of article XVI as follows:

Section 6. **Diverting water – limitations.** (1) The right to divert ANY WATER WITHIN THE STATE OF COLORADO TO BENEFICIAL USES SHALL NEVER BE DENIED, BUT MAY BE LIMITED, OR CURTAILED, SO AS TO PROTECT NATURAL ELEMENTS OF THE PUBLIC'S DOMINANT WATER ESTATE BY HOLDING UNLAWFUL ANY USUFRUCT USE OF WATER CAUSING IRREPARABLE HARM TO THE PUBLIC'S ESTATE. Priority of appropriation shall give the better right as between those using the water for the

same purpose; but when the waters are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

(2) THE USE OF WATER IS A USUFRUCT PROPERTY RIGHT, GRANTED BY THE PUBLIC TO WATER USERS, THAT SHALL REQUIRE THE WATER USE APPROPRIATOR TO RETURN WATER UNIMPAIRED TO THE PUBLIC, AFTER USE, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND THE PUBLIC'S USE AND ENJOYMENT OF WATERS.

(3) THE COLORADO DOCTRINE OF APPROPRIATION ACKNOWLEDGES THAT THE PUBLIC CONFERS THE PRIVILEGE, BY GRANT, FOR THE USE OF ITS WATER, AND THE DIVERSION OF THE SAME, TO ANY APPROPRIATOR FOR THE COMMON GOOD.

(4) ENFORCEMENT AND IMPLEMENTATION OF THIS SECTION THAT CONFERS, BY GRANT, THE USE OF THE PUBLIC'S WATER TO USERS AND THAT STIPULATES THAT USES OF WATER SHALL BE PROTECTIVE OF THE PUBLIC'S RIGHTS AND INTERESTS, ARE MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT, AS STEWARDS, TO PROTECT AND ENFORCE THE PUBLIC'S INTERESTS IN ITS WATER ESTATE.

(5) ANY CITIZEN OF THE STATE OF COLORADO SHALL HAVE STANDING IN JUDICIAL ACTIONS SEEKING TO COMPEL THE STATE OF COLORADO TO ENFORCE THE PROVISIONS OF THIS SECTION.

(6) PROVISIONS OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING, BUT LAWS MAY BE ENACTED, SUPPLEMENTARY TO, AND IN PURSUANCE OF, BUT NOT CONTRARY TO, PROVISIONS OF THIS SECTION.

November 29, 2011, initiative sponsors presented a written response to the C. R. S 1-40-105 (1) "review and comments" interrogatories from the staff(s) at the Colorado Legislative Council and the Office of Legislative Legal Services that requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution.

The submitted document: "*Initiative to Amend ARTICLE XVI, Section 6, Colorado Constitution.* SPONSOR'S ANSWERS TO THE C.R.S. 1-40 "REVIEW AND COMMENT" MEMORANDUM OF NOVEMBER 29, 2011 PRESENTED TO THE SPONSORS OF THE COLORADO INITIATIVE # 45, 2011 – 2012, FROM THE STAFF OF THE COLORADO LEGISLATIVE COUNCIL AND FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE LEGAL SERVICES" is not only the sponsors consideration of the "review and comment" MEMORANDUM" but is also the sponsor's formal statement of the constitutional intent of the initiative.

December 3, 2011, sponsors submitted the Initiative to Amend ARTICLE XVI, Section 6 – DIVERTING WATER – LIMITATIONS language to the Office of the Colorado Secretary of State (Elections Division) for scheduling the setting of an initiative title for the measure at an Initiative Ballot Title Setting Board hearing.

INITIATIVE TO AMEND ARTICLE XVI, SECTION 6, OF THE COLORADO CONSTITUTION:

Ballot Title Setting Board - 4 January 2012
The title as designated and fixed by the Board was as follows:

"An amendment to the Colorado constitution concerning public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding the right to appropriate water for beneficial use to all water within Colorado, including nontributary groundwater and not limited to unappropriated water, subject to the public ownership interest; requiring water users to return water unimpaired after use to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; and allowing any Colorado citizen to sue to enforce the amendment."

## II. STATEMENT OF THE CASE

A hearing before the Initiative Ballot Title Board was scheduled for January 18, 2012 due to a MOTION TO REHEARING, petitioner Doug Kemper: "Reconsideration [was] been requested due to assertions that "the Initiative and Title does not conform to the single-subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and of C.R.S. § 1-40-106.5": *The title, as set by the Title Setting Board, does not comply with the requirement for a single subject as required by section 1-40-106.5, C.R.S., and section 1 (5.5) of article V of the state constitution which require that every law proposed by initiative be limited to a single subject clearly expressed in its title, in that the proposed initiative contains multiple subjects."*

The objector (see MOTION FOR REHEARING), Doug Kemper, is the director of the Colorado Water Congress (C.W.C.), acting as a citizen. Attorneys for petitioner is Stephen H. Leonhardt, # 15122, BURNS, FIGA & WILL, P.C., and Alix L. Joseph, #33345, BURNS, FIGA & WILL, P.C., 6400 S. Fiddlers Green Circle, Suite 1000 Greenwood Village, CO 80111.

Richard G. Hamilton, Fairplay, Colorado, acting pro se, is the respondent sponsor here entering an appearance in support of the Colorado Initiative Ballot Title Setting Board's actions setting the title for Colorado Initiative 2011 -2012 # 45: *Initiative to Modify the Colorado Constitution, ARTICLE XVI, Section 6:* DIVERTING WATER – LIMITATIONS.

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Materials here presented were submitted to the Colorado Initiative Title Setting Board as a "response" to a MOTION TO REHEAR: The following is a copy of the RESPONSE.

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## RESPONSE TO THE MOTION TO REHEAR THE TITLE SET BY THE TITLE SETTING BOARD, JANUARY 4, 2012, FOR INITIATIVE 2011-12 # 45 TO MODIFY THE COLORADO CONSTITUTION, ARTICLE XVI, SECTION 6 – DIVERTING WATER – LIMITATIONS

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Reconsideration has been requested due to assertions that "the Initiative and Title does not conform to the single-subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and of C.R.S. § 1-40-106.5": *The title, as set by the Title Setting Board, does not comply with the requirement for a single subject as required by section 1-40-106.5, C.R.S., and section 1 (5.5) of article V of the state constitution which require that every law proposed by initiative be limited to a single subject clearly expressed in its title, in that the proposed initiative contains multiple subjects."*

The objector (see MOTION FOR REHEARING), Doug Kemper, is the director of the Colorado Water Congress (C.W.C.), acting as a citizen. Attorneys for petitioner is Stephen H. Leonhardt, # 15122, BURNS, FIGA & WILL, P.C., and Alix L. Joseph, #33345, BURNS, FIGA & WILL, P.C., 6400 S. Fiddlers Green Circle, Suite 1000 Greenwood Village, CO 80111.

Richard G. Hamilton, Fairplay, Colorado, acting pro se, is the respondent sponsor here entering an appearance in support of the Colorado Initiative Ballot Title Setting Board's actions setting the title for Colorado Initiative 2011 -2012 # 45: *Initiative to Modify the Colorado Constitution ARTICLE XVI, Section 6* – Diverting Water – *LIMITATIONS.*

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Find here documents relating to the Colorado initiative process, and to the filing of an initiative measure to amend the Colorado constitution - *Initiative to Modify the Colorado Constitution ARTICLE XVI, Section 6* – Diverting Water – *LIMITATIONS.*

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The RESPONSE TO THE MOTION TO REHEAR THE TITLE SET BY THE TITLE SETTING BOARD, JANUARY 4, 2012, FOR THE INITIATIVE 2011-12 # 45 TO MODIFY Article XVI, SECTION 6 of the COLORADO STATE CONSTITUTION – a.k.a. *THE INITIATIVE TO MODIFY THE COLORADO CONSTITUTION, ARTICLE XVI, SECTION 6* – DIVERTING WATER – *LIMITATIONS"* (1.) supports, in part, the Initiative Ballot Title Setting Board's set title for the Initiative 2011 – 2012 # 45, and (2.) opposes, in part, the initiative ballot title, as set, by the Title Setting Board for the subject initiative.

---



INITIATIVE TO AMEND ARTICLE XVI, SECTION 6, OF THE COLORADO CONSTITUTION:
Ballot Title Setting Board - 4 January 2012

The title as designated and fixed by the Board is as follows:

"An amendment to the Colorado constitution concerning public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding ~~the right to appropriate water for~~ beneficial use (REQUISITE) to all water (USES) within Colorado, including nontributary groundwater ~~and not limited to unappropriated water~~, subject to the public ownership interest; requiring water users to return water unimpaired (.) after use (,) to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; and allowing any Colorado citizen to sue to enforce the amendment."

*(ed. note. - Title Board adopted initiative title language that appears here with "double strikethrough words are the sponsor's suggested modifications to the Board's set title.)*

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**Colorado Initiative 2011 – 2012 # 45** (final - as revised) submitted to the Colorado Legislative Council and the Office of Colorado Legislative Legal Services:

"Be it Enacted by the People of the State of Colorado, Section 6 of article XVI in the constitution of the state of Colorado; **amend** section 6 of article XVI as follows:

Section 6. **DIVERTING WATER – LIMITATIONS.** (1) The right to divert water of ANY NATURAL STREAMS WATER WITHIN THE STATE OF COLORADO TO BENEFICIAL USES SHALL NEVER BE DENIED, BUT MAY BE LIMITED, OR CURTAILED, SO AS TO PROTECT NATURAL ELEMENTS OF THE PUBLIC'S DOMINANT WATER ESTATE BY HOLDING UNLAWFUL ANY USUFRUCT USE OF WATER CAUSING IRREPARABLE HARM TO THE PUBLIC'S ESTATE. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.



(2) THE USE OF WATER IS A USUFRUCT PROPERTY RIGHT, GRANTED BY THE PUBLIC TO WATER USERS, THAT SHALL REQUIRE THE WATER USE APPROPRIATOR TO RETURN WATER UNIMPAIRED TO THE PUBLIC, AFTER USE, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND THE PUBLIC'S USE AND ENJOYMENT OF WATERS.
(3) THE COLORADO DOCTRINE OF APPROPRIATION ACKNOWLEDGES THAT THE PUBLIC CONFERS THE PRIVILEGE, BY GRANT, FOR THE USE OF ITS WATER, AND THE DIVERSION OF THE SAME, TO ANY APPROPRIATOR FOR THE COMMON GOOD.
(4) ENFORCEMENT AND IMPLEMENTATION OF THIS SECTION THAT CONFERS, BY GRANT, THE USE OF THE PUBLIC'S WATER TO USERS AND THAT STIPULATES THAT USES OF WATER SHALL BE PROTECTIVE OF THE PUBLIC'S RIGHTS AND INTERESTS, ARE MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT, AS STEWARDS, TO PROTECT AND ENFORCE THE PUBLIC'S INTERESTS IN ITS WATER ESTATE.
(5) ANY CITIZEN OF THE STATE OF COLORADO SHALL HAVE STANDING IN JUDICIAL ACTIONS SEEKING TO COMPEL THE STATE OF COLORADO TO ENFORCE THE PROVISIONS OF THIS SECTION.
(6) PROVISIONS OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING, BUT LAWS MAY BE ENACTED, SUPPLEMENTARY TO, AND IN PURSUANCE OF, BUT NOT CONTRARY TO, PROVISIONS OF THIS SECTION."

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(N. B. -The **following text** is copied from written materials submitted in support of the *Initiative to Amend ARTICLE XVI, Section 6, Colorado Constitution* - submitted sponsor's Monograph entitled:

SPONSOR'S ANSWERS TO THE C.R.S. 1-40 "REVIEW AND COMMENT" MEMORANDUM OF NOVEMBER 29, 2011 - PRESENTED TO THE SPONSORS OF THE COLORADO INITIATIVE # 45, 2011 – 2012, FROM THE STAFF OF THE COLORADO LEGISLATIVE COUNCIL AND FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE LEGAL SERVICES. - NOVEMBER 30, 2011).

(N. B. - modifications / CORRECTIONS / answers thereto / to questions submitted to the initiative sponsors from legislative office(s) staffs are indicated within parentheses - (. . . )). The SPONSOR'S ANSWERS TO THE C.R.S. 1-40 "REVIEW AND COMMENT" MEMORANDUM OF NOVEMBER 29, 2011 legally comprise the sponsor's constitutional intent of the proposed measure.).

"**Purpose**:
"The ~~major ***~~ purpose~~(s)~~ of the proposed amendment appear(s) to be:

> "To change the Colorado constitution to require water (use) rights to be (limited, or) curtailed, if (when) necessary(,) to prevent (any) irreparable harm to natural elements of the public's dominant water estate;



> and, in connection therewith,
> ~~(2)~~ ° To apply the prior appropriation doctrine to all waters, whether appropriated or unappropriated(,) and regardless of whether the waters are part of any natural stream; (yes).
> ~~(3)~~ ° To specify that water (use) rights are usufructory rights; (yes).
> ~~(4)~~ ° To clarify that, under the prior appropriation doctrine, it is the public that grants the right to use water to appropriators; (yes).
> ~~(5)~~ ° To require the executive, legislative, and judicial branches of government to enforce and implement the (provisions of the) proposed initiative; (yes).
> ~~(6)~~ ° To grant to any citizen of the state of Colorado standing to bring an action to compel the state to enforce (ARTICLE XVI, Section 6 of the state constitution). the proposed initiative; (yes), and,
> ~~(7)~~ ° To make the proposed (provisions of the) initiative self-enacting and self-executing. (yes)."

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Richard G. Hamilton, Fairplay, Colorado, acting *pro se* as the respondent sponsor submitting the response here to THE MOTION FOR REHEARING regarding the Colorado Initiative Ballot Title Setting Board's actions setting the title for Colorado Initiative 2011 -2012 # 45: *Initiative to Modify the Colorado Constitution ARTICLE XVI, Section 6 – Diverting Water - LIMITATIONS* – (1.) supports, in part, the Initiative Ballot Title Setting Board's set title for the Initiative 2011 – 2012 # 45, and (2.) opposes, in part, the initiative ballot title, as set, by the Title Setting Board for the subject initiative, to wit:
The initiative ballot title, as set by the Title Setting Board, contains the phrase: " . . . *including nontributary groundwater and not limited to unappropriated water*" which, (1.) does not clarify for any member of the public the meaning of initiative; (2.) is a redundancy in that the initiative title, as set, which correctly incorporates the phrase: " . . . *expanding the right to appropriate water for beneficial use to all water within Colorado*"; and. (3.) includes a legal concept relating to water use usufruct rights unaddressed within the measure, i.e. "*nontributary*". The respondent sponsor requests that the subject phrase be removed from the initiative ballot title, as set. so as to submit the purpose of the measure clearly, and unambiguously. to the public.

Proposal for further modification(s) of the initiative ballot title, as set, are incorporated within the initiative ballot title presented above. The remainder of the initiative ballot title does no violence to the intent, or language. of the measure.

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The MOTION FOR REHEARING - IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2011-12 #45 - states:

"Petitioner, Douglas Kemper, a registered elector of the State of Colorado, by and through his counsel, Burns, Figa & Will, P.C., hereby requests a rehearing and reconsideration of the title and ballot title and submission clause (collectively the "Titles") set by the Title Board on January 4, 2012 for Initiative 2011-12 #45 (the "Initiative"), which would amend Article XVI, § 6 of the Colorado Constitution by adding provisions and deleting several words from the current text. Reconsideration is requested because the Initiative and Titles do not conform to the single subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 140-106.5.

RESPONSE TO THE MOTION TO REHEAR THE TITLE SET BY THE TITLE SETTING BOARD. JANUARY 4, 2012, FOR THE INITIATIVE 2011-12 # 45 TO MODIFY ARTICLE XVI, SECTION 6 OF THE COLORADO STATE CONSTITUTION. *THE INITIATIVE TO MODIFY THE COLORADO CONSTITUTION, ARTICLE XVI, SECTION 6* – DIVERTING WATER – *LIMITATIONS*. 5

"THE INITIATIVE AND TITLES VIOLATE THE SINGLE SUBJECT REQUIREMENT"

"The Initiative violates the single subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5, by having at least these three separate, distinct, and unrelated subjects:
1. Subordination of both past and future water diversion and use rights to a dominant public water estate;
2. Expansion of the scope of water appropriation under the current Constitution, removing the limit to "unappropriated water" and inclusion of appropriated non-tributary groundwater without consent of the overlying landowner;
and;
3. Imposition of a requirement that water be returned by appropriators unimpaired to the stream."

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## ARGUMENT:

### A. SUMMARY OF THE ARGUMENT

The contentions asserted within the MOTION FOR REHEARING - IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2011-12 #45 – are insufficient and null cause(s) for the Initiative Ballot Title Setting Board to determine that the measure for which the ballot title was set violates either Article V, Section 1(5.5) of the Colorado Constitution, or provisions within the Colorado Revised Statutes at 1-40-106.5 (C.R.S. 1973) - see, as rebuttal to the objector's contentions and assertions. the sponsor's response to the "Review and Comment" MEMORANDUM of November 29. 2011 from the staff(s) of the Colorado Legislative Council and the Office of Colorado Legislative Legal Services, the statement of the single purpose of the initiative proposal:

> *"To change the Colorado constitution to require water use rights be limited, or curtailed, when necessary, to prevent any irreparable harm to natural elements of the public's dominant water estate; and in connection therewith . . ."*

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Inserted language below copied from:

*Legislative Research Memorandum – "BILLS TO CONTAIN SINGLE SUBJECT"-"No Change of Original Purpose"*

- Colorado Legislative Drafting Office, MEMORANDUM # 2, December, 1971:

Page 2.

"This memorandum deals with two sections of article V of the Colorado Constitution. Section 21 requires that a bill treat only one subject and that the subject be clearly expressed in the title of the bill."

"The policy behind the one-subject rule is twofold: First, to discourage the practice of combining unrelated measurers in one bill in order to enlist the supporters of each measure and thereby form a



majority; and second, to facilitate the orderly conduct of legislative business. The purpose of requiring that the subject of a bill be expressed in its title is to make legislators and the public aware of the contents of proposed legislation."

Page 3.
"The Colorado Supreme Court's interpretation of these rules suggest legislators and draftsmen should keep in mind the following propositions, as well as policies which underlie the constitutional rules:

(1) Broad, general titles of bills are the safest from a constitutional standpoint, since a general title is most likely to encompass every matter treated in the bill. An enumeration of the provisions of the bill is neither necessary nor desirable, since anything germane to the general subject matter stated in the title may be included in the bill."

Page 6.

A. Section 21 – One-subject rule and descriptive title rule.

"Section 21 of article V of the Colorado constitution provides:

Section 21. Bill to contain but one subject – expressed in title. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; (descriptive title rule) . . . "

"Article V, section 21, consists of two separate but related requirements. For purposes of analysis, they will be discussed separately. First, there is the requirement that each bill shall embrace but one subject. The purpose of this provision was discussed by the Colorado Supreme Court in the case of Catron v. C. Commissioners, decided in 1893:

> "The practice of putting together in one bill subjects having no necessary or proper connection, for the purpose of enlisting in support of such bill the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits, was undoubtedly one of the evils sought to be eradicated." (18 Colo. 553, at 557, 33 P. 513 at 514. See also the discussion of the purpose of the one-subject rule in In Re House Bill No. 168, 21 Colo. 46, at 51, 39 P. 1096. At 1098 (1895))

"More bluntly stated, one purpose of the one-subject rule is to discourage the practice of logrolling. It is argued that the rule serves this purpose only partially and indirectly, since it does not prevent the practice

of logrolling by creating a coalition to support a group of bills, each of which treats a single subject. However, the one-subject rule appears to make logrolling more difficult insofar as the effort required to pass a series of bills is greater than that required to get a single omnibus bill passed." see Ruud, "NO LAW SHALL EMBRACE MORE THAN ONE SUBJECT", 42 Minn. L. Rev. 389, at 448 – 451 (1958)" (in original text).

The initiative ballot title, as set by the Ballot Title Setting Board, complies with Section 21 of article V Colorado constitution provisions in that the initiative ballot tile, as set by the Board, does not contain more than one subject, clearly expressed in its title; (descriptive title rule) . . . " .

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## B. NATURE OF THE CASE

### DEFINITIONS / CONTEXT / SPONSOR'S CONSTITUTIONAL INTENT

Text below copied from the "Review and Comment" MEMORANDUM of November 29, 2011:

"SPONSOR'S ANSWERS TO THE C.R.S. 1-40 "REVIEW AND COMMENT" MEMORANDUM OF NOVEMBER 29, 2011 - PRESENTED TO THE SPONSORS OF THE COLORADO INITIATIVE # 45, 2011 – 2012, FROM THE STAFF OF THE COLORADO LEGISLATIVE COUNCIL AND FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE LEGAL SERVICES. - NOVEMBER 30, 2011":

**What is "irreparable harm"?**

RESPONSE:

"The concept of irreparable harm (see Black's Law Dictionary, Revised 4TH. Edition) -"irreparable *injury (harm).*" "This phrase does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because of no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law. Sanderlin v. Baxter, 76 Va. 306, 44 Am.Rep. 165. . . . "

See also "INJURY" – (Black's Law Dictionary, Revised 4TH. Edition): "Any wrong or damage done to another, either in his person, rights, reputation, or property". Woodruff v. Mining Co., C.C. Cal,. 18 F. 781; Hitch v. Edgecombe County, 132 N.C. 573, 44 S.E. 30

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Text below copied from the "Review and Comment" MEMORANDUM of November 29, 2011:

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**4. What is the intent and effect of deleting the phrase "of any natural stream" in subsections (1) and (2)?**

RESPONSE:

The term used – ". . . of any natural stream" (see Black's Law Dictionary, Revised 4th. Edition) – (see "natural") - "The juristic meaning of this term … differs in the case where it is used in opposition to the term "legal;" and then it means proceeding from, or determined by, physical causes or conditions, as distinguished from positive enactments of law, or attributable to the nature of man rather than the commands of law, or based upon moral rather than legal considerations or sanctions."

The Colorado Supreme Court, in Hartman v. Tresise, 36 COLO. 146, 84 P. 685 (1906), held:

> " . . . Regarding the State Constitution's guarantee of public rights to use "every natural stream," the court held that these rights were not just *subject* to appropriation, but rather that appropriation was the *only* use the people could make of streams. In dissent, J. Bailey opined that the Constitution means that streams "are dedicated to the use of the people, to be used by them in such manner as they see fit," not just for



appropriation (see Colo. Sess. Laws, 1903, ch. 112, section 7 at 233, in re: Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1906)).

J. Bailey, also commenting [dissent] in Hartman v. Tresise, 36 COLO. 146, 84 P. 685 (1906), further opined:

> " . . . Now let us endeavor to determine whether or not the natural streams of this state (Colorado, ed.) are public or private property. Public property may be defined as that which is dedicated to public use and over which the state exercises control and dominion. With this definition in mind, we will examine the Constitution and the various Acts of the legislature with some care.
>
> "The Constitution of this state provides: "*The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.*", Section 5, Article 16, Colorado Constitution. This makes the waters of every natural stream public.
>
> "They (the waters of every natural stream) are dedicated to the use of the people. to be used by them in such manner as they see fit, subject only to one condition: that of the right of appropriation for beneficial purposes. *Until the waters are appropriated and diverted from the stream, they belong to the public. No stronger words could have been used by the people than are used in this declaration. It is idle to say that the waters of streams are dedicated to the public for the purpose of appropriation, because those words are not the words of the Constitution. It is a grant made subject to that right. The moment that water is appropriated, it ceases to belong to the public, but it becomes the property of the appropriator. The individual who makes the diversion and the appropriation has the exclusive right to its use, and the public is barred from interfering with it.*
>
> "*The appropriated water belongs to the appropriator*. The dedication does not go into effect until the appropriation is made, and the moment it is made, the water ceases to belong to the public, but becomes the property of the appropriator."

The issue of " . . . of any natural stream" is, therefore, at once an anachronism due to the period of time at which the Colorado constitution was framed, and adopted, but it is also an anachronism potentially confusing a physical state and a legal estate. Waters imported from the western part of Colorado - over the Continental Divide, and out of the basin-of-origin to another, used by the manner of appropriation for the common good and then released into the receiving waters of another stream, cannot correctly characterize the receiving stream to be ". . . of any natural stream" since it has lost the character of a natural stream, and yet it transports the waters of the public, subject to further appropriative use.

And, see also:

Chief Justice Moses Hallett, in his Colorado Territorial Supreme Court opinion in the case of Yunker v. Nichols, in 1872, opined:

> "In a dry and thirsty land it is necessary to divert the waters of the streams from the natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law."

These words were written by Chief Justice Moses Hallett in his Territorial Supreme Court Opinion in the case of Yunker v. Nichols in 1872 (see the Colorado Archives memorandum on the 1872 *Yunker* decision) - and here, in this case,



Yunker v Nichols, 1872, is where the first words of a Colorado Supreme Court decision regarding the water of the people were spoken.

"It became obvious", continues the Colorado Archives memorandum on the 1872 *Yunker* decision [Yunker v Nichols http://www.colorado.gov/dpa/doit/archives/digital/waterlaw.htm ,], " . . . in the dispute [between Yunker and Nichols], that the doctrine of riparian rights that had evolved in English common law, and was practiced in the eastern states, was inapplicable in the arid American West. The traditional [riparian] law had two central principles - that the right to use water lay only with the owners of land along a water course, and that a user could not appreciably alter the flow of a stream. Either principle would have made western irrigation impossible, as the entire purpose of canal building was to bring water (1) to properties away from the stream and (2) to allow [water] to soak into the fields."

The Colorado Archives MEMORANDUM continues:

> "Hallett revolutionized existing doctrine by breaking from the Riparian Rights system by creating the doctrine of Prior Appropriation, which would come to be known as "The Colorado system" and be practiced throughout western states. In simple terms this meant that an appropriator could capture water from a stream and transport it to another watershed, using streams in both watersheds to convey the appropriated water to its place of beneficial use. Hallett's ideas were used four years later, in 1876, when the Colorado Constitutional Convention met with the intention of resolving existing and potential disputes by constitutional law. At the Colorado Constitutional Convention 1875-1876, Hallett's opinion on water law was incorporated into the Colorado Constitution." (see Excerpts from the *Proceedings of the Constitutional Convention for the State of Colorado*, pg. 700.")

Further reading of Chief Justice Moses Haslett's opinion in *Yunker*, (1 Colo. 552, 555) reveals:

> "The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different [countries]. ... but

rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence."

"But here the law has made provision for this necessity - (the need to apply water to dry land to make it productive) – by WITHHOLDING from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of taking needed supplies of water. ..."

"So, also, the common law recognizes an easement where it is especially necessary to the enjoyment of the dominant estate." (1 Colo. 554).

"All the lands in this territory [Colorado] which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them useful."

"Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself. They are super-induced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be



known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation."

"When the lands of this territory were derived from the general government, they were subject to the laws of nature, which holds them barren until awakened to fertility by nourishing streams of water ..."

Therefore, due to human intervention, and due to the continual physical transfer of the waters of the people (legally) for the common good, by appropriation, with water removed from pre-existing "natural" stream channels, there does not really exist in Colorado today ". . . any natural stream" ("natural stream" has become an unusable, ambiguous term potentially relating either to differing concepts of a legally-created entity, or, otherwise, relating to an undisrupted physical "natural" rheology now uncommon.).

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At contention within this RESPONSE is the concept of ownership prerogative in the "use" of the waters in Colorado, and whether then the "owners of the waters" – the public - have any ability to condition those uses of their waters so as to insure their own ability to the use and enjoyment of those waters.

In *LEGAL APPROACHES TO THE OWNERSHIP, MANAGEMENT AND REGULATION OF WATER FROM RIPARIAN RIGHTS TO COMMODIFICATION*, see *Transforming Cultures eJournal*, Vol. 1 No. 2, June 2006. Janice Gray, Faculty of Law, University of New South Wales postulates regarding the nature of the concept of property:

" . . . the indicia of property which include: the right to exclude all others; the right to alienate and the right to use and enjoy. Without a right to exclude no-one has dominion. Without dominion there is no property. K. Gray, "Property in Thin Air" (1991) CLJ 252 refers to property as a „bundle of rights" and K. Gray & S. Gray (1998) "The Idea of Property in Law", in Bright & Dewar (eds.), *Land Law: Themes and Perspectives*, Oxford University Press, p. 15 comment that

property is "not a thing but rather a relationship which one has with a thing... „Property" is...rather the word one uses to describe particular concentrations of power over things and resources." Chief Justice Gleeson and Gaudron, Kirby & Hayne J.J commented in *Yanner v Eaton* (1999) 201 CLR 351 that "„property" does not refer to a thing: it is a description of a legal relationship with a thing. It refers to a degree of power that is recognized in law as power permissibly exercised over the thing." See also Bank of New South Wales v Commonwealth (1948) 76 CLR 1 at 349.

With regard to water ownership, with regard to water use in Colorado, and with opinion regarding water management and societal coordination of water issues in Colorado present and future, quoting from the monograph (see 32 Envtl. L. 37 (2002)) - PRIORITY: THE MOST MISUNDERSTOOD STICK IN THE BUNDLE, Gregory J. Hobbs, Jr., Justice, Colorado Supreme Court, presented as a portion of the article . . . "TWO DECADES OF WATER LAW POLICY REFORM: A RETROSPECTIVE AND AGENDA FOR THE FUTURE," the Natural Resource Law Center Water Conference, University of Colorado, Boulder, Colo., June 15, 2001, to wit:

"To place the discussion of priority's role in context, I would summarize the major active currents of western water law as the following: **1)** Congress severed water from the title to public lands and



permitted states and territories to establish water rights under their own laws; **2)** the western states chose prior appropriation as basic water allocation and administration law for natural stream waters - Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447-49 (1882); State v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294, 1304-08 (Colo. 1983) (describing Colorado's decision to use a prior appropriation system of water allocation); **3)** under prior appropriation law, water remains a public resource, the states continue to create property rights for the use of this resource, and beneficial use is the basis, measure, and limit of these water rights, Williams v. Midway Ranches Prop. Owners Ass'n, 938 P.2d 515, 521-23 (Colo. 1997); **4)** in times of short supply, state water officials have a duty to curtail junior water rights in favor of senior water rights; **5)** the reserved water rights of the United States and of Native American Tribes are entitled to recognition and administration along with all other rights in order of their adjudicative priority; **6)** enforceable interstate water compacts and equitable apportionment decrees allocate water between the states with congressional approval; **7)** new water demand is created predominantly by the public sector, namely municipalities and special districts that serve the West's municipal and commercial growth; **8)** federal environmental laws significantly constrain new development of surface water resources, shift water supply planning towards increased reliance on groundwater, change water rights from their prior uses, and require implementation of conservation measures; **9)** the changing values and customs of the people of the West—and of the

United States—include clean and flowing water for recreation, instream flow, and restoration of disturbed riverine habitats; and **10)** optimum use, efficient water management, and priority administration are fundamental adaptive principles of western water law that are increasingly important to meeting water needs in the twenty-first century."

Reporting in an article entitled: "2011 COLORADO LEGISLATION: HB 11-1286 - CLARIFY STATE ENGINEER NONTRIBUTARY RULE AUTHORITY - PASSES THE HOUSE AGRICULTURE, LIVESTOCK AND NATURAL RESOURCES COMMITTEE" - March 26, 2011, Marianne Goodland, in *The Colorado Statesman* reported:

> "The state is made up of groundwater basins, designed by the Colorado Ground Water Commission. Nontributary groundwater is located outside those basins, and is defined as places where water withdrawal, within 100 years, will not "deplete the flow of a natural stream at an annual rate greater than one-tenth of one percent" per year. It is water that is so deep and isolated from surface water that the impact of its withdrawal would be minimal.
>
> "More importantly, nontributary groundwater is not subject to the doctrine of prior appropriation. That's a fundamental concept within Colorado water law, and in its simplest form says whomever was there first gets the water right. According to the HB 1286 fiscal note, nontributary groundwater "is based on ownership of the overlying land and a 100-year aquifer life expectancy."



> "According to [State Engineer Dick Wolfe's] presentation, a domestic water well generally drills down to about 300 feet. An oil or gas well may need to drill down by 3,000 feet or more, and in Southwestern Colorado, they're drilling for coal bed methane at levels up to 7,000 feet deep. When an oil or gas well is drilled, it results in "produced water." That's water that is removed from a geologic formation during the extraction process of mining for oil or gas. Once the water reaches the surface it must be separated from the mineral. If the state engineer determines that groundwater is coming from a tributary source, then the oil and gas company must get a water permit. No permit is needed if the water comes from a nontributary source."

At this critical juncture in this RESPONSE, the sponsors seek examination of elements within the opinion rendered in San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999), holding as a matter of state constitutional law that the state cannot abrogate the public trust doctrine by statute, that contends that the state legislature cannot provide in statute that which has been declared otherwise impermissible (see Glass v. Goeckel, Docket No. 126409. COA No. 4. Supreme Court of Michigan, 2005 – ". . . the state lacks the power to diminish [public] rights when conveying . . .[trust] property to private parties." This "public trust doctrine," as the United States Supreme Court held in Illinois Central R. Co. v. Illinois, 146 U.S. 387, 435, 13 S.Ct. 110, 36 L.Ed. 1018 (1892)); (see, also, *MODERN PUBLIC TRUST PRINCIPLES: RECOGNIZING RIGHTS AND INTEGRATING STANDARDS*, Alexandra B. Klass. University of Minnesota Law School, Paper 1495, year 2006, wherein examination of *San Carlos* reveals: "*San Carlos Apache Tribe v. Superior Court*: " . . . the Arizona Supreme Court in 1999 reviewed a state statute enacted in 1995 which stated that "*[t]he public trust is not an element of a water right*" and that in adjudicating water rights, "*the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source.*" The Arizona Supreme Court invalidated the provision, stating that the public trust doctrine in Arizona is a constitutional limitation on legislative

power to give away resources in trust for the public. The court went on to state that it was "for the courts to decide whether the public trust is applicable to the facts" and that the legislature cannot, by statute, destroy the constitutional limitations on its authority.").

Again, see below text from the sponsor's statement of initiative purpose and constitutional intent as was presented to the "Review and Comment" CRS 1-40 MEMORANDUM in the Response to queries from the staff(s) of Legislative Council and Legislative Legal Services:

"SPONSOR'S ANSWERS TO THE C.R.S. 1-40 "REVIEW AND COMMENT" MEMORANDUM OF NOVEMBER 29, 2011 - PRESENTED to THE SPONSORS OF THE COLORADO INITIATIVE # 45, 2011 – 2012, FROM THE STAFF OF THE COLORADO LEGISLATIVE COUNCIL AND FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE LEGAL SERVICES. - November 30, 2011":

RESPONSE TO THE MOTION TO REHEAR THE TITLE SET BY THE TITLE SETTING BOARD, JANUARY 4, 2012, FOR THE INITIATIVE 2011-12 # 45 TO MODIFY ARTICLE XVI, SECTION 6 OF THE COLORADO STATE CONSTITUTION, *THE INITIATIVE TO MODIFY THE COLORADO CONSTITUTION, ARTICLE XVI, SECTION 6* – DIVERTING WATER – *LIMITATIONS*. 13

**Would the prior appropriation system then apply to, e.g., nontributary groundwater?**

RESPONSE:

Yes.

Codification at formerly at Chapter 148 (C.R.S. 1963) WATER RIGHTS AND IRRIGATION changed in 1979. Find here, original statute @ Chapter 148 – WATER RIGHTS AND IRRIGATION - C.R.S. 1963 (supp. 1969) (L. 69, pg. 1219, sec. 2):

> **"WATER RIGHTS AND IRRIGATION** – Article 2. Appropriation and Use: (CRS 148-2-1). **All water property of public.** – "All water originating in or flowing into this state, whether found on the surface or underground, has always been and is hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law."

**N. B.** [ed.note:] Senate Bill No. 481: – "CONCERNING WATER SUBJECT TO APPROPRIATION", CH. 346, SESSION LAWS 1979 (June 22, 1979), at 1366, **WATER AND IRRIGATION** – APPROPRIATION AND USE OF WATER – at Section 4: § **37-92 -102 – Legislative declaration.** (1) (a) was amended so as to change, in the "legislative declaration", the language found there originally from ~~"waters"~~ to WATER IN OR TRIBUTARY TO NATURAL SURFACE STREAMS. Also struck were the words ~~whether found on the surface or underground~~ thereby restructuring not only the prior existing statutory proclamation previously in statute but also inherently modifying statute provisions pertaining the constitutional precepts (see Art.XVI, Section 5) regarding the range and extent of the waters of the public subject to "appropriation and use".

Currently. Colorado Revised Statute(s) reads:

ARTICLE 82 APPROPRIATION AND USE OF WATER

**Cross references:** For water rights provisions in the state constitution, see §§ 5 to 8 of art. VI; for water compacts, see articles 61 to 69 of this title; for conservancy and irrigation districts, see articles 41 to 45 of this title; for conveyance of water rights as real property, see § 38-30-102; for exemption from taxation of ditches, canals, and flumes, see § 39-3-104.

37-82-101. Waters of natural surface streams subject to appropriation.
37-82-102. Priority of right to spring water.
37-82-103. Appropriation of natural springs.
37-82-104. Not to impair vested rights.
37-82-105. Interference with flow - damages.

The language of, and the implication of, the "old codification" – see C.R.S. 1963, 148-2-1, was changed by the adoption of Senate Bill 481, and these significant statutory changes (intent of statute) were incorporated so that the "new" statutory language, CRS 37-92-101, et.seq., did not coincide with, nor did the revised statute language comport with, the previous intent provisions within CRS 148-2-1 (1963). A dramatic change had occurred in Colorado law - one in which the water estate of the people and the control over water had been significantly modified, and narrowed, so that a portion of the water estate had been effectively alienated from the public's dominion.

Notably, the opinion of the U. S. Supreme Court in Illinois Central R. Co. v. State of Illinois, (146 U.S. 387 (1892), 13 S. Ct. 110 December 5, 1892, addresses the ability of a state to remove itself from that state's obligation to be protective of the people's water. In part, the ruling in the United States Supreme Court decision in Illinois Central R. Co. v. State of Illin*ois*, (146 U.S. 387 (1892), 13 S. Ct. 110 (December 5, 1892)), holds:

> "*. . . The question, therefore, to be considered, is whether the Legislature was competent to thus deprive the state of its . . . consequent control of its waters...*"

And, from the same *Illinois Central R.* decision:

> "*. .The doctrine is founded upon the necessity of preserving for the public the use... of waters from private interruption and encroachment... . We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of... waters are subject to the same trusts and limitations.*"

The U. S. Court, in *Illinois Central R.,* held that the state legislature did not have any legal ability / any legal authority to modify the protections of offered by state with regard to the public's water estate so as to deprive the public from their enjoyment of waters and from water uses. Further, the aspect of public water ownership, and of having the state being required to act as a steward of the public's interests, was a duty that the state could never relinquish."



We are now, in year 2012, in the condition, legally. with regard to usufruct uses of the public's waters where agreed upon elements and doctrines include:

> • *the water in Colorado is constitutionally within the estate of the people;*
> • *the U. S. Supreme Court has renounced the ability of the state to divorce itself from the protection of the people's water;*
> *and,*
> • *water constitutional matters in Colorado are superior to contracts and property, as announced in Colorado judicial "first impression" opinion - see Yunker v Nichols, 1 Colo. 551, 555 (1872).*"

Set the purported condition that "nontributary groundwater" as not being subject to the requirements of state administration as has been contended / presented in the comments by the Colorado State engineer [State Engineer Dick Wolfe] in testimony before the Colorado Legislature: "*No permit is needed if the water comes from a nontributary source*" with the Colorado Supreme Court's prior opinion in Safranek v.

Town of Limon, 228 P. 2d 975, 1951, regarding legal action concerning ownership of water within the Town of Limon, Colorado, to wit:

> "The Town of Limon, being in need of further water supply for domestic purposes, sank two wells on lands belonging to them, and thereby found water which it since has pumped and conveyed by pipe line to the town where it is used to supply the needs of its residents."

The Colorado Supreme Court in Safranek v. Town of Limon, 228 P. 2d 975 – Colo. Supreme Court 1951, held : " . . . without raising other questions immediately occurring, it is elementary that any right of respondents to compensation for this water must be predicated upon their ownership. [Counsel for the plaintiffs had] contended: "In this State percolating sub-surface waters, not tributary to any stream, are the property of the owner of the land, as at common law." [The Colorado Supreme Court responded] . . . *As applied to this case, they are mistaken therein, both as to fact and law:*

> [The Colorado Supreme Court responded]. . . "Under our Colorado law, it is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream. DeHaas v. Benesch, 116 Colo. 344, 181 P.2d 453. The burden of proof is on one asserting that such ground water is not so tributary, to prove that fact by clear and satisfactory evidence. Comrie v. Sweet, 75 Colo. 199, 225 P. 214; Leadville Mine Development Co. v. Anderson, 91 Colo. 536, 17 P.2d 303; Dalpez v. Nix, 96 Colo. 540, 45 P.2d 176."

"And, as to all such waters the law is definitely settled that the doctrine of priority of appropriation as established by the Colorado Constitution and the subsequent statutes enacted in aid thereof, applied to such waters to the same extent and with the same force and affect as it did to the surface water of the stream: that is, first in time, first in right." See, also, Wells A. Hutchins, *"Selected Problems in the Law of Water Rights in the West"*, United States Government Printing Office, Washington, 1942, 208 et seq."

The Colorado Court opined further in *Safranek*:

> "Had it been established by the record in this case that the water diverted by the town was nontributary ground water, such as an underground lake, the waters of which are not a part or source of a natural stream, still the above-quoted statement upon which counsel for respondents base their claim of ownership of the water would not be a correct statement of Colorado law. We have long since departed from the English common-law doctrine of ownership of percolating waters by the surface owner, Nevius v. Smith, supra. . . ."

Further, set the Colorado Supreme Court's decision in Vance v. Wolfe , No. 07SA293, April 20, 2009, wherein the Colorado Supreme Court has ruled that the extraction of tributary ground water produced from coal bed methane wells is a "beneficial use" of water that must be regulated under state water laws.



"The decision in Vance, et al. v. Wolfe, in the Colorado Supreme Court, announced on April 20, 2009, also determined that . . . wells producing tributary ground water are, in effect, water wells that require well permits issued by the Colorado State Engineer, and where applicable, a water court-approved plan to replace out-of-priority depletions to impacted stream systems. While the issues squarely before the Court involved coal bed methane wells, the decision may signal the broader application of Colorado water laws to other oil and gas operations in the state. Often, coal seams must be dewatered to release the methane gas, and coal bed methane wells typically produce varying amounts of water as a byproduct of the extractive process. After being brought to the surface, the water is usually disposed of through injection wells, evaporation ponds, or by surface discharge. Historically, the State Engineer has refused to regulate

produced water on the grounds that it is a waste product the management and disposal of which is subject to the jurisdiction of the Colorado Oil and Gas Conservation Commission ("COGCC").

"Under the legislation, operators of coal bed methane wells that produce tributary groundwater will be required to obtain well permits and administrative approval of plans to replace depletions caused by well pumping, no later than March 31, 2010, and to file with the Water Court an application for approval of long-term "plans for augmentation" no later than December 31, 2012. The legislation also authorizes the State Engineer to adopt rules to assist with regulation of the production of nontributary groundwater by delineating areas of nontributary groundwater withdrawal."

"The concept of beneficial use of water is expressed in the Colorado Constitution and [is] defined broadly in the 1969 Water Right Determination and Administration Act (the "1969 Act"). The application of a specific quantity of the waters of the state to a beneficial use gives rise to an appropriation of a water right, subject to water court adjudication and administration by the State and Division Engineers." In common parlance the understanding is: *an appropriation of water without a beneficial use is not a water right / all water rights need a beneficial use to prefect an appropriation of the people's water.*

"Finally, while the most immediate impacts of the *Vance* decision are limited to coal bed methane wells, the decision may signal potential regulation of tributary water produced from conventional oil and gas wells. Examining the overlapping statutory schemes of the 1969 Act, the Ground Water Management Act, and the Oil and Gas Conservation Act, the Court stated broadly that the "production of oil and gas" is subject . . . [to] administration."

Also, the issues here refer to a relatively new category of waters known as "produced water" the concept of which is topical due to the existence of "produced water" as being the result of current oil and gas exploration and production of hydrocarbon resources - see *A White Paper Describing Produced Water from Production of Crude Oil, Natural Gas, and Coal Bed Methane* - see U. S. Department of Energy (D.O.E.), National Energy Technology Laboratory, Argonne National Laboratory, Tom A. Veil, January 2004: ". . . In Colorado, the Oil and Gas Conservation Commission (the COGCC) enjoys primacy over the UIC Class II program." "Produced water is water trapped in underground formations that is brought to the surface along with oil or gas. It is by far the largest volume byproduct or waste stream associated with oil and gas production. Management of produced water presents challenges and costs to operators." And, from the AWWA - American Water Resources Associations - Colorado Section - ORIGINS OF PRODUCED WATER REGULATIONS IN COLORADO - A BRIEF HISTORY by Dave Colvin, P.G., Leonard Rice Engineers: "Produced water" is simply defined as any water produced during the extraction of oil and gas. Produced water has historically been exempt from Colorado's prior appropriation doctrine (as put forth in the Water Right Determination and Administration Act of 1969 and the Ground Water Management Act) and was previously regulated solely by the Colorado Oil and Gas Conservation Commission (COGCC) as exploration and production waste. Produced water is typically discharged to



surface water systems, evaporated in ponds, or most commonly, re-injected into deeper geologic formations."

Produced water, determined to be a "beneficial use" in *Vance,* is administered by the Colorado Oil and Gas Conservation Commission (COGCC) outside the appropriations doctrine priority system even though the produced waters are in the public domain, are managed / administered / permitted by an agency(s) of the state of Colorado under a state government pre-emption of local and regional governments as a

"statewide interest" - see Lundvall Brothers v.Voss, 812 P.2d 693 (Colo. App. 1990812 P.2d at 694). The sole authority for oil and gas (produced water) resides within the Oil and Gas Conservation Commission with water resource matters outside the appropriations doctrine / outside beneficial use protections except those announced by a state agency (s) to wit:. " . . . notwithstanding that distinction, the court concluded that the state's interests in oil and gas development and production, as manifested in the Oil and Gas Conservation Act, is a matter of statewide concern which requires uniformity of regulation and leaves no room for local regulation and that, therefore, the regulation of oil and gas development within a home-rule city, including the use of land required for those activities, is within the exclusive regulatory authority of the Oil and Gas Conservation Commission. (Id. at 694-95.)

Within the Colorado Doctrine of Appropriation, a "water right" can exist only when an appropriation is put to use - economist Richard T. Ely:

> "[The] distinction between property in water itself and a private rights to the use of public water....seems like a refinement, but experience shows it has important consequences, inasmuch as the treatment of water as public property to be appropriated by individuals for their beneficial use strengthens public control, making such control easier under American constitutional government than it is when the water itself is regarded as private property." (see R. T. Ely, *ECONOMICS OF IRRIGATION*, unpublished manuscript, *in* Henry C. Taylor & Anne Dewees Taylor, *THE STORY OF AGRICULTURAL ECONOMICS IN THE UNITED STATES*. 1840-1932, at 833 (1952) (1905); *see also* Samuel C. Wiel, *PUBLIC CONTROL OF IRRIGATION*, 10 COLUM. L. REV. 506, 511-15 (1910); Trelease, *supra* note 20, at 640-41)."

*(N. B.* See, also, Platte Water Co. v. N. Colorado Irrigation Co., 21 P. 711 (Colo. 1889) (grant to water company of exclusive rights in section of river held beyond power of legislature).

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**SUMMATION:**

"Shall Never Be Denied"

Below text excerpted (pgs. 44, 45) from David Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, *ECOLOGY LAW QUARTERLY*, Vol. 32:3, 2005).
"Once the question of ownership had been settled, the constitution proceeded to set the terms of acquisition of rights to use the water:

> "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. (Colorado Constitution, art. XVI, § 6.).



> "The first sentence of this section, often ignored by commentators, appears as something of a puzzle. Is the directive that the right to divert water "shall never be denied" a manifestation of unbridled possessive individualism, an order that the individual's right to appropriate water never be subordinated to other societal values or principles? Such an interpretation would mark this section of the constitution as a radical break with Colorado's (albeit young) legal traditions,

which, we have seen, were concerned more with widening the distribution of the water resource than with facilitating private aggrandizement of wealth.

"While law certainly has known revolution, evolution is a more likely course of historical development. The initial sentence of Section 6 represented not the opening salvo of a capitalist manifesto of private ownership of natural resources, but a crystallization of one of the egalitarian principles that had been developing in the earlier miners" laws and territorial legislation: the power of any person to acquire water rights irrespective of the location of his land. 200 The convention rejected as too friendly to speculators a proposal that the provision of the territorial legislation allowing appropriations by non-riparians, but preserving some preference for settlers within the valley, be made part of the new constitution:

"Mr. Plumb said it was just this sort of thing that the committee desired to prevent. Many men had taken up lands along the streams, and done nothing with them, but were holding them in expectancy; were waiting to see if the Territory was to be a success, allowing their neighbors to do the work to insure that success. But they claimed the right to the water in the stream for the irrigation of all their lands. And the committee proposed to compel them to actually make their appropriations and go to work to help develop the resources of the Territory. 201

(199. COLO. CONST. art. XVI, § 6.)
(200. See text, supra notes 91-95, 148-153, 162-169.)

"Or, as a Colorado lawyer explained a few years later:

We contend that it is but natural right and justice, that the man, who in Colorado settled along the banks of a stream, and took no steps to divert the precious water to a beneficial use, should be subordinated to his neighbor who put his time, labor and money into ditches and reservoirs for the purpose of subduing and cultivating the arid plain; even though that neighbor may not have owned land directly on the banks of, or anywhere near the stream. That it is not right to encourage the „dog in the manger" spirit of the speculator on the banks of the stream, who will not make beneficial use of the water himself, and is not willing to allow the settler further back to get at one of the most precious gifts of the Creator - water. That it is right that the man further back should have the right of way given him by the law of the land to the water which he must have in order to cultivate his fields. (see Harvey Huston, THE RIGHT OF APPROPRIATION AND THE COLORADO SYSTEM OF LAWS IN REGARD TO IRRIGATION 41 (Denver, Chain & Hardy 1893) (italics in original).

"Accordingly, the law's earlier hesitancy about totally abolishing the preference for riparian owners was now laid finally to rest, with the unequivocal declaration of the constitution that "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied" – even to the non-riparian proprietor. (Colorado Constitution art. XVI, § 6. *See* R. H. Hess, *Arid-Land Water Rights in the United States*, 16 COLUM. L. REV. 480, 488-89 (1916))

"Equal opportunity was the guiding principle: "Mr. Plumb said the committee desired to do away with the old doctrine of riparian ownership, so that those who should come here to settle would have equal rights in the unappropriated waters." (see DENVER DAILY TRIB., Feb. 24, 1876.)



"Beneficial Use"

"The opening sentence of Section 6, (see Colorado Constitution. art. XVI, § 6) limiting the right of diversion to "beneficial uses," apparently marks the original use of this term in connection with western appropriation doctrine, but in this matter, too, the novelty was in the language, not in the underlying theory. Though in recent years some have focused on the requirement's potential as a doctrinal vehicle for invalidating uses seen to be wasteful, it originally had little to do with this issue; practically all uses qualified as beneficial under the law, economical or not (see David Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, page 46, ECOLOGY LAW QUARTERLY, Vol. 32:3, 2005).

> "Rather, consistent with the distributive ideologies running through miners" and territorial law, the doctrine was a way of limiting speculation and concentration of wealth in water and encouraging its wide distribution: first, by preventing legislative giveaways of water rights; (*See* Platte Water Co. v. N. Colo. Irrigation Co., 21 P. 711 (Colo. 1889)); and, second, by limiting the amount that could be acquired by any one irrigator to the amount actually needed to water his or her crops at the time of appropriation, as opposed to the amount his ditch was capable of carrying or the amount needed for all lands that could be watered by his ditch (ibid).

"As the prominent California scholar John Norton Pomeroy explained:

> The system places an obstacle in the way of a prior appropriator's obtaining an exclusive control of the entire stream, no matter how large; and secures the rights of subsequent appropriators of the same stream; by requiring that a valid appropriation shall be made for some beneficial purpose, presently existing or contemplated; and by restricting the amount of water appropriated to the quantity needed for such purpose; and by forbidding any change or enlargement of the purpose, which should increase the quantity of the water diverted under the prior appropriation, to the injury of subsequent claimants; and by subjecting the prior appropriation to the effects of an abandonment, by which all prior and exclusive rights once obtained would be lost. By these means, a party is, in theory at least, prohibited from acquiring exclusive control of a stream or any part thereof, not for present and actual use, but for future, expected, and speculative profit or advantage; in other words, a party cannot obtain the monopoly of a stream, in anticipation of its future use and value to miners, farmers and manufacturers." (see John Norton Pomeroy, *Riparian Rights – The West Coast Doctrine* (*Part 13*), 2 W. COAST REP. 297, 300 (1884). *See also id.* (*Part 7*) 1 W. COAST REP. 641, 646 (1884); John E. Ethell, *Irrigation – the Continually Growing Importance of the Conservation and the Equitable Distribution and Use of Water in the Arid and Semi-Arid States and Territories*, 74 CENT. L.J. 244 (1912).

"It was clear that what would come to be known as "beneficial use" was not only a condition specifying the types of uses for water that were included in the legal right (that is, irrigation), but also a measure of that right, limiting it to the amount necessary for essential uses. (see David Schorr. Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights, page 29, *ECOLOGY LAW QUARTERLY*, Vol. 32:3, 2005).

"Less well known today are the many other nineteenth-century American legal regimes, both official and informal, that provided precedents for the Colorado mining district laws, having as their primary concern the wide distribution of property rights to those actually working the resource in question and corresponding restriction of the ability of absentee capitalists to amass such property. These include the federal Preemption Act of 1841, which legalized squatting on the public domain, making permanent the hitherto sporadic policy of making up to 160 acres (a quarter-section) of public land available to actual

inhabitants at a minimum price (see Preemption Act of 1841 §10, 27 Cong. Ch. 16, 5 STAT. 455). Like the later doctrine of prior appropriation, this statute provided that in cases of two or more settlers claiming the same land, the right would belong to the party who had settled first. It also required the settler to improve the land and swear that the appropriation was not being made for speculative purposes (see §§ 10 & 13, 27 Cong. Ch. 16, 5 STAT. 455-56).

" . . in 1877, the riparian priority vis-à-vis corporate diversions abolished, with the statute providing, "nor shall the water of any stream be diverted from its original channel to the detriment of any person or persons who may have priority of right" (see An Act to Provide for the Formation of Corporations § 85, 1877 COLO. GEN. LAWS § 275) - apparently subordinating the ditch company's rights only to earlier appropriations. . . . The common denominator was that speculative holdings, whether by virtue of ownership of riparian land or of priority of appropriation, were not recognized; only water put to productive use supported a valid claim.

"Thus, no one was allowed to forestall or to lock up natural resources. Labor was acknowledged as the creator of wealth, was given a free field, and secured in its reward... all had an equal chance. No one was allowed to play the dog in the manger with the bounty of the Creator. The essential idea of the mining regulations was to prevent forestalling and monopoly. (see CHARLES HOWARD SHINN, LAND LAWS OF MINING DISTRICTS 6-8 (Baltimore, N. Murray 1884); CHARLES HOWARD SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT 8, 20-30 (New York, Alfred A. Knopf 1948) (1885) [hereinafter SHINN, MINING CAMPS]"

Beneficial use of waters in Territorial Colorado, and thereafter, had been encoded into communitarian consciousness, and into statute and case law, on the basis that only use - not speculation, not monopoly, not location of application, and not anticipation of its future use - was the condition of "capture" of water.

The Colorado Doctrine of Appropriation was the first operating model of what came to be known as "pure" appropriation where not only access to waters was predicated solely upon the desire of use of the water but also where the democratization of waters of the people was evidenced only through actual "beneficial" use. (see Embrey v. Owen, 6 Exch 353, 155 ER 579 (1851) wherein he state supreme court later ruled (Derry v. Ross, 5 Colo. 295, 301 (1880)) that water had been *publici juris* in Colorado even before the adoption of the state Constitution. (for *publici juris* in American law, *see* Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 329-402 (Donald Fleming & Bernard Bailyn eds., 1971)). (see *publici juris*. "When a thing is common property, so that anyone can make use of it who likes, it is said to be *"publici juris*" as in the case of light, air, and public water - Black's Law dictionary).

(From: *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights,* Ecology Law Quarterly, Vol. 32:3, 2005. David B. Schorr):

> "One of the most prominent cases in American property law is Coffin v. Left Hand Ditch Co., (6 Colo. 443 (1882)) handed down by the Colorado Supreme Court in 1882. This opinion, which entirely abrogated the system of riparian rights inherited from the common law and so laid out the "Colorado doctrine" of "pure appropriation" for property in water, was widely influential in the adoption of the appropriation doctrine by other western jurisdictions.
>
> "A statute enacted in 1870 declared liability for damage caused by return flow of water after its use to be "in the same manner as riparian owners along natural water-courses." (see An Act Defining Rights and Liabilities of Miners and Mill Men in Certain Cases (§ 2, 1870 COLO.

SESS. LAWS 81; see the similar provisions in the miners" codes, *supra* note 93). (see Gregory Dist. Act 1860 § 19, territorial statute applying riparian-law rules for liability from return flow).

"Colorado was the first state to do away entirely with riparian rights, applying the doctrine of appropriation to all surface water in the state, including that found on private land - hence "pure appropriation." The Pacific coast states and those on the semi-arid eastern fringe of the prior appropriation region have retained some mixture of riparian and appropriative rights for surface water, while the law of the drier states lying in between these two groups followed the lead of the "Colorado doctrine," abolishing riparian rights completely." (see Joseph L. Sax, *Legal Control of Water Resources*, 294-306 (3d ed. 2000));

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**CONCLUSION:**

The Title, Ballot Title and Submission Clause and Summary:

There were no available established codes of "the law of water" in the Territory of Colorado prior to settlement. Rough hewn, ad hoc agreements of community-accepted legal uses of water in Miner's Court's and in the Territorial Legislature were formed from common experiences, fret with difficult factors complicating the uses of waters. The remarkable codes for water uses that emanated from the banks of small streams in mineral-rich drainages were a set of agreements that set to code necessities that arose from water scarcity, refusal to permit monopoly of resource, and from a resolute path of agreement to preclude speculation in waters so that all might have access according to supply. Colorado's evolution exigent water law stemmed from user's understanding of real day-to-day conditions and situations.

At the turn of the Twentieth Century, the people of the State of Colorado in 1910 (see Laws 1910 (Ex. Sess.), pg. 11.): amended ARTICLE V – Legislative Department – **Section 1. General assembly – initiative and referendum:**

> " (1)The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.
> " (2) The first power hereby reserved by the people is the initiative . . . "

Not unlike the creation of rules that emerged from gathering mining communities, from within legislative councils and Miner's Courts, the people of Colorado in 1910 included within constitutional provisions guiding state government the clear instruction that the people "retained the right" and the "power to propose laws and amendments to the constitution . . .".

Here, under consideration, is a proposed measure that would modify the Colorado constitution at ARTICLE XVI, Section 6 - the measure presented seeking to resolve some antiquated, some ambiguous, some elements in need of clarification, and some provisions at-the-current-time now necessary and desirable provisions at that section. The matters presented within the initiated proposal pertain only to, the "use" of the public's waters by diversion as provided in the Colorado Doctrine of Appropriation. The matters presented within the initiated proposal have been proposed for review and plebiscite to the electorate of Colorado so that the public might have the opportunity to redress perceived regulatory

misdirection, might have the opportunity to comment upon the current manner of the use of the public's waters, and might have the opportunity to fine-tune and focus important current considerations in the use of one of Colorado's, and of the public's, most valuable resources.

Colorado Initiative 2011-12 # 45 - the INITIATIVE TO MODIFY THE COLORADO CONSTITUTION, Article XVI, SECTION 6 – DIVERTING WATER – *LIMITATIONS*, as here presented, contains neither any violations of constitutional or legislative provisions relating to the single subject requirements for measures within a proposed constitutional amendment's subject matter, not does the initiative ballot title, as adopted by the Initiative Ballot Title Setting Board, contain any intentional, or unintentional, deceptions in the setting of the title or in the focus and treatment of the subject within the initiative.

---

"Here is a land where life is written in Water
The West is where the Water was and is
Father and Son of old Mother and Daughter
Following Rivers up immensities
Of Range and Desert thirsting the Sundown
ever

" Crossing a hill to climb a hill still Drier
Naming tonight a City by some River
A different Name from last night's camping
Fire.

" Look to the Green within the Mountain cup
Look to the Prairie parched for Water lack
Look to the Sun that pulls the Oceans up
Look to the Cloud that gives the oceans back
Look to your Heart and may your Wisdom
grow
" To power of Lightning and to peace of Snow."

- Thomas Hornsby Ferril

Men shall behold the Water in the Sky
And count the Seasons by the living Grasses.

Then shall the River-namers track the Sunset
Singing the long song to the Shinning Mountains.

Here shall the melting Snows renew the Oxen
Here Firewood is and here shall men build Cities.

Water shall sluice the Gold yellow as leaves
That fall from Silver Trees on silent Hills.

And men shall fashion Glaciers into Greenness
And harvest April rivers in the Autumn.

Water the lightening gave shall give back lightening
And Men shall store the lightening for their use.

Beyond the Sundown is tomorrow's Wisdom
Today is going to be long long ago.

Respectfully submitted this 6th day of February 2012;

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 6th. day of February, 2012, I mailed via an overnight delivery service, or hand delivered, a true and correct copy of the OPENING BRIEF OF THE RESPONDENTS, PHILLIP DOE AND RICHARD G. HAMILTON, in the matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Initiative 2011-2012 # 45, *Initiative to Modify Article XVI, Section 6 – Diversions of Water;* LIMITATIONS, to:

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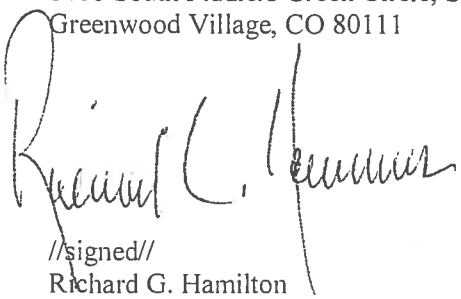

//signed//
Richard G. Hamilton