SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202 ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) Appeal from the Title Board	FILED IN THE SUPREME COURT FEB 2 1 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2011-12 #3 **Petitioner:** DOUGLAS KEMPER, as Registered Elector of the State of Colorado and **Title Board:** WILLIAM A. HOBBS, JASON GELENDER, and DANIEL DOMENICO and **Respondents:** RICHARD G. HAMILTON and PHILLIP DOE, Proponents.	
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ANSWER BRIEF OF PETITIONER, DOUGLAS KEMPER

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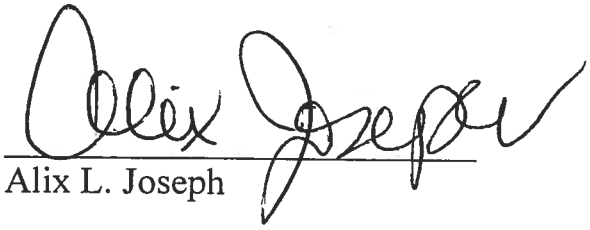

Alix L. Joseph

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SUMMARY OF ARGUMENT

Contrary to the Respondents' arguments, Initiative #3 violates the single subject rule because it contains multiple provisions with separate purposes: subordinating water rights to a public interest, and transferring rights in lands underlying and adjacent to streambeds to the public for access. Proponent Hamilton attempts to skirt the single subject rule by characterizing the measure as enacting the "Colorado public trust doctrine." Contrary to his assertion, the doctrine he has devised for Initiative #3 is not a doctrine rooted in the common law. Unlike Initiative #3's "Colorado public trust doctrine," the public trust doctrine as recognized by the U.S. Supreme Court and other states is rooted in constitutions, statutes, and common law. Moreover, the traditional public trust doctrine applies only to navigable waters and does not subordinate appropriative water rights.

The Title Board and Proponents cannot merge the multiple provisions of Initiative #3 into a single subject simply by arguing that the measure is geared toward a single, broader policy. Rather, the Court must examine both the policy aims of the Initiative and the practical objectives of each provision. Initiative #3's multiple provisions violate the single subject rule, notwithstanding any characterization as part of a broader policy, because they seek to achieve multiple

objectives. Accordingly, Proponents cannot overcome Initiative #3's violation of the single subject rule by characterizing their measure as enacting the "Colorado public trust doctrine."

ARGUMENT

I. The proposed "Colorado public trust doctrine" is defined by the content of Initiative #3.

Though characterized as a single doctrine, the proposed "Colorado public trust doctrine" is defined solely by the terms of Initiative #3, which has multiple subjects and purposes. A proposed initiative must be limited to a single subject, and violates this single subject rule when it "has two or more distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010); Colo. Const. art. V, § 1(5.5); C.R.S. § 1-40-106.5. "[A] proponent's attempt to characterize an initiative under some overarching theme will not save an initiative that contains separate and unconnected purposes from violating the single-subject rule." *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010).

The Court may determine that multiple purposes are accomplished by an initiative with a general theme, such that the initiative violates the single subject requirement. *In re Title and Ballot Title and Submission Clause for 2005-2006*

#55, 138 P.3d 273, 279 (Colo. 2006). Even where the Court can find a general theme in an initiative, all provisions must also have a common objective. *See In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995).

Proponents have characterized Initiative #3 as enacting a "Colorado public trust doctrine." However, because no constitutional, statutory, or common law authority in Colorado establishes any such doctrine, Initiative #3's scope is defined solely by its terms. Initiative #3 contains at least two subjects: the subordination of existing appropriative water rights to the public interest, and the transfer of real property from riparian landowners the public. Under the single subject rule, these two subjects cannot be unified simply by calling them a public trust doctrine.

A. The public trust doctrine as proposed by Initiative #3 is not a common law doctrine.

Proponent Hamilton notes the historical roots and definition of the public trust doctrine, but does not acknowledge how far Initiative #3 goes beyond the traditional understanding. Traditionally, the public trust doctrine is an ancient principle that provides for the public's access to navigable waters over what might otherwise be private property. *See generally*, JOSEPH SAX, THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCE LAW: EFFECTIVE JUDICIAL INTERVENTION, 68 Mich. L. Rev. 477 (1970). Developed in ancient Rome and later in England, this doctrine arose because coastal property owners wanted to exclude the public from

the wet sand area between their property and the ocean. *Id.* Because public access to the wet sand area was necessary to provide for commercial activities like shipping and fishing, it became necessary to fashion a doctrine that struck a balance between private property rights and economic development. *Id.* The result was called the public trust doctrine, which provided that the lands up to the high water mark of navigable waters are held in trust for the public by the state. *Id.*

The public trust doctrine was first recognized by the United States Supreme Court in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), *aff'd.*, 154 U.S. 225 (1984). *Illinois Central* extended the public trust doctrine to the shores of the Great Lakes, beyond the coastal boundaries of the tidal waters, and applied it to the shores of Lake Michigan. *See id.* Various state supreme courts have also read their states' constitutions as containing a public trust doctrine. *See, e.g., Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011); *Galt v. Montana*, 731 P.2d 912, 915 (Mont. 1987); and *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) ("*Mono Lake*"). However, as the State acknowledges, Colorado has never recognized a public trust doctrine. *See People v. Emmert*, 597 P.2d 1025 (Colo. 1979); *see* Title Board's Opening Brief at 6. Initiative #3 would, by constitutional amendment, create and define a Colorado public trust doctrine that never has existed elsewhere in Colorado law.

1. *Illinois Central* describes the "American public trust doctrine," which applies only to navigation and navigable waterways.

In *Illinois Central*, a railroad company was constructing storage buildings along the coast of Lake Michigan in Chicago and wanted to exclude the public from the wharfs, piers, and docks it was building into the waters of Lake Michigan. 146 U.S. at 434. The United States Supreme Court began its analysis by establishing that, for the purposes of navigability, the Great Lakes are just as navigable as the seas, though the Great Lakes are fresh-water and are not affected by the tides. *Id.* at 435-36. The Court noted that Britain's public trust doctrine was limited to the tide waters, but recognized that because England does not have any lakes or inland waterways that the English considered to be "navigable," the words "navigable" and "tide waters" were functionally equivalent. *Id.* The Court ultimately held that the lands underlying navigable waterways, such as Lake Michigan, should be subject to the public trust doctrine, holding that the Great Lakes are "inland seas," *id.* at 435, and that the railroad company's riparian rights only included the right to build structures up to the navigable point in the waters of Lake Michigan, but no further past the "point of navigability." *Id.* at 446.

2. Other states have a public trust doctrine based on language in their respective constitutions, statutes, and jurisprudence.

After the U.S. Supreme Court recognized the public trust doctrine in *Illinois Central*, the legislatures and courts of some western prior appropriation states read their respective constitutions, statutes, or common law as encompassing a public trust doctrine. In 1913, the California Supreme Court determined that California's Constitution provided for a public trust doctrine. *People v. California Fish Co.*, 138 P. 79 (Cal. 1913). Seventy years later, the California Supreme Court in 1983 interpreted its public trust doctrine as protecting the navigable Mono Lake from increasing water diversions made from tributary streams to support a growing Los Angeles. *Mono Lake*, 658 P.2d at 720-21. In *Mono Lake*, the California Supreme Court clarified its 1913 adoption of the public trust doctrine based on a statutory provision prohibiting the state from alienating tidal lands, which the court found to be based on the state constitution's gift clause. *Marks v. Whitney*, 491 P.2d 374, 379 (Cal. 1971) (citing *People v. California Fish Co.*, 138 P. 79 (Cal. 1913)). Further, the appropriative water rights owners who were diverting water from a tributary of Mono Lake had at least some notice that their rights may be curtailed because the lake was navigable and seventy years of California jurisprudence upheld the California public trust doctrine. *Mono Lake,* 658 P.2d at 723-24.

In 2011, the Supreme Court of Nevada adopted the public trust doctrine. *Lawrence*, 254 P.3d at 611-13. *Lawrence* held that the state's common law and constitution supported the principles of the doctrine, though it had never been expressly adopted. The Court declared, "public trust principles are contained in Nevada's Constitution and statutes and are inherent from inseverable restraints on the state's sovereign power." *Id.* at 612. The Court went on to draw inferences from the Nevada Constitution's gift clause, which prohibits the conveyance of public property without a public purpose, and looked to Nevada state statutes that evidence public rather than state ownership of the state's waters, and other lands. *Id.* The Nevada Court upheld the State's title, under the public trust doctrine, only to land underlying portions of the Colorado River that were "navigable at the time of Nevada's statehood." *Id.* at 615. Thus, California and Nevada decisions have looked to their state constitutional provisions and (like *Illinois Central)* to the English common law to define application of a public trust doctrine in navigable waters.

3. The Colorado Supreme Court has held that the Colorado Constitution does not support a public trust doctrine for non-navigable waters such as the Colorado River.

The Colorado Supreme Court expressly determined in *Emmert* that Colorado has not adopted a public trust doctrine. 597 P.2d at 1027-29. In *Emmert*, this

Court affirmed the rule that the streambeds of non-navigable streams are owned by the landowners and not the public. *Id.* Therefore, the defendants in *Emmert* had committed trespass by floating down the Colorado River as it passed over private land because the Colorado River in Colorado is non-navigable. *Id.*

The Court reasoned that the Colorado Constitution is clear that appropriative water rights for beneficial use are the primary reason for the public's rights in the water, noting that the "water of every natural stream . . . is hereby declared to be the property of the public . . . subject to appropriation as hereinafter provided." *Emmert*, 597 P.2d at 1028 (citing Colo. Const. art. XVI, § 5). Colorado's Constitution limits the public's rights in the water of the state to unappropriated water, thereby protecting the rights of appropriators, rather than subordinating water rights to a public interest. *Id.* While noting that Wyoming had allowed recreational use of non-navigable streams bounded by private property, the Court explicitly declined to follow Wyoming's example, noting the differences in the constitutional provisions, and Colorado's Constitution's emphasis on rights of appropriation. *Id.*

Though Proponents strive to characterize their "Colorado public trust doctrine" as one subject, no such doctrine has ever existed in Colorado law. Neither does the traditional public trust doctrine extend to non-navigable waters as

Initiative #3 proposes. Accordingly, the provisions of Initiative #3 must be evaluated on the Initiative's terms alone to determine whether it contains more than one subject. In violation of the single subject rule, the Initiative contains at least two subjects, subordinating water rights to the public interest and transferring to the public privately owned rights in the lands underlying and adjacent to waterways. Those subjects cannot be subsumed into one simply by naming them the "Colorado public trust doctrine."

B. Initiative #3 would adopt its particular combination of provisions, naming them the "Colorado public trust doctrine."

1. Unlike the traditional public trust doctrine, the Initiative's provision for land access extends to all streams.

Many states that have adopted a public trust doctrine have included a public right to access land underlying navigable waters. For example, in *Galt*, 731 P.2d at 915, the Court held that use of the land by the public to access the water of navigable streams "must be of minimal impact." *Id.* Similarly, in Maine the public trust doctrine includes the right of the public to use "intertidal lands." *McGarvey v. Whittredge*, 28 A.3d 620, 624 (Me. 2011). Finally, Nevada has acknowledged that lands submerged beneath navigable waterways are included in the public trust doctrine. *Lawrence*, 254 P.3d at 617. Like *Illinois Central*, these cases refer to navigable waterways in their characterization of the public trust

doctrine. To the contrary, the "Colorado public trust doctrine" proposed in Initiative #3 includes lands beneath and adjacent to non-navigable waterways, encompassing virtually all surface water in Colorado. In so doing, the measure cannot fairly be characterized as adopting a public trust doctrine as that phrase has traditionally been understood.

2. The provisions subordinating water rights are likewise not rooted in the traditional public trust doctrine.

Initiative #3's proposed "Colorado public trust doctrine" would subordinate existing and future appropriative water rights to certain interests of the public, turning the current priority scheme on its head. *See* Colo. Const. art. XVI, § 5. Traditionally, however, the public trust doctrine does not address water rights.

Initiative #3 reaches far beyond the traditional public trust doctrine articulated by *Illinois Central* by subordinating appropriative water rights to the public trust. *Illinois Central* was decided in the context of a riparian rights regime where water is plentiful and not subject to competing priorities as in Colorado and other western states. 146 U.S. at 438. Accordingly, the Supreme Court did not address the impact of the public trust doctrine on private appropriative water rights.

Of the western states that apply the public trust doctrine, only a small number have applied the public trust doctrine to their systems of allocating water rights, most notably California, through the *Mono Lake* decision. *See* 658 P.2d at

732. This application of applying the public trust doctrine is only one element among many that make California's system of allocating water rights virtually unique among prior appropriation states. *See generally* GEORGE A. GOULD, THE PUBLIC TRUST DOCTRINE AND WATER RIGHTS, 34 Rocky Mtn. L. Inst. 25-1, 43 (1988). California's water rights regime recognizes riparian rights and requires that uses be reasonable, as well as beneficial. *Id.* Colorado's water rights regime has no riparian rights and no "reasonable use" limit. In contrast to California courts, Colorado's Supreme Court stated in *Emmert* that the strong language in the Colorado Constitution favoring appropriative rights precludes adoption of a public trust doctrine. *See Emmert*, 597 P.2d at 1028.

As Mr. Domenico acknowledged at the January 4, 2012 Title Board meeting, Initiative #3's "Colorado public trust doctrine" is not a common law doctrine. Title Board Rehearing Transcript, Proposed Initiative #3 ("Rehearing Transcript") 19:19-25, January 4, 2012 (attached as Appendix F). Rather, it is entirely a function of the terms of Initiative #3. Accordingly, Initiative #3's separate and discrete purposes cannot be couched as part of a single doctrine. Rather, because the measure seeks to achieve multiple purposes, subordinating all water rights to a public interest and transferring rights in all streambeds to the public, Initiative #3 violates the single subject rule.

II. Initiative #3's statement that all its provisions constitute a public trust doctrine cannot make it a single subject.

The multiple objectives in Initiative #3 cannot be considered a single subject solely because both proposals are arguably geared towards a single, broader policy or theme. *See In re Public Rights in Waters II*, 898 P.2d at 1078 (finding that common overarching characteristic between two provisions did not amount to single subject where the proposals represented "two distinct and separate purposes which are not dependent upon or connected with each other."). When analyzing whether an initiative is limited to a single subject, it is important for the Court to examine: (1) whether the practical effects of the provisions within that broader principle are sufficiently connected to one another; and (2) the likelihood that the multiple provisions will mislead voters. *In re Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995). Initiative #3, by attempting to pair two fundamentally different proposals beneath the broader umbrella of a "public trust doctrine," cannot withstand the scrutiny of either of those tests.

The Court should focus on the substance and purposes of an initiative, rather than on the broader goals to which the initiative might aspire, when analyzing whether the initiative encompasses a single subject. *See e.g., In re Title, Ballot Title and Submission Clause for 2005-2006 #74,* 136 P.3d 237 (Colo. 2006) (finding that, even where multiple provisions were applied uniformly and served

same broader purpose, effects of provisions were too different to support single subject). In *Amend TABOR 25*, the Court noted that two specific proposals – the establishment of tax credits and procedural changes for future ballot titles – both shared a common characteristic under the blanket subject of "revenue changes" and the broader goal of repeal and amendment of TABOR. 900 P.2d at 125. This tenuous commonality was not enough, however, to overcome the fact that the two proposals were not "dependent upon or connected with" one another, but rather served "two distinct and separate purposes." *Id.* (internal citations omitted).

The differences between the practical effects and purposes of the two proposals in Initiative #3 far outweigh any arguable common connection the two proposals have to a broader policy goal of establishing a public trust doctrine. Initiative #3 proposes to: (1) subordinate existing water rights to the public interest; and (2) grant to the public rights in land that is adjacent to or beneath natural streams. Not only are these proposals not mutually dependent on one another, but they affect two distinct sets of property rights. Considering the different purposes and immediate effects of Initiative #3's dual provisions, and the differing interests attracted by these differing effects (as noted in Petitioner's Opening Brief at 12-14), those provisions impermissibly serve "two distinct and separate purposes." *See Amend TABOR 25*, 900 P.2d at 125; *see also In re 2009-*

2010 #91, 235 P.3d at 1079. Thus, even if the traditional public trust doctrine were a single subject, Initiative #3 far exceeds the scope of the traditional public trust doctrine and cannot be considered a single subject.

III. The Titles' summary of Initiative #3's subject matter is inadequate.

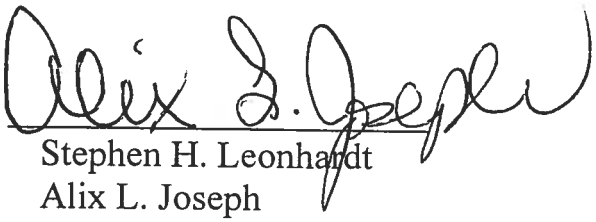
The Title Board argues that the Titles accurately summarize the measure using the phrase, "the public's rights in the water of natural streams." However, this phrase in the Titles is inaccurate and improper for the reasons discussed in Petitioner Kemper's Opening Brief at 16-17.

CONCLUSION

Initiative #3 contains multiple discrete subjects and therefore violates the single subject rule, despite its internal characterization as a single doctrine. Accordingly, this Court should reverse the Board's action in setting the Titles.

Respectfully submitted this 21st day of February 2012.

BURNS, FIGA & WILL, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February 2012, a true and correct copy of the foregoing BRIEF OF DOUGLAS KEMPER IN RESPONSE TO THE OPENING BRIEFS OF THE TITLE BOARD AND OF PROPONENT HAMILTON was served by Federal Express on the following:

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TITLE SETTING REVIEW BOARD MEETING

January 4, 2012

Initiative #3

TRANSCRIPT MADE FROM CD

CHAIRMAN HOBBS: Let's resume. The time is 5:14. The last agenda item is No. 2011-2012, #3, Colorado Water Streams. This is back before the board on a Motion for Rehearing submitted on behalf of Mr. Kemper by Steve Leonhardt and Alix Joseph.

Mr. Leonhardt, I think we need to hear from you first since it's your motion.

MR. LEONHARDT: Thank you, Mr. Chairman. Stephen Leonhardt for the petitioner Mr. Kemper. And Mr. Kemper has stepped out for a few minutes.

The Motion for Rehearing addresses the question of single subject with Initiative No. 3. This initiative contains multiple subjects in that first it would subordinate water use rights, which appear to include past, present, and future water use rights to a Public Trust Doctrine. Water use aspects of that are defined in primarily subsection 4 of the initiative.

Then you have subsection 5 that would establish constitutional public access rights on all streams across private property.

The latter subject was the main issue addressed in at least 20 initiatives proposed last year, most of which were heard by this board. These are two separate subjects. They're not dependent upon

or connected with each other and certainly not necessary to each other. And it appears that we have the issue of logrolling, that these two are combined in a single measure to attract support from the supporters of both concepts that have been the subject of separate and distinct initiatives that have been proposed but not enacted in years past.

Mr. Hamilton's response to our Motion for Rehearing quotes from a recent Nevada Supreme Court case in which Nevada adopted the traditional Public Trust Doctrine, which is something that Colorado has never done. But that decision reinforces that the traditional Public Trust Doctrine is a doctrine regarding the state's ownership of land underlying navigable water rights.

Even if the traditional Public Trust Doctrine were considered to be a single subject, this measure goes far beyond that traditional doctrine in two very different ways: First of all, by subordinating all water rights to the public trust for the so-called public's ownership -- or public's estate or public's interest as defined in the initiative.

And similar to Initiative 45, the public's interest is defined to mean the protection of the environment and public use of water rights.

Second, the initiative would create state ownership along any natural stream in Colorado, not just along navigable waterways. The legal experts on navigable waters have questioned whether there are any navigable waters in Colorado for these purposes.

Certainly, the Colorado Supreme Court has never found there to have been any. At most, navigable waterways is an extremely small subset of the initiative's provision for any natural stream in Colorado.

I know that there was some discussion last time about the Public Trust Doctrine being a concept that has been understood and adopted in other states and other countries going back to Roman times. But that concept is a much narrower one than either of the items proposed in this initiative.

So even if that traditional doctrine were a single subject, it does not render this initiative a single subject.

And while not set forth in the motion, we do have a similar concern with the titles raised concerning the adoption of "the Public Trust Doctrine" for the water of natural streams.

First of all, the characterization of the subject of this matter doesn't address the separate

objectives. But in another sense, the statement is too narrow, in that adoption of "the Public Trust Doctrine" implies that the initiative would have Colorado adopt the traditional Public Trust Doctrine.

But this measure, as I've just outlined, goes far beyond the traditional Public Trust Doctrine as it's been recognized elsewhere over the years.

CHAIRMAN HOBBS: To that last point, you think that -- I'm not sure how to ask the question -- that a reference to the Public Trust Doctrine necessarily must be the traditional Public Trust Doctrine? Or -- I would have thought the proponents may redefine it for Colorado purposes and that if these -- the title drafts ought to explain how it may be different, but there would be nothing wrong with saying this is about the adoption of the Public Trust Doctrine and maybe explaining the major differences.

MR. LEONHARDT: Well, at least I believe the use of the article "the" before Public Trust Doctrine is very misleading in its implication of the traditional Public Trust Doctrine.

CHAIRMAN HOBBS: Okay. And remind me, is that accurate at Line 2 to say Public Trust Doctrine for the water of natural streams? It is limited to natural streams. Or maybe I should ask the

proponents.

MR. LEONHARDT: I'd have to take another look at the measure on that.

Section 2 of the initiative does say that the Colorado Public Trust Doctrine is hereby adopted, et cetera, to protect the public's interest in the water of natural streams. That's the phrase that the board was looking at and adopting, that language.

CHAIRMAN HOBBS: I'm wondering -- the Motion for Rehearing is talking about subsection 5. And I guess this is really going to be a question I have for the proponents again. But I'm wondering whether it (inaudible) provide access from the public along and on the wetted natural perimeter stream banks.

I would like to understand that better, but I'm wondering how you interpret that right of access. Specifically, what does that mean? Does that mean there's a right of access along the banks? Does it mean there's a right of access to walk on the streambed? I'm wondering how you understand that.

MR. LEONHARDT: Any understanding I have is based on how they addressed it at the hearing on this measure two weeks ago. I would defer to them on that question.

CHAIRMAN HOBBS: Fair enough. Thank you.

Any other questions?

MR. DOMENICO: Yeah. Could you just explain how you -- how it is you think that that right of access is unconnected with or incongruous with the Public Trust Doctrine?

MR. LEONHARDT: Well, first of all, the Public Trust Doctrine could mean the traditional Public Trust Doctrine or it could mean the Public Trust Doctrine as it's been defined in Sections 2 through 4 of this measure, which I think are two very different things to begin with.

MR. DOMENICO: Well, how about with -- is it incongruous with only one, or is it unconnected with both, would you argue?

MR. LEONHARDT: I believe it's unconnected with both. I think this initiative has very little to do with the traditional Public Trust Doctrine. Maybe to the slight extent that some day someone might find one stream in Colorado to be navigable, then there might be a connection.

But based on the lack of any finding of navigable streams for this sort of purpose, I don't know that there's any connection with the access part.

The water use part I think extrapolates from a California Supreme Court decision several years ago

that was also based on a navigable waterway, a navigable lake, and a navigable estuary going into the San Francisco Bay. But those issues about navigable waterways under the traditional Public Trust Doctrine do not seem to be connected with either of the subjects that are dealt with in this measure.

The so-called public trust subordinating water use rights to a dominant public interest or public estate deals with rights to divert and use water by prior appropriation under Section 6 of the Constitution. It doesn't deal at all with rights of a landowner who might have a small stream crossing his or her property.

CHAIRMAN HOBBS: My difficulty -- and this is part of what we discussed last time -- is that at least it seems like in subsection 5 that the proponents are basically defining that right of access to be part of Colorado's Public Trust Doctrine.

And I can't say that that's erroneous. It may not be part of a traditional Public Trust Doctrine, but they even say it's the right of the public to use -- through the use of its own water in concert with the Colorado Public Trust Doctrine. Can't proponents define that to be part of a Public Trust Doctrine?

MR. LEONHARDT: Well, they can't define whatever they want to include in a doctrine and thereby make it a single subject. The single subject depends on having subjects that are not incongruous, with having subjects that have a necessary connection to each other. And these do not.

As the Supreme Court involved in the "Public Rights in Water II" case, the mere fact that both of these items on their agenda relate to water does not in and of itself create a single subject.

CHAIRMAN HOBBS: Well, I agree, but it just seems like this subsection 5 is a distant myth, a measure that's defining the public's rights in water. In this case, it's access to the natural stream, along the natural stream.

I don't see that it's incongruous or inconsistent or surprising. It seems like proponents may say that's part of a Public Trust Doctrine -- of the bundle of rights that the public has in the waters of the state in natural streams.

MR. LEONHARDT: I believe that that's a connection made only in the intent of the proponents and that that's not sufficient.

CHAIRMAN HOBBS: Thank you. Mr. Kemper, do you want to testify in support of the Motion for

Rehearing? Do you have anything to add?

MR. KEMPER: Just to support what Steve Leonhardt said. In the interest of the hour, I will (inaudible).

CHAIRMAN HOBBS: Thank you. Before I turn to the proponents, is there anybody else who wishes to testify upon the Motion for Rehearing?

If not, then Mr. Hamilton and Mr. Doe, and/or? You don't both have to testify.

MR. HAMILTON: In the Clark County case -- the Lawrence versus Clark County case, Supreme Court of Nevada, at Page 15, quote: "Resolution of disputes over title to the public trust land is a matter of state law. See Phillips Petroleum v. Mississippi, 484 U.S. 469 ... state courts considering the public trust doctrine have developed their own frameworks for examining the administration of lands held in public trust."

So there are the macro concept of a Public Trust Doctrine. Then there are elements of the Public Trust Doctrine that states undertake themselves. So I believe that that's not incongruous at all.

MR. DOE: As to the objection that they're parts to the whole, I mean, if you went to the Oxford English Dictionary and looked up the word today, you

might find a whole page of explanations, but there's only one word, and we have one concept here, and it's the Public Trust Doctrine and their explanations about what that means. But it's still the Public Trust Doctrine.

And I think generally speaking when you get people like Joseph Sachs talking about public trust, it's called "the Public Trust Doctrine." It has general understanding, legal understanding, and public understanding.

And many states allow public access on their rivers. Montana has for years and years and years and years. Now, it doesn't make the landowners very happy. Utah just implemented that right. So it's not -- this is not unique.

I mean, if the public owns the water, what are its rights with regard to that water? And all we're trying to do is establish what those rights are. If it owns it, I mean, we have the responsibility for keeping the water clean, for stocking it with fish. But we seem to be denied or some people want to deny us the right to enjoy those things that we pay for.

MR. HAMILTON: I'd like to suggest that the title that you adopted at the last hearing is sufficient.

CHAIRMAN HOBBS: Can I ask just -- one question I was asking Mr. Leonhardt, and I'm not sure that it's material, but I just want to -- in, again, subsection 5. Give me a visual. I mean, just what access is granted by that first sentence? Is it just the right to float? Is it something more?

MR. HAMILTON: Access along the wetted natural perimeter of a stream. If the stream is there -- if you're walking in the middle fork of the South Platte down by Hartsel, there's a part that is the literal part along the wetted perimeter. That would be an easement in favor of the public because of that being within the public.

CHAIRMAN HOBBS: Okay.

MR. DOE: What you couldn't do is you couldn't park your car, walk across somebody's private land for half a mile, and then jump in the creek. You would have to have a point of access, probably a bridge or where the state had paid for an easement to get access. And once you got that access, you could stay in that stream up to its high water mark on down the river.

CHAIRMAN HOBBS: Staying within the perimeter of access.

MR. HAMILTON: Yeah. You're not allowed to

jump up.

MR. DOE: You're not allowed to go over to the farmer's house and say, How are you doing today? That doesn't work.

CHAIRMAN HOBBS: And you can step out and fish?

MR. HAMILTON: Yes. You're allowed to -- the access is along and on the wetted perimeter. It's not -- there's no riparian right there -- no riparian property right there.

CHAIRMAN HOBBS: Further questions? Okay. Thank you.

Mr. Strauss?

MR. STRAUSS: Access has to do with portaging. Access is connected to use. You have to have access in order to (inaudible) water. And that is -- access is an incidental of use. There are terms called cordeling and lining related to portaging and essentially means you're carrying the boat upstream. You're holding onto a line of rope and (inaudible) water on the banks, which is -- banks is the area between the ordinary low water mark and the ordinary high water mark.

So there is a connection between access from -- a public access, such as a public county

bridge, and use of the water and then incidental contact with the bed in that use of the water. All those -- there's lots of long-settled U.S. federal laws that . . .

CHAIRMAN HOBBS: Thank you. I don't think I have you signed up for this thing. You signed up for 45.

MR. STRAUSS: Well --

CHAIRMAN HOBBS: Go ahead and sign up for No. 3 as well.

MR. STRAUSS: I signed --

CHAIRMAN HOBBS: Oh, did you already sign up?

MR. STRAUSS: Well, I signed one time.

CHAIRMAN HOBBS: Oh, okay. If you wouldn't mind signing -- this is for No. 3.

MR. STRAUSS: Okay. I didn't see that back there.

CHAIRMAN HOBBS: Thank you. Sorry.

(Inaudible).

CHAIRMAN HOBBS: Board discussion?

MR. DOMENICO: I'll start.

CHAIRMAN HOBBS: Okay. Mr. Domenico.

MR. DOMENICO: This sort of strikes me that it raises a lot of the same concerns that Mr. Hobbs

especially had in No. 46 about potential logrolling, about issues that are related certainly but potentially separate subjects unconnected and incongruous.

This is what's potentially confusing and unclear about some of the precise details. And also I think a potential catchphrase problem, which the conversation here today really raised for me.

So in that sense, it's quite similar the questions I have to ask and answer about whether Section 5 is a separate subject from the Colorado Public Trust Doctrine that's created in Sections 2 through 4.

And I think -- I think I am where I was on 46, I guess it was, that you could certainly -- and people have certainly written measures dealing with each of these separately. But I don't know that that means they have to be dealt with separately.

They both do deal with public use and access to water. Those aren't necessarily the same thing, but they're also not necessarily inconsistent with each other.

So I think I'm -- on the single subject, I think I'm okay. I am very concerned about whether using Public Trust Doctrine is a catchphrase in the

way that "right to life" was a catchphrase. It's certainly part of the text of both measures, and it is also a legal term that is used elsewhere.

But it also strikes me as potentially misleading for the reasons we talked about today that it means a lot -- it means different things. It can be used sort of as a shorthand that can mislead people, I think.

So I'm concerned about using that language in the title, especially as the single subject.

MR. GELENDER: Okay. I think I'll weigh in. I do think there's sufficient connection between what's being defined and that the access rights, as limited in the initiative, seem to be not incongruous and properly connected to the rest of the substance of the initiative.

On the issue of Public Trust Doctrine, it looks like that phrase has been upheld by our Supreme Court in '94 as not being a catchphrase. And they also said -- and that goes to matter of proposed initiative on water rights. And the court said that we don't have to attempt to define or interpret a term even if it might create a new and potentially controversial legal standard.

Having said that, that doesn't necessarily

mean that it's the ideal way to do it (inaudible) subject, and I'd certainly be happy to hear or maybe even propose an alternative as a way that we should just say something like inserting public -- I don't know -- the public use of the water of natural streams or something else.

MR. DOMENICO: Yeah. I mean, I understand that it's been upheld as not a catchphrase. I also wonder, though, if the way that the phrase has been or could be used has changed in such a way since then in the way that maybe "right to life" also would have changed over time and whether -- I'm just concerned it is potentially misleading.

If people already have in their mind something -- when they hear the phrase "Public Trust Doctrine," if people have in their mind that that means something and this means something different, that concerns me.

MR. GELENDER: Would you like to propose an alternative, or would you like me --

MR. DOMENICO: I thought the proposal you were heading towards was a good one.

MR. GELENDER: And I don't know if it goes too far to say something like, considering the expansion of the right of the public to use the water

of natural streams. I'll throw that out there for starters.

CHAIRMAN HOBBS: And I may support that. I'm just wondering about starting more simply and dropping the words "naturally" and saying basically concerning the public's rights in waters of natural streams.

That was actually the subject addressed in No. 135. But what my picture was, then we would go on to say maybe, "and, in connection therewith, establishing a Public Trust Doctrine," or something like that.

Maybe that doesn't add anything, but I agree that saying a single subject is adoption of the Public Trust Doctrine (inaudible). I'm open to changes, but I hate to pack too much into the expression of a single subject.

Mr. Gelender, again, you were saying the expansion of -- go ahead.

MR. GELENDER: Going without the expansion doesn't bother me at all.

CHAIRMAN HOBBS: If you start -- I may have changed your words. I don't remember. I was suggesting "the public's rights and waters of natural streams." But that may not be correct.

MR. DOMENICO: Sorry to interrupt. That's pretty close to the actual language of the measure, which says "the Colorado Public Trust Doctrine is hereby adopted and implemented by the people to protect the public's interests in the water of natural streams."

So you're pretty close to the language of what the measure says is the main purpose or effect of the doctrine it's adopting.

MR. GELENDER: ... for me.

CHAIRMAN HOBBS: Would it be better to say, "the public's interests in the water of natural streams"? Let's take the most strict . . .

Mr. Hamilton?

MR. HAMILTON: A suggestion. How about the adoption of a common law doctrine make a public trust? Your concern that there may well be some aspect of the words public trust that --

MR. DOMENICO: This doesn't strike me as adopting a common law doctrine.

MR. HAMILTON: The common law doctrine -- Justice Field in the Illinois Central called it a common law doctrine.

MR. DOMENICO: Sure. But a common law doctrine is a doctrine created through years of

litigation and case law.

MR. HAMILTON: Yes.

MR. DOMENICO: This is created here and has some very specific definitions.

CHAIRMAN HOBBS: What's your pleasure?

MR. DOMENICO: I liked -- I mean, using something that we've used before strikes me as a good option. Just quoting from the measure is also fine, so . . .

CHAIRMAN HOBBS: Granting the public's rights in waters -- water or waters? 135 said "waters," but maybe it's "water."

MR. GELENDER: Just say "the water." That's the measure --

CHAIRMAN HOBBS: "Of natural streams"?

MR. GELENDER: Yeah. You're good.

CHAIRMAN HOBBS: Okay. Good. Do we then want to say something after the "in connection therewith" without a Public Trust Doctrine?

MR. GELENDER: I would say no personally. I mean, I think if it's viewed as potentially misleading or something like a catchphrase in the title, I don't see why it's necessarily that much less so in the (inaudible).

MR. DOMENICO: Yeah. And I agree with that.

I mean, the measure lays out what the measure does, and the title lays it out. And "Public Trust Doctrine" sort of just characterizes it in a way that doesn't -- I don't think it is meant to add or subtract anything from the specifics of the measure, which I think the title does a pretty good job of laying out.

CHAIRMAN HOBBS: I guess I don't feel strongly about it. But I think it's pretty important to the proponents, and it is the first thing said in their measure: "The Colorado Public Trust Doctrine is hereby adopted."

MR. DOMENICO: Like I said, this is remarkably similar to No. 46.

CHAIRMAN HOBBS: And as an aside, actually, I was wondering if I'm being inconsistent about the single-subject issue because there really is a strong parallel. We start off with a very good-sounding, broad concept, public rights in water, Public Trust Doctrine, or something like that. And then we get down to the details, and there's a controversial provision that's a specific application. Again --

MR. GELENDER: I think you are. I'll say it.

CHAIRMAN HOBBS: I think I can distinguish

it, but it's a pretty fine line.

MR. GELENDER: I agree.

CHAIRMAN HOBBS: Yeah. Phil?

MR. DOE: I guess it really doesn't matter, but my concern would be that by taking out "Public Trust Doctrine," it makes this more subject to challenge of the single subject.

The Public Trust Doctrine, it's basically a single subject. I mean, whether you like the subject or not, it's a single subject. And if you start talking about the public's rights, then all of a sudden you've got a whole canapoli (phonetic) of things going on.

MR. DOMENICO: Right. I understand that. I sort of -- with both this and 46, I sort of questioned, what if you just had a measure that only said "we hereby adopt the Public Trust Doctrine," or "we hereby implement the right to life"? And we think that that might be a catchphrase.

Well, what do you do then? How do you deal with that? But here, I think, you know, both of these measures do specify what is meant in the measure by those phrases. And so I don't think this alters the single-subject analysis one way or the other. I don't think it should, at least.

UNKNOWN SPEAKER: I'm okay with what we have.

CHAIRMAN HOBBS: And I think at least the intent is maybe to not support (inaudible) a challenge. The catchphrase issue may have been resolved, but --

MR. DOMENICO: Yeah. It may have been.

CHAIRMAN HOBBS: Mr. Gelender, are you okay with what we have?

MR. GELENDER: I am.

CHAIRMAN HOBBS: Any other motions or discussion?

The essence of the Motion for Rehearing is really a challenge to single subject. You know, I think in an ancillary way, by amending the description of the single subject in the titles, I don't feel like we're totally going off on a frolic and detour, even though we have sometimes in the past anyway in a Motion for Rehearing. And then we grant the Motion for Rehearing and then identify other issues with the titles.

I wanted to observe that in case anyone is concerned about what we're doing so far. I mentioned, I think there really is a good argument that there's potential single-subject violation. I think this is

slightly different from No. 46, which felt more like logrolling and then (inaudible) prohibition on intentionally killing innocent people.

It seems more separate to me compared to this where I think we're talking about broad rights. And the question is, what do they apply to? It's more a question of the details. You know, you can criticize --

MR. DOMENICO: No, I agree with you. I think they're very parallel. I find this one slightly harder; that they're not as necessarily related to one another as the others.

But I agree they're very similar issues.

CHAIRMAN HOBBS: Well, if there's no other discussion and no other suggestions, then I think I will make a motion that the board deny the motion -- well, I'll state it the other way around.

One way to state it is grant the motion to the extent that the board submit the titles and deny it in all other respects. And I guess another way is deny the motion except to the extent that the board has changed them. Preference on the motion?

MR. DOMENICO: I second the latter, I think.

CHAIRMAN HOBBS: Deny. Accept?

MR. DOMENICO: Yes, accept.

CHAIRMAN HOBBS: That the board deny the motion for rehearing except to the extent that the phrase may have been changed to the titles. Is there a second?

MR. DOMENICO: That's what I second. I second that.

CHAIRMAN HOBBS: Oh, okay.

MR. GELENDER: Second by Mr. Domenico.

CHAIRMAN HOBBS: Okay. Any further discussion? If not, all the those in favor, say "aye."

(Collective "ayes.")

CHAIRMAN HOBBS: All those opposed, "no." That motion carries three to zero.

That completes action on No. 3. That concludes our agenda today. And the time is 5:50 p.m. Thank you so much for your patience and for sticking it out.

CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF JEFFERSON)

I, VALORIE S. MUELLER, Registered Professional Reporter and Notary Public in and for the State of Colorado, duly appointed to transcribed the herein recording, certify that said was taken in shorthand by me and was thereafter reduced to typewritten form by me and processed under my supervision, the same consisting of 26 pages, and that the same is a full, true and complete transcription, given the quality of the audio CD.

I further certify that I am not related to, employed by, or counsel to any of the parties herein, or otherwise interested in the events of the within cause.

IN WITNESS WHEREOF, I have affixed my signature this 26th day of January, 2012.

My Commission Expires: December 10, 2015.

_____
VALORIE S. MUELLER
Registered Professional Reporter