

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

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

IN RE TITLE AND BALLOT TITLE AND
SUBMISSION CLAUSE SET FOR
INITIATIVE 2011-12 #3

Petitioners: 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.

Attorneys for Petitioners:

BURNS, FIGA & WILL, P.C.
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FILED IN THE
SUPREME COURT

JAN - 9 2012

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

▲ COURT USE ONLY ▲

Case No.

PETITION FOR REVIEW

Douglas Kemper (“Petitioner”), a registered elector of the State of Colorado, by and through his counsel, Burns, Figa & Will, P.C., respectfully petitions this Court pursuant to C.R.S. § 1-40-107(2) to review the actions of the Ballot Title Board with respect to the setting of the title, ballot title and submission clause for proposed Initiative 2011-2012 #3 which was submitted to appear on the November 2012 ballot. Mr. Kemper is the Executive Director of the Colorado Water Congress.

I. ACTION OF THE BALLOT TITLE BOARD

The Ballot Title Board (the “Board”) conducted a public meeting pursuant to C.R.S. § 1-40-106(1) on December 21, 2011, at which time it designated and fixed a title, ballot title and submission clause for the Initiative 2011-2012 #3. Petitioner, a registered elector of the State of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on December 28, 2011. The Motion for Rehearing was heard at the next regularly scheduled meeting of the Board on January 4, 2012. At the rehearing, the Board, by majority vote, denied Petitioners’ objections. Petitioners hereby seek review of the final action of the Board pursuant to C.R.S. § 1-40-107(2) with regard to the issues set forth below.

II. ADVISORY LIST OF ISSUES PRESENTED

A. Whether, in identifying the measure's subject in the Title as "the public's rights in the waters of natural streams," the Board incorrectly determined that Initiative 2011-2012 #3 is limited to a single subject, as required by article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5, in light of the multiple objectives of this measure to:

1. Adopt the "Public Trust Doctrine" that would subordinate water rights to public ownership interests; and
2. Transfer real property adjacent to and beneath all natural streams from private landowners to the public.

B. Whether the Board's title and ballot title and submission clause for Initiative 2011-2012 #3 is unfair in that the phrase "concerning the public's rights in the water of natural streams" does not clearly express a single subject.

III. SUPPORTING DOCUMENTATION

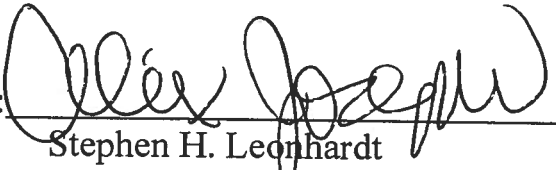
As required by C.R.S. § 1-40-107(2), a certified copy of Initiative 2011-2012 #3 with the corresponding title and submission clause, and a certified copy of the Motion for Rehearing and the Board's rulings thereon, are submitted herewith.

IV. RELIEF REQUESTED

Petitioners respectfully request this Court to find that the Title Board lacked jurisdiction to set the title and submission clause because the measure contains multiple subjects.

Respectfully submitted this 9th day of January 2012.

BURNS, FIGA & WILL, P.C.

By: 
Stephen H. Leonhardt
Alix L. Joseph

6400 S. Fiddlers Green Circle, Suite 1000
Greenwood Village, CO 80111

**Attorneys for Petitioner
Douglas Kemper**

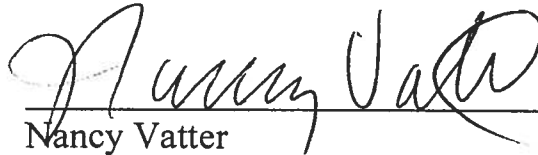
CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITION FOR REVIEW** was served via U.S. mail on this 9th day of January 2012, as follows:

Maurice Knaizer, Esq.
Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Mr. Richard Hamilton
P.O. Box 156
Fairplay, CO 80440
rghamilton@skybeam.net

Mr. Phil Doe
7140 S. Depew Street
Littleton, CO 80128
ptdoe@comcast.net



Nancy Vatter



STATE OF COLORADO

**DEPARTMENT OF
STATE**

CERTIFICATE

I, **SCOTT GESSLER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2011-2012 #3 'Use of Colorado Water Streams'"

..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 5th day of January, 2012.

A handwritten signature in cursive script, appearing to read "Scott Gessler", is written over a horizontal line.

SECRETARY OF STATE

Ballot Title Setting Board

Proposed Initiative 2011-2012 #3¹

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

An amendment to the Colorado constitution concerning the public's rights in the water of natural streams, and, in connection therewith, making public ownership of such water legally superior to water rights, contracts, and property law; granting unrestricted public access along and use of natural streams and their stream banks up to the naturally wetted high water mark; prohibiting the state from transferring its water rights; allowing the state government to manage others' water rights, while requiring state government to act as steward of and to protect, enforce, and implement public ownership of water; and allowing any Colorado citizen to sue to enforce the amendment.

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

Shall there be an amendment to the Colorado constitution concerning the public's rights in the water of natural streams, and, in connection therewith, making public ownership of such water legally superior to water rights, contracts, and property law; granting unrestricted public access along and use of natural streams and their stream banks up to the naturally wetted high water mark; prohibiting the state from transferring its water rights; allowing the state government to manage others' water rights, while requiring state government to act as steward of and to protect, enforce, and implement public ownership of water; and allowing any Colorado citizen to sue to enforce the amendment?

Hearing December 7, 2011:

Only one designated representative appeared for the hearing.

Hearing rescheduled to December 21, 2011 at 1:00 p.m.

Hearing December 21, 2011:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 2:48 p.m.

¹ Unofficially captioned "Use of Colorado Water Streams" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Hearing January 4, 2012:

Motion for rehearing denied except to the extent that the Board made changes to the title.

Hearing adjourned 5:50 p.m.

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DEC 28 2011

S. WARD

Colorado Secretary of State
BEFORE THE TITLE BOARD, STATE OF COLORADO

MOTION FOR REHEARING

IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR
INITIATIVE 2011-12 #3

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 December 21, 2011 for Initiative 2011-12 #3 (the "Initiative"), which would amend the Colorado Constitution by adding several provisions to Article XVI, § 5. 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. § 1-40-106.5.

The Initiative and Titles Violate the Single Subject Requirement

The subjects of this measure include:

1. The adoption of a "Public Trust Doctrine" elevating public ownership over water use rights; and
2. Transfer of real property adjacent to and beneath all natural streams from private landowners to the public.

Thus, 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 these two separate, distinct and unrelated subjects.

- A. The stated purpose of the Initiative is to adopt the Public Trust Doctrine, which would subrogate existing water rights to the rights of the public.**

The Initiative would add six subsections to Article XVI, § 5 of the Constitution, numbered as Subsections (2) – (7). Subsection (2) would expressly adopt the "Colorado public trust doctrine" to "defend the public's water ownership rights of use and public enjoyment." According to Subsection (3), the Colorado Public Trust Doctrine "provides that the public's estate in water in Colorado has a legal authority superior to rules and terms of contracts or property law." Finally, Subsection (4) addresses water appropriation rights under Section 6 of Art. XVI, spelling out ways in which such rights will be subordinate to the "public's estate." In particular, Subsection 4(a) of the Initiative provides that "the use of the public's water by the

manner of appropriation . . . is a usufruct property right” which survives “under the legal condition that the appropriator is aware that a usufruct right is servient to the public’s dominant water estate and is subject to terms and conditions of this Colorado public trust doctrine.” Subsections 4(c) and (e) spell out the state government’s stewardship duties which include managing not only the state’s water rights, but also others’ water rights to protect the natural environment and public water use. Thus, this Initiative would subrogate the rights of those who hold water rights by appropriation to the favored “public interest” in Colorado’s water for environmental protection and public use.

Colorado water law is grounded in the right of prior appropriation, which is constitutionally guaranteed. Unlike most other states, Colorado’s constitution reserves water for use by private parties who appropriate such water and place it to beneficial use. Colo. Const. art. XVI, § 5. (“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.”) Thus, the Constitution “simply and firmly establishes the right of appropriation in this state.” *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979). This right is further protected in Section 6 of Article XVI which states, “[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.” Colo. Const. art. XVI, § 6.

Colorado has not applied the Public Trust Doctrine to water rights. *See Emmert*, 597 P.2d. at 1029-30. Instead, Colorado courts have emphasized the property nature of appropriative water rights, holding that an appropriation creates a “most valuable property right” in the exclusive use of water. *Navajo Devel. Co. v. Sanderson*, 655 P.2d 1374, 1377-78 (Colo. 1982). This distinction recognizes the adverse impacts that the Public Trust Doctrine would have on existing water rights under the prior appropriation doctrine. *See Gregory J. Hobbs, Jr. and Bennett W. Raley, Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 855-56 (1989). By adopting the public trust doctrine, the Initiative would necessarily and expressly subrogate the rights of those who hold appropriative water rights from the state to the rights of the public to be managed by the state government.¹

B. The conveyance of lands adjacent to and beneath natural streams from private landowners to the public is a separate subject from adopting the Public Trust Doctrine.

Subsection 5 of the Initiative would create the right of “[a]ccess by the public along, and on, the wetted natural perimeter of a stream bank of a water course of any natural stream in Colorado.” Colorado landowners currently own the land beneath the non-navigable streams adjacent to their land. *Emmert*, 597 P.2d at 1027 (“the land underlying non-navigable streams is

¹ Proponent Richard Hamilton has previously proposed a series of initiatives that would expressly adopt a “public trust doctrine” in the Colorado Constitution provisions governing water, Art. XVI, Section 5. *See MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076 (Colo. 1995); *In re Proposed Initiative on Water Rights*, 877 P.2d 321 (Colo. 1994); *see also* 2001-2002 Proposed Initiative #135.

the subject of private ownership and is vested in the proprietors of the adjoining lands.”) Ownership rights of land along a streambed are distinct from the rights of appropriation. *See id.* at 1029. The Initiative would remove these property rights of landowners and give them to the people of Colorado for the state government to enforce. The question of property rights along natural streams was the subject of numerous proposed initiatives in 2010. *See* 2009-2010 Proposed Initiatives ## 69-81 and 84-90.

Among the purposes of single-subject requirement is to prevent the practice of putting together in one measure multiple subjects “for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits. *In re 2009-2010 # 45*, 234 P.3d at 646 (stating that the single-subject rule seeks “to prevent proponents from joining incongruous subjects in the same measure, thereby ensuring that each proposal depends on its own merits for passage” (quoting *In re # 43*, 46 P.3d at 441)). Initiative #3 inappropriately joins subjects relating to appropriation of water and landowner rights in an attempt to garner support from two distinct interest groups. This, it violates the single subject requirement, and the Title Board should not set Titles for the Initiative.

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing by the Title Board and reconsideration of the Title Board’s actions in setting a title and ballot title and submission clause on December 21, 2011 for Initiative 2011-12 #3.

Respectfully submitted this 28th day of December, 2011.

BURNS, FIGA & WILL, P.C.

By: 

Stephen H. Leonhardt, #15122

Alix L. Joseph, #33345

6400 S. Fiddlers Green Circle, Suite 1000

Greenwood Village, CO 80111

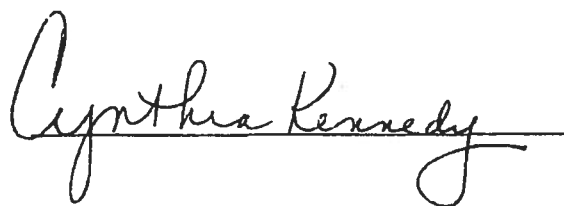
**Attorneys for Petitioner,
Douglas Kemper**

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **MOTION FOR REHEARING** was served via U.S. mail and E-mail on this 28th day of December 2011, as follows:

Mr. Richard Hamilton
531 Front Street
Fairplay, CO 80440
rghamilton@skybeam.net

Mr. Phillip Doe
7140 S. Depew Street
Littleton, CO 80128
ptdoe@comcast.net

A handwritten signature in cursive script that reads "Cynthia Kennedy". The signature is written in black ink and is positioned to the right of the contact information for Mr. Phillip Doe. The signature is written over a horizontal line that extends across the width of the signature.

RECEIVED

Proposed Initiative Measure 2011-2012

NOV 22 2011

Final

11:15 a.m.

ELECTIONS
SECRETARY OF STATE

INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE

Be it Enacted by the People of the State of Colorado:

Section 5 of article XVI of the constitution of the state of Colorado is amended to read:

Section 5. Water of streams public property - public trust doctrine. (1) 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.

(2) THIS COLORADO PUBLIC TRUST DOCTRINE IS HEREBY ADOPTED, AND IMPLEMENTED, BY THE PEOPLE OF THE STATE OF COLORADO TO PROTECT THE PUBLIC'S INTERESTS IN THE WATER OF NATURAL STREAMS AND TO INSTRUCT THE STATE OF COLORADO TO DEFEND THE PUBLIC'S WATER OWNERSHIP RIGHTS OF USE AND PUBLIC ENJOYMENT.

(3) THIS COLORADO PUBLIC TRUST DOCTRINE PROVIDES THAT THE PUBLIC'S ESTATE IN WATER IN COLORADO HAS A LEGAL AUTHORITY SUPERIOR TO RULES AND TERMS OF CONTRACTS OR PROPERTY LAW.

(4) THE PUBLIC CONFERS THE RIGHT TO THE USE OF ITS WATER, AND THE DIVERSION OF THE WATER UNDER SECTION 6 OF THIS ARTICLE, TO AN APPROPRIATOR FOR A BENEFICIAL USE AS A GRANT FROM THE PEOPLE OF THE STATE OF COLORADO TO THE APPROPRIATOR FOR THE COMMON GOOD.

(a) THE USE OF THE PUBLIC'S WATER BY THE MANNER OF APPROPRIATION, AS GRANTED IN THIS ARTICLE, IS A USUFRUCT PROPERTY RIGHT ASSOCIATED WITH THE USE OF WATER. USUFRUCT RIGHTS FOR THE USE OF WATER SURVIVE UNDER THE LEGAL CONDITION THAT THE APPROPRIATOR IS AWARE THAT A USUFRUCT RIGHT IS SERVIENT TO THE PUBLIC'S DOMINANT WATER ESTATE AND IS SUBJECT TO TERMS AND CONDITIONS OF THIS COLORADO PUBLIC TRUST DOCTRINE.

(b) USUFRUCT WATER RIGHTS SHALL NOT CONFER OWNERSHIP TO WATER OTHER THAN USUFRUCT RIGHTS TO THE APPROPRIATOR.

(c) USUFRUCT WATER RIGHTS, CONFERRED BY THE PUBLIC TO AN APPROPRIATOR FOR USE, MAY BE MANAGED BY THE STATE GOVERNMENT, ACTING AS A STEWARD OF THE PUBLIC'S WATER, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND TO PROTECT THE PUBLIC'S ENJOYMENT AND USE OF WATER.

(d) A USUFRUCT WATER USER IS IMPRESSED UNDER THE CONDITION THAT NO USE OF WATER HAS DOMINANCE OR PRIORITY OVER NATURAL STREAMS OR PUBLIC HEALTH OR WELL-BEING.

(e) WATER RIGHTS, HELD BY THE STATE OF COLORADO FOR GOVERNMENT OPERATIONS, SHALL BE HELD IN TRUST FOR THE PUBLIC BY THE STATE OF COLORADO WITH THE STATE ACTING AS THE STEWARD OF THE PUBLIC'S WATER ESTATE. WATER RIGHTS HELD BY THE STATE OF COLORADO SHALL NOT BE TRANSFERRED BY THE STATE OF COLORADO FROM THE PUBLIC ESTATE TO PROPRIETARY INTEREST.

(5) ACCESS BY THE PUBLIC ALONG, AND ON, THE WETTED NATURAL PERIMETER OF A STREAM BANK OF A WATER COURSE OF ANY NATURAL STREAM IN COLORADO IS A RIGHT OF THE PUBLIC TO THE USE OF ITS OWN WATER IN CONCERT WITH THE COLORADO PUBLIC TRUST DOCTRINE.

(a) THE RIGHT OF THE PUBLIC TO THE USE OF THE WATER IN A NATURAL STREAM AND TO THE LANDS OF THE BANKS OF THE STREAMS WITHIN COLORADO SHALL EXTEND TO THE NATURALLY WETTED HIGH WATER MARK OF THE STREAM AND IS IMPRESSED WITH NAVIGATION SERVITUDE FOR COMMERCE AND PUBLIC USE AS RECOGNIZED IN THE COLORADO PUBLIC TRUST DOCTRINE.

(b) THE WATER OF A NATURAL STREAM AND ITS STREAMBED, AND THE NATURALLY WETTED LANDS OF THE SHORES OF THE STREAM, SHALL NOT BE SUBJECT TO THE LAW OF TRESPASS AS THE WATER OF NATURAL STREAMS AND THE BANKS OF THEIR STREAM COURSES ARE PUBLIC HIGHWAYS FOR COMMERCE AND PUBLIC USE.

(c) PUBLIC USE OF WATER, RECOGNIZED AS A RIGHT IN THE COLORADO PUBLIC TRUST DOCTRINE, SHALL NOT BE CONTROLLED IN LAW AS A USUFRUCT BUT SHALL BE A RIGHT OF THE PUBLIC TO PROTECT AND ENJOY ITS OWN WATER.

(6) ENFORCEMENT AND IMPLEMENTATION OF SUBSECTIONS (2) TO (7) OF THIS SECTION OF THE COLORADO PUBLIC TRUST DOCTRINE TO PROTECT THE PUBLIC'S RIGHTS AND INTERESTS IN WATER ARE MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT AS STEWARDS TO PROTECT THE PUBLIC'S INTERESTS IN ITS WATER ESTATE. 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.

(7) SUBSECTIONS (2) TO (7) OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING, BUT LAWS MAY BE ENACTED SUPPLEMENTARY TO AND IN PURSUANCE OF, BUT NOT CONTRARY TO, THE PROVISIONS THEREOF.

PHILLIP DOE
LITTLETON, COLORADO

RICHARD HAMILTON
FAIRPLAY, COLORADO