SUPREME COURT, STATE OF COLORADO Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	Supreme Court Case No: 2012 SA 8

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

In the Matter of the Title, Ballot Title, and Submission Clause for the Proposed Initiative 2011 – 2012 # 3.

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

OPENING BRIEF OF THE RESPONDENT~~S~~ ~~PHILLIP DOE AND~~ RICHARD G. HAMILTON

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Table of Contents

Table of Authorities

Cases
(*N. B. Included in AUTHORITIES are citations accessed in sponsor's RESPONSE to CRS 1-40 "review and comment" MEMORANDUM, May 18, 2012*).

Archuleta v. Boulder & Weld County Ditch Co., 118 Colo. 43, 192 P.2d. 891 (1948)

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District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984)

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San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999)

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Article XVI, Section 5 of the Colorado Constitution

Article XVI, Section 6 of the Colorado Constitution

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C. R. S. §1-40-102, et. seq.,,

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I. STATEMENT OF THE ISSUES

May 14, 2011, initiative proponents (hereafter sponsors) submitted the following proposed amendment to the Colorado Constitution to the Colorado Legislative Council and the Office of Legislative Legal Services:

INITIATIVE FOR THE ADOPTION OF THE COLORADO PUBLIC TRUST DOCTRINE

Be it Enacted by the People of the State of Colorado.
Section 5 of article XVI 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 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 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 STREAM OR PUBLIC HEALTH 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 PARAMETER 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 PROVISIONS OF THIS 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 THIS 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 THIS 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 PROVISIONS CONTAINED WITHIN THIS COLORADO PUBLIC TRUST DOCTRINE TO PROTECT THE PUBLIC'S RIGHTS AND INTERESTS IN WATER IS 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 ENFORCE THE PROVISIONS OF THIS SECTION.
(7) SUBSECTIONS (2) AND (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.

November 22, 2011, the initiative proposal - proposed Colorado Initiative 2011 – 2012 # 3 - was presented to the Office of the Colorado Secretary of State - Elections - for scheduling for action before the Ballot Initiative Title Setting Board (hereafter the Board).

December 21, 2011, the Board considered the proposed "Initiative to Adopt the Colorado Public Trust Doctrine" - Colorado proposed initiative 2011 – 2012 # 3 – and did set the initiative ballot title, summary and submission clause (collectively hereafter the "title") after determining that the initiated proposal comprised a "single subject" in accord with Colorado Constitutional provisions of Article V, Section 1(5.5), and with provisions within C.R.S. § 1-40-106.5.

December 28, 2011, Petitioner Douglas Kemper requested a rehearing by the Board, and reconsideration of the Board's actions in setting the title on December 21, 2011. The Board did reconsider the title for the initiative proposal Colorado Initiative 2011 – 2012 # 3 January 4, 2012, and denied "The Motion to Rehear" the proposal holding that the initiative did comport with the "single subject" requirements of the Colorado constitution as well as comporting with statute.

1. Ballot Title Setting Board

The title set by the Board on December 21, 2011, and sustained by the Board January 4, 2012:

Proposed Initiative 2011-2012 #3

*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.* *

- *ed. note: ((sponsor comment –Initiative 2011 – 2012 # 3 – *Initiative to Adopt the Colorado Public Trust Doctrine* - is not correctly captioned, as the measure propounds that the ownership of the waters within Colorado is in the public estate, and that the captioning - opposed by the sponsors in legislative review and comment hearings - does not clearly reflect the nature or the content of the measure.")).
- ed. note: ((**N. B.** HB 11- 1072 – amending §1-40-102, et. seq.,, Colorado Revised Statutes – was signed 06/02/2011 by the Governor – signed into law after Initiative # 3 filing with Colorado legislative officials.)).

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

"An amendment to the Colorado constitution concerning the adoption of the public trust doctrine for 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 adoption of the public trust doctrine for 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 21, 2011:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 2:48 p.m.

II. STATEMENT OF THE CASE

a. 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, Bums, 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.

b. RESPONSE TO THE MOTION TO REHEAR THE TITLE SET BY THE TITLE SETTING BOARD, DECEMBER 21, 2011, FOR THE INITIATIVE 2011-12 #3 TO MODIFY ARTICLE XVI, § 5 OF THE COLORADO STATE CONSTITUTION – a.k.a. *THE INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE*

(ed. note. submitted in full - unedited from original.)

"Reconsideration has been requested due to allegations and assertions that "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 title violates 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 are 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, pro se, is the respondent sponsor now in support of the Colorado Initiative Ballot Title Setting Board's actions of setting and adopting the title for the *Initiative to Adopt the Colorado Public Trust Doctrine* – Colorado Initiative 2011 -2012 # 3.

Respondent sponsor here quotes, rather extensively, the opinion in Lawrence v. Clark County, 127 Nev. Adv. Op. No. 32, July 7, 2011, to answer allegations, and assertions, from the objector Kemper.

The Supreme Court of Nevada, in *Lawrence*, expressly adopted the public trust doctrine as an element in Nevada's jurisprudence "by expressly adopting the doctrine and determining its application in Nevada, given the public's interest in Nevada's waters." Review by Colorado government entities, considering actions contemplating the adoption of the Colorado Public Trust Doctrine, could benefit from the learned comments of the Nevada court in *Lawrence*.

"IN THE SUPREME COURT OF THE STATE OF NEVADA, No. 54165", to wit:

OPINION
By the Court, SAITTA, J.:

"This appeal concerns whether state-owned land that was once submerged under a waterway can be freely transferred to respondent Clark County, or whether the public trust doctrine prohibits such a transfer. Generally, under the public trust doctrine, a state holds the banks and beds of navigable waterways in trust for the public and subject to restraints on alienability. Although the public trust doctrine has never expressly been adopted in Nevada, this court has previously applied some of its tenets and its existence is implicit in Nevada law.

"Thus, in this opinion, we clarify Nevada's public trust doctrine jurisprudence by expressly adopting the doctrine and determining its application in Nevada, given the public's interest in Nevada's waters and the law's acknowledgment of that interest. In so doing, after setting forth the facts and procedural history, we will discuss the development of the public trust doctrine in general, and then its development in Nevada specifically. Next, we will set forth Nevada's public trust doctrine framework, under which we conclude that whether the formerly submerged land is alienable, such that it can be transferred to Clark County, turns on the unanswered questions of whether the stretch of water that once covered the land was navigable at the time of Nevada's statehood, whether the land became dry by reliction or by avulsion, and whether transferring the land contravenes the public trust. We thus reverse the district court judgment underlying this appeal, which determined that the disputed land is transferable to Clark County, and we remand this matter for determinations as to whether the disputed land was submerged beneath navigable waters at the time of Nevada's statehood, how it became dry land, and, if necessary, whether its transfer accords with the public's interest in it."

"Public trust doctrine principles inherent from limitations on the state's sovereign power."

"The final underpinning of our formal adoption of the public trust doctrine arises from the inherent limitations on the state's sovereign power, as recognized in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). In *Illinois Central*, the United States Supreme Court established the principle that "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." Id. at 453. In other words, because the state holds such property in trust for the public's use, the state is simply without power to dispose of public trust property when it is not in the public's interest. ("A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."); Kootenai Environ. Alliance v. Panhandle Yacht, 671 P.2d 1085, 1088 (Idaho 1983). ("[A] state, as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties."); Coxe v. State, 39 N.E. 400, 402 (N.Y. 1895) ("The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign, right; and it has been frequently said that a trust is ingrafted upon this title for the benefit of the public, of which the state is powerless to divest itself."). Under the public trust doctrine, the Legislature has the power only to act as a fiduciary of the public in its administration of trust property. The public trust doctrine is thus not simply common law easily abrogated by legislation; instead, the doctrine constitutes an inseverable restraint on the state's sovereign power.

"In sum, although the public trust doctrine has roots in the common law, it is distinct from other common law principles because it is based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power, as recognized by *Illinois Central*. Accordingly, in the words of Justice Rose, it is "appropriate, if not our constitutional duty," to expressly adopt the doctrine to ensure that the state does not breach its duties as a sovereign trustee, and we do so here. Mineral County, 117 Nev. at 248, 20 P.3d at 808 (Rose, J., concurring). Thus, contrary to the County's position, any legislation that purports to convey public trust lands is subject to judicial review. See San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) ("It is for the courts to decide whether the public trust doctrine is applicable to the facts. *The Legislature cannot by legislation destroy the constitutional limits on its authority.").* (ed., *emphasis added.*) (N. B. ed. note: see pg. 8.)

"Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times "forms the outer boundaries of permissible government action with respect to public trust resources." In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation. Id. (quoting Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997), and Kootenai Environ. Alliance v. Panhandle Yacht, 671 P.2d 1085, 1095 (Idaho 1983)). (N. B. ed. note: see pg. 7.)

"Clark County argues that we should not adopt the public trust doctrine to review the Legislature's conveyances of trust property, because the public trust doctrine is rooted in common law and, thus, cannot supersede legislation. See, e.g., Gwathmey v. State through Dept. of Envir., 464 S.E.2d 674, 682-84 (N.C. 1995) (explaining that, in North Carolina, the public trust doctrine has not been codified in the state constitution, and thus, while the common law doctrine creates a presumption that the state did not transfer public trust lands in a manner inimical to the public trust, the state legislature, as representatives of the people, was free to do so without reservation of any public trust rights). In addition, as it contended during oral argument, Clark County asserts that adopting the public trust doctrine is unwise because, in Clark County's estimation, the doctrine assigns to courts the allegedly impossible task of determining if at any point a given parcel of land was beneath a navigable waterway to ascertain its trust status. In so arguing, however, Clark County fundamentally misapprehends the sources and functions of the public trust doctrine in Nevada and exaggerates the difficulty of determining a land parcel's trust status. (N. B. ed. note: see pg. 9.)

"Resolution of disputes over title to public trust land is a matter of state law - see Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484-85 (1988). Thus, state courts considering the public trust doctrine have developed their own frameworks for examining the administration of lands held in public trust. See District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984) ("In this country the public trust doctrine has developed almost exclusively as a matter of state law."). Although several approaches to making a determination regarding the transferability of public trust land exist, the approach taken by Arizona deserves concerted attention, as its constitution contains a gift clause nearly identical to Nevada's. Moreover, Arizona's approach is instructive because it faces many of the same challenges that this state faces in maintaining its public trust property, given its arid desert climate and rapidly expanding urban population. See Tracey Dickman Zobenica, *The Public Trust Doctrine in Arizona's Streambeds*, 38 Ariz. L. Rev. 1053, 1054 (1996).

"In Arizona Center for Law v. Hassell, 837 P.2d 158 (Ariz. Ct. App. 1991), a case with facts and issues remarkably similar to those presented here, the Court of Appeals of Arizona extensively considered the relationship between the public trust doctrine and the Arizona gift clause. In *Hassell,* the Arizona Legislature enacted legislation relinquishing, through an uncompensated quitclaim, the state's claim to any "interest in all watercourses other than the Colorado, Gila, Salt, and Verde Rivers and in all lands formerly within those rivers but outside their current beds." Id. at 162. The legislation also allowed

"record titleholder[s] of lands in or near the beds of the Gila, Salt, or Verde Rivers" to obtain a quitclaim deed for just $25 per acre. Id.

"The Arizona Center for Law in the Public Interest and several individuals (collectively, Arizona Center) commenced a lawsuit against Arizona Land Commissioner Milo J. Hassell, the state land department, and the State of Arizona (collectively, Land Commissioner). Id. at 163. Arizona Center sought to invalidate the legislation, alleging that it "violated the gift clause of the Arizona Constitution . . . and the state's sovereign duty to protect the public [interest]." Id. (citations omitted). The trial court granted the Land Commissioner summary judgment, determining that "[e]ven if the rivers were navigable at statehood, . . . the state could legally relinquish its claims to the riverbeds for the purpose of 'unclouding title.'" Id. Arizona Center appealed. Id.

"Although the parties in *Hassell* briefed the gift clause and public trust issues separately, the Arizona Court of Appeals considered them in unison, id., at 66. The court explained, "Because the gift clause of the Arizona Constitution explicitly limits governmental freedom to dispose of public resources, it provides an appropriate framework for judicial review of an attempt by the legislative and executive branches to divest the state of a portion of its public trust." id.

Relying upon Arizona's gift clause jurisprudence, the *Hassell* court then fashioned the following test for reviewing the validity of dispensations of trust property:

> [W]hen a court reviews a dispensation of public trust property . . . public purpose and fair consideration[ ] must be shown. . . . [A]ny public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations, id. at 170. Applying this test, the *Hassell* court concluded that the legislation being challenged was "invalid under the public trust doctrine and [the gift clause] of the Arizona Constitution." id. at 173. see Tracey Dickman Zobenica, The Public Trust Doctrine in Arizona's Streambeds, 38 Ariz. L. 6 Rev. 1053, 1054 (1996). (N. B. ed. note: see pg. 15.)

"Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 490 (1970) ("When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."). We therefore conclude that legislation conveying public trust property from the state to a government subdivision is within the ambit of the public trust doctrine and must be analyzed to determine whether such a conveyance results in a violation of the public trust. (N. B. ed. note: see pg. 18.)"

"The respondent sponsor Hamilton here opposes the MOTION TO REHEAR the Title, as set for Colorado Initiative 2011 – 2012, for *The Initiative to Adopt the Colorado Public Trust Doctrine*, as being unnecessary due to the Colorado Ballot Initiative Ballot Setting Board having set an initiative ballot tile that did clearly reflect the ". . . *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* . . . ".

C. ARGUMENT

A. Summary of the Argument:

The materials provided here in this portion of the OPENING BRIEF OF THE RESPONDENTS, PHILLIP DOE AND RICHARD G. HAMILTON, are drawn from written response, May 18, 2011, to "review and comment" provisions of CRS 1-40-101(1) " . . . requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiated petitions for proposed amendments to the Colorado constitution."

(N. B. SPONSORS ANSWERS TO THE C. R. S. 1-40 "REVIEW AND COMMENT" MEMORANDUM QUESTIONS FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE COUNSEL AND THE COLORADO OFFICE OF LEGISLATIVE LEGAL SERVICES.)

The answers provided here are drawn from the initiative sponsors response to the "review and comment" inquiries and are to be considered the formal record of the sponsor's intent concerning the constitutional modification to the constitution by the sponsors of the Colorado Initiative # 3, 2011-2012 – "INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE";

N. B. (**bold lettering** here indicates questions from Legislative Council and Legislative Legal Services staff(s), with lettering of normal type indicates "response" from the sponsors to staff questions.) (Words and lettering with ~~double strikethrough~~ are sponsors editing of text, in the original, of Legislative Council and Legislative Legal Services staff's MEMORANDUM.)

"Purpose~~(S)~~

"The ~~major~~ (single) **purpose~~(s)~~ of the proposed amendment ~~appears~~** is **to be:** (sponsor's note: see "single subject rule" – i.e. *the single purpose of the proposed amendment appears to be ...*);

"To oblige within the Colorado Constitution the adoption of the public trust doctrine to protect the public's interests in waters of natural streams, and in connection therewith;

> "to make the use of the public's waters by the manner of appropriation servient, in law, to the public's dominant water estate;
>
> "to require water use rights held by the state of Colorado, including any water use rights held by the state of Colorado for government operations, to be held in trust for the public, and to prohibit any government in Colorado the state of Colorado from transferring or alienating any water rights from the public estate to any proprietary interest;
>
> "to include re-affirm the right of the public's to access to the waters of a natural stream as an element part of the this Colorado public trust doctrine;
>
> "to **require the executive, legislative, and judicial branches of Colorado state government** to recognize, **to enforce** defend, **and** to **implement** this Colorado public trust doctrine; and to regulate in a manner so as to hold that every and all governments, when acting as holders of water usufructury rights in Colorado, are impressed with this same obligation;
>
> "and,
>
> "to ~~grant~~ stipulate that ~~to~~ any person of the state of Colorado has standing to bring an action ~~enabling~~ seeking to enforce this Colorado public trust ~~the doctrine~~ doctrine."

The sponsors of Colorado Initiative 2011 – 2012 # 3 – Initiative to Adopt the Colorado Public Trust doctrine – have, from the inception of staff review and comment, have insisted that the initiative has a single purpose: "To oblige within the Colorado Constitution the adoption of the public trust doctrine to protect the public's interests in waters of natural streams . . ."

B. Nature of the case:

(The materials provided here in this portion of the OPENING BRIEF OF THE RESPONDENTS, PHILLIP DOE AND RICHARD G. HAMILTON, are drawn from written response, May 18, 2011, to "review and comment" provisions of CRS 1-40-101(1) ". . . requires the directors of the Colorado Legislative Counsel and the Office of Legislative Legal Services to "review and comment" on initiated petitions for proposed amendments to the Colorado constitution."

(N. B. SPONSORS ANSWERS TO THE C. R. S. 1-40 "REVIEW AND COMMENT" MEMORANDUM QUESTIONS FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE COUNSEL AND THE COLORADO OFFICE OF LEGISLATIVE LEGAL SERVICES.

(The answers provided here are drawn from the initiative sponsors response to the "review and comment" inquiries and are to be considered the formal record of the sponsor's intent concerning the constitutional modification to the constitution by the sponsors of the Colorado Initiative # 3, 2011-2012 – "INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE").

"The purported and espoused purpose of the "review and comment" C. R. S. 1-40 requirements, here being responded and characterized, is that this process attempts to assure that the initiative sponsors, seeking to modify the Colorado constitution, propose constitutional modification language and intent that is clearly enunciated.

"A "public trust doctrine" concept is largely a broad, and relatively sweeping, somewhat undefined, concept of natural resource law and regulation that has, at its core, a concept that the state is to be directed to acknowledge the state's stewardship responsibilities regarding the public's ownership and interests in the public's estate." (see Joseph Sax in *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970)). The 2011 *Initiative to Adopt the Colorado Public Trust Doctrine* offers a constitutional modification of ARTICLE XVI, Section 5 - Water of streams public property - public trust doctrine, and in so doing is a public trust doctrine that is specific to Colorado as an impressment upon Colorado water constitutional and other legal provisions as those constitution guarantees affect the aquatic environment and the laws and stipulations relating to Colorado water and to the public ownership thereof.

"In the shaping article reviewing the public trust doctrine (see Professor Joseph Sax in *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970)), states, at 475, in Section I – The Nature of the Public Trust Doctrine – Historical Background:
"The source of the modern public trust law is found in a concept that received much attention in Roman and English law – the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature (see Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* 182 – 85 (2 d. ed. 1932) ...indicating that two points should be emphasized: *First*, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes were distinguished from general public property which the sovereign could routinely grant to private owners. *Second*, while it was understood that in certain common properties – such as the

seashore, highways, and running water - where "perpetual use was dedicated to the public" - it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government." ...

. . . "It has rather been the general rule that land titles from the federal government run down only to the high water mark, with title seaward of that point remaining in the states, which, upon their admission to the Union, took such shorelands in "trusteeship" for the public (see, generally, P. Gates, *History of Public Land Law Development* (1968)). Whether, and to what extent, that trusteeship constrains the states in their dealings with such lands has, however, been a subject of much controversy. If the trusteeship puts such lands wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right is quite an extraordinary one, restraining government ..." "The question, then, is whether then the public trust concept has some meaning ..., whether there is in the name of the public trust any judicially enforceable right which restrains governmental activities dealing with particular interests such as shorelands or parklands, and which is more stringent than are the restrains applicable to governmental dealings generally."

"Three types of restrictions on governmental authority are often thought to be imposed by the public trust (this threefold formulation is suggested by broad language which commonly appears in public trust cases: 'This title is held in trust for the people for the purposes of navigation, fishing, bathing, and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically, it is a trust property and should be devoted to the fulfillment of purposes of the trust, to wit: the service of the people." - see Hayes V. Bowman, 91 S.2d. 795, 799 (Fla. 1957); *first,* the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; *second,* the property must not be sold, even for a fair cash equivalent; and *third,* the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses particular to that resource." "Confusion has arisen from the failure of many courts to distinguish between the government's general obligation to act for the public benefit, and the special, and more demanding obligation which it may have as a trustee of certain public resources."

Modern understanding of elements within the prevue of a contemporary public trust doctrine are demonstrated and summarized, in particular, in the discussion within Marks v. Whitney, 6 Cal. 3d. 25, 259 491 P.2d. 374,380, 98 Cal. Rprt. 790, 796 (1972) (holding that the public has standing to sue to enforce trust, and that public uses are varied in context) – (see Symposium Comments: *The Public Trust After LYONS and FOGERTY: Private Interests and Public Expectations,* 16 U. C. Davis L. Rev. 631 (1982- 1983)):

> "(p)ublic easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes ... " "(t)he traditional triad of uses – navigation, commerce and fisheries – does not limit the public interest in the trust reservation..." "(t)he public uses to which lands and waters are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of lands and waters is the preservation of those lands and waters in their natural state so that they may serve as ecological units... as open space, and as environments which provide food and habitat for birds and (wildlife), and which favorably affect the scenery and climate of the area."

The . . . nature of the question of public "uses" of waters is addressed by the clarification that the Colorado public trust doctrine does not seek a classification of "uses", but rather pronounces and incorporates public desires associated with its ownership of waters and the protections of the natural environment. The primary focus issue within this Colorado public trust doctrine is that the people of the state of Colorado own the water in Colorado as provided for in ARTICLE XVI, Section 5, and, as such, may seek water-related activities as owners of their estate. Also, as "it has never been clear whether the public had an enforceable right to prevent infringement of those interests", the adoption this Colorado public trust doctrine and of the obliging nature of public statements requiring the State of Colorado to "protect and defend" the public's waters, this Colorado public trust doctrine will provide direction in law for the state to become, and continue to be, the quasi-sovereign responsible for the stewardship of the public's ownerships rights in water. The elements contained within the adopted Colorado public trust doctrine are not limited to a narrow compliance of the rights and responsibilities of the state as administrator to enforce regulation, but they also include the surety for the public to have the benefit that state enactment of legislation and state judicial determination are undertaken and pronounced with an intent to preserve and protect the public's valued estate.

"Various public uses, including elements of a navigation servitude, need not be determined solely on the basis of the amount of water flowing, but may be impressed through the public ownership of water, the dedication of streams and rivers and water courses as public highways, and the public desire to use the water for public purpose(s)." see United States v Utah, 283 US 64, 51 S. Ct. 438, 75 L. Ed. 844, 1931(holding that the State of Utah was admitted to the Union under the "equal footings" provisions enunciated in Pollard's Lessee v. Hagen et. al., 44 U. S. 212, 11 L. Ed. 565, 27 S. Ct. 729, 1845); U. S. v. Rio Grande Dam & Irrig. Co. 174 US 690, 19 S. Ct. 770, 43 L. Ed. 1136, 1899 (holding that navigability was in the interest of the United States); and, especially, see Economy Light & Power Co. v. U. S., 256 U.S. 113 (1921), No. 104 (stipulating that navigation servitude was impressed upon waters of the territories and states formed by article 4 of the compact in the Ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio; to wit:

> "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.' 1 Stat. 51, 52, note; Rev. Stat. U. S. (1878 Ed.) pp. 13, 16.
>
> "Nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the states may have done, from assuming entire control in the matter. The Act of 1899 (30 Stat. 1151), upon which the present bill is founded, is a due assertion of the authority of Congress over all navigable waters within its jurisdiction; and it must be accorded due weight as such."
>
> "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the [256 U.S. 113, 123] navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."
>
> "But, so far as it established public rights of highway in navigable waters capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power [256 U.S. 113, 123] of Congress to regulate commerce with the Indian tribes. Pollard's Lessee v.

Hagan, 3 How. 212, 229, 230; *Ex parte Webb*, [225 U. S. 663, 683], 690 S., 691, 32 Sup. Ct. 769; United States v. Sandoval [231 U. S. 28, 38], 34 S. Sup. Ct. 1."

Emphatically, this Colorado public trust doctrine is not a "use" doctrine in the aspect of an "appropriation" as presented in the Colorado Constitution at ARTICLE XVI, **Section 6 – Diverting unappropriated water - priority preferred uses**. This Colorado public trust doctrine is not conditioned by, not impressed by, nor constrained in any manner by any provision or decision rendered pertaining to ARTICLE XVI, Section **16** save for the provision in ARTICLE XVI, Section 5: "*... subject to appropriation as hereinafter provided.*" This Colorado public trust doctrine is a statement of ownership of water in the people, and is a statement of the prerogatives of the public in water as is hereby stipulated in ARTICLE XVI, Section 5 of the Colorado Constitution.

***** A. What are the "public's interests in the water of natural streams"?**

The foremost recognition in case law of the "public's interests in the waters of natural streams" is found the discussion within Marks v. Whitney, 6 Cal. 3d. 251, manifesting the following:

> "(p)ublic easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes ... " "(t)he traditional triad of uses – navigation, commerce and fisheries – does not limit the public interest in the trust reservation..." "(t)he public uses to which lands and waters are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of lands and waters is the preservation of those lands and waters in their natural state so that they may serve as ecological units... as open space, and as environments which provide food and habitat for birds and (wildlife), and which favorably affect the scenery and climate of the area."

The question of public "uses" of waters does not seek a classification of "uses", but rather incorporates public desires associated with its ownership of waters. The issues within a public trust doctrine is that the people of the state of Colorado own the water in Colorado and, as such, may seek water-related activities as owners of their estate compliant with the rights and responsibilities of the state as administrator to enforce regulation, *jus regium*.

And, a further exposition of the nature of the public's interests in public waters is contained within the carefully propounded language within the U. S. Supreme Court decision: Illinois Central R. Co. v. State of Illinois (1892) wherein the U. S. Supreme Court announced that the rights and ownership of waters, and certain lands associated with water, could never be held outside of the public ownership and was impressed by the doctrine of public waters known as the public trust doctrine.

The U. S. Supreme Court decision cited as being the "landmark" decision in moving the public trust doctrine from the national standard to the level of the states is the 1892 U. S. Supreme Court decision Illinois Central R. Co. v. State of Illinois, 146 U.S. 387 (1892), 13 S. Ct. 110 (December 5, 1892). The Illinois Legislature in 1869 had passed legislation that had provided much of the waterfront of Lake Michigan in Chicago to the Illinois Central Railroad as a fee simple absolute ownership. When a newly-elected Legislature passed legislation to overturn the grant from the 1869 Legislature, subsequent legal actions passed through the courts until the 1892 United States Supreme Court decision. In his majority opinion, Justice Field, commenting on the "common law doctrine" being discussed opined in the following manner:

"... this doctrine has been often announced by this court, and is not questioned by counsel of the parties."

"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 question, therefore, to be considered, is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and the consequent control of it waters... "

"The state holds the title to the lands by common law, which we have already shown." "It is a title different in character from that which the state holds lands intended for sale. It is different from the title which the United States hold in the public lands which are open for preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry over commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties."

"... the exercise of that trust requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of property. The control of the state for purposes of the trust can never be lost ...".

And, as to the question of the potential for the adoption of a Colorado public trust doctrine to create not only policy re-directions in the care and use and applications of state waters but also to establish a new direction for the support, control and regulation for elements of the trust on Federal lands within the state domain, an answer might be found in the United States Supreme Court decision California Coastal Zone Commission, et. al. v. Granite Rock Company, 107 S. Ct. 1419 (March 24, 1987) in which the U. S. Court found:

"(t)he Property Clause of the constitution, which gives Congress plenary power to legislate use of federal lands, does not itself automatically conflict with all state regulation of federal lands. "Even within the sphere of the Property Clause, which gives Congress plenary power to legislate use of federal lands, state law is preempted only when it conflicts with the operation or objectives of federal law, or when congress evidences intent to occupy a given field (U. S. C. A. Const. Art. 4, (3 cl. 2))."

In summary, " ... (these) cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously grants rights or the enforcement of the trust against lands and waters long thought to be free of the trust ... Except for those rare instances in which a grantee may (have) acquired a right to use former trust property free of trust restrictions, the grantee holds (an interest) subject to the trust, And while he may assert a vested right to the servient estate and to any improvement he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes." see National Audubon Society v. Superior Court of Albany County, 21 ERC 1490; February 17, 1983.

Materials here below contain some pertinent and important perceptual observations as contained within the monograph relating to Colorado - see *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights,* Ecology Law Quarterly, Vol. 32:3, 2005, David B. Schorr): (ed. note: **citations included in original**).

"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 [rights] in water, was widely influential in the adoption of the appropriation doctrine by other western jurisdictions.

Further:

"If the waters are the property of the public, they are, of course, not owned by riparian land owners . . ."

"But why not suffice with replacing riparian title with ownership by appropriators? Why the communitarian, public-property rhetoric, so at odds with the supposed frontier ethic of individualism and private property?

"The conceptual punch of the section lies precisely in this public-property theory as the basis for the right of appropriation. Opening up the opportunity to acquire a water right to all members of the public was not, as one might have expected, based on a theory of the water being *res nullius*, un-owned, and therefore freely available to all. It was, rather, as in riparian doctrine, the property of the public, *publici juris*.186 Only the right to use could be acquired,187 and then only under conditions stipulated by the owner (through its agent, the state).188 The recognition of public ownership, lobbied for by the territorial Grange,189 was important for providing the theoretical and legal underpinnings for the limitations on appropriation that would be applied by the state to prevent the replacement of monopoly by riparian owners with monopoly by speculating appropriators. As explained by the 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.190

185. Alvin Marsh, *in* DENVER DAILY TRIB., Feb. 19, 1876.
186. *See* Embrey v. Owen, 6 Exch 353, 155 ER 579 (1851). The state Supreme Court later ruled that water had been *publici juris* in Colorado even before the adoption of the state Constitution. Derry v. Ross, 5 Colo. 295, 301 (1880). 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).
187. City of Denver v. Bayer, 2 P. 6, 7 (Colo. 1883); Wheeler v. N. Colo. Irrigation Co., 17 P. 487, 489-90 (Colo. 1888).
188. 1 WIEL, *supra* note 13, at 197; *Wheeler*, 17 P. at 490; Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co., 48 P. 828, 830 (Colo. App. 1897); Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912)
189. *The Grangers*, ROCKY MTN. NEWS, Dec. 18, 1875, at 4. The Grange was part of a larger post-Civil-War agrarian movement, often referred to as "the Granger movement," whose goals included strengthening the independence of yeoman farmers and combating the power of the corporations. *See generally* SOLON JUSTUS BUCK, THE GRANGER MOVEMENT (1913); CARL C. TAYLOR, THE FARMERS' MOVEMENT, 1620-1920, at 139 (1953).

Further:

"The theoretical innovation of this section went yet one step further. The assertion of public ownership, as distinguished from state ownership, was significant for the framers, who evidently had something like the public trust doctrine, with its limits on legislative power to dispose of a public resource, in mind for Colorado's water.191

"A proposal to have the constitution declare that "The primary right of ownership in the waters of all the streams in this State is and shall be at all times in the State"192 was met with opposition from H. P. H. Bromwell, whose experience as a U.S. Congressman and member of the radical 1870 Illinois Constitutional Convention lent him particular influence in the debates:193 Bromwell was not in favor of giving an opportunity for pools to be formed to speculate in water, and did not want the Legislature to be surrounded by such crowds of monopolists. If the capitalists get hold of all the water, they will have the people by the throat. [He] did not want to see the Legislature free to do as they wanted to with all the water of the State.194

"His fellow leader of the agrarian "Granger" faction195 and chair of the committee on irrigation, S. J. Plumb, agreed, saying "that the General Assembly could not be relied upon, and he wanted to get the matter as far from them as possible;"196 "Mr. Plumb urged that the stream should be under the control of the sovereign people, and not subject to the management and manipulations of the Legislature."197 The radicals' arguments carried the day.198

190. 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.
191. Trelease, supra note 20, at 646. See also Michael C. Blumm et al., Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794, 24 ECOLOGY L.Q. 461, 502-03 (1997). See generally Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970).
192. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875, at 44 (1907).
193. By contemporary account, Bromwell was styled the "Orthodox Blackstone of the convention." *Our Constitution Makers, Who and What They Are*, DENVER TRIB. SUPP., Feb. 14, 1876. For his anti-corporate activity in the Illinois convention, *see* DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 84, 330-31, 418, 487 (Springfield, E.L. Merritt 1870). *See also* Colin B. Goodykoontz, *Some Controversial Questions Before the Colorado Constitutional Convention of 1876*, 17 COLO. MAG.1, 11 (1940).
194. *Constitutional Convention*, DENVER DAILY TIMES, Feb. 18, 1876, at 4.
195. *The Grangers*, ROCKY MTN. NEWS, Dec. 17, 1875, at 4.
196. Constitutional Convention, supra note 194, at 4.
197. DENVER DAILY TRIB., Feb. 19, 1876.
198. *See* 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).

Appellants argued, based on a plausible reading of Colorado's territorial water legislation,304 that the statutes had modified the common law of riparian rights only in extending the right to appropriate water to non-riparians within the watershed, but no further.305 In its decision, however, the Colorado court rejected any role at all for riparian or local use as a factor in water rights, making *Coffin* the seminal decision for the "pure appropriation" or "Colorado" doctrine.The motivation for this radical approach is illuminated by developments in western water law in the years immediately preceding The Colorado rule was clear: . . . riparian lands would have no water right incidental to them; all landowners could acquire

water rights only by use, regardless of their land's location.

William Young Birch 1803); 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 427 (New York, O. Halsted 1832) (riparian right incident to ownership of land); JOHN M. GOULD, TREATISE ON THE LAW OF WATERS 360 (Chicago, Callaghan & Co. 1883) (riparian right "parcel of the land").300. *Contra* Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 520, n.14 (2002).301. 1861 Irrigation Act § 1, 1861 Colo. Sess. Laws 67, quoted *supra* at note 148. *See* Abstract R. 3-4, 8-9, Coffin v. Left Hand Ditch Co. (No. 885), Colo. St. Archives.302. *Coffin*, 6 Colo. at 449.303. *Id.* at 444, 449.304. *See supra* at notes 148, 162-164. 305. Appellants' Br. 9-13, Coffin v. Left Hand Ditch Co. (No. 885), Colo. St. Archives.

C. The title, ballot title and submission clause, and summary:

The Colorado Initiative Ballot Title Setting Board correctly, and fairly, fixed and determined the title, ballot title, and submission clause for the proposal that fairly expressers the true intent and meaning of the proposed amendment to the Colorado constitution. The Colorado Initiative Ballot Title Setting Board also correctly determined that the initiated proposal – Colorado Initiative 2011 - 2012 # 3 - *Initiative to Adopt the Colorado Public Trust Doctrine* - was a measure that contained a "single subject" that conforms to the single-subject requirements of Article V Section 1(5.5) of the Colorado Constitution, and Colorado Revised Statutes § 1-40-106.5.

IV. CONCLUSION

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 for Colorado Initiative 2011 – 2012 – *Initiative to Adopt the Colorado Public Trust Doctrine* - complies with Section 21 of article V Colorado constitution provisions in that the initiative ballot tile, as set by the Board.

Respectfully submitted this 23rd. day of January 2012;

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 23rd. day of January, 2012, I mailed via an overnight delivery service 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 # 3, *Initiative to Adopt the Colorado Public Trust Doctrine*, to:

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//signed//
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