

SUPREME COURT, STATE OF COLORADO

Colorado Supreme Court
101 West Colfax Avenue, Suite 800
Denver, Colorado 80202

Supreme Court Case No:
2012 SA 8

**FILED IN THE
SUPREME COURT**

FEB - 6 2012

**OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk**

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

**ANSWER BRIEF OF THE RESPONDENTS
PHILLIP DOE AND RICHARD G. HAMILTON**

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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.

INITIATIVE BALLOT TITLE SETTING BOARD

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

Proposed Initiative 2011-2012 #3 - Initiative to Adopt the Colorado Public Trust Doctrine.

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

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.

"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.

RESPONSE TO "MOTION TO REHEAR" THE TITLE AS SET BY THE TITLE SETTING BOARD

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*.

III. ARGUMENT

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 expresses 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.

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"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 measures 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."

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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))

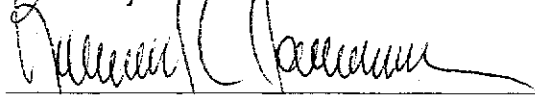
“More bluntly stated, one purpose of the one-subject rule is to discourage the practice of logrolling. It is argued that the rule serves this purpose only partially and indirectly, since it does not prevent the practice of logrolling by creating a coalition to support a group of bills, each of which 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)”(original text).

The initiative ballot title, as set by the Ballot Title Setting Board for Colorado Initiative 2011 – 2012 #3 - *Initiative to Adopt the Colorado Public Trust Doctrine* - complies with Section 21 of article V Colorado constitution provisions in that the initiative ballot tile does not contain more than a single subject.

PETITIONER, requested this Court “. . . to find the Title Board lacked jurisdiction to set the title and submission clause because the measure contains multiple subjects.”

The PETITIONER presented no argument to the Court substantiating purported violations of state constitutional provisions or statutory requirements necessitating the action requested. Sponsors of the proposed initiated measure request the Court reject the PETITIONER’s request.

Respectfully submitted this 6th. day of February 2012;



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CERTIFICATE OF SERVICE

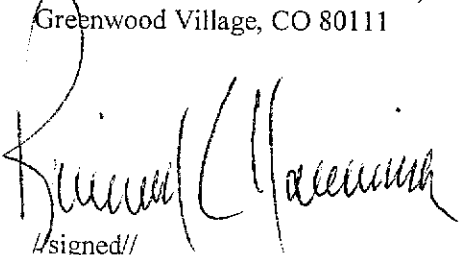
I HEREBY CERTIFY that, on this 6th. day of February, 2012, I mailed via an overnight delivery service, or hand delivered, a true and correct copy of the OPENING BRIEF OF THE RESPONDENTS, PHILLIP DOE AND RICHARD G. HAMILTON, in the matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Initiative 2011-2012 # 3, *Initiative to Adopt the Colorado Public Trust Doctrine*, to:

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//signed//

Richard G. Hamilton