

SUPREME COURT, STATE OF COLORADO  
101 West Colfax Avenue, #800  
Denver, CO 80203  
ORIGINAL PROCEEDING PURSUANT TO  
C.R.S. § 1-40-107(2)  
Appeal from the Title Board

FILED IN THE  
SUPREME COURT

MAR - 5 2012

OF THE STATE OF COLORADO  
Christopher T. Ryan, Clerk

IN RE TITLE AND BALLOT TITLE AND  
SUBMISSION CLAUSE SET FOR  
INITIATIVE 2011-12 #45

**Petitioner:** DOUGLAS KEMPER, as  
Registered Elector of the State of Colorado  
and

**Title Board:** WILLIAM A. HOBBS, JASON  
GELENDER, and DANIEL DOMENICO  
and

**Respondents:** RICHARD G. HAMILTON and  
PHILLIP DOE, Proponents.

▲ COURT USE ONLY ▲

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Case No. 12SA22

**ANSWER BRIEF OF PETITIONER, DOUGLAS KEMPER**


## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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- It contains \_\_\_\_\_ words.
- It does not exceed 18 pages.



Stephen H. Leonhardt

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## **SUMMARY OF ARGUMENT**

Initiative 45 has no single unifying purpose. Rather, its three separate subjects have differing objectives, lacking any necessary or proper connection. While one part of the initiative would subordinate appropriated water rights to the state's control, in order to protect newly defined "public interests," another would expand the ability to appropriate water to allow such claims over new types of water, particularly nontributary groundwater. Unlike these provisions limiting or expanding rights to divert water by appropriation, another subsection would impose new requirements for returning water unimpaired after use, addressing the separate subject of water quality requirements for discharging water. Contrary to the Title Board's analysis, these subjects each would fundamentally alter the current subject of section 6 of article XVI in very different ways.

The Title Board properly refused to consider Mr. Hamilton's suggested revisions to the Titles on rehearing. Because Mr. Hamilton filed no motion for rehearing, his suggested changes to the Titles should not be considered in this appeal.

## ARGUMENT

### **I. Initiative #45 contains multiple purposes, and, therefore, violates the single subject rule.**

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

On appeal, the Court must determine whether multiple purposes are accomplished by an initiative with a general theme, such that the initiative violates the single subject requirement. *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 279 (Colo. 2006). Even where the Court can find a general theme in an initiative, all provisions must also have a common objective. *See In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995).

In 2010, this Court held that an initiative broadly characterized by its proponents as having the purpose of protecting the waters of the state had multiple subjects. *See In re Title 2009-2010 #91*, 235 P.3d at 1073. Proponents argued that the initiative was only one subject because its primary purpose was to increase the powers of Colorado’s nine basin roundtables and interbasin compact committee, which agencies would be funded by a newly-created beverage tax. *Id.* at 1074. Disagreeing with proponents, the Court determined that the initiative contained at least two subjects: (1) creating and administering a beverage container tax, and (2) prohibiting the General Assembly from exercising its legislative authority over the basin roundtables and interbasin compact committee until 2015, while embedding these statutorily created entities within the water sections of the Colorado Constitution and vesting them with significant new authority. *Id.* at 1073-74. Simply characterizing the initiative under a broad statement of purpose—“to protect and preserve the waters of this state”—could not properly unite separate subjects into one. *Id.* at 1080. On the contrary, the establishment and administration of a beverage tax had no necessary or proper connection to a prolonged prohibition on the General Assembly exercising its authority over the basin roundtables and interbasin compact committee. *Id.* Similarly, Initiative 45



contains three subjects and objectives, that are separate and distinct, even though the Proponents would combine them in a single section of the Constitution.

**A. Initiative #45 seeks to establish “a dominant water estate” held by the public, contrary to traditional understandings of the public’s interest in water.**

Subsection (1) of Initiative #45 would amend section 6, article XVI of the Colorado Constitution by adding that the right to divert water to beneficial uses “may be limited, or curtailed, so as to protect natural elements of the public’s dominant water estate by holding unlawful any usufruct use of water causing irreparable harm to the public’s estate.” This provision would subordinate existing and future appropriative water rights to the interests of the public in these “natural elements.” This purpose echoes the “public trust doctrine” theme of the same proponents’ current Initiative #3 and several of their previous proposed initiatives, including some where this subject was improperly combined with other purposes. Initiative #45 “only recasts the words” of those earlier measures. *In re Title, Ballot Title and Submission Clause for 2007-2008, #17*, 172 P.3d 871, 875-76 (Colo. 2007); *see also Public Rights in Waters II*, 898 P.2d at 1077-80.

Section 5 of article XVI of the Colorado Constitution establishes that 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.” Colorado courts have long recognized that the “public” and “the people” are synonymous. *Wyatt v. Larimer & Weld Irrigation Co.*, 29 P. 906, 911 (Colo. App. 1892). Thus, the Colorado Constitution has secured public ownership and use of the water of the state’s natural streams by the passage of ownership “to the people by the first appropriation to a beneficial use.” *Id.* at 910.

By creating a “dominant water estate” in the public to protect “natural elements,” subsection (1) of Initiative #45 subordinates the public ownership of water as traditionally defined—by beneficial use—to the protection of undefined “natural elements.” This provision of Initiative #45 would disrupt Colorado’s scheme of priority-based water rights by subordinating appropriative water rights, regardless of priority, to the public’s “dominant water estate.” This subordination would undermine existing water rights, thereby reducing the public’s control of water supplies as traditionally defined under Colorado law.

**B. Another aim of Initiative #45 would greatly expand the right to appropriate water, overriding Colorado’s separate allocation of nontributary groundwater.**

Initiative #45 would delete the central phrase, “the unappropriated waters of any natural stream,” from article XVI, section 6 of the Colorado Constitution. Contrary to the Title Board’s assertion, this redaction would change the subject of Section 6 by expanding the scope of waters in which rights may be obtained by appropriation, thereby altering the legal foundation for acquiring rights in nontributary groundwater.<sup>1</sup> Hamilton admitted he intends such a result. Opening Brief of the Respondents Phillip Doe and Richard G. Hamilton (“Hamilton’s Opening Brief”) at 20 (quoting Respondents’ response to the Office of Legislative Legal Service’s query, “Would the prior appropriation system then apply to, e.g., nontributary groundwater?” as “Yes.”).

As explained in Petitioner Kemper’s Opening Brief, Colorado’s current law of nontributary groundwater rights under the 1965 Act is based on land ownership, and is entirely separate and distinct from appropriation of water of the natural

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<sup>1</sup> As noted in Petitioner’s Opening Brief at 11-15, such rights are currently obtained under the 1965 Ground Water Management Act, as amended and codified at C.R.S. § 37-90-101, *et seq.* (hereinafter the “1965 Act”), rather than by appropriation under the Constitution.

streams of Colorado under the Colorado Constitution. *Chatfield E. Well Co., Ltd. v. Chatfield E. Prop. Owners Ass'n.*, 956 P.2d 1260, 1268 (Colo. 1998); see Petitioner Kemper's Opening Brief at 12-15. Because nontributary groundwater is not "of any natural stream," and it is not subject to the provisions for appropriation in article XVI, section 6. See *Colorado v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1308 (Colo. 1983). Vested rights in nontributary groundwater are established by different criteria than appropriation water rights, so such rights would be reexamined by different standards if prior appropriation became the legal framework for allocation this resource.

Eradicating this fundamental distinction between the water of natural streams under the Colorado Constitution and nontributary groundwater is its own discrete subject. Hamilton argues that "'natural stream' has become an unusable, ambiguous term potentially relating either to differing concepts of a legally-created entity, or, otherwise, relating to an undisrupted physical 'natural' rheology now uncommon." Hamilton's Opening Brief at 17. Despite Mr. Hamilton's effort to impose his own definition on the term, the meaning of "natural stream" as used in the context of the Colorado Constitution is necessarily a legal one.

In *Whitten v. Coit*, 385 P.2d 131, 135,-140 (Colo. 1963), this Court held that the prior appropriation system does not apply to nontributary groundwater, noting that article XVI, sections 5 and 6 “make specific reference in recognizing the ‘appropriation’ doctrine only to the waters in ‘natural streams.’” The *Whitten* decision left open the question of how nontributary groundwater could be allocated, spurring the General Assembly to enact the 1965 Act, which created a framework for the use and conservation of those waters not part of any natural stream. See C.R.S. § 37-90-102(2). This Court affirmed its decision in *Whitten* in *Southwestern*, by holding that the plain language of the Constitution, using the phrase “waters of every natural stream,” encompasses “only waters in natural streams and all waters tributary thereto” as being subject to appropriation. 671 P.2d at 1308.

Hamilton characterizes S.B. 481,<sup>2</sup> which was a 1979 change to the Water Right Determination and Administration Act of 1969 (“1969 Act”), C.R.S. 37-92-101 *et seq.*, as altering Colorado’s prior appropriation system by changing the word “waters” to “water in or tributary to natural surface streams.” Hamilton Opening Brief at 20. On the contrary, S.B. 481 merely clarified the scope of

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<sup>2</sup> The relevant portion of S.B. 481 was enacted as C.R.S § 37-92-102(1)(a) (1979).

appropriation under the Constitution. The General Assembly enacted S.B. 481 in 1979 in response “to the *Huston* case and to concerns regarding speculation in water rights.” *In re Board of County Comm’rs*, 891 P.2d 952, 959 (Colo. 1995) (citing Ch. 346, 1979 Colo. Sess. Laws 1366); see *Southeastern Colo. Water Conservancy Dist. v. Huston*, 593 P.2d 1347, 1349 n. 2 (Colo. 1979). The same *Huston* litigation, involving several speculative claims for appropriation of nontributary groundwater, culminated in this Court’s 1983 decision in the *Southwestern* case. *Id.*; see *Southwestern*, 671 P.2d at 1300. That decision confirmed the scope of appropriation under the Constitution, which is limited to tributary waters of a natural stream, as S.B. 481’s amendment simply clarified. *Id.* at 1300, 1308, 1317.

Mr. Hamilton attempts to tie the expansion of the appropriation framework to cover nontributary groundwater to his recurring effort to establish a public trust doctrine in Colorado. He argues that Colorado’s legal system for nontributary groundwater pursuant to the 1965 Act and other regulations somehow violates the “public trust doctrine,” as described in *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999) and *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892), *aff’d*, 154 U.S. 225 (1984). See Hamilton Opening Brief at 19-24. The

United States Supreme Court recently revisited the public trust doctrine and *Illinois Central* specifically, stating that the law of that case was “necessarily a statement of Illinois law.” *PPL Montana, LLC v. Montana*, No. 10-218, 505 U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 2012 WL 555205, at \*18 (Feb. 22, 2012) (citing *Idaho v. Cour d’Alene Tribe of Idaho*, 521 U.S. 261, 284-86 (1997)). The Court explained this principle, holding that “the public trust doctrine remains a matter of state law,” and thus, “the States retain residual power to determine the scope of the public trust over waters within their borders.” *Id.*

In light of the U.S. Supreme Court’s most recent holding, the cases cited by Hamilton only reflect the public trust doctrine as conceived in Arizona and Illinois, respectively. Unlike these other states, Colorado law does not recognize a public trust doctrine, even for navigable waters. *See People v. Emmert*, 597 P.2d 1025, 1027-28 (Colo. 1979). Moreover, as noted above, Colorado’s constitutional provisions on natural streams do not extend to nontributary groundwater. Thus, Hamilton’s attempted connection between Initiative #45’s first purpose (of establishing a public trust doctrine in Colorado) and its second objective (of expanding the scope of waters subject to appropriation to include nontributary groundwater) simply fails; its premise lacks any foundation under Colorado law.

The legal effect of removing the phrase “the unappropriated waters of any natural stream” from article XVI, section 6 of the Colorado Constitution, is not to extend the public trust doctrine, but to eliminate longstanding constitutional limits on the right to appropriate and use water. The water to be appropriated must be “unappropriated” and must be “of any natural stream.” Removal of these limits would alter the subject of the appropriation doctrine and would especially impact Colorado landowners’ groundwater rights that have already been decreed or vested under the 1965 Act, if others seek to obtain the same water by appropriation.

**C. The third purpose of Initiative #45 is to address the regulation of water quality, a distinct and separate objective from the administration of water rights.**

Subsection (2) of Initiative #45 would require appropriators to “return water unimpaired to the public, after use, so as to protect the natural environment and the public’s use and enjoyment of waters.” As a preliminary matter, it is unclear what practical effect is intended by Subsection (2). The provision appears, at a minimum, to inject a nebulous water quality requirement into the Colorado Constitution, and perhaps to prohibit the transfer and use of “foreign water” in Colorado. Under a more drastic interpretation, Initiative #45 could result in the



prohibition of consumptive beneficial uses of water entirely. Mr. Hamilton's Opening Brief does not address the intent of the provision.

Broadly speaking, in Colorado the regulation of water quality and the administration and protection of water rights are two separate matters. *See* Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 886 (1989). The singular focus of the prior appropriation doctrine, as enshrined in sections 5 and 6 of the Colorado Constitution, is to ensure the people's right to the beneficial use of water. *Id.* at 888. In contrast, the regulatory scheme addressing water quality in Colorado is premised on the state's police power. *Id.* at 883. Indeed, section 104 of the Colorado Water Quality Control Act maintains the separation of subjects by ensuring that rights to appropriate water pursuant to sections 5 and 6 of article XVI of the Colorado Constitution will not be curtailed by water quality regulations. *See id.* at 890; C.R.S. § 25-8-104. Whatever the intent of subsection (2), under any reasonable interpretation, this provision reflects a separate and distinct subject and purpose from the provisions of Initiative #45 that concern the allocation of water rights.

**D. These three subjects lack any necessary or proper connection, and therefore violate the single-subject rule.**

Initiative #45 would revise article XVI, section 6 of the Colorado Constitution and accomplish three distinct objectives by 1) creating a “dominant public estate” in water, that would subordinate both past and future appropriative water rights; 2) expanding the scope of water appropriation by removing the limits to “unappropriated water” and waters of a “natural stream”; and 3) injecting a water quality standard into the Colorado Constitution by requiring that appropriators return water unimpaired to the stream. As demonstrated above, these objectives are not sufficiently connected or interrelated to satisfy the single-subject rule.

The State contends that “[a]lthough #45 alters the details, it does not alter the long-recognized scope of the subject” of section 6 of article XVI of the Colorado Constitution. Opening Brief of Title Board at 6. The State’s reasoning blurs the analysis required by the single-subject rule. It is precisely the “details” of the Initiative that are under review. The State seeks to place Initiative #45 under the broad heading of “water” to avoid analysis of the multiple, unconnected purposes contained in the Initiative. Passage of Initiative #45 would expand upon what is currently the singular subject of section 6 of Article XVI of the Colorado

Constitution, the appropriation of water in Colorado streams, injecting three distinct subjects with different objectives. None of those purposes bear a sufficient, necessary and proper connection to section 6, or to each other. The common theme that provisions relate to “water” does not create a single subject. *Public Rights in Water, II*, 898 P.2d at 1080.

**II. The Title Board properly refused Proponents’ request to modify the Titles at the Rehearing on January 18, 2012.**

In his Opening Brief, Proponent Hamilton advocates modified language for the title, ballot title, and submission clause for Initiative #45 (together, “Titles”). *See* Hamilton Opening Brief at 9-11. The Title Board held a rehearing reconsidering whether to set the Titles on motion from Petitioner Kemper. At the rehearing, Proponent Hamilton verbally requested that the Board modify the Titles. The Board properly refused to consider Mr. Hamilton’s request to modify the Titles because he failed to file a motion for a rehearing. *See* Rehearing Trans. at 21 (attached as Appendix C). Any person who seeks to modify titles set by the Title Board must file a motion for rehearing within seven days after the Board sets titles. *See* C.R.S. § 1-40-107. Similarly, Mr. Hamilton lacks standing to advocate revisions to the Titles in this appeal. *See Matter of Proposed Initiative on School Pilot Program*, 874 P.2d 1066, 1070 n.1 (Colo. 1994) (holding that filing a motion

for rehearing with the Title Board is a “prerequisite” to the Supreme Court’s exercise of jurisdiction over a claim that the title, ballot title and submission clause, or summary fixed by the Board does not fairly express the true meaning or intent of a proposed initiative).

### CONCLUSION

Initiative #45 contains multiple discrete subjects and purposes and, therefore, violates the single subject rule. Accordingly, this Court should reverse the Board’s action in setting the Titles.

Respectfully submitted this 5<sup>th</sup> day of March, 2012.

BURNS, FIGA & WILL, P.C.

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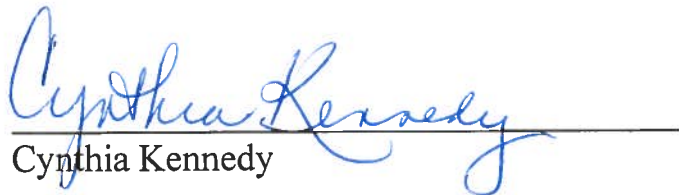
**CERTIFICATE OF MAILING**

The undersigned hereby certifies that a true and correct copy of the foregoing **ANSWER BRIEF OF PETITIONER, DOUGLAS KEMPER** was served via Federal Express on this 5th day of March, 2012, as follows:

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TITLE SETTING REVIEW BOARD MEETING

January 18, 2012

Initiative #45

TRANSCRIPT MADE FROM CD

1                   CHAIRMAN HOBBS: The next item on the  
2 board's agenda is 2011-2012, No. 45, Limits on Water  
3 Diversion. This is before the board on a Motion for  
4 Rehearing.

5                   So I first would turn to the petitioners  
6 for the Motion for Rehearing. Mr. Leonhardt, would  
7 that be you? Okay. If you'll come forward then,  
8 please. Thank you.

9                   MR. LEONHARDT: Thank you, Mr. Chairman,  
10 Members of the Board. Stephen Leonhardt appearing on  
11 behalf of the Petitioner, Douglas Kemper, requesting  
12 rehearing primarily on the grounds that this measure  
13 includes multiple subjects, the first subject being  
14 the subordination of water diversion and use rights,  
15 both existing and future rights, to what's  
16 characterized as a dominant public water estate for  
17 public purposes defined in the measure.

18                   The second being in the deletions from the  
19 existing language of Article XVI, Section 6 of the  
20 Constitution removing the limit to unappropriated  
21 water, removing the limit to water of natural  
22 streams so that the provision would expand to  
23 include appropriation of nontributary groundwater by  
24 any party without consent of the overlying  
25 landowner. And also removal of the limit to

1 unappropriated water being subject to appropriation.

2           And the third subject being that in  
3 addition to the restrictions and impasse regarding  
4 diversion of water, this measure would impose a  
5 requirement that water be returned unimpaired to the  
6 stream, thus implicating the discharge of water to  
7 streams and other water bodies after it's been used.

8           These subjects are separate subjects.  
9 They're not dependent upon one another. They're not  
10 necessarily connected with one another. The  
11 combination of the three in a single measure is  
12 likely to create a voter's surprise by implicating  
13 these different subjects.

14           CHAIRMAN HOBBS: Questions for  
15 Mr. Leonhardt?

16           A couple things. You know, the motion,  
17 you know, references the fact that in the titles we  
18 described the single subject as public control of  
19 water. And I think one of -- one issue with that  
20 that you raised is that it doesn't necessarily  
21 encompass everything in the measure --

22           MR. LEONHARDT: Right.

23           CHAIRMAN HOBBS: -- which is really not so  
24 much -- well, although I didn't understand you to be  
25 objecting to the title necessarily but really to the



1 fact that it is a single subject. In other words,  
2 that's -- it can't -- a single subject cannot be  
3 described, and that doesn't do it.

4 MR. LEONHARDT: Exactly.

5 CHAIRMAN HOBBS: And it struck me that even  
6 though there are several different things achieved by  
7 the measure, as you described them, I'm still having  
8 trouble seeing them as distinct and unconnected with  
9 each other.

10 It seemed to me, and I'm not quite sure  
11 the best way to describe it, is that everything in  
12 the measure, to some degree, works together to  
13 enhance or promote the public's rights in water.  
14 And there's several things about that. But it  
15 seemed like that -- that they are all connected in  
16 that regard.

17 Whether or not that's the best expression  
18 of the single subject, it seems like everything in  
19 the measure tends to enhance the public's rights in  
20 water. Would you comment on that a little bit,  
21 please?

22 MR. LEONHARDT: Well, public rights to water  
23 is a concept that obviously means different things to  
24 different people. And historically, I think, in  
25 Colorado it's been viewed largely as the public's

1 rights to appropriate water for beneficial use.

2 This right to appropriate for beneficial  
3 use would, in one sense, be expanded by the measure  
4 by opening it up to all water, not just the  
5 unappropriated water of natural streams. But in  
6 other respects, it would be restricted by the  
7 initiative. It would be subordinated by the  
8 initiative to these newly defined public interests  
9 in the environment and so-called public use of  
10 water. And last, but not least, it would be  
11 burdened with requirements governing how water is  
12 returned.

13 So I guess in one sense, it would open up  
14 rights for appropriation. In another sense, it  
15 would restrict and burden and subordinate rights of  
16 appropriation. And yet in another sense, it would  
17 enhance these newly defined public rights in water  
18 for environmental protection and recreational uses.

19 And certainly all those different agendas  
20 really that are encompassed in this one measure seem  
21 to be too broad to be a single subject with a  
22 unified and coherent opinion.

23 CHAIRMAN HOBBS: Thank you. Other questions  
24 for Mr. Leonhardt?

25 If not, then let me turn to others. I'll

1 start with Mr. Hamilton. Would you like to start,  
2 or Mr. Doe, on behalf of proponents? If you'll  
3 identify yourself again, please, sir.

4 MR. DOE: My name is Phillip Doe. I live in  
5 Littleton, Colorado.

6 You know, to me, this reform of 6 --  
7 Section 6 of Article XVI does nothing more than put  
8 a limit or describe what the rights of ownership  
9 are. And heretofore it seems to me that those  
10 rights have been pretty much subsumed by user  
11 rights.

12 And since we're down to our last drop of  
13 water and things are clicking along in this state at  
14 a rapid rate, particularly with relationship to oil  
15 and gas exploration and fracing, the public should  
16 have some right to describe what it will allow and  
17 what it won't allow in terms of its ownership.

18 It's kind of like a person having 11 cars  
19 and allowing somebody to use two of those cars for  
20 free with the expectation that it be returned to  
21 them in reasonable condition; that it not be  
22 destroyed. But saying that the 11th car is reserved  
23 for me, and you can't have it because I need it.

24 And it seems to me that that's what this  
25 does. There is a limit to what can be allowed. And

1 within those limits, there are conditions for  
2 allowing you to use what we agreed to. And that's  
3 all this does.

4 CHAIRMAN HOBBS: Mr. Hamilton?

5 MR. HAMILTON: My name is Richard Hamilton.  
6 I reside in Fairplay, Colorado. I created the  
7 response to the motion to rehear. And as I understand  
8 it, it's been made part of your packet, as well as  
9 part of the record.

10 I also added today the 1979 codes adopted  
11 that includes Senate Bill 481, which is the General  
12 Appropriations Act of Colorado. It has multiple  
13 sections. It deals with a variety of topics. It  
14 does appropriation, and there are certain things  
15 like storage and import and things like that.

16 Legislative processes have cascaded down  
17 from the general topic and the topics of  
18 consideration underneath the general topic. And I  
19 believe that that's what is contained in 6. I don't  
20 believe that there's any new or nefarious or hidden  
21 agendas in 6.

22 I think it's really clear that beneficial  
23 use is more of the conditions that makes  
24 appropriation into a water right. And the water  
25 right is right to use, through appropriation and

1 beneficial use, the public's resources.

2 I commend you for the title. I have  
3 certain suggestions as to modification of the title.  
4 I don't know whether this is an appropriate time to  
5 do this or whether that is the purview of those who  
6 filed the motion.

7 On Page 2 is my suggestion for those. It  
8 really does span the beneficial use requisite of all  
9 water uses. And the rest of it is either  
10 redundancy, or it's not contained within the title  
11 or within the measure.

12 CHAIRMAN HOBBS: I'll leave it up to the  
13 board whether they want to take that on.

14 MR. HAMILTON: Oh, certainly. Absolutely.  
15 Thank you for your time.

16 CHAIRMAN HOBBS: Questions for proponents?  
17 Thank you.

18 Mr. Kemper, I overlooked you. You had  
19 signed up to testify. Do you want to comment on the  
20 Motion for Rehearing?

21 MR. KEMPER: (Inaudible).

22 CHAIRMAN HOBBS: Yes, sir.

23 MR. KEMPER: Thank you, Mr. Chair and  
24 Members of the Committee.

25 I did want to re-emphasize the importance

1 on this nontributary groundwater issue. And I want  
2 to make sure that the board understands that  
3 nontributary groundwater is not allocated based on  
4 the appropriation doctrine currently. It's based on  
5 land ownership.

6 And so the effect of this measure by the  
7 sponsor's own responses on the review and comment  
8 hearing was that their intent is to subject  
9 nontributary groundwater to appropriation, which  
10 completely changes the way existing water  
11 groundwater -- nontributary groundwater is  
12 allocated, theoretically making, at least, every  
13 decree invalid.

14 And I don't know as the title really  
15 allows the person, especially the public that would  
16 read that, to be put on notice if that was the case.

17 Further, I don't know as the title also  
18 puts folks on notice that any decree is subject to  
19 being requantified. That means every -- as an  
20 example, every municipal water user -- every person  
21 that takes delivery of municipal water would have  
22 their own supplies of water in jeopardy and that a  
23 new standard is being imposed on their water  
24 provider that may make it more difficult for them to  
25 deliver water to them because of their decrees. The

1 amount of water they have available to them for  
2 diversion are limited.

3           So we've got different things happening  
4 here. One with the diversion of water, the use and  
5 storage of that water, return flows of water. And  
6 on that topic, I don't think that the title is also  
7 putting folks on notice on this issue about  
8 irreparable harm.

9           One of the issues that's becoming a very  
10 big topic right now is endocrine disrupters in  
11 wastewaters. Those are, I think, birth control  
12 pills and so forth that get into -- that people take  
13 and find their way -- that are not removed and are  
14 essentially almost impossible to remove in the  
15 wastewater discharges causing effects on fish  
16 downstream, including sex change of fish downstream.

17           So there is this issue out here about  
18 whether or not wastewater discharges would be  
19 existing -- wastewater discharges would be allowed  
20 under this. So is an average person on notice that  
21 their discharge of water, whether it be through a  
22 municipal system or through an individual sewage  
23 disposal system, septic systems, is put on notice in  
24 this that that may not be permissive?

25           And then the third thing I wanted to say,

1 in the review and comment hearing, it was fairly  
2 clear that this bundle, as we're talking about,  
3 these sets of issues that are out there also include  
4 the access to streams.

5 We spent a fair amount of time on the  
6 review and comment hearing about the public's  
7 dominant estate also including this access to  
8 stream. So, there again, you, at least on the  
9 surface, would be prohibiting people from securing a  
10 reservoir, for limiting access -- public access to  
11 drinking water supplies or water being stored for  
12 drinking water and so forth, and whether or not  
13 you're putting people on -- landowners on notice.

14 But essentially, as long as it's in some  
15 kind of public interest test, that as long as  
16 somebody stays within the high waterline of the  
17 stream, they can go across your property -- they can  
18 go wherever they want to as long as they're doing  
19 some public purpose.

20 So we think again that those are really  
21 different subjects. And that concludes my comments  
22 for the moment.

23 CHAIRMAN HOBBS: Any questions for  
24 Mr. Kemper? Thank you very much.

25 MR. KEMPER: Great. Thank you. I



1 appreciate the opportunity.

2 CHAIRMAN HOBBS: Anyone else before -- I'll  
3 return to Mr. Leonhardt to see if he has any opposing  
4 remarks. Anyone else present wish to testify on the  
5 Motion for Rehearing?

6 If not, Mr. Leonhardt, do you have  
7 anything further you would like to add?

8 MR. LEONHARDT: First of all, if the board  
9 chooses to address Mr. Hamilton's proposed revisions  
10 to the title, I'd like the opportunity to address  
11 those but won't do so at the moment.

12 With regard to the single-subject issues,  
13 first of all, let me just emphasize the existing  
14 language of Article XVI, Section 6 of the  
15 Constitution has been that way since statehood. It  
16 has been relied on by the courts, the Colorado  
17 Supreme Court in particular, for several notable  
18 water rights decisions concerning what the right to  
19 prior appropriation is all about.

20 Tinkering with that language has effects  
21 totally separate and apart from the expressed intent  
22 of the proponents to promote and protect the public  
23 rights in water.

24 And, in particular, with regard to  
25 nontributary groundwater, I believe this is very

1 important. In the mid- to late 1970s, there were a  
2 series of claims made for appropriation of  
3 nontributary groundwater all over the state,  
4 generally known as the Houston claims.

5           These led to some court proceedings and  
6 significant legislation in the 1970s, as well as  
7 several major decisions from the Colorado Supreme  
8 Court, the end result of which, relying on the  
9 language of Article XVI, Section 6 of the previous  
10 Colorado Supreme Court decision of Whitten versus  
11 Coit, which we cited on our Motion for Rehearing --  
12 but the end result is that the Court said, no,  
13 nontributary groundwater is not subject to the prior  
14 appropriation doctrine. It's for the legislature to  
15 deal with as it sees fit.

16           And the legislature said this is the  
17 providence of the landowner to control the  
18 nontributary groundwater beneath their property or,  
19 in the event of a municipal water supplier, then the  
20 landowners are given implied consent. The municipal  
21 water supplier has the right to this water.

22           So there have been a number of decrees  
23 entered for nontributary groundwater, including the  
24 Denver Basin that extends from Denver to Colorado  
25 Springs and to the east. Numerous decrees entered

1 for the water rights for both municipal water  
2 suppliers and for landowners saying, apart from all  
3 the requirements of prior appropriation, you have  
4 the right to this water. You can rely on it in the  
5 future.

6 But by opening nontributary groundwater to  
7 prior appropriation, those rights would be thrown  
8 into question. It would open the door for the --  
9 well, speculation is certainly disfavored in prior  
10 appropriation, but the same kind of speculative  
11 efforts of would-be appropriators to capture the  
12 nontributary groundwater resource would be reopened  
13 by these deletions to the existing language of  
14 Article XVI, Section 6.

15 That's why I believe this piece of the  
16 measure constitutes a very significant separate  
17 subject. It does not have any necessary connection  
18 whatsoever to the proponents' primary aims in this  
19 measure.

20 Also, with regard to the title language,  
21 "public control of water," I guess the more I look  
22 at that phrase the more I question whether it might  
23 be a catchphrase. And, certainly, I question  
24 whether it has different meanings to different  
25 people because much of the water in Colorado is

1 controlled through municipalities, municipal water  
2 suppliers, special districts, water conservancy  
3 districts.

4 There is significant public control of  
5 water through these local and regional entities that  
6 would be greatly disrupted and harmed by this  
7 initiative. And none of that is indicated by the  
8 use of that phrase or the remaining language in the  
9 title.

10 So, yes, we do object to that phrase in  
11 the title, in particular, as well.

12 CHAIRMAN HOBBS: Thank you. If there's no  
13 other testimony, then I'll turn to discussion by the  
14 board. Members?

15 MR. DOMENICO: I still find this pretty  
16 troubling. It certainly does a lot of very important  
17 things relating to water, water rights, use of water.  
18 There's no doubt about that.

19 But doing a number of important things  
20 doesn't necessarily mean that they're not unified by  
21 a single subject. I still am troubled, though, that  
22 I've never been clear, I don't think, in particular,  
23 about why the deletions about unappropriated water  
24 of natural streams are connected with the rest of  
25 the purpose of the measure.

1           That, in particular, seems -- that  
2 argument, in particular, seems persuasive to me that  
3 that may be somewhat surprising, altering not just  
4 sort of the focus of water rights in Colorado from  
5 private prior appropriation to sort of public  
6 control, or however we decided to phrase it, but  
7 also expanding and changing kind of what the entire  
8 regime involves, to include groundwater,  
9 nontributary groundwater.

10           And I've never been certain about the  
11 proponents' reasoning for making those changes, I  
12 don't think.

13           CHAIRMAN HOBBS: Mr. Gelender?

14           MR. GELENDER: With that, I think I have the  
15 same concerns. I would, as I did last time, still  
16 find a single subject here because I think -- it was  
17 actually, I think, clarified for me Mr. Leonhardt  
18 talking about the struggling with this issue of the  
19 expansion on one side, which I believe is  
20 Mr. Domenico's issue, of the regime to sort of a  
21 broader scope of water -- all water in the state  
22 combined with a sort of greater control, perhaps, of  
23 how that water is used.

24           But then when I -- which looks like an  
25 opposition to begin with, but then as I think about

1 it more, it still seems to me like it falls under  
2 the proponents' sort of -- what appears to be their  
3 overall goal or purpose of -- I guess call it water  
4 conservation or protection of the water resource.

5 And in thinking of it in that context, it  
6 seems to make sense to then have it apply to all the  
7 water in the state, whether it's underground,  
8 tributary, in the streambed, whatever, and then to  
9 also limit the way it's used.

10 So understanding the concerns and thinking  
11 it is probably a close question, I still would find  
12 a single subject.

13 And then the last thing is that I think  
14 there's been a lot of argument to the effect that  
15 the consequences of this could be quite dramatic.  
16 But our jurisdiction, I think, doesn't extend too  
17 much to trying to anticipate all the legal effects  
18 of the measure as opposed to just determining  
19 whether it has a single subject and a single  
20 purpose. And I still think, by a fairly close call,  
21 that it does.

22 CHAIRMAN HOBBS: I think at this point I'm  
23 persuaded that there's more than a single subject  
24 here. It does -- as Mr. Domenico and Mr. Gelender  
25 said, I think there's certainly some very significant

1 and important changes made to Colorado law by the  
2 measure. But it still seems to me that they have some  
3 connection that they kind of all move in the same  
4 direction.

5 And I guess -- I don't know whether this  
6 is a question for Mr. Domenico, but with respect to  
7 your point about, you know, expanding, you know,  
8 beyond natural streams and unappropriated waters, it  
9 just seems to me that we're talking about expanding  
10 the water to divert to beneficial uses.

11 And that still seems to me harmonious or  
12 consistent with the idea of public control or public  
13 rights in water. I mean, I don't see it as in  
14 opposite or conflicting or surreptitious, I guess,  
15 even though, again, that is one of the very, very  
16 significant -- or two of the very, very significant  
17 things about the measure.

18 But it still seems to me that the  
19 different features are harmonious or connected with  
20 each other, even though they're certainly fairly  
21 dramatic changes to Colorado law. I think I could  
22 vote for denying the motion for rehearing.

23 MR. DOMENICO: I'm not sure I disagree with  
24 either of your comments. And I think, though, that  
25 just because all the portions of the measure go in the

1 same basic direction does not necessarily mean they're  
2 all a single subject.

3           It helps, and I think that's an important  
4 factor. But I also think part of the reason -- or  
5 the entire reason that the discussion of the  
6 dramatic consequences of a number of the things that  
7 this measure would do is important to us is because  
8 we do have to figure out if we understand the  
9 measure well enough and to know that there isn't  
10 some truly dramatic consequence that we've missed  
11 and failed to convey.

12           And in addition, if there is such a  
13 thing -- and we've had a lot of time to discuss and  
14 look at this -- that suggests that perhaps there is  
15 a surreptitious aspect to the measure and that if we  
16 can't catch it after all of this analysis and back  
17 and forth, the voters would be at least as surprised  
18 as we would be to find something in there that we  
19 haven't quite understood.

20           So that's sort of my general comment about  
21 why all these things are troubling to me and why I  
22 think they're part of our -- they're appropriately  
23 part of our consideration.

24           That said, I don't think the proponents  
25 would deny that they're trying to do something



1 dramatic with major widespread consequences. And  
2 they are -- perhaps some of them are surprising, but  
3 only because the details of water law are sort of  
4 complicated and hard to necessarily understand  
5 without a lot of background knowledge.

6           That makes it hard always to handle  
7 something like this that has kind of a fairly  
8 detailed existing legal regime and makes major  
9 changes to it. Is that a single subject or is it  
10 multiple subjects?

11           I mean, if you were to sort of develop the  
12 current regime piece by piece, I'm not sure you  
13 could develop it under a single subject. Can you  
14 reform the existing regime when you couldn't create  
15 it in a single measure? We've sort of have that  
16 philosophical discussion in the past.

17           I'm not sure I know the answer. But I  
18 still think that there are some surprising aspects  
19 to the measure and that that's what troubles me the  
20 most. And I'm just struggling with whether the  
21 surprising aspects are just because of a sort of  
22 lack of background knowledge or because of something  
23 about the measure itself. And I'm not sure.

24           But given that you two are both sort of  
25 already on board, I'll probably -- it's not worth

1 making a motion, I don't think, to grant the Motion  
2 for Rehearing, although I will say that I am  
3 troubled by the measure.

4 CHAIRMAN HOBBS: Mr. Hamilton also raised  
5 the possibility of amending the titles. For myself,  
6 I'm reluctant to do that for a couple of reasons. One  
7 is, I'm not convinced that the titles should be  
8 amended as Mr. Hamilton has suggested. I think  
9 they're probably okay.

10 But I'm also a little troubled by the way  
11 it's before us where we have the Motion for  
12 Rehearing from Mr. Leonhardt, which really just  
13 raises a single-subject question, not a title  
14 question. Although Mr. Leonhardt did -- in the  
15 discussion this afternoon, did question the  
16 expression of the single subject.

17 And Mr. Hamilton, though, did not file a  
18 Motion for Rehearing. I don't know that that's  
19 stopped us in the past. But like I say, I don't see  
20 a compelling need to change the titles that we set  
21 before. Mr. Hamilton?

22 MR. HAMILTON: Richard Hamilton. We concur.

23 CHAIRMAN HOBBS: Thank you. Any further  
24 discussion by the board?

25 If not, then I will move -- I'll offer a

1 motion then. I move that the board deny the Motion  
2 for Rehearing.

3 MR. GELENDER: Second.

4 CHAIRMAN HOBBS: Any further discussion by  
5 the board? If not, all those in favor, say "aye."

6 (Collective "ayes.")

7 CHAIRMAN HOBBS: All those opposed, "no."

8 MR. DOMENICO: No.

9 CHAIRMAN HOBBS: That motion carries two to  
10 one.

11 That completes action on the rehearing on  
12 No. 45. The time is 2:20 p.m. And that completes  
13 our agenda for today. Thank you very much.

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1 CERTIFICATE

2 STATE OF COLORADO )  
 ) ss.  
3 COUNTY OF JEFFERSON )

4 I, VALORIE S. MUELLER, Registered  
5 Professional Reporter and Notary Public in and for the  
6 State of Colorado, duly appointed to transcribed the  
7 herein recording, certify that said was taken in  
8 shorthand by me and was thereafter reduced to  
9 typewritten form by me and processed under my  
10 supervision, the same consisting of 22 pages, and that  
11 the same is a full, true and complete transcription,  
12 given the quality of the audio CD.

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

17 IN WITNESS WHEREOF, I have affixed my  
18 signature this 8th day of February, 2012.  
19 My Commission Expires: December 10, 2015.

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VALORIE S. MUELLER  
Registered Professional Reporter