

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

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.

**Attorneys for Petitioner:**

BURNS, FIGA & WILL, P.C.  
Stephen H. Leonhardt (#15122)  
Alix L. Joseph (#33345)  
Sarah M. Shechter (#40478)  
6400 South Fiddlers Green Circle, Suite 1000  
Greenwood Village, CO 80111  
Phone: (303) 796-2626  
Fax: (303) 796-2777  
E-mails: sleonhardt@bfw-law.com  
ajoseph@bfw-law.com  
sshechter@bfw-law.com

FILED IN THE  
SUPREME COURT

FEB 13 2012

OF THE STATE OF COLORADO  
Christopher T. Ryan, Clerk

▲ COURT USE ONLY ▲

Case No. 2012SA22

**OPENING 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).

Choose one:

It contains \_\_\_\_\_ words.

It does not exceed 30 pages.

This brief complies with C.A.R. 28(k).

For the party raising the issue: It contains under a separate heading a concise statement of the applicable standard of appellate review with citation to authority.



Sarah M. Shechter

## TABLE OF CONTENTS

<b>CERTIFICATE OF COMPLIANCE</b> .....	ii
<b>TABLE OF CONTENTS</b> .....	iii
<b>TABLE OF AUTHORITIES</b> .....	iv
<b>ISSUES PRESENTED</b> .....	1
<b>STATEMENT OF THE CASE</b> .....	3
<b>SUMMARY OF THE ARGUMENT</b> .....	4
<b>LEGAL ARGUMENT</b> .....	5
I. Initiative #45 contains at least three distinct subjects.....	5
A. Standard of Review .....	6
B. Initiative #45 violates the single subject rule.....	7
1. A proposed initiative must be limited to a single subject.....	7
2. The first purpose of Initiative #45 is to subordinate water rights to a public estate in water. ....	9
3. The second objective of Initiative #45 would remove limits that the Constitution presently imposes on the right to appropriate water.....	11
4. The third purpose of Initiative #45 is to require appropriators to return water to the stream “unimpaired.”.....	16
5. These three subjects lack any necessary or proper connection, and therefore, violate the single subject rule.....	17
II. The Titles for Initiative #45 do not fully express the Initiative’s true intent and meaning. ....	19
A. Standard of Review.....	19
B. The Titles imprecisely and inaccurately describe the single subject as the “public control of water.” .....	20

## TABLE OF AUTHORITIES

### Cases

<i>Bayou Land Co. v. Talley</i> , 924 P.2d 136 (Colo. 1996).....	17
<i>Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP</i> , 45 P.3d 693 (Colo. 2002).....	16
<i>Chatfield Well Co., Ltd. v. Chatfield East Property Owners Ass'n.</i> , 956 P.2d 1260 (Colo. 1998).....	14, 16, 17
<i>City of Aurora v. Acosta</i> , 892 P.2d 264 (Colo. 1995).....	7
<i>City of Thornton v. Bijou Irr. Co.</i> , 926 P.2d 1 (Colo. 1996).....	21
<i>Colorado v. Southwestern Colorado Water Conservation District</i> , 671 P.2d 1294 (Colo. 1983).....	15, 16, 19
<i>Combs v. Agricultural Ditch Co.</i> , 28 P. 966 (1892) .....	20
<i>Danielson v. Vickroy</i> , 627 P.2d 752 (Colo. 1981) .....	19
<i>Fundingsland v. Colo. Ground Water Comm'n.</i> , 468 P.2d 835 (Colo. 1970).....	18
<i>In re Proposed Initiative for 1997-1998 #62</i> , 961 P.2d 1077 (Colo. 1998) .....	25
<i>In re Public Rights in Waters II</i> , 898 P.2d 1076 (Colo. 1995) .....	9, 23
<i>In re Title and Ballot Title and Submission Clause for 2005-2006 #55</i> , 138 P.3d 273 (Colo. 2006).....	9, 10
<i>In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255</i> , 4 P.3d 485 (Colo. 2000).....	10, 11
<i>In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002</i> #43, 46 P.3d 438 (Colo. 2002).....	11
<i>In re Title, Ballot Title and Submission Clause, for 2005-2006 #74</i> , 136 P.3d 237 (Colo. 2006).....	10
<i>In re Title, Ballot Title, and Submission Clause and Summary for 2005-2006 #75</i> , 138 P.3d 267 (Colo. 2006).....	7
<i>In re Title, Ballot Title, and Submission Clause for 2007-2008 #62</i> , 184 P.3d 52 (Colo. 2008).....	24, 25
<i>In re Title, Ballot Title, and Submission Clause, for 2009-2010 #24</i> , 218 P.3d 350 (Colo. 2009).....	9
<i>In re Title, Ballot Title, Submission Clause for 2009-2010 #45</i> , 234 P.3d 642 (Colo. 2010).....	8, 25, 26
<i>In re Title, Ballot Title, Submission Clause for 2009-2010 #91</i> , 235 P.3d 1071 (Colo. 2010).....	6, 7, 8
<i>Navajo Dev. Co., Inc. v. Sanderson</i> , 655 P.2d 1374 (Colo. 1982).....	13

<i>Park County Sportsmen's Ranch LLP v. Bargas</i> , 986 P.2d 262 (Colo. 1999).....	17, 18
<i>People v. Rodriguez</i> , 112 P.3d 693 (Colo. 2005).....	7
<i>Qualls, Inc. v. Berryman</i> , 789 P.2d 1095 (Colo. 1990).....	19
<i>Whitten v. Coit</i> , 385 P.2d 131 (Colo. 1963).....	15, 16

**Statutes**

Clean Water Act, 33 U.S.C. § 1251.....	16
Safe Drinking Water Act, 42 U.S.C. § 300f,.....	16
C.R.S. § 1-40-102(10).....	19
C.R.S. § 1-40-106(1).....	3
C.R.S. § 1-40-106(3)(b).....	19, 20
C.R.S. § 1-40-106.5.....	1
C.R.S. § 1-40-107(1).....	3
C.R.S. § 1-40-107(2).....	4
Colorado Water Quality Control Act, C.R.S. § 25-8-101.....	16
C.R.S. § 37-90-101, <i>et seq.</i> .....	11, 12, 13
C.R.S. § 37-90-102(2).....	14
C.R.S. § 37-90-103.....	13
C.R.S. § 37-90-137(4).....	13

**Other Authorities**

BLACK'S LAW DICTIONARY 1052 (7 <sup>th</sup> ed. 1999).....	9
MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 790 (1984).....	9

**Constitutional Provisions**

Colo. Const. article V, section 1(5.5).....	1, 7
Colo. Const. article XVI, section 5.....	10, 12
Colo. Const. article XVI, section 6.....	passim

## ISSUES PRESENTED

A. Whether the Ballot Title Setting Board (the "Board") incorrectly determined that Initiative 2011-2012 #45 ("Initiative #45") is limited to a single subject, as required by article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5, in light of the multiple objectives of this measure to:

1. Subordinate both past and future water diversion and use rights to mandated state government enforcement of a dominant public water estate;
2. Expand the scope of water appropriation under article XVI, section 6 of the current Constitution, by removing the terms limiting such appropriation to "unappropriated waters of any natural stream" so as to allow appropriation of nontributary groundwater without consent of the overlying landowner; and
3. Impose a requirement that water appropriators return water unimpaired to the stream.

B. Whether the Board's title, ballot title, and submission clause (collectively, the "Titles") for Initiative #45 are unfair in that the phrase "concerning public control of waters" is misleading and fails to clearly express a

single subject that encompasses all the issues actually addressed in the proposed initiative.

### **STATEMENT OF THE FACTS**

Richard G. Hamilton and Philip Doe ("Proponents") proposed Initiative #45, a copy of which is attached as **Appendix A** ("App. A"). Initiative #45 would amend article XVI, section 6 of the Colorado Constitution, adding several provisions and deleting some of the current text, in order to achieve three distinct objectives. In particular, the measure would provide that the right to divert water for beneficial use "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 rights to divert and use water to a dominant public water estate, as enforced by the state government. Initiative #45 would further amend article XVI, section 6 by deleting words that currently limit the appropriation of water to "unappropriated waters of any natural stream." This amendment would expand the scope of water appropriation so as to allow appropriation of nontributary groundwater without consent of the overlying landowner. Finally, Initiative #45 would impose a requirement that water appropriators return water "unimpaired to the public" after use.

The title set by the Board reads as follows:

An amendment to the Colorado constitution concerning public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding the right to appropriate water for beneficial use to all water within Colorado, including nontributary groundwater and not limited to unappropriated water, subject to the public ownership interest; requiring water users to return water unimpaired after use to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; 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 substantially the same as the title, except that it begins with the phrase, “[s]hall there be,” and ends with a question mark.

### **STATEMENT OF THE CASE**

On January 4, 2012, the Board conducted a public meeting pursuant to C.R.S. § 1-40-106(1), at which time the majority of a divided Board determined that Initiative #45 consisted of a single subject, and designated and fixed the titles. Petitioner Douglas Kemper, a registered elector of the State of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on January 11, 2012. At



the rehearing on January 18, 2012, the Board denied Mr. Kemper's Motion for Rehearing by the same majority vote, with Solicitor General Domenico voting no. *See* Title Board Rehearing Transcript, Proposed Initiative #45 ("Rehearing Transcript") 22:1-10, January 18, 2012 (attached as **Appendix B**). Mr. Kemper seeks review of the final action of the Board pursuant to C.R.S. § 1-40-107(2).

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the Board's decision to set Titles for Initiative #45 because it violates the single subject requirement, having at least three unconnected subjects and purposes. First, the measure has the general aim of subordinating water diversion and use rights, including those already established and vested by prior appropriation, to a "dominant public estate in water," which the Initiative would create. While one part of Initiative #45 would subordinate existing water rights, another part would expand the scope of the prior appropriation system. The measure would delete selected words from the Constitution's text, which currently limits the prior appropriation system to "unappropriated waters of any natural stream." These deletions would expand the prior appropriation system to include nontributary groundwater, allowing appropriation of such water without consent of the overlying landowner. Finally, another provision in the measure would require water appropriators to "return

water unimpaired to the public” after use, establishing a new and drastic water quality standard for discharges to streams. Each of Initiative #45’s main subjects—the subordination of water use rights, expanded scope of prior appropriation, and requirement for unimpaired discharge—constitute separate subjects and purposes lacking a common objective or any necessary or proper connection to one another.

Moreover, the Titles for Initiative #45 are unclear and misleading in using the phrase “public control of water” to summarize the Initiative’s subject. This phrase fails to encompass each purpose of the measure, such as the expanded scope of prior appropriation, which has no relation to public control over water. The phrase is also misleading because it implies that the measure would increase public communities’ control over their water supplies, when in fact they would lose control to new mandates to be enforced by the state government.

### **LEGAL ARGUMENT**

#### **I. Initiative #45 contains at least three distinct subjects.**

This Court should reverse the Board’s decision to set Titles for Initiative #45 because it violates the single subject rule. It contains the following distinct subjects and purposes:

1. To subordinate both past and future appropriative water rights to a dominant public estate in water;
2. To expand the scope of water appropriation under the Colorado Constitution by removing the limits to “unappropriated water” and waters of a “natural stream”; and
3. To impose a requirement that appropriators return water unimpaired to the stream.

**A. Standard of Review**

When reviewing a challenge to the Title Board’s actions in setting titles, the Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title, Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). While the Court does not examine the initiative’s efficacy, construction, or future application, the Court must examine the proposed initiative sufficiently to enable review of the Board’s action. *Id.* In reviewing a proposed initiative and titles, the Court employs the rules of statutory construction, reading all words and phrases in context and construing them according to the standards of grammar and common usage. *In re Title, Ballot Title, and Submission Clause and Summary for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006). Courts shall “afford the language of the Constitution its ordinary and

common meaning to give effect to every word and term contained therein, wherever possible.” *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005) (internal quotations omitted). The Court should favor a construction that will give effect to each word, rather than one that will render some words useless. *City of Aurora v. Acosta*, 892 P.2d 264, 267 (Colo. 1995).

**B. Initiative #45 violates the single subject rule.**

Initiative #45 violates the single subject rule because it attempts to achieve multiple unconnected objectives.

**1. A proposed initiative must be limited to a single subject.**

A proposed initiative must be limited to a single subject. Colo. Const. article V, section 1(5.5); C.R.S. § 1-40-106.5. A proposed initiative violates the 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, 2009-2010 #91*, 235 P.3d at 1076. Indeed, “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, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010). The danger associated with an initiative that contains multiple subjects is the “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious

provision coiled up in the folds of a complex issue.” *In re Title, Ballot Title, and Submission Clause, for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009) (quotations omitted).

Even where the Court can find a general theme in an initiative, all provisions must have a common objective. See *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995). The Court must “examine sufficiently an initiative’s central theme, as expressed, to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme.” *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 279 (Colo. 2006). The Court may determine that multiple purposes are accomplished by an initiative with a general theme, defeating it under the single subject rule. *Id.*

To evaluate whether an initiative encompasses multiple subjects, the Court should first look to the text of the proposed initiative. *In re Title, Ballot Title and Submission Clause, for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006). Initiatives with multiple provisions do not violate the single subject rule if the provisions have a “necessary and proper relationship to the substance of the initiative.” *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255*, 4 P.3d 485, 495 (Colo. 2000) (quotation omitted). A connection is

“necessary and proper” if it is “appropriate and well adapted to fulfilling an objective.” BLACK’S LAW DICTIONARY 1052 (7<sup>th</sup> ed. 1999). “Necessary” describes an object that is “logically unavoidable . . . absolutely needed: required.” MERRIAM-WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 790 (1984). Similarly, to be “proper,” such language must be “strictly limited to a specified thing, place, or idea [or] marked by suitability, rightness, or appropriateness.” *Id.* at 943. As such, details in an initiative must not only be logically connected to the central theme of the initiative, but must be “dependent upon or connected with each other” to complete the specified objective. *In re Title, 1999-2000 #255*, 4 P.3d at 495 (quotation omitted). Requiring each initiative to contain only necessary and proper subparts ensures that each objective depends upon its own merits for passage. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 440 (Colo. 2002). The subject of the initiative should be capable of being clearly expressed in the initiative’s title. *Id.*

**2. The first purpose of Initiative #45 is to subordinate water rights to a public estate 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 subordinates existing and future appropriative water rights to the interests of the public in these "natural elements."<sup>1</sup>

Colorado water law is based on the right of prior appropriation, constitutionally guaranteed by article XVI, sections 5 and 6. Colorado's Constitution creates and protects the right of any person or entity to appropriate the waters of any natural stream and put them to beneficial use. Section 6 provides: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." *See also*, Colo. Const. article XVI, section 5 ("The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."). Under this doctrine of prior appropriation, the person who first diverts water and puts it to beneficial use has a priority that is superior to any other person who subsequently appropriates water from the same water resource. *See*

---

<sup>1</sup> The Proponents of Initiative #45 have also proposed Initiative #3, which would similarly amend the Colorado Constitution to subordinate appropriative water rights to a public estate in water. An appeal from title setting for that measure is pending in Case No. 2012SA8.

*Navajo Dev. Co., Inc. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982). An appropriative water right is a “most valuable property right” to use a certain amount of water, subject only to the amount of water physically available for appropriation and the amount taken to satisfy senior priorities. *Id.* at 1378.

Initiative #45 would disrupt Colorado’s scheme of priority-based water rights by subsection (1)’s provision subordinating appropriative water rights, regardless of priority, to the public’s “dominant water estate.” Currently, the value of a water right is the priority to use a certain amount of water from a specified source, such as a river or lake. *Navajo Dev. Co.*, 655 P.2d at 1377. Under Initiative #45, the value of a water right’s priority would be diminished because the priority would be subject to protecting a public estate in water.

3. **The second objective of Initiative #45 would remove limits that the Constitution presently imposes on the right to appropriate water.**

The deleted language in Proposed Initiative 2011-2012 #45, specifically the deletion of the phrase, “the unappropriated waters of any natural stream” in section 6 of Article XVI of the Colorado Constitution, will expand the scope of rights that may be obtained by appropriation, and will alter the legal foundation for acquiring rights in nontributary groundwater under the 1965 Ground Water Management Act, as amended and codified at C.R.S. § 37-90-101, *et seq.* (hereinafter the “1965



Act”). The right to use nontributary groundwater is presently governed by the provisions of the 1965 Act, as amended. *Chatfield Well Co., Ltd. v. Chatfield East Property Owners Ass’n*, 956 P.2d 1260, 1268 (Colo. 1998); C.R.S. § 37-90-101, *et seq.*

Article XVI, section 5 of Colorado’s constitution provides that the previously unappropriated “water of every natural stream” is the property of the public, subject to appropriation. Section 6 uses similar terms to guarantee that anyone may acquire the right of appropriation by diverting “the unappropriated waters of any natural stream” for beneficial use. In *Colorado v. Southwestern Colorado Water Conservation District*, this Court determined 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 1294, 1308 (Colo. 1983). *See also Whitten v. Coit*, 385 P.2d 131, 135, 140 (Colo. 1963) (holding that the prior appropriation system does not apply to nontributary groundwater and noting that article XVI, sections 5 and 6 “make specific reference in recognizing the ‘appropriation’ doctrine only to the waters in ‘natural streams’”), *overruled on other grounds by Board of County Comm’rs v. Park County Sportsmen’s Ranch, LLP*, 45 P.3d 693 (Colo. 2002). Thus, while all groundwater in Colorado is a

public resource, nontributary groundwater is not subject to appropriation. *See Chatfield East*, 956 P.2d at 1268 (explaining differences between rights to use nontributary groundwater and prior appropriation water rights).

While holding that a nontributary groundwater right was not subject to the prior appropriation system, *Whitten* did not specify how a user of nontributary groundwater could obtain or confirm a property right to use that water. In response to the 1963 *Whitten* decision, the General Assembly passed the 1965 Act, exercising its authority over nontributary groundwater. C.R.S. § 37-90-101, *et seq.* Later, following the Court's 1983 decision in *Southwestern*, the General Assembly passed Senate Bill 5 in 1985, extending the 1965 Act framework by providing for landowners (or others with their express or implied consent) to obtain rights to withdraw and use the nontributary groundwater underlying their lands. *See Park County Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262, 266 (Colo. 1999) (explaining C.R.S. § 37-90-137(4) and related definitions in C.R.S. § 37-90-103). Subsequent decisions of this Court have confirmed that the right to use nontributary groundwater outside designated basins is a creation of statute within the General Assembly's plenary authority. *See, e.g., Bayou Land Co. v. Talley*, 924 P.2d 136, 146 (Colo. 1996).

The result of this evolution of the law is that the 1965 Act, as amended, governs rights to use nontributary groundwater. *See Chatfield East*, 956 P.2d at 1268. The 1965 Act pronounces the policy of the State that “nontributary ground water shall be devoted to beneficial use in amounts based upon conservation of the resource and protection of vested water rights.” C.R.S. § 37-90-102(2). Unlike surface water and much tributary groundwater, nontributary aquifers contain a finite amount of water. *See Fundingsland v. Colo. Ground Water Comm’n*, 468 P.2d 835, 839 (Colo. 1970). Also unlike water in surface streams and tributary aquifers, 1965 Act affords the owners of lands overlying nontributary aquifers the right to withdraw groundwater. *Bargas*, 986 P.2d at 266. This method of allocating nontributary groundwater is based not on priority of appropriation by diversion to beneficial use, but rather “is based by operation of statute upon overlying land ownership with no diversion requirement and with available quantity determined by a 100-year aquifer life expectancy.” *Id.*

By deleting the phrase “waters of any natural stream,” from article XVI, section 6, Initiative #45 will alter rights in nontributary groundwater as they have developed under the 1965 Act in three ways. First, the deletion of the language will subject all water, including nontributary groundwater, to appropriation under the Colorado Constitution. Second, the proposed change will curtail the

legislature's "plenary power over the disposition of nontributary ground water." *Qualls, Inc. v. Berryman*, 789 P.2d 1095, 1097-98 (Colo. 1990), citing *Southwestern*, 671 P.2d at 1318. Finally, subjecting nontributary groundwater to the doctrine of prior appropriation would remove the foundation on which the 1965 Act has authorized landowners, or those with their consent, to establish rights in nontributary groundwater. This would open up the nontributary groundwater resource to appropriation without the landowner's consent, and could eliminate rights of landowners that have already been decreed or vested under the 1965 Act if others seek to obtain the same water by appropriation.

The Initiative also would delete the word "unappropriated" from the first sentence of section 6, article XVI. Like "natural stream," the word "unappropriated" limits the water available for appropriation not already appropriated, thus protecting existing appropriative water rights. This Court and lower courts have relied on the word "unappropriated" in defining the extent of property rights established by diverting water to beneficial use. *See, e.g., Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981); *Combs v. Agricultural Ditch Co.*, 28 P. 966 (1892). Deleting "unappropriated" and "natural stream" are material changes that remove longstanding constitutional limits on the right to appropriate and use water.

**4. The third purpose of Initiative #45 is to require appropriators to return water to the stream “unimpaired.”**

Subsection (2) 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.” This requirement would transform the legal framework for how water users may discharge water after using it. This legal framework, summarized below, is entirely separate and distinct from the laws governing water diversion and use rights.

First, this proposal would impose a requirement at odds with existing federal and state environmental laws and regulations concerning water quality, including the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*, and the Colorado Water Quality Control Act, C.R.S. § 25-8-101, *et seq.* Requiring water to be returned to the stream “unimpaired” would add a far more stringent water quality standard for discharging water after use than currently is required by existing federal and state laws.

This requirement could also make reuse of appropriated “foreign water” unconstitutional. Presently, an appropriator who lawfully diverts water in one river basin and transports it into another river basin may reuse that water to extinction. *See City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 68 (Colo. 1996). The mandate

that water be returned “unimpaired” could be understood as requiring water to be returned to its basin or stream of origin. This requirement would certainly mean that water must be returned to a stream and could not be used to extinction and could be construed to prohibit consuming even part of the diverted water. Whatever the ultimate scope of the measure, it is clear that the objective of this provision is separate and distinct from the provisions of Initiative #45 that concern rights to divert and use water.

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

Initiative #45’s three subjects—subordinating water rights, subjecting nontributary groundwater to appropriation, and requiring water to be returned to the stream unimpaired—lack any necessary or proper connection, and therefore, violate the single subject rule.

The first purpose of Initiative #45 is to create a dominant public estate in Colorado’s waters and to subordinate appropriative water rights to the public estate. Initiative #45’s second purpose is to expand the scope of the prior appropriation system, extending it to include nontributary groundwater, which is not currently available for appropriation. The third purpose of Initiative #45 is to require water users to discharge water “unimpaired,” which would impose

heightened water quality standards and alter the ability of water users to transport water from one stream basin to another.

In voting against the Title Board's denial of the Motion for Rehearing, Solicitor General Domenico recognized this lack of a connection among the three provisions:

I still am troubled, though, that I've never been clear . . . about why the deletions about unappropriated water of natural streams are connected with the rest of the purpose of the measure. That . . . argument, in particular, seems persuasive to me that that may be somewhat surprising, altering not just . . . the focus of water rights in Colorado from private prior appropriation to sort of public control, or however we decided to phrase it, but also expanding and changing . . . what the entire regime involves, to include groundwater, nontributary groundwater.

Rehearing Transcript (attached as **Appendix B**) 15:21-16:9.

The only common characteristic of the three subjects is the general theme of water. This Court, however, has already determined that a common theme of "water" is too broad to constitute a single subject. *In re Public Rights in Waters II*, 898 P.2d at 1080. Though the three subjects concern water, they do not have a single objective, and none of these subjects requires that any of the others be enacted to achieve its underlying purpose. It is not necessary to subject nontributary groundwater to prior appropriation or require that water be returned to the stream unimpaired to achieve the purpose of subordinating water rights to a

public estate. Similarly, the other two subjects do not require that appropriative water rights be subordinated to a public estate. Nor is it necessary to subject nontributary groundwater to appropriation in order to achieve the purpose of returning water to the stream unimpaired. Because the three subjects lack a necessary and proper connection, Initiative #45 violates the single subject rule.

**II. The Titles for Initiative #45 do not fully express the Initiative's true intent and meaning.**

The Titles should be "a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative." C.R.S. § 1-40-102(10). In setting titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." C.R.S. § 1-40-106(3)(b). The Titles fail to meet these standards, because they erroneously describe Initiative #45 as an amendment to the Colorado constitution "concerning public control of water."

**A. Standard of Review.**

In reviewing titles, the Court must "engage all legitimate presumptions in favor of the propriety of the Title Board's actions. . . ." *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). While



the Court may not rewrite the titles or submission clause for the Board, it must determine whether the prohibition against unclear titles has been violated. *Id.* The Court will “reverse the Board’s action in preparing [the titles] if they contain a material and significant omission, misstatement, or misrepresentation.” *Id.* (quoting *In re Proposed Initiative for 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998)). Ballot titles “shall correctly and fairly express the true intent and meaning’ of the initiative,” unambiguously stating the principle of the amendment. *Id.* (quoting C.R.S. § 1-40-106(3)(b)). Further, the Colorado Constitution also requires that the title clearly express the initiative’s single subject. *In re Title, 2009-2010 #45*, 234 P.3d at 647-48.

The matter covered by [the initiative] is to be clearly, not dubiously or obscurely, indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind.

*Id.*

**B. The Titles imprecisely and inaccurately describe the single subject as the “public control of water.”**

This Court should reverse the Board’s decision setting the Titles for Initiative #45, because the phrase “public control of water” is too vague and does not adequately describe the full scope of the measure.

The phrase "public control of water" is too vague because it does not specify that Initiative #45 would subordinate existing and future appropriative water rights to a newly-created "dominant water estate" belonging to the public. Second, the phrase "public control of water" is inadequate because it does not encompass the expanded scope of appropriation to include previously appropriated water and nontributary groundwater, due to the deletion of words from Section 6. This expanded scope of appropriation is unrelated to public control of water, and instead would alter publicly and privately owned water rights.

The phrase is also misleading because it implies that public communities would have increased control over water. On the contrary, the measure would diminish these public entities' control over their own water resources by subordinating water rights to a "public estate" in water, controlled by all branches of state government.

In drafting the Titles, the Board has attempted to craft a title that describes only a single subject. In the process, however, the Board has described Initiative #45 in terms that are misleading. Doing so demonstrates that the Board cannot fashion a title for Initiative #45 that both concerns only a single subject and accurately describes the scope of the measure. Because the Titles are too broad

and are misleading about the purposes of Initiative #45, this Court should reverse the Board's decision.

### CONCLUSION

This Court should reverse the Board's action in setting the Titles because Initiative #3 is not limited to a single subject, so that no title should be set, and because the Titles are unclear and misleading.

Respectfully submitted this 13<sup>th</sup> day of February 2012.

BURNS, FIGA & WILL, P.C.

By: 

Stephen H. Leonhardt

Alix L. Joseph

Sarah M. Shechter

**Attorneys for Petitioner,  
Douglas Kemper**

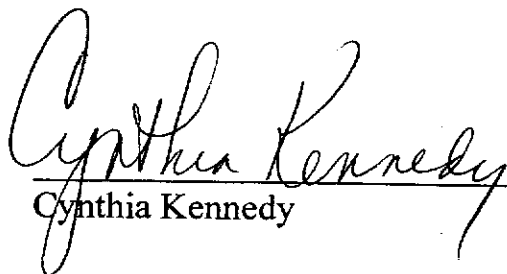
**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of February 2012, a true and correct copy of the foregoing OPENING BRIEF OF DOUGLAS KEMPER was served by Federal Express addressed to the following:

Maurice Knaizer  
Assistant Attorney General  
Colorado Attorney General's Offices  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, CO 80203

Mr. Richard G. Hamilton  
531 Front Street  
Fairplay, CO 80440

Mr. Phillip Doe  
7140 S. Depew Street  
Littleton, CO 80128

  
Cynthia Kennedy

Received 12/22/11 2:00 P.M.

*AS* SWARD

2011-2012 #45

FINAL VERSION

**Initiative to Amend ARTICLE XVI, Section 6, of the Colorado Constitution**

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

In the constitution of the state of Colorado, amend section 6 of article XVI as follows:

**Section 6. Diverting ~~unappropriated~~ water - ~~priority-preferred-uses~~ LIMITATIONS.** (1) The right to divert ~~the unappropriated waters of any natural stream~~ WATER WITHIN THE STATE OF COLORADO to beneficial uses shall never be denied, BUT 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. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of ~~any natural stream~~ are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

(2) THE USE OF WATER IS A USUFRUCT PROPERTY RIGHT, GRANTED BY THE PUBLIC TO WATER USERS, THAT SHALL REQUIRE THE WATER USE APPROPRIATOR 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.

(3) THE COLORADO DOCTRINE OF APPROPRIATION ACKNOWLEDGES THAT THE PUBLIC CONFERS THE PRIVILEGE, BY GRANT, FOR THE USE OF ITS WATER, AND THE DIVERSION OF THE SAME, TO ANY APPROPRIATOR FOR THE COMMON GOOD.

(4) ENFORCEMENT AND IMPLEMENTATION OF THIS SECTION THAT CONFERS, BY GRANT, THE USE OF THE PUBLIC'S WATER TO USERS AND THAT STIPULATES THAT USES OF WATER SHALL BE PROTECTIVE OF THE PUBLIC'S RIGHTS AND INTERESTS, ARE MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT, AS STEWARDS, TO PROTECT AND ENFORCE THE PUBLIC'S INTERESTS IN ITS WATER ESTATE.

(5) ANY CITIZEN OF THE STATE OF COLORADO SHALL HAVE STANDING IN JUDICIAL ACTIONS SEEKING TO COMPEL THE STATE OF COLORADO TO ENFORCE THE PROVISIONS OF THIS SECTION.

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

**Ballot Title Setting Board**

**Proposed Initiative 2011-2012 #45<sup>1</sup>**

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

An amendment to the Colorado constitution concerning public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding the right to appropriate water for beneficial use to all water within Colorado, including nontributary groundwater and not limited to unappropriated water, subject to the public ownership interest; requiring water users to return water unimpaired after use to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; 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 public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding the right to appropriate water for beneficial use to all water within Colorado, including nontributary groundwater and not limited to unappropriated water, subject to the public ownership interest; requiring water users to return water unimpaired after use to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; and allowing any Colorado citizen to sue to enforce the amendment?

*Hearing December 21, 2011:*

*Withdrawn by proponents.*

*Hearing adjourned 3:10 p.m.*

---

<sup>1</sup> Unofficially captioned "Limits on Water Diversion" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

*Hearing January 4, 2012:  
Single subject approved; staff draft amended; titles set.  
Hearing adjourned 5:02 p.m.*

*Hearing January 18, 2012:  
Motion for Rehearing denied.  
Hearing adjourned 2:20 p.m.*



TITLE SETTING REVIEW BOARD MEETING

January 18, 2012

Initiative #45

TRANSCRIPT MADE FROM CD

Valorie S. Mueller, RPR  
VSM REPORTING, LLC

(303) 979-0959  
P.O. Box 271208, Littleton, CO 80127

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

Valorie S. Mueller, RPR  
VSM REPORTING, LLC

(303) 979-0959  
P.O. Box 271208, Littleton, CO 80127

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

Valorie S. Mueller, RPR  
VSM REPORTING, LLC

(303) 979-0959  
P.O. Box 271208, Littleton, CO 80127



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

Valorie S. Mueller, RPR  
VSM REPORTING, LLC

(303) 979-0959  
P.O. Box 271208, Littleton, CO 80127