

<p>SUPREME COURT STATE OF COLORADO</p> <p>101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	<p>FILED IN THE SUPREME COURT.</p> <p>FEB 21 2012</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board.</p>	<p>OF THE STATE OF COLORADO Christopher T. Ryan, Clerk</p>
<p>IN RE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2011-12, #3</p> <p>DOUGLAS KEMPER, as Registered Elector of the State of Colorado Petitioners,</p> <p>v.</p> <p>RICHARD G. HAMILTON AND PHILLIP DOE, Proponents and WILLIAM A. HOBBS; DANIEL DOMENICO; and JASON GELENDER Title Board</p> <p>Respondents.</p>	<p>^ COURT USE ONLY ^</p>
<p>JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5380 FAX: (303) 866-5671 E-Mail: maurie.knaizer@state.co.us Registration Number: 05264 *Counsel of Record</p>	<p>Case No. 12SA8</p>
<p>ANSWER BRIEF OF TITLE BOARD</p>	

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 978 words.

It does not exceed 30 pages.

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

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.



TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT.....	2
I. The measure contains a single subject	2
A. Standard of Review.....	2
B. The Tie Between Public Waters and Land Beneath or Immediately Adjacent to Public Waters Has Long Been Recognized Under the Public Trust Doctrine	2
II. The Titles Are Clear, Fair and Accurate	4
A. Standard of Review.....	4
B. The titles fairly and accurately clearly express the single subject.....	4
CONCLUSION	5

TABLE OF AUTHORITIES

PAGE

CASES

Arizona for Law in the Public Interest v. Hassel, 837 P.2d 158 (Ariz. App. 1991).....	4
Lawrence v. Clark County, 254 P.3d 606 (Nev. 2011).....	3
Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988)	3
Shively v. Bowlby, 152 U.S. 1 (1894)	3

William A. Hobbs, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Board (hereinafter “Board”), hereby submit their Answer Brief.

STATEMENT OF THE ISSUES

The Board adopts the Statement of the Issues as set forth in Petitioners’ Opening Brief

STATEMENT OF THE CASE

The Board adopts the Statement of the Case as set forth in the Petitioners’ Opening Brief.

SUMMARY OF THE ARGUMENT

The measure contains a single subject. The measure incorporates the public trust doctrine into the Colorado Constitution. The measure defines the scope and extent of the public trust doctrine.

The titles are clear. The titles accurately summarize the content of the measure.

ARGUMENT

I. The measure contains a single subject

A. Standard of Review

The Board set forth the standard for review in its Opening Brief.

B. The Tie Between Public Waters and Land Beneath or Immediately Adjacent to Public Waters Has Long Been Recognized Under the Public Trust Doctrine.

Much of Objectors' Brief emphasizes Colorado's historic distinction between public waters and lands adjacent to such waters under the public trust doctrine. This historic distinction is immaterial for the purpose of the single subject analysis. An underlying function of the initiative process is to effect change. The question is not whether the proposed measure changes Colorado's public trust doctrine. The question is whether the change is consistent with the single subject rule.

The proposed measure seeks to amend the public trust doctrine in a manner that expands the public trust doctrine to include lands under or adjacent to public waters. In fact, most courts and states recognize

the integral relationship between public waters and the streambeds and banks beneath the waters. The United States Supreme Court in *Shively v. Bowlby*, 152 U.S. 1 (1894), concluded:

At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation...Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.

Id. at 57. The Court reiterated this position in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478 (1988):

...it has never been suggested in any of this Court's prior decisions that the many statements included therein-to the effect that the States owned all the soil beneath waters affected by the tide-were anything less than an accurate description of the governing law.

Recently, the Nevada Supreme Court acknowledged that the public trust doctrine applied to lands that were ultimately permanently exposed through the process of avulsion. *Lawrence v. Clark County*, 254 P.3d 606, 615-16 (Nev. 2011). The majority of states have

acknowledged that the public trust doctrine encompasses lands underneath waters. *Arizona for Law in the Public Interest v. Hassel*, n. 13, 837 P.2d 158, 167 (Ariz. App. 1991).

The Board's conclusion is consistent with the common understanding and application of the public trust doctrine. The Board correctly concluded that the measure contains a single subject.

II. The Titles Are Clear, Fair and Accurate.

A. Standard of Review

The Title Board incorporates the standard of review set forth in its Opening Brief.

B. The titles fairly and accurately clearly express the single subject.

The introductory phrase in the titles states that the measure is “[a]n amendment to the Colorado constitution concerning the public’s rights in the water of natural streams.” The Petitioners contend that the titles are inaccurate and misleading because the statement of the subject does not convey that the measure also covers “rights in lands

along and under natural streams.” (Petitioners’ Opening Brief, pp. 16-17). The Court must reject this argument

Petitioners’ contention fails for the obvious reason that it ignores the remainder of the titles. The titles specifically state that the measure grants “unrestricted public access along and use of natural streams and their stream banks up to the naturally wetted high water mark.” Thus, the titles, when read as a whole, unmistakably convey the concept that the measure covers both streambeds and banks of public waters.

CONCLUSION

For the reasons stated in the Board’s Opening Brief and this brief, the Court must approve the action of the Board.

JOHN W. SUTHERS
Attorney General


/s/Maurice G. Knaizer

MAURICE G. KNAIZER, 05264*
Deputy Attorney General
Public Officials
State Services Section
Attorneys for Title Board
*Counsel of Record

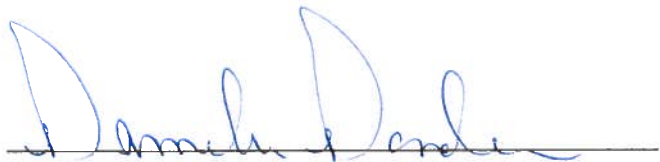
CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same by overnight FedEx or Express Mail, postage prepaid, at Denver, Colorado, this 21st day of February, 2012 addressed as follows:

Stephen H. Leonhardt
Alix L. Joseph
Sarah M. Shechter
Burns, Figa & Will, P.C.
6400 South Fiddlers Green Circle,
Suite 1000
Greenwood Village, CO 80111

Mr. Richard Hamilton
P.O. Box 156
Fairplay, CO 80440

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

A handwritten signature in blue ink, appearing to read "Daniel Dende", written over a horizontal line.