

SUPREME COURT, STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

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 #3

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.

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FILED IN THE
SUPREME COURT

JAN 30 2012

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

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Case No. 12SA8

OPENING BRIEF OF 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

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ISSUES PRESENTED

A. Whether the Ballot Title Setting Board (the "Board") incorrectly determined that Initiative 2011-2012 #3 ("Initiative #3") 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, identifying the measure's subject in the title, ballot title, and submission clause (collectively, the "Titles") as "the public's rights in the waters of natural streams," in light of the multiple objectives of this measure to:

1. Adopt a "Public Trust Doctrine" that would subordinate water rights to public ownership interests; and
2. Transfer real property adjacent to and beneath all natural streams from private landowners to the public.

B. Whether the Board's Titles for Initiative #3 are unfair in that the phrase "concerning the public's rights in the water of natural streams" does not clearly express either a single subject or the full scope of Initiative #3.

STATEMENT OF THE FACTS

Richard Hamilton and Phillip Doe ("Proponents") proposed Initiative 2011-2012 #3, a copy of which is attached as **Appendix A**. Initiative #3 would amend section 5 of article XVI of the Colorado Constitution by adding six subsections numbered (2) – (7). Subsection (2) would expressly adopt what it calls a

“Colorado public trust doctrine” to “defend the public’s water ownership rights of use and public enjoyment.” According to subsection (3), this Colorado public trust doctrine would provide that “the public’s estate in water in Colorado has a legal authority superior to rules and terms of contracts or property law.” Subsection (4) addresses appropriative water rights under section 6, article XVI of the Colorado Constitution, enumerating ways in which water rights will be subordinate to the “public’s estate.” In particular, subsection 4(a) of Initiative #3 states that “[t]he use of the public’s water by the manner of appropriation . . . is a usufruct property right,” which will “survive under the legal condition that the appropriator is aware that a usufruct right is servient to the public’s dominant water estate and is subject to terms and conditions of this Colorado public trust doctrine.” Subsections 4(c) and (e) give the state government stewardship duties that include managing not only the state’s water rights, but also others’ water rights, for the purpose of protecting the natural environment and public water use.

In addition to these provisions modifying the appropriation system for water rights, subsection (5) of Initiative #3 would create a right of public access along the banks and beds of “any natural stream in Colorado,” up to the natural high water mark, and require the state government to enforce this right.

The Board designated and fixed the following title:

An amendment to the Colorado constitution concerning the public's rights in the water of natural streams, and, in connection therewith, making public ownership of such water legally superior to water rights, contracts, and property law; granting unrestricted public access along and use of natural streams and their stream banks up to the naturally wetted high water mark; prohibiting the state from transferring its water rights; allowing the state government to manage others' water rights, while requiring state government to act as steward of and to protect, enforce, and implement public ownership of water; and allowing any Colorado citizen to sue to enforce the amendment.

The ballot title and submission clause as designated and fixed by the Board is substantially the same as the title, except that it begins with the phrase, "Shall there be," and ends with a question mark.

STATEMENT OF THE CASE

The Board conducted a public hearing on December 21, 2011, at which time it determined that Initiative #3 consisted of a single subject and set 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 December 28, 2011. At a hearing held on January 4, 2012, the Board denied the Motion for Rehearing except to the extent that the Board made changes to the Titles. 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 #3 because it violates the single subject rule. First, Initiative #3 would amend the Colorado Constitution to create a "Colorado public trust doctrine," subordinating appropriative water rights to the public interests defined in the measure. Second, Initiative #3 would transfer a right to access lands under and adjacent to naturally flowing streams away from landowners and to the public. Changes to interests in land and subordination of water rights constitute separate subjects, each with a distinct and separate purpose, designed to appeal to different interest groups.

In addition, the Titles for Initiative #3 are unclear and misleading. The Board has attempted to craft Titles that express a single subject, describing Initiative #3 as "[a]n amendment to the Colorado constitution concerning the public's rights in the water of natural streams." This phrase attempts to express a single subject, but fails to encompass Initiative #3's provision creating rights to access land adjacent to streams. Thus, the Board set Titles that do not unambiguously describe the entire subject matter of Initiative #3. The Board's inability to set Titles that are limited to a single subject and clearly express the full scope of Initiative #3 further demonstrates that the Initiative contains multiple

subjects. Because Initiative #3 is not limited to a single subject, this Court should reverse the Board's action in setting the Titles.

LEGAL ARGUMENT

I. Initiative #3 violates the single subject rule because it attempts to accomplish multiple discrete purposes.

This Court should reverse the Board's decision to set Titles for Initiative #3 because it violates the single subject rule. It contains the following distinct subjects and purposes:

1. To adopt a "Colorado public trust doctrine," which would create a dominant public estate in the waters of the State of Colorado and subordinates water rights obtained by appropriation to the public's specified interests; and
2. To transfer real property adjacent to and beneath all natural streams from private landowners to the public.

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 and 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). 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).

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 to an extent that defeats it under the single subject rule. *Id.*

B. Initiative #3 violates the single subject rule.

Initiative #3 violates the single subject rule because its separate provisions serve two separate and discrete purposes. The first purpose of Initiative #3 is to subordinate existing appropriative water rights to the public interest, which Initiative #3 describes as including environmental protection, public health and safety, and public use and enjoyment. The second purpose of Initiative #3 is to transfer access rights in the lands under and adjacent to natural streams from private landowners to the public for the public's use and enjoyment.

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, § 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 and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010).

The single subject rule seeks "to prevent proponents from joining incongruous subjects in the same measure, thereby ensuring that each proposal

depends on its own merits for passage.” *In re Title 2009-2010 #45*, 234 P.3d at 646 (quotations omitted). 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). This practice, called “log rolling,” places “voters in the position of voting for some matter they do not support to enact that which they do support.” *In re Title, 2009-2010 #91*, 235 P.3d at 1079 (citation omitted).

2. The “Colorado public trust doctrine,” as defined by Initiative #3, would subordinate existing water rights to the public interest.

Subsection (2) of Initiative #3 would adopt, and subsections (2) – (4) define, a “Colorado public trust doctrine.” The purposes of this doctrine are “protect[ing] the public’s interests in the water of natural streams and [instructing] the state of Colorado to defend the public’s water ownership rights of use and public enjoyment.” According to subsection (3), the Colorado public trust doctrine “provides that the public’s estate in water in Colorado has a legal authority superior to rules and terms of contracts or property law.” Subsection (4) then addresses water rights appropriated pursuant to section 6 of article XVI, detailing

how the Colorado public trust doctrine will subordinate appropriative water rights to the public's interest.

Colorado water law is grounded in the right of prior appropriation, constitutionally guaranteed by sections 5 and 6 of article XVI. Unlike several other states, Colorado's Constitution establishes and protects the right of any person or entity to appropriate the waters of the state and put them to beneficial use. Colo. Const. art. XVI, § 5 ("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."); Colo. Const. art. XIV, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). Under this doctrine of prior appropriation, the person who first diverts water and puts it to beneficial use has a right superior to any other person who subsequently appropriates water from the same water resource. *See 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 (citation omitted).

This right to appropriate water is distinct from any ownership right in the land through which the water course flows. See *People v. Emmert*, 597 P.2d 1025, 1029 (Colo. 1979); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882). The Colorado public trust doctrine as defined by Initiative #3 would disrupt Colorado's scheme of priority-based water rights by subordinating existing appropriative water rights, regardless of priority, to the public's interest. 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. Subjecting this established priority to the "public's estate in water" would be a radical change to Colorado's prior appropriation system, substantially diminishing the value of the property rights obtained in reliance on established priorities.

3. Initiative #3 also grants rights in the lands adjacent to and beneath natural streams from the landowners to the public.

Conversely, subsection (5) does not concern water rights, but instead alters the rights of landowners in lands adjacent to and under natural streams. Subsection (5) would grant "[a]ccess by the public along, and on, the wetted natural perimeter of a stream bank of a water course of any natural stream in Colorado." Under Colorado law, a landowner owns the land beneath the non-navigable streams running through or adjacent to its property. *Emmert*, 597 P.2d at 1027 (holding

that, “the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands”).

As this Court has recognized, ownership rights of land along a streambed are a distinct subject from appropriative water rights grounded in Article XVI of the state’s constitution. *See id.* at 1029; *see also Bd. of Cnty. Comm’rs v. Park Cnty. Sportsmen’s Ranch, LLP*, 45 P.3d 693, 709 n. 29 (Colo. 2002) (acknowledging that in *Emmert*, the court’s holding that “the beds of non-navigable streams in Colorado are not held by the state under a public trust theory . . . did not affect the right of appropriators to conduct their appropriated water through the natural channel across the landowner’s property without interference.”) Subsection (5) of Initiative #3 would remove these property rights in land from the landowners and transfer them to the public.

4. The dual purposes of Initiative #3 violate the single subject rule.

Initiative #3 violates the single subject rule because it would alter two different types of property rights: it would subordinate existing appropriative water rights to the public interest, regardless of priority; and it would transfer rights to the lands under and adjacent to streambeds away from private landowners to the public.

Initiative #3 characterizes these two distinct subjects as falling under the guise of the “Colorado public trust doctrine.” Unlike other states, Colorado law does not recognize a public trust doctrine for navigable waters. *See Emmert*, 597 P.2d at 1027-28 (distinguishing Wyoming’s constitution, which has been held to allow for a public right to access the surface of waters bounded by private property, from section 5, article XVI of Colorado’s Constitution). In *Emmert*, the Supreme Court considered whether section 5, article XVI grants the public a right to float and fish on a non-navigable natural stream (the Colorado River) as it flows through, across, and within the boundaries of privately-owned property. *Id.* at 1026. The Court determined that section 5, article XVI establishes the right of appropriation but does not address land ownership, and therefore, does not assure public access to waters for purposes other than appropriation. *See id.* at 1028-29. Instead, a riparian streambed owner has a common law right to the exclusive use of the lands under and adjacent to a naturally flowing stream, as well as to the surface of the waters bounded by his lands. *Id.* at 1028-29. Despite the characterization of Initiative #3 as a singular “doctrine,” the initiative would not draw on constitutional provisions, statutes, or common law already in effect in Colorado. Rather, the language of Initiative #3 would be the exclusive definition of the “Colorado public trust doctrine.”

Though characterized as parts of the unique creation that Initiative #3 calls “the Colorado public trust doctrine,” the purposes of the two parts to the Initiative #3 are distinct. The purpose of subsections (2) – (4) is to create a system of water rights allocation in which public interests are favored over water rights that have been appropriated for beneficial use. Conversely, the purpose of subsection (5) is to take ownership of streambeds and adjacent lands away from landowners and transfer it to the public. Colorado has long recognized that water and land rights are separate and distinct property rights. See e.g. *Colorado v. Southwestern Colorado Water Conservancy District*, 671 P.2d 1294, 1317 (Colo. 1983) (recognizing that “Congress elected to patent land separately from water.”), superseded by statute on other grounds by, *Humphrey v. Southwestern Dev. Co.*, 734 P.2d 637 (Colo. 1987); *Bowers v. McFadzean*, 257 P. 361, 362 (Colo. 1927) (acknowledging that an owner may convey land separately from water.).

Neither of the two subjects – subordinating water rights and transferring rights in land under streams – requires that the other be enacted to achieve its underlying purpose. The only common characteristic claimed by the Proponents is that both involve “water of natural streams.” 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.

Past initiatives have treated water rights and access to streambeds as separate subjects. *Compare In re Title, Ballot Title, Submission Clause and Summary 1996 #6*, 917 P.2d 1277 (Colo. 1996) (adopting a public trust doctrine to protect the public's rights in the water of Colorado) *with In re Fair Fishing*, 877 P.2d 1355, 1359 (Colo. 1994) (providing that travel along streambeds while water is flowing shall not be treated as criminal trespass) *and* Initiative 2009-10 #87 (attached as Appendix B), Initiative 2009-10 #88 (attached as Appendix C), Initiative 2009-10 #89 (attached as Appendix D), and Initiative 2009-2010 #90 (attached as Appendix E) (all providing for a right to float over privately-owned streambeds). Several initiatives have treated access to streambeds separately to appeal to a distinct constituency.

Combining the distinct subjects of Initiative #3 into one initiative may place “voters in the position of voting for some matter they do not support to enact that which they do support.” *In re Title, 2009-2010 #91*, 235 P.3d at 1079 (citation omitted). Initiative #3 inappropriately joins two purposes into one measure to garner support from two distinct interest groups, defeating the purpose of the single subject rule. Accordingly, this Court should reverse the Board's action in setting the Titles.

II. The Titles set for Initiative #3 do not fully express the Initiative's true meaning and intent.

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 describe Initiative #3's subject as concerning only “the public's rights in the water of natural streams,” and improperly gloss over Initiative #3's rights of access on lands.

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.* (quotations omitted). 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. (citation omitted) (bracket in original)

B. The Titles imprecisely and inaccurately describe the subject as the "public's rights in the water of natural streams."

This Court should reverse the Board's decision because the Titles for Initiative #3 are misleading about the substantial impact its passage would have on both water rights and landowner rights. The Titles describe Initiative #3 as "[a]n amendment to the Colorado constitution concerning the public's rights in the water of natural streams," failing to encompass Initiative #3's provisions for rights to lands under and adjacent to natural streams. The Board has attempted to craft Titles that describe a single subject, but in the process could not cover the Initiative's separate provisions altering privately held rights in lands along and

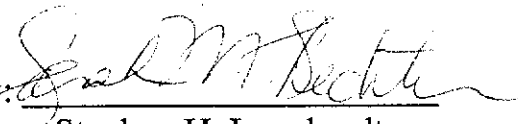
under natural streams. This further demonstrates that Initiative #3 inappropriately concerns multiple subjects. Because the Board's Titles fail to describe a single subject for Initiative #3, this Court should reverse the Board's action.

CONCLUSION

This Court should reverse the Board's action in setting the Titles because Initiative #3 is not limited to a single subject and because the Titles are unclear and misleading.

Respectfully submitted this 30th day of January 2012.

BURNS, FIGA & WILL, P.C.

By: 

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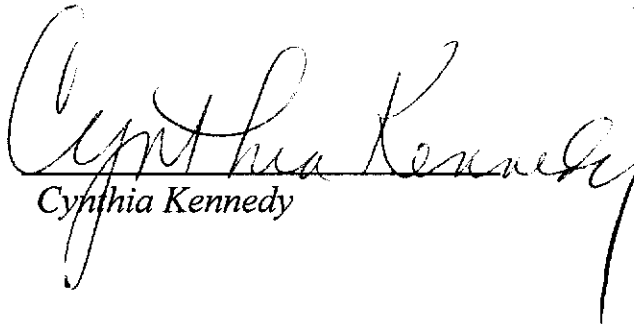
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2012, a true and correct copy of the foregoing OPENING BRIEF OF DOUGLAS KEMPER was served by Federal Express on the following:

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Ballot Title Setting Board

Proposed Initiative 2011-2012 #3¹

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

An amendment to the Colorado constitution concerning the public's rights in the water of natural streams, and, in connection therewith, making public ownership of such water legally superior to water rights, contracts, and property law; granting unrestricted public access along and use of natural streams and their stream banks up to the naturally wetted high water mark; prohibiting the state from transferring its water rights; allowing the state government to manage others' water rights, while requiring state government to act as steward of and to protect, enforce, and implement public ownership of water; and allowing any Colorado citizen to sue to enforce the amendment.

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

Shall there be an amendment to the Colorado constitution concerning the public's rights in the water of natural streams, and, in connection therewith, making public ownership of such water legally superior to water rights, contracts, and property law; granting unrestricted public access along and use of natural streams and their stream banks up to the naturally wetted high water mark; prohibiting the state from transferring its water rights; allowing the state government to manage others' water rights, while requiring state government to act as steward of and to protect, enforce, and implement public ownership of water; and allowing any Colorado citizen to sue to enforce the amendment?

Hearing December 7, 2011:

Only one designated representative appeared for the hearing.

Hearing rescheduled to December 21, 2011 at 1:00 p.m.

Hearing December 21, 2011:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 2:48 p.m.

¹ Unofficially captioned "Use of Colorado Water Streams" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Hearing January 4, 2012:

Motion for rehearing denied except to the extent that the Board made changes to the title.

Hearing adjourned 5:50 p.m.

NOV 22 2011

Final

11:15 a.m.

ELECTIONS
SECRETARY OF STATE**INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE**

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

Section 5 of article XVI of the constitution of the state of Colorado is amended to read:

Section 5. Water of streams public property - public trust doctrine. (1) The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

(2) THIS COLORADO PUBLIC TRUST DOCTRINE IS HEREBY ADOPTED, AND IMPLEMENTED, BY THE PEOPLE OF THE STATE OF COLORADO TO PROTECT THE PUBLIC'S INTERESTS IN THE WATER OF NATURAL STREAMS AND TO INSTRUCT THE STATE OF COLORADO TO DEFEND THE PUBLIC'S WATER OWNERSHIP RIGHTS OF USE AND PUBLIC ENJOYMENT.

(3) THIS COLORADO PUBLIC TRUST DOCTRINE PROVIDES THAT THE PUBLIC'S ESTATE IN WATER IN COLORADO HAS A LEGAL AUTHORITY SUPERIOR TO RULES AND TERMS OF CONTRACTS OR PROPERTY LAW.

(4) THE PUBLIC CONFERS THE RIGHT TO THE USE OF ITS WATER, AND THE DIVERSION OF THE WATER UNDER SECTION 6 OF THIS ARTICLE, TO AN APPROPRIATOR FOR A BENEFICIAL USE AS A GRANT FROM THE PEOPLE OF THE STATE OF COLORADO TO THE APPROPRIATOR FOR THE COMMON GOOD.

(a) THE USE OF THE PUBLIC'S WATER BY THE MANNER OF APPROPRIATION, AS GRANTED IN THIS ARTICLE, IS A USUFRUCT PROPERTY RIGHT ASSOCIATED WITH THE USE OF WATER. USUFRUCT RIGHTS FOR THE USE OF WATER SURVIVE UNDER THE LEGAL CONDITION THAT THE APPROPRIATOR IS AWARE THAT A USUFRUCT RIGHT IS SERVIENT TO THE PUBLIC'S DOMINANT WATER ESTATE AND IS SUBJECT TO TERMS AND CONDITIONS OF THIS COLORADO PUBLIC TRUST DOCTRINE.

(b) USUFRUCT WATER RIGHTS SHALL NOT CONFER OWNERSHIP TO WATER OTHER THAN USUFRUCT RIGHTS TO THE APPROPRIATOR.

(c) USUFRUCT WATER RIGHTS, CONFERRED BY THE PUBLIC TO AN APPROPRIATOR FOR USE, MAY BE MANAGED BY THE STATE GOVERNMENT, ACTING AS A STEWARD OF THE PUBLIC'S WATER, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND TO PROTECT THE PUBLIC'S ENJOYMENT AND USE OF WATER.

(d) A USUFRUCT WATER USER IS IMPRESSED UNDER THE CONDITION THAT NO USE OF WATER HAS DOMINANCE OR PRIORITY OVER NATURAL STREAMS OR PUBLIC HEALTH OR WELL-BEING.

(e) WATER RIGHTS, HELD BY THE STATE OF COLORADO FOR GOVERNMENT OPERATIONS, SHALL BE HELD IN TRUST FOR THE PUBLIC BY THE STATE OF COLORADO WITH THE STATE ACTING AS THE STEWARD OF THE PUBLIC'S WATER ESTATE. WATER RIGHTS HELD BY THE STATE OF COLORADO SHALL NOT BE TRANSFERRED BY THE STATE OF COLORADO FROM THE PUBLIC ESTATE TO PROPRIETARY INTEREST.

(5) ACCESS BY THE PUBLIC ALONG, AND ON, THE WETTED NATURAL PERIMETER OF A STREAM BANK OF A WATER COURSE OF ANY NATURAL STREAM IN COLORADO IS A RIGHT OF THE PUBLIC TO THE USE OF ITS OWN WATER IN CONCERT WITH THE COLORADO PUBLIC TRUST DOCTRINE.

(a) THE RIGHT OF THE PUBLIC TO THE USE OF THE WATER IN A NATURAL STREAM AND TO THE LANDS OF THE BANKS OF THE STREAMS WITHIN COLORADO SHALL EXTEND TO THE NATURALLY WETTED HIGH WATER MARK OF THE STREAM AND IS IMPRESSED WITH NAVIGATION SERVITUDE FOR COMMERCE AND PUBLIC USE AS RECOGNIZED IN THE COLORADO PUBLIC TRUST DOCTRINE.

(b) THE WATER OF A NATURAL STREAM AND ITS STREAMBED, AND THE NATURALLY WETTED LANDS OF THE SHORES OF THE STREAM, SHALL NOT BE SUBJECT TO THE LAW OF TRESPASS AS THE WATER OF NATURAL STREAMS AND THE BANKS OF THEIR STREAM COURSES ARE PUBLIC HIGHWAYS FOR COMMERCE AND PUBLIC USE.

(c) PUBLIC USE OF WATER, RECOGNIZED AS A RIGHT IN THE COLORADO PUBLIC TRUST DOCTRINE, SHALL NOT BE CONTROLLED IN LAW AS A USUFRUCT BUT SHALL BE A RIGHT OF THE PUBLIC TO PROTECT AND ENJOY ITS OWN WATER.

(6) ENFORCEMENT AND IMPLEMENTATION OF SUBSECTIONS (2) TO (7) OF THIS SECTION OF THE COLORADO PUBLIC TRUST DOCTRINE TO PROTECT THE PUBLIC'S RIGHTS AND INTERESTS IN WATER ARE MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT AS STEWARDS TO PROTECT THE PUBLIC'S INTERESTS IN ITS WATER ESTATE. ANY CITIZEN OF THE STATE OF COLORADO SHALL HAVE STANDING IN JUDICIAL ACTIONS SEEKING TO COMPEL THE STATE OF COLORADO TO ENFORCE THE PROVISIONS OF THIS SECTION.

(7) SUBSECTIONS (2) TO (7) OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING, BUT LAWS MAY BE ENACTED SUPPLEMENTARY TO AND IN PURSUANCE OF, BUT NOT CONTRARY TO, THE PROVISIONS THEREOF.

PHILLIP DOE
LITTLETON, COLORADO

RICHARD HAMILTON
FAIRPLAY, COLORADO

RECEIVED

APR 09 2010

4:13am
C.H.
MM

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

Colorado Secretary of State

Article XVI of the Constitution of the State of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

SECTION 9. RIGHTS OF USE – NATURAL STREAMS.

(1) **Purposes and findings.** REASONABLE ACCESS TO COLORADO'S NATURAL STREAMS AND THE LANDS IMMEDIATELY ADJACENT TO THE NATURAL STREAMS IS AN IMPORTANT ELEMENT OF SAFE USE OF STATE WATERS. THE PEOPLE OF COLORADO CONFIRM AND CLARIFY THAT SPECIFIC RIGHTS ARE ASSOCIATED WITH THIS ACCESS AND FURTHER ACKNOWLEDGE THAT THE PUBLIC'S EXERCISE OF SUCH RIGHTS DOES NOT ADVERSELY AFFECT PROPERTY INTERESTS OF LANDOWNERS WHOSE PROPERTIES ARE ADJACENT TO NATURAL STREAMS.

(2) **Rights of use.** THE RIGHT TO USE THE WATER OF EVERY NATURAL STREAM WITHIN THE STATE OF COLORADO HISTORICALLY INCLUDED AND SHALL CONTINUE TO INCLUDE:

(a) THE RIGHT TO FLOAT ANY CRAFT UPON ANY NATURAL STREAM THAT IS CAPABLE OF SUCH USE;

(b) THE RIGHT, AS A NECESSARY INCIDENT TO THAT USE, TO MAKE SUCH CONTACT WITH THE BED OR BANKS OF THE NATURAL STREAM BELOW THE HIGH WATER MARK THAT IS THE MINIMUM POSSIBLE FOR THE FULL AND SAFE ENJOYMENT OF THE PUBLIC'S EASEMENT TO FLOAT; AND

(c) THE RIGHT TO FISH WHILE FLOATING.

(3) **Limitations on rights of use.** NOTHING IN THIS SECTION SHALL BE CONSTRUED TO:

(a) ALLOW ACCESS TO A NATURAL STREAM BY CROSSING PRIVATE LAND WITHOUT PERMISSION;

(b) ALLOW THE DROPPING OR DRAGGING OF AN ANCHOR OR THE INTENTIONAL BROACHING OF A CRAFT;

(c) CREATE A WATER RIGHT, AFFECT ANY EXISTING WATER RIGHT, OR IMPAIR THE RIGHT TO APPROPRIATE WATER; OR

(d) AFFECT TITLE TO THE BED OR BANKS OF ANY NATURAL STREAM.

(4) **Definition.** "HIGH WATER MARK" OF A NATURAL STREAM MEANS MEANS THE VISIBLE CHANNEL OF A NATURAL WATERCOURSE WITHIN WHICH WATER FLOWS WITH SUFFICIENT

FREQUENCY SO AS TO PRECLUDE THE ERECTION OR MAINTENANCE OF MAN-MADE IMPROVEMENTS WITHOUT SPECIAL PROVISION FOR PROTECTION AGAINST FLOWS OF WATER IN SUCH CHANNEL OR THE CHANNEL DEFINED BY THE MEAN ANNUAL FLOOD, WHICHEVER IS GREATER.

RECEIVED

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CLB
MM

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