

**SUPREME COURT
STATE OF COLORADO**

101 West Colfax Avenue, Suite 800
Denver, CO 80202

Original Proceeding Pursuant to Colo. Rev. Stat.
§ 1-40-107(2)
Appeal from the Ballot Title Board.

**IN RE TITLE, BALLOT TITLE AND
SUBMISSION CLAUSE FOR PROPOSED
INITIATIVE 2011-12, #3**

DOUGLAS KEMPER, as Registered Elector of the
State of Colorado
Petitioners,

v.

RICHARD G. HAMILTON AND PHILLIP DOE,
Proponents
and
**WILLIAM A. HOBBS; DANIEL DOMENICO; and
JASON GELENDER**
Title Board

Respondents.

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FILED IN THE
SUPREME COURT

NOV 15 2011

OF THE STATE OF COLORADO
Christopher W. Ryan, Clerk

^ COURT USE ONLY ^

Case No. 12SA8

OPENING BRIEF OF TITLE BOARD

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 2122 words.

It does not exceed 30 pages.

The brief does not comply with CAR 28(g) because it exceeds the word and/or page limit. A motion to accept the over length brief has been filed contemporaneously with the brief.

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

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. _____, p. _____), not to an entire document, where the issue was raised and ruled on.

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.

Or

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

Maurice Kno

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William A. Hobbs, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Board (hereinafter "Board"), hereby submit their Opening Brief. The proposed initiative is attached as exhibit A. The titles are attached as exhibit B.

STATEMENT OF THE ISSUES

The Board adopts the Statement of the Issues as set forth in the Petition for Review

STATEMENT OF THE CASE

The Board adopts the Statement of the Case as set forth in the Petition for Review.

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 SINGLE SUBJECT CHALLENGE

A. Standard of Review

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) (#91). Only in a clear case should the court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982)

B. The Measure Contains a Single Subject

Objectors contend that the Board should not have set titles for 2011-2012 #3 because it contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one

subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

The Colorado General Assembly enacted legislation to implement the constitutional amendment. § 1-40-106.5, C.R.S. (2011). The General Assembly's stated intent is "to forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure" and "[t]o prevent surreptitious measures and to apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced on the voters." Section § 1-40-106.5(1)(e)(1) and (II), C.R.S. (2011)

An initiative, consistent with the single subject requirement, may contain several purposes that are interrelated. #91, 235 P.3d at 1076. Conversely, "[a] proposed initiative that has two or more distinct and separate purposes which are not dependent or connected with each

other violates” the single subject rule. *Id.* The mere assertion of a general theme will not save the initiative if it contains multiple subjects. *Id.* A comprehensive proposal in an initiative “contains a single subject if all of its provisions relate directly to its single subject.” *Id.*

The Court will not address the merits of a proposed initiative, interpret it or construe its future legal effects. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause and Summary for 2009-2010, #24*, 218 P.3d 350, 353 (Colo. 2009).

Colo. Const. art. XVI, § 5 governs water of Colorado streams. It states, “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.” This Court has declared that the public trust doctrine is not a part of art. XVI, § 5. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1975); *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board*, 901 P.2d 1251, 1262 (Colo. 1995) (Mullarkey, J., dissenting).

The measure seeks to alter Colorado’s law by incorporating the public trust doctrine in the Constitution and defining the scope of the public trust doctrine. §§ 2 and 3. It establishes that the use of the public’s water is a “usufruct property right associated with the use of water.” § 4(a). It then states that “[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 is a right of the public to the use of its own water in concert with the Colorado public trust doctrine.” § 5(a). It exempts the water of the natural stream, the streambed and the naturally wetted lands of shores of the stream from Colorado’s trespass laws. § 5(b).

The public's right in waters may be diminished if members of the public cannot obtain access to the waters. In recognition of this potential problem, courts have acknowledged the relationship between water, streambeds and banks and have included all three within the public trust doctrine. The Montana Supreme Court has held that the public has a right to portage around barriers in the water in the least intrusive manner possible. *Galt v. State*, 731 P.2d 912, 915 (Mont. 1987) ("We hold that use of the bed and banks must be of minimal impact."); The Maine Supreme Court recently recognized that the public trust doctrine encompasses the right of the public to use intertidal lands. *McGarvey v. Whittredge*, 28 A.3d 620, 624 (Me. 2011) The Nevada Supreme Court has acknowledged that certain lands adjacent to waters may be included within the public trust doctrine. *Lawrence v. Clark County*, 254 P.3d 606, 617 (Nev. 2011).

The different sections of the measure addressing water, streambeds and wetted lands are related to each other. As other courts have recognized, the public's rights in water are integrally related to

streambeds and river banks. The measure recognizes that these matters are related and seeks to incorporate them into the Colorado Constitution. Because they are sufficiently related, the concepts constitute a single subject.

For these reasons, the Court must conclude that the measure contains a single subject.

II. THE TITLES ARE FAIR, CLEAR AND ACCURATE

A. Standard of Review

The Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” #91, 235 P.3d at 1076. Only in a clear case should the court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d at 306.

**B. The Titles Fairly, Accurately and Clearly
Express the Single Subject.**

Section § 1-40-106(3), C.R.S. (2006) establishes the standard for setting titles. It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58

(Colo. 2008). However, the Board is not required to set out every detail. *In re Title, Ballot Title and Submission Clause for 2001-2002 #21 and #22*, 44 P.3d 213, 222 (2002). In setting titles, the Board may not ascertain the measure's efficacy, construction or future application. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645, 649 (Colo 2010). The Court does not demand that the Board draft the best possible title. *Id.* at 648. The Court will read the titles as a whole. If the titles, read as a whole, fairly and accurately summarize the measure, the Court will affirm the titles. *Id.* at 649.

The measure adopts the public trust doctrine. § 2. It states that the public trust doctrine is superior to rules and terms of contracts and property law. § 3. It states that the state acts as the steward of the waters. § 4. It authorizes public access along the banks of the stream, and exempts the water, the streambed and the river banks from trespass laws. § 5. It then discusses enforcement rights. § 6.

The titles accurately summarize the measure. The titles define the subject as "the public's rights in the water of natural streams." They

then inform the public that the measure (1) makes public ownership of water legally superior to other rights; (2) grants unrestricted public access; (3) prohibits the state from transferring water rights; (4) allows state government to manage others' water rights; (5) requiring the state government to act as a steward of the public's ownership of water; and (5) affords Colorado citizens the right to enforce the amendment.

CONCLUSION

For the reasons stated in this brief, the Court must approve the action of the Title Board.

JOHN W. SUTHERS
Attorney General


/s/Maurice G. Knaizer

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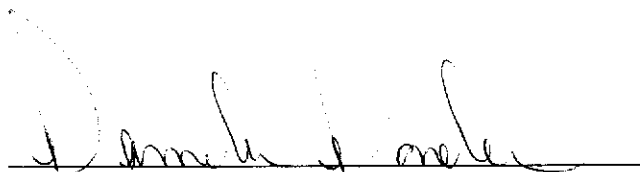
CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same by FedEx or Express Mail Overnight at Denver, Colorado, this 30th day of January 2012 addressed as follows:

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A handwritten signature in cursive script, appearing to read "D. M. [unclear]", is written over a horizontal line.

RECEIVED

Proposed Initiative Measure 2011-2012 73

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

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.

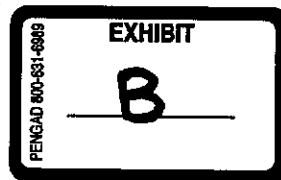
Hearing rescheduled to December 21, 2011 at 1:00 p.m.

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.