

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 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 2013-2014 #103

Petitioners:

MIZRAIM S. CORDERO, SCOTT PRESTIDGE, and
DOUGLAS KEMPER, as Registered Electors of the
State of Colorado

v.

Title Board:

SUZANNE STAIERT, JASON GELENDER, and
DANIEL DOMENICO

and

Respondents:

PHILLIP DOE, BARBARA MILLS-BRIA, and
SANDRA TOLAND, Proponents.

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Case Number: 2014SA000137

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.

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It contains, under a separate heading, a concise statement of the applicable standard of appellate review with citation to authority.

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S/ Stephen H. Leonhardt

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ISSUES PRESENTED

A. Whether the Ballot Title Setting Board (the “Board”) lacked jurisdiction under C.R.S. § 1-40-106 to set the title, ballot title, and submission clause (collectively, the “Titles”) for Initiative 2013-2014 #103 (“Initiative #103”) at the initiative’s Rehearing, when:

1. Barbara Mills-Bria, one of two Designated Representatives of the Initiative’s proponents, failed to appear for the rehearing on April 25, 2014 (the “Rehearing”), as required by C.R.S. § 1-40-106(4)(a); and

2. The Board accepted a substitute for Designated Representative Barbara Mills-Bria at the Rehearing in violation of C.R.S. § 1-40-104, which requires proponents to designate representatives “[a]t the time of any filing of a draft,” and 1-40-106(4)(a), which requires these Designated Representatives to appear at any title board meeting “at which the [D]esignated [R]epresentative’s ballot issue is considered.”

B. Whether the Board incorrectly determined that Initiative #103 is limited to a single subject, in light of the multiple objectives of this measure to:

1. Create a constitutional public trust doctrine based on creation of a common property interest in the environment and natural resources;

2. Create an inalienable right to clean air, clean water, and the preservation of the environment and natural resources (defined collectively in the initiative as “public trust resources”);
3. Criminalize the manipulation of data, reports, or scientific information in an attempt to utilize public trust resources for private profit; and
4. Apply retroactive conditions and requirements on any local, state, or federal permit issued for any public action or commercial dealing in which public trust resources may be affected.

C. Whether the Board’s Titles for Initiative #103 are unfair in that the phrase “concerning public ownership of natural and environmental resources” does not clearly express either a single subject or the full scope of Initiative #103, and in that they omit any mention of the creation of an inalienable right, which is a material feature of the Initiative.

STATEMENT OF THE CASE

A. Statement of Facts.

Phillip Doe and Barbara Mills-Bria (“Proponents”) proposed Initiative #103, a copy of which is attached as **Appendix A**. Initiative #103 would amend article XVI of the Colorado constitution by adding a new section 9 with six subsections.

Subsection (1) declares that the people of Colorado have an “inalienable right to clean air, pure water, including ground and surface water, and the preservation of the environment and natural resources” These resources are defined in subsection (1), and are referred to in the new Section, as “public trust resources.” Subsection (1) goes on to declare that public trust resources are the “common property of all the people, including generations yet to come,” and then the subsection obligates the state to “conserve and maintain [these resources] for the benefit of all the people.”

Subsection (2) expands upon the newly created trust obligations of “the state government and its agents” by requiring them to “protect public trust resources from substantial impairment, including pollution from external sources.” The standard by which the state shall gauge an “action or policy,” according to subsection (2), is termed “the precautionary principle.” This principle would require the proponent to demonstrate that a proposed action is “not harmful” if the action has a “suspected risk of substantially impairing” public trust resources, absent any “scientific consensus that the action or policy is harmful.”

Subsection (3) of the initiative allows any Colorado citizen, “as beneficiary of public trust resources,” to petition in court “to defend and preserve such resources against substantial impairment,” and to “ensure that the state is meeting

its obligations as trustee.” Subsection (3) also spells out the remedies that may be granted in these civil actions.

The fiduciary duty of the state as trustee is further explained in subsection (4). This duty requires the state to use “the best science available in any process or proceeding in which public trust resources may be affected.” Additionally, the subsection requires the state to refer for criminal prosecution “any person, corporation, or other entity found to be manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit.” Such activity, according to subsection (4), could result in penalties, criminal or otherwise, including loss of charter to operate in the state.

Subsection (5) declares that this new Section of the constitution is self-enacting and self-executing, but further states that it shall apply to a public action or commercial dealing that violates the provision of the new Section, “regardless of the date of any applicable local, state, or federal permits.” Finally, subsection (6) provides that laws may be enacted to “enhance, but cannot be contrary to” the new Section.

B. Nature of the Case, Cause or Proceeding and Disposition Below.

The Board conducted a public hearing (the “Initial Hearing”) on April 16, 2014, pursuant to C.R.S. § 1-40-106. At the Initial Hearing, the Board accepted

two Affidavits of Designated Representative for Initiative #103: one from Phillip Thomas Doe and another from Barbara Mills-Bria, certified copies of which are attached as **Appendix B, Pages 2-3**. Both Affidavits were signed and notarized in accordance with C.R.S. § 1-40-106(4)(b). The Board then considered Initiative #103, determined that it 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 April 23, 2014. The Motion for Rehearing, together with a motion for rehearing on the same measure filed by Mizraim S. Cordero and Scott Prestidge, was heard at the next scheduled meeting of the Board (the “Rehearing”) on April 25, 2014.

One of the Designated Representatives, Barbara Mills-Bria, failed to appear at the Rehearing. Instead, the Board accepted an “Acknowledgement of Withdrawal” from Ms. Mills-Bria, signed by her and Mr. Doe, a certified copy of which is attached as **Appendix B, Pages 4-5**. The Board then accepted an “Acknowledgement of Replacement of Designated Representative,” with notarized signatures by a substitute for Ms. Mills-Bria, Sandra Toland, and by Mr. Doe, a certified copy of which is attached as **Appendix B, Pages 6-7**. The Board also accepted a signed and notarized Affidavit of Designated Representative from Sandra Toland, a certified copy of which is attached as **Appendix B, Page 8**.

The Board denied both Motions for Rehearing by majority vote, except to the extent that the Board made changes to the Titles. Board member Jason Gelender voted to grant the motions. The Board designated and fixed the following title at the Rehearing:

An amendment to the Colorado constitution concerning public ownership of natural and environmental resources, and, in connection therewith, creating a public trust in those resources, which include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, regardless of any prior federal, state, or local approval; seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

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. Mr. Kemper seeks review of the final action of the Board pursuant to C.R.S. § 1-40-107(2).

SUMMARY OF THE ARGUMENT

The Board lacked jurisdiction to set Titles for Initiative #103 because one of the two Designated Representatives of the Proponents, Barbara Mills-Bria, failed to appear for the Rehearing as required by statute. The Board lacked statutory authority to accept a substituted Designated Representative at the Rehearing. The absence of Ms. Mills-Bria therefore deprived the Board of jurisdiction to set Titles at the Rehearing.

Initiative #103 has multiple subjects. Not only does it create a constitutional public trust doctrine, linked to a newly declared common property interest in the environment and natural resources, it also: (1) creates an inalienable right to clean air, clean water, and preservation of the environment and natural resources; (2) criminalizes the manipulation of data, reports and scientific information under certain circumstances; and (3) applies conditions and requirements retroactively to any existing local, state, or federal permits that could affect public trust resources. These surreptitious subjects, hidden under the broad rubric of a public trust, lack any necessary or proper connection to the stated purpose of a public trust doctrine.

Even if Initiative #103 contained a single subject, the Titles set by the Board do not fairly express the true intent and meaning of Initiative #103. The phrase “concerning public ownership of natural and environmental resources,” used to

summarize the Initiative's entire subject, fails to encompass the Initiative's foray into criminal law or its reconsideration of existing permits and property rights. Moreover, the Titles fail to clearly describe the Initiative's treatment of existing permits, and omit any mention of the inalienable right the Initiative would create.

This Court should reverse the Board's action in setting Titles because the Board lacked jurisdiction to set Titles in the absence of a Designated Representative at the Rehearing, Initiative #103 is not limited to a single subject, and the Titles fail to disclose the full scope and essential features of the Initiative.

LEGAL ARGUMENT

I. The Board lacked jurisdiction to set the Titles for Initiative #103 because one of the initiative's Designated Representatives failed to appear at a meeting at which the initiative was considered.

This Court should find that the Board lacked jurisdiction to set the Titles for Initiative #103 because one of the initiative's Designated Representatives, Barbara Mills-Bria, failed to appear at the Rehearing at which the initiative was considered.

A. Standard of Review

This Court reviews statutes governing the Board's authority *de novo*. *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo. 2013). The goal in construing a statute is to ascertain and give effect to the General Assembly's intent, first by looking at the statutory language in question. *Byrne v. Title Board*, 907 P.2d 570, 573 (Colo.

1995). Where the language of the statute is clear and unambiguous, this Court gives effect to the plain and ordinary meaning of the statute, without resorting to other rules of statutory construction. *Id.* The statutory scheme creating the Board contains detailed and comprehensive provisions delineating the Board's duties and the process and procedural standards by which the Board is to carry out its unique statutory charge. *See In re Title, Ballot Title and Submission Clause, and Summary for Proposed Initiative Entitled "W.A.T.E.R."*, 831 P.2d 1301, 1306 (Colo. 1992).

B. Designated Representatives of a ballot initiative's proponents must comply with attendance and affidavit requirements under the law.

For a ballot initiative to be considered at a Title Board meeting, Designated Representatives of an initiative's proponents must comply with the statutory attendance and affidavit requirements. C.R.S. § 1-40-106(4). Each Designated Representative shall appear at any Title Board meeting at which the Designated Representative's ballot issue is considered. C.R.S. § 1-40-106(4)(a). Each Designated Representative shall certify by notarized affidavit that he is familiar with the statutory requirements placed upon him as a Designated Representative, and shall sign and file such affidavit with the secretary of state at the first Title Board meeting at which the Designated Representative's ballot issue is considered.

C.R.S. § 1-40-106(4)(b). The Title Board “shall not” set a title for a ballot issue if either Designated Representative of the proponents fails to appear at a Title Board meeting or file an affidavit as required by law. C.R.S. § 1-40-106(4)(d).

The title setting process is not complete until the Title Board has ruled on any motions for rehearing. *Hayes*, 293 P.3d at 557. A rehearing for an initiative is not simply a “procedural” hearing, but is an important part of the statutory scheme designed to implement the constitutional single-subject and clear-title requirements. *Id.* Under the plain language of C.R.S. § 1-40-106(4)(d), the Board may not waive these attendance and affidavit requirements; it is deprived of the authority to set a title when either of the Designated Representatives fails to appear at a Title Board meeting. *Id.* at 557-58.

Barbara Mills-Bria was a Designated Representative for Initiative #103 and its predecessors, Initiatives #73 and #83, from the time each of these measures was submitted for review and comment. She confirmed her status as Designated Representative when she signed and submitted a notarized affidavit at the Initial Hearing for Initiative #103. The affidavit stated that Ms. Mills-Bria was “familiar with the provisions” regarding her responsibilities as a Designated Representative. The Board accepted Ms. Mills-Bria’s affidavit at the Initial Hearing for Initiative #103, along with that of the initiative’s other Designated Representative, Phillip

Thomas Doe. The Board then set the Titles for Initiative #103. At the Board's next regularly scheduled meeting, the Board conducted the Rehearing on Initiative #103 pursuant to two Motions for Rehearing filed in accordance with C.R.S. § 1-40-107(1). Ms. Mills-Bria failed to appear at the Rehearing as required by C.R.S. § 1-40-106(4)(a).

The Board accepted a notarized affidavit from Sandra Toland, as a purported substitute for Ms. Mills-Bria, at the Rehearing. By accepting the substitute affidavit, the Board exceeded its statutory authority. C.R.S. § 1-40-106(4)(b) requires such affidavits to be submitted "at the first title board meeting at which the designated representative's ballot issue is considered." Since this was not the first Title Board meeting considering Initiative #103, the Board had no statutory authority to accept the Affidavit. The Board operated outside its statutory authority, therefore, when it set Titles for Initiative #103 even as one of the Designated Representatives, Barbara Mills-Bria, failed to appear at the Rehearing.

The statute is clear and unambiguous that the Board lacks jurisdiction to set Titles when "either of the Designated Representatives" fails to appear at a title board meeting where the measure is considered. This mandatory attendance requirement includes the Rehearing. *Hayes*, 293 P.3d at 557. Additionally, the Board lacked jurisdiction under C.R.S. § 1-40-106(4)(d) when it accepted Ms.

Toland's Affidavit that had not been filed at the Initial Hearing on Initiative #103, "as required" by law. *See* C.R.S. § 1-40-106(4)(d). A Designated Representative's failure to attend a rehearing deprives the Board of jurisdiction to set titles at the rehearing. *Hayes*, 293 P.3d at 557. Therefore, this Court should find that the Board lacked jurisdiction to set the Titles for Initiative #103 because Designated Representative Barbara Mills-Bria failed to appear at a meeting at which her initiative was considered.

II. Initiative #103 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 #103 because it violates the single subject rule. It contains the following distinct subjects and purposes:

1. To create a constitutional public trust doctrine based on a declared common property interest in the environment and natural resources;
2. To create a new inalienable right to clean air, clean water, and preservation of the environment and natural resources;
3. To criminalize any manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit; and

4. To apply retroactively new conditions and requirements to previously permitted activities and transactions, “regardless of the date of any applicable local, state, or federal permits,” subjecting current property interests to a taking.

A. Standard of Review.

Generally, the Board’s actions are treated as presumptively valid. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1222 (Colo. 2000). However, the “court must sufficiently examine an initiative to determine whether a measure violates the single subject rule.” *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). When necessary, the court may characterize a proposal sufficiently to enable review of the Board's actions. *Id.* 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.” *Id.* at 279.

B. An initiative must be limited to only one subject.

A proposed initiative violates the single subject requirements of article V, section 1(5.5) of the Constitution and C.R.S. § 1-40-106.5 when it “relate[s] to more than one subject and . . . [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot*

Title and Submission Clause, and Summary for 1999-2000 #256, 12 P.3d 246, 253 (Colo. 2000) (quoting *In re Proposed Initiative “Public Rights in Waters II,”* 898 P.2d 1076, 1078-79 (Colo. 1995)) (brackets in original).

The danger associated with a broad general theme containing 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 [initiative].” *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009) (quoting *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007)). To evaluate whether or not an initiative encompasses a single subject, 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). The Court should employ the usual rules of statutory construction, including reading all words and phrases in context and construing them according to the rules 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). In construing an initiative’s language, each clause is presumed to have a specific purpose. *In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 542 (Colo. 1996). 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).

C. The theme of Initiative #103 is too broad and vague, and its hidden subjects would lead to voter surprise, defeating the purpose of the single subject rule.

Though characterized as parts of the single theme that Initiative #103 calls “the state’s duties under the public trust doctrine,” the several parts of Initiative #103 reveal at least four distinct purposes. None of the four subjects requires that any of the others be enacted to achieve its underlying purpose. The only common characteristic claimed by the Proponents is that all four distinct and separate subjects involve “the state’s duties under the public trust doctrine.” Just as this Court has determined that a common theme of “water” is too broad to constitute a single subject, *see In re Public Rights in Waters II*, 898 P.2d at 1080, so it follows that “the state’s duties under the public trust doctrine is entirely too broad of a theme to constitute a single subject – especially when the “public trust doctrine” is as all-encompassing as the one proposed here. Such a concern was voiced by Mr. Jason Gelender, member of the Title Board, at the Rehearing prior to his vote against the Board’s jurisdiction based on the initiative’s violation of the single subject rule: “I think the public would be surprised in voting on this to find out just how broad it really is likely to be, that it’s likely to apply a public trust to just

about everything.” Rehearing Transcript dated April 25, 2014 (“Rehearing Transcript”), p. 19, ll. 17-20, attached as **Appendix C**.

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, Ballot Title and Submission clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010) (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, 2009-2010 #24*, 218 P.3d at 353 (quotations omitted). This danger is highlighted when an initiative with multiple subjects is “improperly offered as a single subject by stating the subject in broad terms.” *In re Title, 2007-2008 #17*, 172 P.3d at 874. Combining these four separate and distinct subjects of Initiative #103 into one initiative would surprise voters by hiding the measure’s separate purposes under a broad theme. Accordingly, this Court should reverse the Board’s action in setting the Titles.

1. Initiative #103 creates a constitutional public trust doctrine based on a newly created common property interest in “public trust resources.”

Subsections (1) and (2) of the Initiative would obligate the state and its agents, as “trustees” of “public trust resources,” to protect those resources against

“substantial impairment, including pollution from external sources.” Public trust resources are defined in subsection (1) as “clean air, clean water, *including ground and surface water*, and the preservation of the environment and natural resources.” (Emphasis added.) Subsection (1) declares that these resources are the “common property” of all the people, including generations yet to come. As trustee, the state would be required to conserve and maintain public trust resources for the benefit of all the people. These “public trust” obligations and standards are similar to those Mr. Doe proposed in a 2007 measure, where this Court noted the “public trust language . . . only recasts the words of prior [public trust] initiatives,” and held the public trust requirements lacked any proper connection to creation of a new state environmental agency, violating the single subject requirement. *In re Title, 2007-2008 #17*, 172 P.3d at 875.

The newly imposed trust obligations on the state with regard to the newly created common property interest in the state’s ground and surface water, among other resources, would completely alter the nature of Colorado’s water rights. 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. XVI, § 6 (“The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.”). Only the unappropriated water is the public’s property; citizens and communities acquire property rights in this resource by appropriation and beneficial use. 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).

Initiative #103’s public trust in the environment and natural resources would follow and extend the path some other states have taken in expanding their common-law public trust doctrines to protect environmental features of water resources. For example, the California Supreme Court has held that the state has public trust obligations to preserve tidelands “in their natural state, so that they

may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). California’s Supreme Court also recognized this public trust doctrine was on a “collision course” with prior appropriation water rights, ultimately requiring state agencies to take public trust interests into account in determining or reconsidering previously granted water rights. *National Audobon Society v. Superior Court*, 658 P.2d 709, 712, 727-28 (Cal. 1983). Hawaii’s Supreme Court reached the same result in applying a constitutional provision similar¹ to the public trust features in Section (1) of Initiative #103 to limit existing water rights in order to preserve the environment. *In re Water Use Permit Applications*, 9 P.3d 409, 452-54 (Haw. 2000) (citing *National Audobon*, 658 P.2d at 728 n. 27 (Cal. 1983)).

¹ Hawaii’s Constitution, art. XI, § 1, provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

Colorado, by contrast, has never recognized any form of public trust doctrine in water, having rejected such a concept as inconsistent with Colorado's constitution and prior appropriation doctrine. *People v. Emmert*, 597 P.2d 1025, 1027-28 (Colo. 1979); *see also In re Title, Ballot Title, and Submission clause for 2011-2012 #3*, 274 P.3d 562, 573 (Colo. 2012) (Hobbs, J., dissenting); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1263 (Colo. 1995) (Mullarkey, J., dissenting) (noting, "This court has never recognized the public trust with respect to water."). Accordingly, Initiative #103's proposed public trust for environmental protection, and its accompanying declaration of "common property," would radically transform Colorado's scheme of priority-based water rights if interpreted (as in California and Hawaii) to subordinate existing appropriative water rights, regardless of priority, to the public's new common property right. Under Colorado's prior appropriation doctrine, 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 these established priority rights to the "common property of all Coloradans" would be a radical change to Colorado's prior appropriation system, substantially diminishing the value of the property rights grounded in the established priorities. This public trust, with its inherent disruption to Colorado's water law, has no

necessary or proper connection with the other subsections of Initiative #103 which recognize an inalienable right of all Coloradans to public trust resources, criminalize certain uses of scientific data in an attempt to utilize resources for private profit, and retroactively apply permitting conditions and requirements.

2. Initiative #103 creates an inalienable right to clean air, clean water, and the preservation of the environment and natural resources.

Subsection (1) of Initiative #103 declares that “the people of Colorado have an inalienable right” to public trust resources, defined within the subsection as “clean air, clean water . . . and the preservation of the environment and natural resources.”

The Colorado Bill of Rights recognizes that: “All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.” COLO. CONST. art. II, § 3. Inalienable rights are not absolute rights. *Colorado Anti-Discrimination Comm’n v. Case*, 380 P.2d 34, 41 (Colo. 1962). To determine whether a restriction placed on an inalienable right is valid, Colorado courts determine whether the restriction is “based upon a proper exercise of the police

power of the state in the protection of the public health, safety and welfare.”
People v. Nothaus, 363 P.2d 180, 182 (Colo. 1961).

By declaring that Coloradans have an inalienable right to public trust resources, Initiative #103 places this right among the most zealously protected rights that are recognized under the state constitution. Public trust resources would become one of the few rights specifically named as “inalienable,” and of such importance to the state that the standard of review protecting them would be the most demanding for the state to overcome. The creation of an inalienable right to public trust resources has no necessary or proper connection to the adoption of a public trust doctrine, nor does it have a necessary or proper connection to the criminalization of certain acts involving scientific data, nor to the retroactive application of permitting requirements.

3. Initiative #103 expands criminal law in a way that is unconnected to the adoption of a public trust doctrine.

Not only would Initiative #103 impose trust responsibilities altering private property rights that have long been recognized and protected in Colorado, but it would create new criminal law in a way that is not necessary or connected to “public ownership of natural and environmental resources.” Subsection (4) requires the state to refer “for prosecution for any criminal offenses that may

apply” any person, corporation, or other entity found to be “manipulating data, reports, or scientific information in any attempt to utilize public trust resources for private profit.” There is no such crime under Colorado law entailing the specific elements of “manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit.”

By subjecting someone to potential criminal prosecution for any such act, Initiative #103 is criminalizing it. The Board’s adopted title language, “criminalizing the manipulation of data, reports or scientific information in an attempt to use public trust resources for private profit,” recognizes this fact. Criminalizing the manipulation of certain data in order to generate private profit has no necessary or proper connection to the adoption of a public trust doctrine. Neither does it have a necessary or proper connection to the creation of an inalienable right, nor to the retroactive application of permitting requirements.

4. Initiative #103 imposes retroactive conditions and requirements on permits that affect public trust resources.

Subsection (5) declares that the newly-created Section of the Colorado Constitution shall apply to “a public action or commercial dealing that would violate it, *regardless of the date of any applicable local, state, or federal permits.*” (Emphasis added.) This plain language of the initiative makes clear that the

newly-created trustee obligations placed on the state and its agents, including the requirement to “conserve and maintain” public trust resources (subsection (1)), the “precautionary principle” (subsection (2)), and the fiduciary duties to use the “best science available” as well as the criminalization of certain uses of scientific data for private profit (subsection (4)), are to be applied retrospectively and retroactively to any presently valid permit. Such permits could include those authorizing the production of oil and natural gas, as well as decrees and permits for the diversion or use of water resources. Subjecting these property interests in presently valid permits to this retroactive application of new permitting requirements threatens these interests with a taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) (“The Fifth Amendment’s Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’”) This retroactive application of permitting requirements has no necessary or proper connection with the adoption of a public trust doctrine, nor does it have a necessary or proper connection to the creation of an inalienable right to public trust resources, nor to the criminalization of certain acts involving scientific data used for private profit.

III. The Titles set for Initiative #103 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/for’ or ‘no/against’ vote will be unclear.” C.R.S. § 1-40-106(3)(b). The Titles fail to meet these standards, because they describe Initiative #103’s subject as concerning only “public ownership of natural and environmental resources,” and improperly omit material provisions of the Initiative.

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.*). 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 inaccurately describe the Initiative’s subject as the “public ownership of natural and environmental resources.”

This Court should reverse the Board’s decision setting Titles for Initiative #103 because the phrase “concerning public ownership of natural and environmental resources” is too vague and does not adequately describe the full scope of the measure. The Titles describe the subject of Initiative #103 as “[a]n amendment to the Colorado constitution concerning public ownership of natural and environmental resources.” This phrase is too vague because it fails to indicate the Initiative’s extent to the point of reconsidering existing permits and property

rights. Moreover, the phrase is inadequate and misleading in that it fails to consider the Initiative's provisions that would create a new inalienable right and a new crime. The Titles fail to provide voters with adequate notice that, by providing for state control of natural and environmental resources, the Initiative would expand criminal law and limit private property rights.

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 #103 in terms that are misleading. Doing so demonstrates that the Board cannot fashion a title for Initiative #103 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 #103, this Court should reverse the Board's decision.

C. The Titles do not clearly describe the Initiative's treatment of existing permits.

This Court should reverse the Board's decision because the Titles for Initiative #103 are misleading about the measure's terms operating against private property interests in permits issued by the government for the use, access, or production of natural resources within the state. The Titles use the phrase "regardless of any prior federal, state, or local approval" to describe the permits to

which the new conditions and requirements under Initiative #103 would be applied retroactively. This language fails to provide voters with adequate notice that presently-issued permits, which are completely valid under current law and which allow Coloradans lawfully to use, access, or produce various kinds of natural resources within the state for private purposes, would be subject to a threat of a taking if the initiative were enacted into law.

D. The Titles improperly omit a material feature of the Initiative.

This Court should reverse the Board’s decision setting the Titles for Initiative #103 because the Titles omit a material feature of the initiative involving the creation of an “inalienable right” to public trust resources. By failing to include this important purpose of the initiative, the Titles do not adequately inform the voters of a very significant right they are creating for all Colorado citizens. Voters would be unclear regarding the impact of their “yes” or “no” vote on Initiative #103 if they are not provided with notice of this new inalienable right to public trust resources.

CONCLUSION

This Court should reverse the Board’s action in setting the Titles because Ms. Mills-Bria’s absence deprived the Board of jurisdiction, Initiative #103 is not limited to a single subject, and the Titles are unclear and misleading.

Respectfully submitted this 15th day of May, 2014.

BURNS, FIGA & WILL, P.C.

***Original signature at the offices of
Burns, Figa & Will, P.C.***

By: S/ Stephen H. Leonhardt
Stephen H. Leonhardt (#15122)
Alix L. Joseph (#33345)
Wenzel J. Cummings (#41250)

**Attorneys for Petitioner
Douglas Kemper**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of May, 2014, a true and correct copy of the above and foregoing **OPENING BRIEF OF PETITIONER DOUGLAS KEMPER** was served on the following via ICCES or by Federal Express, addressed as follows:

Via ICCES:

John W. Suthers, Attorney General
LeeAnn Morrill, Esq.
Sueanna P. Johnson, Esq.
Assistant Attorneys General
Colorado State Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203

Richard C. Kaufman, Esq.
Sarah K. Pallotti, Esq.
Julie A. Rosen, Esq.
Ryley Carlock & Applewhite
1700 Lincoln Street, Suite 3500
Denver, CO 80203

Via Federal Express:

Phillip Doe
7140 South Depew Street
Littleton, CO 80128

Sandra Toland
2552 S. Macon Way
Aurora, CO 80014

Barbara Mills-Bria
1831 South Welch Circle
Lakewood, CO 80228

***Original signature at the offices of
Burns, Figa & Will, P.C.***

S/ Chia Colleen Mandry

RECEIVED

MAR 25 2014

Be it Enacted by the People of the State of Colorado

Colorado Secretary of State

SWARO 9:12 A.M.
DATE FILED: May 15, 2014 3:13 PM

SECTION 1. In the constitution of the state of Colorado, add section 9 to article XVI as follows:

Section 9. The state's duties under the public trust doctrine to secure the rights of the people to protect natural resources. (1) THE PEOPLE OF COLORADO HAVE AN INALIENABLE RIGHT TO CLEAN AIR, CLEAN WATER, INCLUDING GROUND AND SURFACE WATER, AND THE PRESERVATION OF THE ENVIRONMENT AND NATURAL RESOURCES, REFERRED TO IN THIS SECTION AS "PUBLIC TRUST RESOURCES" ON WHICH WE ALL DEPEND AND THAT PROVIDE FOR THE HEALTH, SAFETY, AND HAPPINESS OF ALL NATURAL PERSONS, INCLUDING FUTURE GENERATIONS. PUBLIC TRUST RESOURCES ARE THE COMMON PROPERTY OF ALL THE PEOPLE, INCLUDING GENERATIONS YET TO COME. AS TRUSTEE OF THESE RESOURCES, THE STATE SHALL CONSERVE AND MAINTAIN THEM FOR THE BENEFIT OF ALL THE PEOPLE.

(2) THE STATE GOVERNMENT AND ITS AGENTS, AS TRUSTEES, SHALL PROTECT PUBLIC TRUST RESOURCES AGAINST SUBSTANTIAL IMPAIRMENT, INCLUDING POLLUTION FROM EXTERNAL SOURCES. IN SATISFYING THE STATE'S TRUST RESPONSIBILITIES, THE PRECAUTIONARY PRINCIPLE SHALL ALWAYS BE APPLIED; IF AN ACTION OR POLICY HAS A SUSPECTED RISK OF SUBSTANTIALLY IMPAIRING PUBLIC TRUST RESOURCES. IN THE ABSENCE OF SCIENTIFIC CONSENSUS THAT THE ACTION OR POLICY IS HARMFUL, THE BURDEN OF PROOF THAT IT IS NOT HARMFUL FALLS ON THOSE PROPOSING TO TAKE THE ACTION. THE STATE SHALL SEEK NATURAL RESOURCE DAMAGES FROM THOSE ENTITIES THAT CAUSE SUBSTANTIAL IMPAIRMENT OF PUBLIC TRUST RESOURCES AND USE SUCH FUNDS TO REMEDIATE THE HARM.

(3) ANY COLORADO CITIZEN, AS A BENEFICIARY OF PUBLIC TRUST RESOURCES, MAY PETITION A COURT OF COMPETENT JURISDICTION TO DEFEND AND PRESERVE SUCH RESOURCES AGAINST SUBSTANTIAL IMPAIRMENT AND TO ENSURE THAT THE STATE IS MEETING ITS OBLIGATIONS TO PRUDENTLY MANAGE SUCH RESOURCES AS A TRUSTEE. REMEDIES MAY BE GRANTED IN BOTH LAW AND EQUITY. IF A COURT FINDS THAT THE STATE HAS NOT FULFILLED ITS DUTIES AS TRUSTEE, CITIZENS ARE ENTITLED TO RECOVER ALL COSTS OF LITIGATION, INCLUDING EXPERT AND ATTORNEY FEES.

(4) THE FIDUCIARY DUTY OF THE STATE AS TRUSTEE REQUIRES IT TO USE THE BEST SCIENCE AVAILABLE IN ANY PROCESS OR PROCEEDING IN

WHICH PUBLIC TRUST RESOURCES MAY BE AFFECTED. ANY PERSON, CORPORATION, OR OTHER ENTITY FOUND TO BE MANIPULATING DATA, REPORTS, OR SCIENTIFIC INFORMATION IN AN ATTEMPT TO UTILIZE PUBLIC TRUST RESOURCES FOR PRIVATE PROFIT SHALL BE REFERRED FOR PROSECUTION FOR ANY CRIMINAL OFFENSES THAT MAY APPLY IN ADDITION TO OTHER PENALTIES THE STATE MAY IMPOSE, INCLUDING LOSS OF CHARTER TO OPERATE IN THE STATE.

(5) THIS SECTION IS SELF-ENACTING AND SELF-EXECUTING AND SHALL APPLY TO A PUBLIC ACTION OR COMMERCIAL DEALING THAT WOULD VIOLATE IT, REGARDLESS OF THE DATE OF ANY APPLICABLE LOCAL, STATE, OR FEDERAL PERMITS.

(6) LAWS MAY BE ENACTED TO ENHANCE, BUT CANNOT BE CONTRARY TO, THE PROVISIONS OF THIS SECTION.

PHILLIP T. DOE
7140 S. DEPEW
LITTLETON, CO 80128
303 973 7774

BARBARA MILLS-BRIA
1831 S. WELCH CIR
LAKEWOOD, CO 80228
303 929 4213



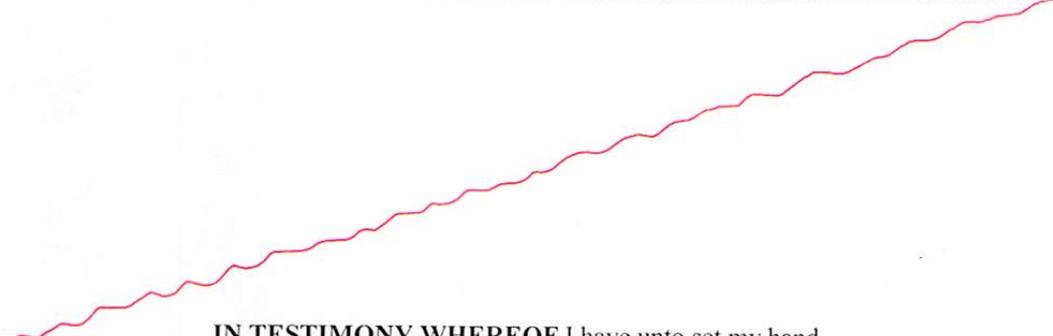
STATE OF COLORADO

DEPARTMENT OF
STATE

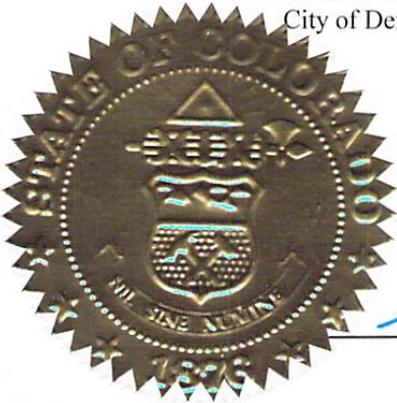
CERTIFICATE

I, **SCOTT GESSLER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the Affidavit of Designated Representative for Phillip Thomas Doe, Affidavit of Designated Representative for Barbara Mills-Bria, Acknowledgment of Withdrawal of Designated Representative, Acknowledgment of Replacement of Designated Representative, and Affidavit of Designated Representative for Sandra Toland for Proposed Initiative "2013-2014 #103 'Public Trust Resources'".....



..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 28th day of April, 2014.



SECRETARY OF STATE



AFFIDAVIT OF DESIGNATED REPRESENTATIVE

1. Designated Representative's Information:

Proposed Initiative Number(s): 103

Your Full Name (please print) Phillip Thomas Doe

Last Name Doc First Name Phillip

Your Physical Address - This address is my: Residence Address Business/Work Address

Street name and number (no P.O. Boxes) 7140 S. Dapew City/Town Littleton State CO Zip Code 80128

Your Email Address (All correspondence with designated representatives will be via email unless the designated representatives request correspondence via mail)

ptdoe@comcast.net

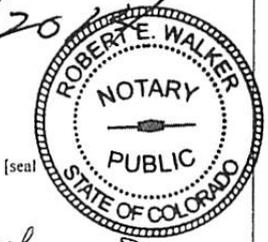
2. Sign below in the physical presence of the notary:

Affirmation: I do solemnly affirm that I am familiar with the provisions of Article 40 of Title 1, C.R.S., including but not limited to the prohibition on circulators' use of false addresses in completing circulator affidavits, and the summary of designated representatives' responsibilities prepared by the Secretary of State.

Sign and Date

Signature of Designated Representative [Signature] Date of Signing 4/16/2014

STATE OF COLORADO
COUNTY OF DENVER



Subscribed and affirmed before me this 16 day of April, 2014 by Phillip Thomas Doe
Day Month Year Printed name of Designated Representative

Signature (and Title) of Notary / Official Administering Oath Robert E. Walker

My Commission Expires: 08-12-2015

Revised 4/22/2013



AFFIDAVIT OF DESIGNATED REPRESENTATIVE

1. Designated Representative's Information:

Proposed Initiative Number(s): # 103

Your Full Name (please print)

Mills-Osria
Last Name

Barbara
First Name

Your Physical Address – This address is my: Residence Address Business/Work Address

1831 S Welch Circle
Street name and number (no P.O. Boxes)

Lakewood
City/Town

CO
State

80228
Zip Code

Your Email Address (All correspondence with designated representatives will be via email unless the designated representatives request correspondence via mail)

bmillsosria@msk.com

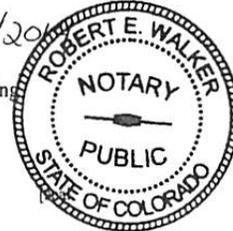
2. Sign below in the physical presence of the notary:

Affirmation: I do solemnly affirm that I am familiar with the provisions of Article 40 of Title 1, C.R.S., including but not limited to the prohibition on circulators' use of false addresses in completing circulator affidavits, and the summary of designated representatives' responsibilities prepared by the Secretary of State.

Sign and Date

[Signature]
Signature of Designated Representative

4/16/2014
Date of Signing



STATE OF COLORADO
COUNTY OF DENVER

Subscribed and affirmed before me this 16 day of April, 2014 by Barbara Mills-Osria
Day Month Year Printed name of Designated Representative

Signature (and Title) of Notary / Official Administering Oath Robert E. Walker

My Commission Expires: 08-12-15

Revised 4/22/2013

ORIGINAL

RECEIVED

ACKNOWLEDGMENT

APR 24 2014

Colorado Secretary of State

State of Colorado

12:15 pm

County of JEFFERSON

D. Volkosh

The foregoing instrument was acknowledged before me on this 23 day of APRIL, 2014

By BARBARA MILLS-BRIA AND PHILLIP T. DOE

Anne Nicholas
Notary Public Signature

ANNE NICHOLAS
Notary Name

Personally Known _____ OR Type of Identification Produced COLD. D.L.



Seal

Expiration

THIS CERTIFICATE MUST
BE ATTACHED TO THE
DOCUMENT DESCRIBED
AT RIGHT

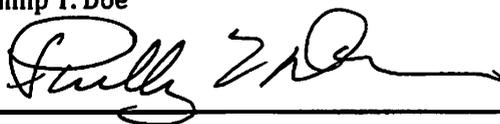
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<u>WITHDRAW AS DESIGNATED REP.</u>	TITLE OR TYPE OF DOCUMENT
<u>1</u>	NUMBER OF PAGES
<u>4.23.14</u>	DATE OF DOCUMENT
<u>N/A</u>	SIGNER(S) OTHER THAN NAMED ABOVE

Barbara Mills-Bria needs to withdraw as designated representative for ballot issue #103. Ms. Mills-Bria is unable to attend the Title Board Rehearing due to a death in her family.

Designated representative
Barbara Mills-Bria



Second designated representative:
Phillip T. Doe



ACKNOWLEDGMENT

State of Colorado

County of Denver

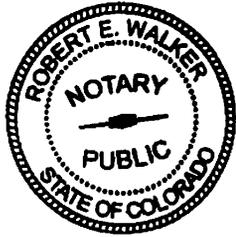
The foregoing instrument was acknowledged before me on this 24 day of April,
2014,

By Sandra Jo Toland

Robert E. Walker
Notary Public Signature

Robert E. Walker
Notary Name

Personally Known _____ OR Type of Identification Produced Colorado Driver's License



Seal

Expiration 08-12-2015

**THIS CERTIFICATE MUST
BE ATTACHED TO THE
DOCUMENT DESCRIBED
AT RIGHT**

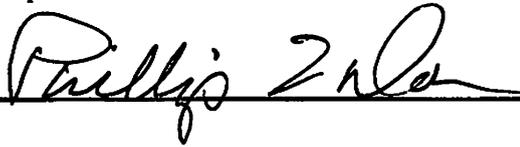
DESCRIPTION OF ATTACHED DOCUMENT	
<u>Acknowledgment replacing designated</u>	<u>Representative</u>
TITLE OR TYPE OF DOCUMENT	
<u>one</u>	
NUMBER OF PAGES	
<u>24 April 2014</u>	
DATE OF DOCUMENT	
<u>Phillip T. Doe</u>	
SIGNER(S) OTHER THAN NAMED ABOVE	

Sandy Toland is replacing Barbara Mills-Bria as designated representative for ballot issue #103 because Ms. Mills-Bria is unable to attend the Title Board Rehearing due to a death in her family

Designated representative
Sandy Toland

A handwritten signature in cursive script that reads "Sandy Toland". The signature is written in black ink and is positioned above a solid horizontal line.

Second designated representative:
Phillip T. Doe

A handwritten signature in cursive script that reads "Phillip T. Doe". The signature is written in black ink and is positioned above a solid horizontal line.



AFFIDAVIT OF DESIGNATED REPRESENTATIVE

1. Designated Representative's Information:

Proposed Initiative Number(s): #103

Your Full Name (please print)

TOLAND Last Name SANDRA First Name

Your Physical Address – This address is my: Residence Address Business/Work Address

2552 S. MACON WAY Street name and number (no P.O. Boxes) AURORA City/Town CO State 80014 Zip Code

Your Email Address (All correspondence with designated representatives will be via email unless the designated representatives request correspondence via mail)

sjtoland@ecentral.com

2. Sign below in the physical presence of the notary:

Affirmation: I do solemnly affirm that I am familiar with the provisions of Article 40 of Title 1, C.R.S., including but not limited to the prohibition on circulators' use of false addresses in completing circulator affidavits, and the summary of designated representatives' responsibilities prepared by the Secretary of State.

Sign and Date

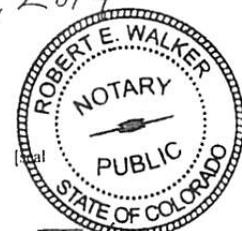
Sandra Toland Signature of Designated Representative April 24, 2014 Date of Signing

STATE OF COLORADO
COUNTY OF DENVER

Subscribed and affirmed before me this 24 day of April, 2014 by Sandra Toland
Day Month Year Printed name of Designated Representative

Signature (and Title) of Notary / Official Administering Oath Robert E. Walker

My Commission Expires: 08-12-2015



1 CHAIRWOMAN STAIERT: All right. We are back
2 on. This is a continuation of yesterday's Title Board
3 Setting Hearing. We're meeting today in the Aspen Room
4 at the Secretary of State's Office, which is on the
5 Third Floor, 1700 Broadway.

6 The date is Friday, April 25th and we have
7 four additional matters held over from yesterday for
8 rehearing. The first matter is Initiative 2013-2014
9 No. 103. And there was a Motion for Rehearing filed by
10 Mr. Kaufman. If you could come up and --

11 MR. LEONHARDT: Madam Chair, Members of the
12 Board, we have two jurisdictional issues today. The
13 first is a new one, since our Motion for Rehearing is
14 filed.

15 Designated representative, Barbera Mills-Bria,
16 is not present today, was not present yesterday.
17 Section 1-40-106(4)(a) requires that each designated
18 representative shall appear at any Title Board Meeting
19 where a valid issue is considered.

20 And Section 4(b) requires that each designated
21 representative must sign an affidavit at the first
22 Title Board Hearing.

23 Respectfully, we do not believe that there's
24 any authorization for a new designated representative
25 to sign the affidavit at a rehearing.

1 And that's why we respectfully question
2 whether the Board has jurisdiction to allow the
3 proponents to proceed with a brand new designated
4 representative at this late stage of the proceedings.

5 Ms. Mills-Bria has been the designated
6 representative throughout, up through the first hearing
7 along with Mr. Doe, up through the first hearing that
8 was held last week.

9 I believe there was some reference yesterday
10 to the 2012 Supreme Court decision on the statute in
11 Hayes v. Odkey where the Court recognized that this
12 statutory requirement is both unambiguous and
13 inflexible and that the intent and purpose of this
14 requirement is that the designated representatives be
15 available to explain the Measures, to answer the
16 Board's questions, including answering the Board's
17 questions on review and comment hearing.

18 Mr. Doe and Ms. Mills-Bria were the designated
19 representatives at the review and comment hearing on
20 the similar initiatives based on which Legislative
21 Council waived review and comment on Initiative 103.

22 They have been the designated representatives
23 throughout Initiative 103, continuing through this
24 Board's hearing last week.

25 I don't know if the Board wants to hear other

1 jurisdictional arguments at this point or to address
2 this issue first.

3 CHAIRWOMAN STAIERT: Yes, if you could do all
4 jurisdictional and then we'll get a response from staff
5 and the proponent.

6 MR. LEONHARDT: Okay. And the jurisdictional
7 issue raised in our Motion for Rehearing is the
8 question of multiple subjects.

9 We believe Initiative 103 contains at least
10 four subjects. First, it would create a constitutional
11 form of a public trust doctrine based on a newly
12 created common property interest in the environment and
13 certain natural resources designated as public trust
14 resources. That's in Section 1.

15 Also, in Section 1, it would create a new
16 inalienable right to a clean and preserved environment.

17 And Section 4 includes creation of a new crime
18 based on manipulation of data.

19 And in Section 5 would retroactively apply new
20 conditions and requirements to any applicable federal,
21 state, local permits regardless of when they were
22 granted, less impairing established property rights.

23 The primary focus of the Initiative is
24 creating a public trust in the environment and
25 resources as a common property right. This is broad

1 and sweeping and necessarily takes away private
2 property rights by bringing them into common property.
3 And similar themes have appeared in Initiative 89 that
4 the Board reviewed last week.

5 Mr. Doe, one of the designated representatives
6 of this Measure, also some of the board members may
7 recall, was a proponent of a couple of public trust
8 initiatives two years ago, Initiatives 3 and 45,
9 regarding public trust and water resources. And of
10 Initiative 17 in 2017, which involved a public trust
11 standard for state agency decision-making.

12 And similar to that, what the court found on
13 that Measure, Initiative 103, simply recasts the words
14 of the public trust standard in a different form, but
15 in a way that constitutes a separate subject from other
16 subjects in this Measure.

17 The other subjects that I believe are
18 surreptitious subjects coiled up the folds, just as the
19 public trust standard was found to be in the 2007 case,
20 creating a new inalienable constitutional right,
21 certainly as a subject all in and of itself.

22 Retroactive application to previous permits,
23 includes permits that have granted property rights.
24 But this is unrelated to the designation of common
25 property rights in the public trust in that common

1 property.

2 And last, but not least, creation of a new
3 crime to be specified, but vaguely defined in the
4 Constitution is a separate subject. It's not necessary
5 to the purpose of the Initiative. These other three
6 subjects are not necessarily properly connected to the
7 primary theme of the public trust, nor do they have a
8 necessary or proper connection to one another.

9 And those are our jurisdictional points for
10 this hearing.

11 CHAIRWOMAN STAIERT: All right. Thank you.

12 MS. PALLOTTI: We have the same jurisdictional
13 issues.

14 CHAIRWOMAN STAIERT: You could incorporate his
15 comments, whatever you want.

16 MS. PALLOTTI: May it please the Board, Sarah
17 Pallotti appearing on behalf of the objectors, Mr.
18 Cordero and Mr. Prestidge.

19 I'd just like to reiterate Mr. Leonhardt's
20 comments about the jurisdictional issues. As he said,
21 the designated representative, Barbera Mills-Bria, is
22 not present today.

23 The Supreme Court case Hayes v. Odkey requires
24 strict construction of the statute requiring both
25 proponents to be here. She's not here. This is a

1 pretty black and white issue.

2 There's also the same single-subject
3 requirements that we'd like to incorporate. There's,
4 at a bare minimum, at least three subjects in this
5 proposal, the establishment of a common property right
6 to all public trust resources, imposing upon the state
7 a public trusteeship to protect these public trust
8 resources, which is not recognized in the Colorado
9 Constitution, and then creating a new preemption scheme
10 whereby any applicable local, state, or federal permit
11 previously recognized would be superseded by this
12 doctrine.

13 This, of course, is completely separate from
14 the establishment of a common property right or from
15 the establishment of a public trust.

16 CHAIRWOMAN STAIERT: Thank you. On the issue
17 of the proponents, Mr. Ward, do you want to --

18 MR. WARD: So, we have a notarized affidavit
19 from Ms. Mills-Bria withdrawing as a designated
20 representative, along with a notarized affidavit and an
21 affidavit of designated representative from Sandra
22 Toland, appointing herself as a new designated
23 representative.

24 Mr. Doe has signed both of these notarized
25 documents consenting to the switch out of designated

1 representatives.

2 CHAIRWOMAN STAIERT: Okay. And did you say we
3 have a rule on that?

4 MR. WARD: There is nothing in rule, although
5 we have used this procedure in the past.

6 CHAIRWOMAN STAIERT: Okay. All right. Do you
7 want to come up and respond?

8 MR. DOE: As to that matter?

9 CHAIRWOMAN STAIERT: To the jurisdictional, to
10 the single subject and the issue about the
11 substitution.

12 MR. DOE: Sure. Single subject, public trust,
13 this is the United States Supreme Court. This is what
14 they said in the Illinois Central case, which I'm sure
15 you're all familiar with.

16 The public trust doctrine is of ancient
17 origin. Its roots trace to Roman civil law and its
18 principles can be found in English common law, et
19 cetera, et cetera, et cetera.

20 So, we're not creating anything. We're simply
21 memorializing something that already exists. And it's
22 our right to protect that which is ours against
23 overreach -- statutory overreach by government.

24 And as to what our rights are, which seem to
25 be in some question, I'd like to turn to our State

1 Constitution and the Bill of Rights.

2 Section 1, Vestment of Political Power. We
3 take this stuff seriously. All political power is
4 vested and derived from the people. All government of
5 right originates from the people. It's founded upon
6 their will only and instituted solely for the good of
7 the whole.

8 And then as to inalienable rights, which seems
9 to be the source of some confusion here. And this is
10 Section 3.

11 All persons have certain natural, essential,
12 an inalienable rights, among which may be reckoned the
13 right of enjoying and defending their lives and
14 liberties of acquiring, possessing and protecting
15 property and of seeking and obtaining their safety and
16 happiness.

17 Now if we did not have the right to protect
18 that which is ours, what rights do we have? Now all
19 this Initiative is doing is establishing a way of
20 protecting the public's resources against overreach and
21 a regulatory system which doesn't seem to be working
22 for us.

23 That's my statement. That's where we stand.
24 It's a simple principle. It's a conceptual thing, but
25 it's one purpose.

1 CHAIRWOMAN STAIERT: Any questions for any of
2 the --

3 BOARD MEMBER: Well, do you want to -- let me
4 just address, I guess, the substitution right.

5 The way I read the case and the statute, the
6 only real question for us is whether we have in front
7 of us the designated representatives.

8 And so, in other words, is the substitution
9 effective, right? If it is effective, then we're fine.
10 If it's not, then the Hayes case requires us to say we
11 don't have jurisdiction. I think I'm understanding our
12 situation correctly.

13 CHAIRWOMAN STAIERT: Yes.

14 BOARD MEMBER: So, it seems to me that there
15 should be a process by which people can substitute a
16 new designated representative, either for instances
17 like this or if someone could imagine an even more dire
18 situation in which one of the proponents is actually
19 incapacitated. It doesn't seem to me that that should
20 mean they can't go forward. So I would give effect to
21 the substitution and move on.

22 CHAIRWOMAN STAIERT: I would too for those
23 same reasons that there has to be a way to do a
24 substitution. The case that was referred to was a case
25 where the proponents were not in the room and that's a

1 little bit different than allowing for a substitution,
2 which we've heard has been notarized and authorized by
3 the other representatives, so I don't have a problem
4 with it.

5 BOARD MEMBER: Yeah. I think I agree. I
6 mean, absent some indication that we don't have
7 authority to do a substitution or some statute or rule
8 that says we're doing it the wrong way, which I don't
9 think exists, it seems appropriate to me.

10 CHAIRWOMAN STAIERT: We're going to vote on
11 it. Why don't we vote on that issue? Do you want to
12 do a motion?

13 BOARD MEMBER: Sure. Is it a denial of
14 rehearing at this point or just a motion to find that
15 we have the jurisdiction?

16 CHAIRWOMAN STAIERT: We have jurisdiction.

17 BOARD MEMBER: I just move that we have
18 jurisdiction to continue on and that's not being
19 removed due to having a new designated proponent.

20 BOARD MEMBER: Second.

21 CHAIRWOMAN STAIERT: All those in favor? Aye.

22 MR. DOMENICO: Aye.

23 MR. GELENDER: Aye.

24 CHAIRWOMAN STAIERT: All right. So now we're
25 on to the single-subject question. Does anyone have

1 any questions for the proponent or opponent?

2 MR. GELENDER: I have a question. The
3 Initiative refers to natural resources. What does that
4 cover?

5 MR. DOE: Well, I think it goes on to say air,
6 water, land, but that isn't all inclusive. The
7 public's air, land, and water, I mean, those are among
8 the natural recourses.

9 MR. GELENDER: Right. What I'm asking is what
10 other ones do you think fall under that term?

11 MR. DOE: I think you could say state parks,
12 wildlife, which is a public resource.

13 MR. GELENDER: Okay.

14 MR. DOE: That's not meant to be all
15 inclusive. I mean, we've always said there would have
16 to be a rule in making them on this and somebody's
17 going to have to decide what the limitations are.

18 MR. GELENDER: Okay.

19 MR. DOE: We resisted, as I think you know,
20 when this was under review with legal counsel trying to
21 define every issue. It's just like the issue of what
22 is substantial impairment.

23 I can tell you what substantial impairment
24 means to me, but I don't think that we have to be so
25 broad that we define these things at this point.

1 MR. GELENDER: Okay. I'm done for now.

2 MR. DOMENICO: I guess I have a bit of a
3 question. So, I understand what you're saying, partly,
4 is that, if I'm not mistaken, your position is,
5 essentially, you shouldn't have to do this, right?
6 Your reading of the various parts of the constitution
7 is that we basically -- this should have been the
8 situation all along, essentially, right?

9 MR. DOE: Right.

10 MR. DOMENICO: But your comment about English
11 common law and the quote from Illinois Central that's
12 come up in the past, I think what the petitioners, the
13 objectors are saying is, it would be one thing to just
14 say, look, we're going to impose this public trust idea
15 that's consistent with English common law, this general
16 established idea.

17 But you've also kind of gone a step beyond
18 that and added a number of very specific provisions
19 that aren't necessarily what you would come up with
20 under the kind of generic historic understanding, the
21 criminal offense, the local versus state preemption
22 idea.

23 So that, I think, is their point is
24 establishing a public-trust idea, maybe even common
25 property, is one thing. Going then the next step in

1 kind of, in some ways, micromanaging is that the
2 meaning of that, tweaking it, how it would work out in
3 practice is perhaps, takes you out of the kind of
4 general idea that, for example, the water context came
5 up, and makes it more like situations that the court,
6 the Supreme Court has said your sort of use of a big,
7 broad idea is covering these very specific and
8 potentially important aspects of the Measure that
9 aren't necessarily part of the general idea of a public
10 trust.

11 MR. DOE: Mm-hmm.

12 MR. DOMENICO: Do you want to expound?

13 MR. DOE: Yes, please. Well, our experience,
14 and I think the legal experience of people that deal in
15 public trust, namely, Hap Dunning at the University of
16 California, Davis, is one of the chief legal experts on
17 this subject, do not believe that public trust will be
18 observed unless there are several -- unless there are
19 pretty specific provisions providing for the
20 enforcement. And this is the Colorado Supreme Court on
21 this very issue, I think. I think it's germane to that
22 issue.

23 The single-subject requirement must be
24 liberally construed so as not to impose undo
25 restrictions on the initiative process.

1 To that end, the single-subject requirement
2 does not preclude the use of provisions that are not
3 wholly integral to the basic idea of the proposed
4 initiative.

5 As you know, this is a laborious process and
6 it takes a lot of people's efforts to get this done.
7 But I think, you know, if you look at the public's
8 reaction to how the environment is being treated and
9 how the public's resources are being treated, I think
10 we all have an obligation to allow the public to vote
11 on this issue. How do we want to protect the
12 environment?

13 You know, there's an experiment in biology
14 where you put a frog in a pond and then you slowly turn
15 up the heat and you slowly continue to turn up the heat
16 until it boils and the frog dies.

17 There are some people of the opinion that
18 that's what we're doing to our environment and our
19 natural resources. And all we're trying to do is
20 protect those things for this generation and the coming
21 generations. That's all we're trying to do and we
22 think it has to have teeth.

23 BOARD MEMBER: I thought you were going to
24 compare that to a Title Board Hearing.

25 MR. DOE: Well, I'm not a lawyer. I just have

1 to tell you what I'm thinking. I'm sorry.

2 MR. DOMENICO: No, I understand. I think the
3 concern is, is you're exactly right, how are we going
4 to deal with this perceived problem?

5 And the question that I think we sort of have
6 to ask ourselves is, are there people -- does it makes
7 sense to say all these things should be in the same
8 Measure or if you want to impose a public trust, great,
9 go for it.

10 But if you want to rearrange the preemption
11 system, you might have to ask people separately if
12 that's an additional step they want to take. Or if you
13 want to criminalize certain types of information
14 gathering, that might be a separate issue.

15 Those are the questions I think I have that,
16 sure, you can ask people all these questions, but can
17 you make them choose all or nothing. And I think this,
18 to me, is a close case. I'm probably inclined to go
19 forward, but I do think it's a close case.

20 MR. DOE: May I just say -- I'll try to be on
21 point, at least as my non-legal mind perceives it.

22 I mean, let's take, for instance, something
23 that I think is tantamount to this. Let's say that the
24 public wanted to reform public education.

25 I think it would be illogical and naïve to

1 think that if they were going to reform education,
2 they'd have to it first K, then one, then two, then
3 three, then four, then -- because they're all somewhat
4 different, but it's all under the concept of public
5 education.

6 I think that's what we're arguing here is the
7 concept of public trust and we want it to work. We
8 simply want it to work. And there's a mechanism there
9 to make it work and that's all we're asking for.

10 MR. DOMENICO: Okay. I don't think I have any
11 more questions.

12 CHAIRWOMAN STAIERT: Okay. Thank you.

13 MR. GELENDER: Well, I guess it's time for me
14 to go into a sort of some rather long and hopefully
15 somewhat clear explanation because I did vote to find a
16 single subject last time and I don't plan to vote that
17 way today.

18 So, that sort of change of mind, especially
19 when it's not necessarily based particularly on what's
20 in the Motions for Rehearing, I think it's appropriate
21 to explain that.

22 So first, as to last time why I thought then
23 that this had a single subject was it's certainly very
24 broad, but at least reading it on its face it seemed
25 that everything was connected to a broad purpose,

1 which, for me, is essentially something like a public
2 right to environment or environmental protection.

3 I don't know that I saw much log rolling, you
4 know, that there's anything in here sort of designed to
5 induce people who are not -- I guess would not consider
6 themselves in favor of environmental protection, sort
7 of generally, to sign up for this.

8 And I don't know that it's deliberately or
9 intentionally surreptitious. And then we have the
10 precedent from No. 3 two years ago, which was also
11 quite broad.

12 And I was sort of left with the question,
13 well, based on all those factors in the precedent is
14 just expanding this doctrine beyond water into all this
15 other stuff seemed like too big.

16 And my instincts were saying yeah, this is
17 just too much, but I couldn't find a case on point that
18 necessarily said, well, a subject can be just too big,
19 even the ones the cases would say water, and those
20 types of things.

21 It was always not really so much that the term
22 was too big, but that what was under it wasn't
23 necessarily and properly connected. At the time I
24 thought these things might be.

25 As for why I'm inclined to change my mind, in

1 looking at this more I started to get concerned for
2 sort of what does preservation of the environment and
3 natural resources mean?

4 And what I think is, a lot of people could
5 look at this, voters, and think they're voting on
6 protecting the air and the water, basically.

7 So I looked up natural resources. A variety
8 of definitions from the OECD, among other places, and
9 it includes a lot. It includes things like soil,
10 timber, game, which I think a proponent acknowledged,
11 you know, fish, mineral resources.

12 And in considering that, then I ran up against
13 the other thing, which is we're not supposed to
14 consider the effects of initiatives or what could
15 happen with them.

16 That said, relying on simply public surprise,
17 I think the public would be surprised in voting on this
18 to find out just how broad it really is likely to be,
19 that it's likely to apply a public trust to just about
20 everything.

21 I'm not sure that someone couldn't say, you
22 know, just cut off oil and gas credits, start an action
23 to prevent oil and gas drilling on someone's private
24 property altogether. I think this could apply to
25 things like grazing rights.

1 And while we can't speculate too much, we do
2 have to know generally what an initiative is going to
3 do to find a single subject and I just think that the
4 use, especially the environment and natural resources,
5 I think those are two different things, frankly, that
6 natural resources encompasses a lot more than people
7 are inclined to think it does in the context of the
8 rest of the Measure. And for that reason I'm inclined
9 to not find a single subject today.

10 MR. DOMENICO: Well, there's very little I
11 disagree with in what you said, except I think the
12 conclusion. I do think it's remarkably broad. I think
13 there is a fairly good chance that people just reading
14 environment or natural resources would not comprehend
15 quite how far that could go.

16 But, to me, that doesn't necessarily make it
17 separate subjects. Just as you said, it makes it an
18 incredibly broad subject.

19 As I was, I think, revealing through my
20 questions, once you're dealing with something that
21 broad, it does become to me, and I think this is
22 reflected in the case law. Once you start dealing with
23 something so broad, when you start kind of
24 micromanaging it and having sort of specific provisions
25 that are related, but sort of not necessary to

1 implement your broad vision, it starts to get
2 troubling.

3 And that's where I get a little bit concerned
4 about this and in particular about -- the preemption
5 is, to me, is certainly, I assume, likely to be
6 helpful, but is also kind of a major provision that
7 isn't necessarily part of it.

8 You can certainly have a strong public trust,
9 public ownership system of all these things, I think,
10 without that aspect of it.

11 But we've already approved dozens, hundreds,
12 thousands of Measures with local preemption efforts in
13 them and this one doesn't seem to me to cause a problem
14 if those didn't.

15 So, I agree, I think it's a closed case. I
16 think trying to do something both so broad and then
17 incorporating so many specifics is potentially
18 problematic, but I don't think this quite goes over the
19 line.

20 CHAIRWOMAN STAIERT: I mean, I agree. This
21 may be a case that the court would tell us we were
22 wrong. Sometimes that's very hard to predict. I think
23 that -- I'm persuaded that even though it's a very
24 broad topic, it is a single topic, which is the
25 creation of the public trust and because it creates a

1 public trust over a lot of things, I don't think makes
2 it a secondary subject.

3 My greater concern was actually the -- you
4 know, the part about the damages and the criminalizing
5 and the manipulation and all those kinds of things that
6 are sort of separate from that concept, but they are
7 all part of the same concept.

8 And I'm typically pretty liberal in my
9 construction of single subject just because of the
10 right to petition and the fundamental nature of that
11 right. And so I'm persuaded that it's single subject.
12 I think it's our motion.

13 MR. DOMENICO: Okay. So, then I'll move that
14 we deny the motion for rehearing on motions for
15 rehearing on jurisdictional grounds and find that the
16 Measure 103 has a single subject.

17 CHAIRWOMAN STAIERT: Second. All those in
18 favor? Aye.

19 MR. DOMENICO: Aye.

20 CHAIRWOMAN STAIERT: Opposed?

21 MR. GELENDER: No.

22 CHAIRWOMAN STAIERT: Okay. So that passes two
23 to one. And now we're on to the language. I'm not
24 sure which order you want to go in, but come talk about
25 the language or if you want to come up together, that's

1 fine too.

2 MR. LEONHARDT: Thank you, Madam Chair.

3 Steven Leonhardt for Petitioner Douglas Kemper.

4 With regard to the title language, first of
5 all, I would look at the phrase "concerning a public
6 trust and environmental resources", which I think is
7 reflective of the problems that some of us and some of
8 the board members were struggling with regarding is
9 this a single subject? If so, why is it?

10 I think, first of all, it's too narrow in some
11 respects. Environmental resources, it seems to me
12 significantly more narrow than the environment and
13 natural resources as has been discussed this morning.

14 And the phrase "concerning a public trust and
15 environmental resources" certainly gives no indication
16 of creating a new crime or reopening previously granted
17 federal and other permits.

18 I think we've also got a catch-phrase issue.
19 And I know we had a similar issue on rehearing with an
20 issue of 89 last week.

21 I agree that the phrase "public trust" is
22 central in this initiative. However it's used here to
23 mean something very different than the traditional
24 public trust doctrine that Mr. Doe alluded to with the
25 Illinois Central case and Roman law and Common law, as

1 explained in the Illinois Central decision by the U.S.
2 Supreme Court that public trust doctrine has
3 traditionally been understood to mean a restraint on
4 the sovereigns conveyance of tide lands and navigable
5 waters and the underlying lands in order to protect
6 public use for commercial, navigation, and fishing.

7 Traditional public trust doctrine was further
8 explained in a dissenting opinion on a court on
9 Initiative 3 two years ago. But it looks nothing like
10 the public trust that's purposed in this initiative and
11 to the extent that the public has any basis to
12 understand the phrase "public trust" as anything other
13 than a catch phrase, it would have to be the
14 traditional doctrine and that's not the sense in which
15 it's used here at all.

16 Also, just to respond briefly to Mr. Doe's
17 statement that this has always been the law of the U.S.
18 Supreme Court, also suggested in Illinois Central and
19 recognized very clearly on another case two years ago
20 called PPL Montana v. State of Montana.

21 The public trust doctrine is not an issue of
22 federal law. It's an issue of state law for each state
23 to decide. And as the Colorado Supreme Court has
24 decided in People v. (inaudible) acknowledged it in a
25 few other decisions since then, the State of Colorado

1 does not recognize a public trust doctrine either as a
2 matter of common law or constitutional law, which is
3 why anything that might be called a public trust in
4 this initiative would be newly created.

5 So our concerns with the title begin with that
6 opening phrase.

7 We also would believe that the title
8 improperly omits mention of two key features of the
9 initiative and therefore is insufficient.

10 It does not mention the creation of a
11 inalienable right to specific features of the
12 environment and natural resources. And an inalienable
13 right certainly is an important concept
14 constitutionally and one that should be disclosed in
15 the title.

16 The title also improperly omits mention of the
17 retroactive application of requirements in the
18 initiative to previously approved local, state, and
19 federal permits.

20 CHAIRWOMAN STAIERT: Do you have any
21 suggestion for what you believe the single subject
22 would be?

23 MR. LEONHARDT: I don't believe it's a single
24 subject.

25 CHAIRWOMAN STAIERT: Okay.

1 MS. PALLOTTI: This is Sarah Pallotti again
2 for objectors, Mr. Cordero and Mr. Prestidge.

3 The Board kind of touched on this in the
4 discussion of the single-subject requirement, but I
5 think this initiative is plagued by being too broad,
6 misleading, and a lot of voters are going to be
7 surprised.

8 So even finding the single subject has been
9 met, I think it's so vague that the Board simply can't
10 set a title that's going to accurately reflect the true
11 intent of this provision.

12 This was already touched on once, but I think
13 -- more so on the natural resources side, but Section 1
14 discusses the preservation of the environment.

15 Again, this term "environment", I think, is a
16 buzzword that voters are going to jump at. Everyone
17 can get on board with this idea, but not recognizing
18 how broad that it is and how much that encompasses.

19 The environment is defined by *Black's Law*
20 *Dictionary* as a sum total of all surroundings of a
21 living organism, including natural forces and other
22 living things which provide conditions for development
23 and growth as well as danger and damage.

24 I think that's about as broad of a definition
25 as you can find and that's something that voters aren't

1 going to understand how much is encompassed by this.

2 Going on into Section 2, it states that the
3 state government and its agents, as trustees, shall
4 protect public trust resources against substantial
5 impairment.

6 Again, this is a really broad term. There's
7 no standard given of what constitutes substantial
8 impairment. And then combining that with the
9 environment and natural resources, if I throw a Coke
10 can in the Platte River, is that substantial
11 impairment, as opposed to pollution from plants on
12 I-70?

13 I don't think voters will understand what kind
14 of actions are going to be impacted. With the way the
15 title is currently set, there's no way for them to
16 understand this initiative.

17 Again, going on in Section 2, if an action or
18 policy has a suspected risk of substantially impairing
19 public trust resources, then the burden would fall to
20 the proponent of the action or policy to show it is not
21 harmful.

22 Suspected risk is an extremely low standard
23 that's going -- again, voters aren't knowing that
24 that's what they are getting themselves into and what
25 types of actions are going to trigger this burden and

1 that they can't go forward without proving that it's
2 not harmful.

3 Lastly, going on to Section 6, which is not
4 mentioned in the title, it states that laws may be
5 enacted to enhance, but cannot be contrary.

6 This is even more vague than previous issues
7 the Board has dealt with of state versus local
8 regulation. There's nothing in this section explaining
9 whether a more restrictive regulation at the state
10 would enhance this provision, whether it would be
11 contrary. There's nothing giving guidance there.

12 I think these broad definitions are going to
13 lead to a lot of voter surprise when they find out what
14 they've actually signed up for. You take that in
15 connection with the fact that the title completely
16 omits Section 5 and 6 of the initiative.

17 Section 5 of the initiative states this
18 section is self-enacting and self-executing and shall
19 apply to a public action or commercial dealing that
20 would violate it regardless of the date of any
21 applicable local, state, or federal permit.

22 I think there's an argument to be made that
23 this would amount to a taking of -- as we've discussed,
24 as the Board already mentioned -- that if natural
25 resources includes mineral rights, previously

1 recognized permits issued by federal, state, or local
2 governments would no longer be recognized and that
3 could amount to a taking.

4 Again, I think a voter is going to be
5 surprised to find that in voting for what they thought
6 was a preservation of natural resources, they've
7 actually consented to a taking of their property
8 rights.

9 So, for those reasons, I think the Board must
10 grant our motion and deny sitting title because it's
11 too vague and ambiguous.

12 CHAIRWOMAN STAIERT: Okay. Thank you. Any
13 questions?

14 BOARD MEMBER: No.

15 CHAIRWOMAN STAIERT: Do you want to come up
16 and make any record as a proponent?

17 MR. DOE: I like the title as set. I thought
18 you did a good job. I would like to say something
19 about language. And just because something has common
20 usage doesn't make it hackneyed. You can say
21 motherhood and apple pie and that may be tried, but
22 motherhood isn't.

23 And the environment is a commonly-used term
24 that I think has common meaning to most people. And to
25 assert or imply that the public doesn't know what it

1 means by the environment I think is disingenuous. I
2 think they do know.

3 And when they're asked to vote on the
4 environment, whether it should be protected or not,
5 overwhelmingly -- generally in surveys over 70 percent
6 say it should be protected. Give them the chance to
7 figure out whether this is a good law or not.

8 CHAIRWOMAN STAIERT: Okay. Thank you.

9 BOARD MEMBER: There were a couple things that
10 struck me. I would at least consider taking the public
11 trust language out of the single subject and referring
12 instead to something like public ownership of natural
13 and environmental resources.

14 And then if we did that, we'd have to probably
15 add a tiny bit before the definition. I also thought
16 it was worth considering discussing kind of undoing
17 existing permits potentially or -- but I lean against
18 that. Other than that, I was basically okay with it.

19 CHAIRWOMAN STAIERT: Do you want to add
20 something there about creating a -- in connection
21 therewith creating a public trust?

22 BOARD MEMBER: Yeah, something like that.

23 CHAIRWOMAN STAIERT: Because then we define
24 the trust, so that would probably be where it should
25 go.

1 MS. PALLOTTI: This is Sarah Pallotti for Mr.
2 Cordero and Mr. Prestidge. I think the title, again,
3 as currently written completely omits a very critical
4 section of this initiative, which is those permits that
5 we talked about, regardless of the date of any
6 applicable local, state or federal permit.

7 I think to allow the title to go forward with
8 no mention of a pretty critical section of the
9 initiative is going to be extremely misleading to
10 voters.

11 BOARD MEMBER: And for what it's worth, I'm
12 inclined to agree with that. I do think we should have
13 some reference to that.

14 CHAIRWOMAN STAIERT: Okay.

15 BOARD MEMBER: Can I quickly suggest, maybe,
16 before we get to that, a way to clean up part of the
17 mess that I created. Instead of saying "creating a
18 public trust in those resources" and then "comma which
19 include or are defined to include" and then go over to
20 clean air, et cetera. I don't know where you want to
21 put the other part.

22 CHAIRWOMAN STAIERT: Yeah, wherever you want
23 to.

24 BOARD MEMBER: Maybe after "impairs them" as
25 part of the same clause, on line 7, would be my first

1 instinct.

2 BOARD MEMBER: So I wonder if it might work
3 better after "the impairment" on line 6?

4 BOARD MEMBER: Okay.

5 BOARD MEMBER: I mean, maybe it's something
6 like regardless of whether the impairment occurred. It
7 seems like it's regardless of whether the impairment
8 was initially authorized or something like that because
9 that's what it's really saying, but it's not entirely
10 accurate.

11 The only purpose of this, regardless of the
12 date of permits thing seems to me is if we find this --
13 if a court finds this to create a substantial
14 impairment, they essentially don't care whether the
15 person's been authorized to do it, if I read it right.

16 BOARD MEMBER: Right. That's the way I think
17 it reads too.

18 BOARD MEMBER: I mean, I think I almost say
19 regardless of whether any government or government
20 entity or whatever, you know, previously authorized the
21 activity that resulted in the impairment. I know
22 that's way too long, but something like that seems --

23 BOARD MEMBER: Well, the other way to do it
24 would be something like applying its provisions to any
25 public action or commercial dealing, regardless of any

1 applicable local, state or federal permits or something
2 like that, the date of.

3 BOARD MEMBER: Yeah. Thank you. My question
4 for you is, what are you trying to do with this
5 Subsection 5 and what's it do in your mind?

6 BOARD MEMBER: Well, I think that substantial
7 impairment is a concept that exists regardless of
8 whether an activity has been authorized or not. So it
9 may cause certain activities to cease. So I would
10 suggest that you say "regardless".

11 I think I would say something like, on line 6
12 after "against" maybe "any" and then put like an
13 including clause, including impairment that results
14 from previously authorized or previously permitted
15 actions.

16 BOARD MEMBER: Couldn't you just say
17 "regardless of -- I mean, I like the basic structure,
18 but why not just regardless of any applicable local,
19 state or federal permits or regardless of the date of
20 any --

21 BOARD MEMBER: Regardless of government
22 permits.

23 BOARD MEMBER: Yeah.

24 BOARD MEMBER: Something like that.

25 BOARD MEMBER: Yeah. I mean, that's the sense

1 of it, I think.

2 BOARD MEMBER: Right. I mean, the basic point
3 is, so I got my permit to drill this year, so I'm
4 drilling. This would subject me to the provision, the
5 substantive provisions even if I couldn't walk in and
6 say, well, I already have my permit, leave me alone,
7 right?

8 BOARD MEMBER: Yeah, you might be able to dry
9 up a river, but with this, you might not be able to dry
10 up a river.

11 CHAIRWOMAN STAIERT: Okay.

12 MR. LEONHARDT: I'm not sure that that fully
13 captures it. And in particular, I doubt that it fully
14 captures the important aspect of retroactivity. And I
15 think even the phrase that's been added would not be
16 understood by the usual voter to be retroactive, which
17 Section 5 clearly is.

18 And maybe a way to begin to address that might
19 be to say, regardless of any previous federal, state or
20 local approval.

21 BOARD MEMBER: Works for me.

22 BOARD MEMBER: I would prefer "existing" or
23 "preexisting".

24 CHAIRWOMAN STAIERT: Yeah.

25 BOARD MEMBER: I was going to say "prior".

1 BOARD MEMBER: Well, okay, "prior" or
2 "preexisting".

3 CHAIRWOMAN STAIERT: I'm okay with "prior".

4 BOARD MEMBER: Okay.

5 BOARD MEMBER: Yeah. I think that's better.

6 CHAIRWOMAN STAIERT: Anything else?

7 BOARD MEMBER: Give me a second. You know, I
8 think it's a reflection of the single-subject challenge
9 here, but we have an "and" in our single subject.

10 I mean, if we think natural and environmental
11 resources are two different things, maybe we keep it
12 there otherwise, I would suggest that maybe we pick
13 whichever one we may think is broader or just say --
14 well, I don't know if we'd want to just say "resources"
15 --

16 CHAIRWOMAN STAIERT: No.

17 BOARD MEMBER: -- that's too much, but just a
18 thought.

19 BOARD MEMBER: Yeah. I'm okay with it as is.
20 I'd be okay picking one or the other to --

21 BOARD MEMBER: I'm fine putting an "and" in
22 the subject.

23 BOARD MEMBER: Okay. I'm not going to push.

24 BOARD MEMBER: I never really have understood
25 that obsession either, but I know it exists. So, I'm

1 inclined to leave it, I guess, for now.

2 CHAIRWOMAN STAIERT: Okay. Let me read it
3 then. It's an amendment to the Colorado Constitution
4 concerning public ownership of natural and
5 environmental resources and in connection therewith
6 creating a public trust in those resources, which
7 include clean air, clean water, and the preservation of
8 the environment and natural resources requiring the
9 status trustee to conserve and maintain public trust
10 resources by using the best science available to
11 protect them against any substantial impairment
12 regardless of any prior, federal, state or local
13 approval seeking natural resource damages from anyone
14 who substantially impairs them and using damages
15 obtained to remediate the impairment allowing Colorado
16 citizens to file enforcement actions in court requiring
17 any person who is purposing an action or policy that
18 might substantially impair public trust resources to
19 prove that the action or policy is not harmful and
20 criminalizing the manipulation of data reports or
21 scientific information in an attempt to use public
22 trust resources for private property.

23 So my only question was, do we need a
24 semicolon in the middle of all those commas?

25 BOARD MEMBER: Yes, on line 6, after

1 "approval", yes.

2 CHAIRWOMAN STAIERT: Okay.

3 BOARD MEMBER: So I'll move that we deny the
4 motions for rehearing, except to the extent that we
5 have modified the title as it now appears on the
6 screen.

7 CHAIRWOMAN STAIERT: Second. All those in
8 favor? Aye.

9 BOARD MEMBER: Aye.

10 CHAIRWOMAN STAIERT: Opposed?

11 BOARD MEMBER: No.

12 CHAIRWOMAN STAIERT: Okay. All right. So, it
13 passes two to one.

14 (The hearing concerning No. 103 was
15 concluded.)

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