SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 15, 2014 4:19 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Setting Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #103 ("PUBLIC TRUST RESOURCES") **Petitioners**: Mizraim Cordero, Scott Prestidge, and Douglas Kemper v. **Respondents:** Phillip Doe, Barbara Mills-Bria, and Sandra Toland, and **Title Board:** Suzanne Staiert, Daniel Domenico, and Jason Gelender.	▲**COURT USE ONLY**▲ Case No. 2014SA137
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OPENING BRIEF OF THE TITLE BOARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

It contains 6,251 words.

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

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

/s/ Sueanna Johnson

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Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (the "Title Board"), by and through undersigned counsel, hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

I. Issues presented for review by Douglas Kemper

1. Whether the Title Board lacked jurisdiction to set title for Proposed Initiative 2013-2014 #103 because the Title Board accepted the substitution of Sandra Toland as one of the designated representatives in place of Barbara Mills-Bria, who was not at the rehearing.

2. Whether Proposed Initiative 2013-2014 #103 contains multiple subjects because it (a) creates a constitutional public trust doctrine based on a new common property right; (b) creates a new inalienable right to clean air, clean water, and preservation of the environment and natural resources (c) criminalizes any manipulation of data, reports or scientific information in an attempt to use public trust resources for private profit; and (d) retroactively applies conditions and

requirements to previously permitted activities and transactions, subjecting current property interests to a taking.

2. Whether the title for Proposed Initiative 2013-2014 #103 is vague, confusing and fails to express clearly a single subject because the phrase "concerning public ownership of natural and environmental resources" does not encompass all the issues addressed in the measure.

3. Whether the title for Proposed Initiative 2013-2014 #103 is misleading because it omits reference to the creation of an "inalienable right" to public trust resources.

4. Whether the title for Proposed Initiative 2013-2014 #103 is misleading and likely to cause public confusion because the use of the term "prior federal, state, or local approval" is vague and fails to inform voters of the threat of a taking through the retroactive application of the measure.

II. Issues presented for review by Mizraim Cordero and Scott Prestidge.

5. Whether the Title Board lacked jurisdiction to set the title for Proposed Initiative 2013-2014 #103 because the Title Board accepted the substitution of Sandra Toland as one of the designated

representatives in place of Barbara Mills-Bria, who was not at the rehearing.

6. Whether Proposed Initiative 2013-2014 #103 contains multiple subjects because it (a) establishes a common property right to "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources;" (b) creates a constitutional public trust doctrine and imposes a trusteeship on the state; (c) criminalizes the manipulation of data, reports, or scientific information used in an attempt to utilize public trust resources for private profit; and (d) retroactively applies the requirements of the initiative to previously issued local, state, and federal permits, thus subjecting current property interests to a taking.

7. Whether the title for Proposed Initiative 2013-2014 #103 is confusing and misleading because the phrase "preservation of the environment and natural resources" is both vague and overly broad.

8. Whether the title for Proposed Initiative 2013-2014 #103 is confusing and misleading because it fails to define the term "substantial impairment."

9. Whether the title for Proposed Initiative 2013-2014 #103 is confusing and misleading because it fails to inform voters that previously issued permits are subject to takings through the retroactive application of the measure.

10. Whether the title for Proposed Initiative 2013-2014 #103 is confusing and misleading, as it omits in its entirety section 6 of the measure.

STATEMENT OF THE CASE

Phillip Doe and Barbara Mills-Bria were the original proponents for Proposed Initiative 2013-2014 #103 ("#103"). At the rehearing, Sandra Toland was substituted as one of the designated representatives in place of Ms. Mills-Bria. Mizraim Cordero and Scott Prestidge through counsel and Douglas Kemper through separate counsel objected to the title set by the Title Board on grounds #103 contained multiple subjects, and the title was misleading and omitted material information. At the rehearing, the Title Board found that it had jurisdiction to proceed with #103 despite the substitution of the designated representative. The Tittle Board also determined that the

measure contained a single subject, but modified the title in response to two issues raised by the Petitioners. This appeal follows.

STATEMENT OF THE FACTS

On March 25, 2014, Proponents Phillip Doe and Barbara Mills-Bria filed #103 with the Colorado Secretary of State. The Title Board held a hearing on April 16, 2014, and after finding a single subject, set title for the measure.

#103 seeks to amend the Colorado constitution by adding section 9 to article XVI. Section 1 of the measure sets forth that the People of Colorado have an "inalienable right" to public trust resources, and that the state is the trustee to conserve those public trust resources that are the common property of the public for future generations to come. "Public trust resources" is defined in the measure to include "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources."

Section 2 of the measure requires the state, as trustee, to protect the public trust resources from substantial impairment. While a standard for substantial impairment is not defined, the measure indicates that the burden of proof is on the person proposing to take an

action to prove that the action or policy is not substantially harmful in the absence of scientific consensus. The measure authorizes the government to seek damages against entities that cause substantial impairment to public trust resources. Section 3 authorizes citizens, as beneficiaries of public trust resources, to bring actions to defend and preserve such resources against substantial impairment, as well as to ensure the government satisfies its obligations to prudently manage such resources as trustee.

Section 4 authorizes criminal prosecution for any entity that is alleged to be manipulating scientific data in an attempt to utilize public trust resources for profit. Section 5 states the measure is self-executing, and its provisions apply to commercial dealings that would violate it, regardless of the date of any applicable local, state, or federal permits. Section 6 authorizes that laws may be enacted to enhance but may not be contrary to the measure.

On April 23, 2014, Douglas Kemper ("Petitioner Kemper" or collectively "Petitioners") filed a motion for rehearing on grounds #103 contained multiple subjects and the title set was unclear and misleading. On the same day, Mizraim Cordero and Scott Prestidge

("Petitioner Cordero" or collectively "Petitioners") also filed a motion for rehearing on similar grounds, but raised some additional issues with respect to unclear title.

At the April 25, 2014 rehearing, Barbara Mills-Bria was not in attendance. She and Phillip Doe, however, substituted Sandra Toland as the designated representative in her stead. Ms. Toland executed an affidavit in accordance with § 1-40-106(4)(b), C.R.S., and was in attendance with Mr. Doe at the rehearing. *See* Attachments to Kemper's Petition for Review.

The Title Board heard argument on the substitution of a designated representative issue, but ultimately found that it continued to have jurisdiction over #103, as two designated representatives were present at the rehearing. The Title Board also found on a 2-1 vote that the measure contained a single subject. The Title Board, however, modified the title on a 2-1 vote in response to two objections raised by Petitioners. Specifically, the Title Board changed the statement of the single subject and indicated that the state as trustee must preserve public trust resources regardless of any prior federal, state, or local approval.

The Petitioners filed their appeals on May 1, 2014 raising as an issue the substitution of a designated representative, as well as raising single subject and unclear title arguments.

SUMMARY OF THE ARGUMENT

The Title Board had jurisdiction to proceed with the rehearing on #103, as two designated representatives were present. Even though Ms. Toland was substituted for Ms. Mills-Bria, the statutes concerning initiatives and referendum are silent on whether substitution is permitted. In absence of an explicit prohibition against substitution, the statutes should be interpreted in favor of the right to initiative, and should not be construed in a technical manner that hampers that right.

#103 contains a single subject, because while the topic may be broad – i.e. creating public ownership of environmental and natural resources – the implementation provisions contained in the measure are connected and related. The Petitioners arguments to support the measure contains multiple subjects inappropriately looks to the potential effects or merits of the measure, which is beyond this Court's scope of review.

The title for #103 is fair, clear, and accurate. The statement of the single subject accurately reflects the purpose of the measure. Additionally, the title does not omit material information, as the terms "substantial impairment" and "preservation of the environment and natural resources" are not defined in the measure, and therefore may not be defined by the Title Board. Similarly, the fact that the measure allows for supplemental legislation does not need to be included in the title. Finally, excluding that the public has an "inalienable right" to public trust resources and the potential effects of the measure's retroactive application from the title was appropriate, as the Title Board, nor this Court, may speculate on how a measure will be interpreted or applied.

ARGUMENT

I. The Title Board had jurisdiction to set the title for #103.

A. The standard of review for statutory interpretation.

The Court will review the statutes governing the Title Board's authority to act *de novo*. *Hayes v. Ottke (In re Title, Ballot Title &*

Submission Clause for Proposed Initiative 2011-2012 Nos. 67, 68, and 69), 293 P.3d 551, 554 (Colo. 2012). However, the right of initiative is a fundamental right, *see Loonan v. Woodley*. 882 P.2d 1380, 1383 (Colo. 1984), and therefore statutory provisions concerning the initiative process should be liberally construed to facilitate and not hamper this right. *See Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996); *see also Armstrong v. Davidson*, 10 P.3d 1278, 1283 (Colo. 2000) (the Court will interpret constitutional and statutory provisions governing the initiative process in favor of the right of initiative instead of "hampering it with technical statutory provisions or construction.") If a statute is silent or ambiguous regarding the matter at issue, the court will interpret the statute to comport with the General Assembly's objectives. *Buckley v. Chilcutt*, 968 P.2d 112, 117 (Colo. 1998).

B. The statutes governing initiatives and referendum do not prohibit substitution of a designated representative.

The Petitioners argued at the rehearing that the Title Board did not have jurisdiction to proceed with #103 because Ms. Mills-Bria was not in attendance. In support of their argument, the Petitioners looked to the language in §§ 1-40-104 and 1-40-106(4)(b), C.R.S. concerning the

duties of designated representatives, as well as this Court's decision in *Hayes,* 293 P.3d at 556, which held that the presence of both designated representatives at the Title Board meetings was "inflexible." The Petitioners argument should be rejected.

First, there is nothing in the statutes concerning designated representatives that prohibits substitution; in fact, the statute is silent in this regard. Absent an explicit statutory prohibition, the statute should be interpreted liberally in favor of the right of initiative to allow for substitutions. *See Armstrong,* 10 P.3d at 1283.

Section 1-40-104, C.R.S., states: "At the time of any filing of a draft as provided in this article, the proponents shall designate the names and mailing addresses of two persons who shall represent the proponents in all matters affecting the petition and to whom all notices or information concerning the petition shall be mailed." Section 1-40-106(4)(b) C.R.S., reads, in part: "The designated representative shall sign and file the affidavit with the secretary of state *at the first* title board meeting at which the designated representative's ballot title is considered." (emphasis added). The Petitioners argue that these provisions mean that the General Assembly has foreclosed substitution

because a designated representative must be designated at the time the initiative is filed, and that person may only execute the affidavit at the first meeting, and not like Ms. Toland, who executed her affidavit prior to the rehearing.

The Title Board indicated at the rehearing that while they have no rules governing substitution of a designated representative, they had accepted substitutions before. The Title Board determined that absent an explicit statutory prohibition against substitution, that there should be a procedure whereby designated representatives may be substituted so proponents can proceed with the process. For example, a designated representative may become disabled and unable to proceed with their duties, or more drastically, may die during the initiative process. Such circumstances should not prevent from proponents moving forward.

The Title Board's conclusion is consistent with *Armstrong,* 10 P.3d at 1283. The issue in that case whether the proponents improperly obtained signatures during the time in which an appeal of the Title Board's action was pending before the Supreme Court. In finding that signatures may be obtained during appellate review, the Court reasoned: "This conclusion is supported by the absence of a provision in

Title 1, Article 40, for a stay or postponement of the Title Board's action. Specifically, the Initiative and Referendum statutes do not contain any provision prohibiting a proponent from circulating a petition in reliance on the Title Board's action while an opponent is pursuing appellate review." *Id.*

Likewise, there is nothing in the statutes that prohibits substitutions. A designated representative does not only have duties in relation to the initiative before the Title Board, but is required "to represent the proponents in all matters affecting the petition." § 1-40-102(3.7), C.R.S. This means that a designated representative may need to appear or participate at a protest hearing challenging the sufficiency of the petition under § 1-40-118, C.R.S., and is required to submit certain reports concerning the payment of circulators who obtained signatures for the petition under § 1-40-121, C.R.S.

Section 1-40-104, C.R.S., requires identity of a designated representative at the time the draft is filed, but makes no mention that substitution is prohibited. The language of § 1-40-106(4)(b), C.R.S., should be interpreted to mean that the designated representative must complete the affidavit before the Title Board discusses and considers

that particular initiative. This reading effectuates the intended purpose to have designated representatives attest to their familiarity with the statutes and process before the Title Board considers the measure, but does not prohibit that such an affidavit could not be executed before a rehearing due to a substitution. Ms. Toland executed the required affidavit before the rehearing. Substitution of a designate representative should be permitted so that proponents may be able to discharge their responsibilities without fear that they must re-start the entire process simply because extenuating circumstances required a designated representative to withdraw.

Second, the Petitioners reliance on *Hayes* should be rejected. The issue in *Hayes*, 293 P.3d at 556, was whether the Title Board lacked authority to set title for initiatives where fewer than both designated representatives were present at the rehearings. The *Hayes* Court held that based on the statutory language in § 1-40-106(4)(b), C.R.S., which had been amended in 2011, the intent of the General Assembly was "inflexible and unambiguous" that both designated representatives must be present for all meetings in which the Title Board considers their initiatives. *Id.* at 556. In reaching this conclusion, the Court

determined that the General Assembly had used the language of "each" and "either" in §§ 1-40-106(4)(b) and (d), C.R.S., to mean that both designated representatives had to be present. *Id.* The Court also reasoned that the duties for designated representatives are no longer procedural but contain substantive requirements. *Id.* at 558. These substantive requirements are "designed to promote the purpose of the title setting process by ensuring that the Board has access to information it needs to resolve the substantive issues raised at any meeting concerning a proposed initiative." *Id.*

The documents substituting Ms. Toland as the designated representative were notarized by Mr. Doe and Ms. Mills-Bria on April 23 and 24, 2014. Ms. Mills-Bria indicated that the substitution was due to a death in her family that prevented her from attending the rehearing. *See* Attachments to Kemper's Petition for Review. Due to the numerous requests for rehearing before the Title Board, #103 was not considered by the Board until April 25th. As such, the documents reveal that the substitution occurred in advance of the Title Board meeting, and Ms. Toland was in attendance with Mr. Doe during consideration of #103 on April 25th. Therefore, *Hayes* does not apply, as

both designated representatives were present when the Title Board considered #103.

To the extent *Hayes* is applicable, the purpose of the two designated representative requirement found in that case was effectuated with the substitution, as both Mr. Doe and Ms. Toland were present to provide the Title Board with information about their measure at the rehearing. In fact, Mr. Doe was asked several questions by the Title Board at the rehearing to which he responded. The Petitioners cannot raise any factual issue in which the Title Board's information gathering was impaired or the Petitioners' rights to object were violated due to substitution of the designated representative. The rigid and technical construction of the statute advanced by the Petitioners work against the right of initiative to prevent substitutions that might be necessitated due to unforeseen circumstances that arise during the initiative process. As such, this Court should uphold the Title Board's finding that it had jurisdiction to proceed with the rehearing on #103, as Mr. Doe and Ms. Toland, as the substituted designated representative, were present.

II. The Initiative contains a single subject.

The Petitioners raise four single subject arguments that are essentially the same. The Petitioners' arguments should be rejected.

A. The standard of review to determine single subject.

The Title Board may not set title for a ballot initiative that contains more than one subject. Colo. Const., art. V, § 1(5.5); *see also* § 1-40-106.5(1)(a), C.R.S. The single subject requirement prohibits the inclusion of "incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection." § 1-40-106.5(1)(e)(I), C.R.S.; *see also Kelly v. Tancredo (In re Proposed Ballot Initiative on Parental Rights)*, 913 P.2d 1127, 1130-31 (Colo. 1996); *In re Title*, 900 P.2d 104, 113 (Colo. 1995) (stating that "… so long as an initiative encompasses *related* matters it does not violate the single subject requirement of [the] state constitution.") (Scott, J., concurring) (emphasis in original).

A measure contains a single subject if the matters encompassed are "necessarily and properly connected" to each other rather than "disconnected or incongruous." *Kemper v. Hamilton (In re Title, Ballot*

Title & Submission Clause 2011-2012 #3), 274 P.3d 562, 565 (Colo. 2012) ("*In re #3*"). Stated differently, if a measure tends to carry out one general purpose, then minor provisions necessary to effectuate that purpose will not violate the single subject rule. *In re Title v. John Fielder,* 12 P.3d 246, 253 (Colo. 2000); *see also Ausfahl v. Caldera (In re Title for 2005-2006 #74)*, 136 P.3d 237, 239 (Colo. 2006) (the single subject is not violated unless the text of the measure carries out "two distinct and separate purposes" which are not "dependent upon or connected with each other.") Likewise, the measure contains a single subject even if it has different effects or it makes policy decisions that are not inevitably interconnected. *Fielder,* 12 P.3d at 254. In order to satisfy the single subject requirement, the Title Board is "vested with considerable discretion in setting the title," and therefore the Supreme Court liberally construes the single-subject requirement. *Title v. Apple*, 920 P.2d 798, 802 (Colo. 1996).

B. There are not multiple or distinct purposes contained in the measure.

Petitioner Kemper argues #103 contains at least four distinct subjects, including it (a) creates a constitutional public trust doctrine

based on a new common property right; (b) creates a new inalienable right to clean air, clean water, and preservation of the environment and natural resources (c) criminalizes any manipulation of data, reports or scientific information in an attempt to use public trust resources for private profit; and (d) retroactively applies conditions and requirements to previously permitted activities and transactions, subjecting current property interests to a taking. Petitioner Cordero argues the same because the measure (a) establishes a common property right to "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources;" (b) creates a constitutional public trust doctrine and imposes a trusteeship on the state; (c) criminalizes the manipulation of data, reports, or scientific information used in an attempt to utilize public trust resources for private profit; and (d) retroactively applies the requirements of the initiative to previously issued local, state, and federal permits, thus subjecting current property interests to a taking. The Title Board addresses Petitioners' objections jointly, and argues they should be rejected.

While establishing public ownership of environment and natural resources may be considered broad in scope, this does not violate the single subject requirement. Breadth alone does not violate the single subject requirement if the provisions of a proposal are connected. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256,* 12 P.3d 246, 254 (Colo. 2000). For example, the Court has upheld an initiative whose single purpose was "management of development," even though it was acknowledged that topic was "broad." *See Fielder*, 12 P.3d at 254 (a measure that "addressed numerous issues in a detailed manner," such as a referendum requirement for voter approval of growth maps and curtailment of home rule over development, related to the single subject).

Similarly, other measures that sought to adopt a public trust doctrine have been found to contain a single subject so long as the measures did not contain distinct purposes. *In re #3,* 274 P.3d at 567, dealt with an initiative that sought to adopt a Colorado public trust doctrine for the protection of the public's interests in the waters of natural streams. In holding that the initiative contained a single subject, the Court reasoned that the "public's right in waters of natural

streams" describes the purpose of "Colorado's public trust doctrine" and relates to the other necessarily and properly connected subsections of the measure by describing the details of that doctrine. *Id.* The Court likewise noted that the effect the measure might have on Colorado water law was irrelevant to whether the measure contained a single subject. *Id.* at 568, fn. 2; *see also Title v. Hufford*, 917 P.2d 1277, (Colo. 1996) (the Court held that the single subject of the public's interest in state waters is connected to a public trust doctrine and assignment of water rights to the public).

Creation of public ownership of environmental and natural resources is not an "overreaching theme," as the measure does not contain separate and unrelated provisions. *See e.g. In re Title v. Respondents: Dennis Pohill and Douglas Campbell, Proponents, & Title*, 46 P.3d 438, 441 (Colo. 2002) ("*In re #43*") (identifying cases where measures were rejected because they contained topics that were too general or broad with unrelated provisions). For example, #89 is not like a proposal in which "water" was the common characteristic found in a measure that the Court determined was too broad a topic, as there was no "necessary connection" between the public trust concerning

water rights and district election requirements. *In re Title*, 898 P.2d 1076, (Colo. 1995).

Likewise, #89 is not like *Kemper v. Hamilton (In re Title)*, 172 P.3d 871, 875 (Colo. 2007), in which the Court held that inclusion of a public trust standard for agency decision-making was coiled up within the creation of an environmental conservation department in violation of the single subject requirement. The Court stated: "In this initiative, the public trust standard subject is paired with the subject of reorganizing existing natural resource and environmental protection divisions, programs, boards, and commissions, and these are separate and discrete subjects that are not dependent upon or necessarily connected with each other." *Id.*

The cases that have rejected overly broad themes are those in which a broad topic is necessary in order to put various unrelated provisions together. Here, on the other hand, the measure sets forth that public ownership of environmental or natural resources (also known as public trust resources) is connected to the state's obligation to act as a trustee. The remainder of the measure details the enforcement mechanisms to protect those public trust resources. The "substantial

impairment" standard adopted in the measure is directly related to the state's duty to act as a trustee to take action when necessary and appropriate for protection of the public trust resources. The ability of citizens, as beneficiaries of the trust, to bring their own actions to either protect public trust resources or ensure the state is meeting its obligations is likewise connected to protection of that end. Similarly, criminalizing the manipulation of scientific information by private entities in an attempt to utilize public trust resources for profit allows the state as a fiduciary to ensure that the best available science governs whether public trust resources are being substantially impaired. In essence, this is a measure that contains a broad vision, but does not attempt to micromanage that vision with unrelated topics or purposes. *See In re #3, supra.*

The Petitioners arguments for why #103 violates the single subject rule focus on the effects or merits of the measure instead of the plain language. Specifically in Petitioner Kemper's motion for rehearing, he argued: "The Initiative would effectively dismantle water rights and water laws that have been held intact as a property rights regime based on Colorado's constitution, statutory, and case law for

more than 150 years." In addition, he argued: "This retroactivity of the Initiative's new requirements would threaten pre-existing private property interests in natural resources within the state if the 'process or proceeding' by which a private party obtained a valid permit to use those resources were later found to violate these requirements."

These are similar arguments raised and rejected by the same petitioner in *Kemper v. Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45)*, 274 P.2d 576, 581, fn. 2 (Colo. 2012). There, Petitioner Kemper argued that the measure at issue in that case would "so drastically alter the landscape of Colorado water law that it could not possibly contain a single subject." *Id.* In rejecting that argument, the Court indicated that it may not opine on how an initiative may be applied, and must confine its single subject review to the plain language of the measure. *Id.; see also Fielder*, 12 P.3d at 254 (the Court noted that "just because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected that it does not necessarily violate the single subject requirement); *Outcelt v. Bruce*, 959 P.2d 822, 825, fn. 2 (Colo. 1998) (the

Court noted that it is neither appropriate nor possible to attempt to predict all the effects of an amendment in the pre-election phase). Here, the arguments raised by Petitioners are similarly inappropriate for a single subject analysis, and outside the scope of review by this Court.

III. The title for the Initiative is fair, clear, and accurate.

A. The standard of review with respect to setting a title.

The Title Board's duty in creating a title and submission clause is to summarize the central features of a measure. *In re Petition on Sch. Fin.*, 875 P.2d 207, 210 (Colo. 1994). Not every feature of a measure must appear in the title. *Fielder,* 12 P.3d at 256. The title should be a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative. § 1-40-102(10), C.R.S.; *see also* § 1-40-106(1)(b), C.R.S. (ballot titles shall be brief, but the Title Board should consider the public confusion that might result with misleading titles).

The Court's limited review "prohibits [it] from addressing the merits of a proposed initiative, and from suggesting how an initiative

might be applied." *In re 43,* 46 P.3d at 443. The actions of the Title Board are presumptively valid. *In re 1999-2000 #104*, 987 P.2d 249, 254 (Colo. 1999); *see also Tancredo*, 913 P.2d at 1131 (stating that the Supreme Court grants "great deference to the board's broad discretion in the exercise of its drafting authority.")

The title set by the Title Board is reviewed as a whole to determine if it is fair, accurate, and complete. *In re #3,* 274 P.3d at 565. A title will be upheld if the Title Board's language "clearly and concisely reflects the central features of the initiative." *Paredes v. Corry (In re Title, Ballot Title, & Submission Clause 2007-2008 # 61*, 184 P.3d 747, 752 (Colo. 2008). The Supreme Court will only reverse the Title Board's title if it contains "a material or significant omission, misstatement, or misrepresentation." *In re Title v. Buckley*, 972 P.2d 257, 266 (Colo. 1999); *see also Brown v. Peckman (In re Title)*, 3 P.3d 1210, 1213 (Colo. 2000) (the Supreme Court will reverse the actions of the Title Board in setting the title when the chosen language is "clearly misleading.")

B. The statement of the single subject is sufficiently informative.

Petitioner Kemper argues that the statement of the single subject "concerning public ownership of natural and environmental resources" is vague, and fails to clearly state a single subject that includes all the issues addressed in the measure. This argument must be rejected.

The clear title requirement does not mandate that details of the single subject must be expressed in the initial clause. Rather, the Title Board meets its obligations if the initiative's single subject is "clearly expressed in its titles." *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d, 642, 647 (Colo. 2010). Thus, the Court will review the language used throughout the title. If the language of the title, read as a whole, adequately conveys the meaning of a measure, the Court will affirm the decision of the Title Board. *Id.* at 648. A title is sufficient if it provides voters with a "reasonably ascertainable expression of the initiative's purpose." *Id.*

First, Petitioner Kemper's assumes that the Title Board's finding of a single subject is in error. Here, as argued above, the Title Board did not err when it found a single subject for #103. Second, Petitioner Kemper's argument assumes that all aspects of the measure must be included in the title, and this simply is not the case. *See Aisenberg v.*

Campbell, 1 P.3d 739, 744 (Colo. 2000) (the Title Board is not required to include every aspect of a proposal in the title and submission clause, to discuss every possible effect, or provide specific explanations of the measure).

The Title Board modified the statement of the single subject by removing reference to "a public trust in environmental resources" in response to objections made by Petitioners at the rehearing that the traditional concept of a public trust is different than what Petitioners believe is proposed in #103. The Petitioners likewise argued that because the Colorado Supreme Court has never adopted the public trust concept in Colorado that any use of the word than traditionally understood would be misleading to the voters. Modification of the single subject statement to "concerning public ownership of natural and environmental resources" clearly expresses to voters that Colorado's environment is the common property of the people, and then the title details the scope and implementation provisions as set forth in the measure. Any other issues that Petitioner Kemper may want in the title, such as potential effects or changes to existing constitutional

provisions or laws or water doctrines concern implementation and interpretation of the measure, and would be improper to include.

C. The Title Board does not need to include all aspects of the measure in the title.

Petitioner Cordero argues that the title fails to define the term "substantial impairment" and the phrase "preservation of the environment and natural resources" is vague and overly broad. Additionally, the title omits any reference to section 6, rendering it misleading. These arguments should fail.

The Title Board is not required to define terms that are not defined in the proposal. *Herpin v. Head (In re Title, Ballot Title & Submission Clause)*, 4 P.3d 485, 498 (Colo. 2000) (the Title Board did not err when it did not define "prospective firearm transferee" because the measure did not define the term); *see also Title v. Swingle*, 877 P.2d 321, 327 (Colo. 1994) (excluding the word "strong" before "public trust doctrine" in the title was not fatal, as the measure did not define the term in the measure).

Similarly, the Title Board and this Court may not define terms if it would require interpretation of the measure. In *Hayes v. Lidley (In re*

Titlle, Ballot Title & Submission Clause), 218 P.3d 350, 356 (Colo. 2009), an objector argued that a title was misleading because it did provide more information about what the word "guarantee" meant in the measure. The objector argued that "guarantee" is a legal term of art, as voters may think their right to a secret ballot in employee representation elections is "guaranteed" when that standard may not match the legal reality. *Id.* In rejecting this argument, the Court stated that the objector was requiring the Court "to conclude the text and titles of the Initiatives are misleading vis-à-vis future legal interpretation and implementation" and that the objector was "essentially inviting [the Court] to interpret the legal scope of the Initiative's 'guarantee,' and then require the interpretation to be spelled out in the title." *Id.*

Here, the term "substantial impairment" is not defined in the measure. Similarly, the phrase "preservation of the environment and natural resources" comes directly from the measure. Mr. Doe explained at the rehearing that he knew that the measure would need further legislation to determine the scope and limit of the measure. In order to define these terms or give context to their limitations, this Court would

essentially need to engage in legal interpretation of the measure, and then require the Title Board to set forth that interpretation into the title. This is clearly beyond the scope of review for this Court, and Petitioner Cordero's arguments should be rejected.

In addition, omission of section 6 of the #103 was not inappropriate. Section 6 states: "Laws may be enacted to enhance, but cannot be contrary to, the provisions of this section." *In re #3*, 274 P.3d at 568, concerned a measure that had a similar provision in its initiative that stated: "Subsections (2) to (7) are self-enacting and self-executing, but laws may be enacted supplementary to and in pursuance of, but not contrary to, the provisions thereof." *Id.* at Appendix. The title set by the Title Board in that case did not mention that supplemental laws may be enacted, and yet the title was upheld. *Id.* The Court should likewise affirm the title on this basis.

D. The Title Board may not interpret the measure or speculate on its effect or impact.

Petitioner Kemper argues that the title is misleading, as it fails to inform voters that the measure creates an "inalienable right" to public trust resources. He bases this argument on the premise that an

"inalienable right" is not transferable to other people or capable of condemnation. The Petitioners also argue that the phrase "regardless of any prior federal, state, or local approval" is vague, and fails to sufficiently inform voters of the imminent potential threat of takings of private property through retroactive application. These argument should be rejected.

This Court has consistently held that neither the Court nor the Title Board may interpret a measure or "construe it future legal effects." *In re Title, Ballot Title and Submission Clause for 2007-2008, #57*, 185 P.3d 142, 145 (Colo. 2008). The arguments raised by Petitioners go to the effect, application, or interpretation the measure may have on other state laws or constitutional provisions. For example, whether the term "inalienable right" is interpreted or applied in such a manner to so that the right is no transferable or subject to condemnation will depend upon application and interpretation of the measure. *See In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255,* 4 P.3d 485, 498 (Colo. 2000) (titles are not "misleading because they do not refer to the Initiative's possible interplay with existing state and federal laws.")

Likewise, the title sufficiently informs voters that the state, as trustee, must conserve the public trust resources against substantial impairment, regardless of any prior federal, state or local approval. The language of section 5 of the measure states: "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." The Petitioners' arguments focus on this provision *potentially* affecting private property rights, thus resulting in takings. Although this may be a possible effect of the measure, it would be inappropriate for the Title Board to put that in the title. The title sufficiently informs voters of the measure's retroactive application, but how that retroactive application is implemented is for the courts to decide if the measure is passed, and not for the Title Board to speculate. *See In re Title, Ballot Title, Submission Clause, and Summary for Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 721 (Colo. 1994) (the Title Board and Court may not "speculate" on how a proposed amendment may be interpreted or harmonized with other relevant provisions).

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the actions of the Title Board and approve the title for #103.

Respectfully submitted this 15th day of May, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on this 15th day of May, 2014, I duly served this **OPENING BRIEF OF THE TITLE BOARD** on all parties via ICCES or overnight delivery, addressed as follows:

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