

<p>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</p>	
<p>IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2015-2016 #4</p> <p>Petitioner: DOUGLAS KEMPER, as Registered Elector of the State of Colorado; v.</p> <p>Title Board: SUZANNE STAIERT, JASON GELENDER, and DAVID BLAKE; and</p> <p>Respondents: PHILLIP T. DOE and BARBARA MILLS-BRIA</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>ANSWER BRIEF</p>	

Certificate of Compliance

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

Specifically, the undersigned certifies that:

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

- It contains 4,417 words.
- It does not exceed 30 pages.

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

- For the party responding to the issue:

It contains, under a separate heading, placed before discussion of the issue, a statement of whether Petitioner agrees with the opponent's statements concerning the standard of review, and if not, why not.

- I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*** (Original signature on file
at Burns, Figa & Will, P.C.) ***

s/Stephen H. Leonhardt

Stephen H. Leonhardt

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SUMMARY OF ARGUMENT

Far beyond strengthening state government's environmental stewardship obligations for public resources, Initiative #4 would create common property in all natural resources. These subjects of mandating stewardship and creating common property lack a proper connection to each other, or to referral for criminal prosecution, and cannot be merged under the broad theme of a public trust. Such separate subjects may not be combined in a single initiative, so the Board's actions should be reversed. Moreover, the Titles are deficient in that they fail to disclose two features of the Initiative, its creation of common property and its express applicability to commercial dealings.

ARGUMENT

Petitioner Kemper files this Answer Brief in response to the brief filed as "Respondents' Answer Brief" by Mr. Doe and Ms. Mills-Bria (the "Proponents") on February 4, 2015, which the Court construes as their Opening Brief ("Proponents' Opening Brief"). The Title Board has elected not to file briefs in this matter. (Notice of Title Board, filed February 4, 2015, ICESS ID# 323B3A78A21E2.)

I. Initiative #4 Violates the Single Subject Rule Because it Contains Multiple, Disconnected Subjects.

A. Standard of Review.

Mr. Kemper disagrees with the Proponents' characterization of the standard of review for whether an initiative contains a single subject. Although this Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions," the Colorado Constitution prohibits the Title Board from setting title for a proposed initiative that contains more than one subject. *In re Title, Ballot Title and Submission Clause for 2009–2010 #45*, 234 P.3d 642, 645 (Colo. 2010) (citing COLO. CONST. art. V, § 1 (5.5)). "An initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes that are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 277 (Colo. 2006). Accordingly, this Court must overturn the Title Board's decision if it determines that an initiative clearly contains more than one subject. *In re Title, Ballot Title, and Submission Clause for 2013–2014 #76*, 333 P.3d 76, 79 (Colo. 2014). To determine whether the Title Board violated the single subject rule, this Court must examine an initiative's individual statements in light of their context and the initiative as a whole. *In re Title, Ballot Title and Submission Clause for 2009–2010 #24*, 218 P.3d 350, 353 (Colo. 2009).

B. The Initiative attempts to unite several separate, disconnected subjects under the broad theme of a public trust doctrine.

Initiative #4 violates the single subject rule because it contains more than one subject. The Proponents cannot bundle these subjects together under the theme of the “public trust doctrine.” “A proponent’s attempt to characterize a proposed initiative under ‘some overarching theme’ will not save the measure if it contains separate and unconnected purposes.” *In re Title, Ballot Title and Submission Clause for 2011–2012 #3*, 274 P.3d 562, 565-66 (Colo. 2012). An overarching theme does not satisfy the single subject requirement when the initiative contains “disconnected or incongruous provisions.” *In re Title, Ballot Title and Submission Clause for 2011–2012 #45*, 274 P.3d 576, 579–80 (Colo. 2012). Put another way, “an initiative containing two or more provisions with no necessary connection or common objective offends the single-subject requirement even if all parts of the initiative address the same general area of law.” *In re Title, Ballot Title, Submission Clause and Summary for 1997–1998 #74*, 962 P.2d 927, 928 (Colo. 1998).

Initiative #4 contains at least three separate subjects: (1) creating a new common property interest in all natural resources, including water and minerals, mandating a constitutional public trust for preservation of these resources; (2) imposing obligations on the State of Colorado to protect the environment; and

(3) requiring referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources. As explained in Petitioner Kemper's Opening Brief, each of these subjects is separate and distinct. Despite the Proponents' efforts to link each subject to a public trust doctrine theme, the creation of a new common property interest in resources, imposition of new obligations on the state to protect the environment, and mandate for referral of crimes for prosecution are each separate and distinct subjects that are unconnected from and independent of each other.

1. The public trust doctrine created by the Initiative is a theme, not a single subject.

In 2007, the Court considered Initiative 2007-2008 #17 which would create a public trust and a new Department of Environmental Conservation. The court found multiple subjects when "the public trust . . . is paired with . . . reorganizing existing natural resource and environmental protection divisions, programs, boards, and commissions." *In re Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007). Like Initiative 2007-2008 #17, Initiative #4 not only creates public trust duties over a variety of natural resources such as water and minerals, but it also redefines standards for environmental protection. In fact, Initiative #4 goes even farther by creating a new common property interest in

natural resources. These are separate subjects that are not necessarily and properly connected with each other.

Initiative #4 is also similar to the 1995 initiative proposed in *Public Rights in Waters II* in the sense that Proponents offer an umbrella theme, “the public trust,” in an attempt to unite multiple separate subjects. See *In re Proposed Initiative “Public Rights in Waters II,”* 898 P.2d 1076 (Colo. 1995). In *Public Rights in Waters II*, this Court determined that some provisions (involving water conservancy district elections) lacked a proper connection to a public trust in water, holding the “common characteristic that the paragraphs all involve ‘water’ is too general and too broad to constitute a single subject.” *Id.* at 1080. By the same reasoning, the common theme of a public trust in the environment and natural resources also must be too general and too broad to weave incongruous provisions including environmental mandates, property ownership, and criminal law into a single subject.

Furthermore, the public trust created by Initiative #4 is broader than other public trust initiatives that this Court has considered in recent years. This Court upheld an initiative that encompassed only Colorado’s water resources in *In re Ballot Title 2011–2012 #3*. In that case, 2011–2012 Initiative #3 endeavored to “protect the public’s interests in the water of natural streams” and allowed the public access “along, and on, the wetted natural perimeter” of any “natural

stream.” 274 P.3d at 564. This Court upheld the Title Board’s finding that “the public’s rights in the waters of natural streams” is a single subject and concluded that the initiative’s additional provisions, regarding the state’s duties and enforcement, were not separate subjects because they were properly connected to the single subject. *Id.* at 564, 566–67. In upholding the single subject finding, this Court distinguished Initiative #3’s single subject from “water,” which it held to be an “overarching theme” instead of a single subject in *Public Rights in Waters II*. *Id.* at 567 (citing *Public Rights in Waters II*, 898 P.2d at 1080). Justice Hobbs authored a dissent observing, among other things, that the initiative improperly lumped water interests together with land interests in streambeds. *See id.* at 574 (Hobbs, J. dissenting). As Justice Hobbs explained, “public water ownership and public submerged-land ownership evolved under completely different circumstances and completely different legal regimes. As such, they cannot be considered a single subject.” *Id.*

Last year this Court held that an initiative with public trust features contained a single subject where it proposed “the creation of a public right to Colorado’s environment.” *In re Title, Ballot Title and Submission Clause for 2013–2014 #89*, 328 P.3d 172, 177 (Colo. 2014). Proposed 2013–2014 Initiative #89 declared Colorado’s environment to be the “common property of Coloradans,” along with a few provisions the Court identified as mechanisms carrying out the

declared objective by protecting Colorado’s environment.¹ *Id.* The Court held that the subject was not an “overly broad, overarching category,” and that each of #89’s subsections was properly connected to the subject. *Id.*

Justice Hobbs again issued a dissent, observing that Initiative #89 contained at least two separate subjects that did not function as implementation mechanisms, one of which was the creation of a “totally new type of public ownership in the environment that is foreign in Colorado’s legal heritage.”² *Id.* at 182. The rationale in this dissent is even more compelling here, because Initiative #4 is far broader than the previous 2013–2014 #89 or 2011–2012 #3. The public trust doctrine in Initiative #4 is not limited to water resources or even to the “environment.” It encompasses not only air, water and the environment, but preservation of all natural resources. By creating common ownership in all natural resources, Initiative #4 directly contradicts existing private property rights in these resources, expressly raising the separate subject that Justice Hobbs found was implicit in Initiative #89. *See id.* at 182–83. As dissenting Title Board member Gelender noted at the rehearing on Initiative #4:

¹ Structurally, Initiative #89 was much simpler than Initiative #4. It contains three subsections; the first is a declaration of common property in the environment, the second is a conservation mandate, and the third grants authority to local governments. *Id.* at 180-81 (Appendix).

² The other subject identified by Justice Hobbs was the abolition of existing State preemption doctrines. *Id.* at 184. This subject is not addressed in the text of Initiative #4.

Between the potentially retroactive prosecution, the addition of not just the environment but also, and maybe it's part of the environment,³ but natural resources as part of what is subjected to the public trust doctrine, which in this one [Initiative #4] is explicitly referenced, even though it generally has applied in the past only to things like water.

Transcript of Rehearing, attached hereto as **Appendix B**, p. 9, l. 23 – p. 10, l. 5.

Initiative #4's formulation of a public trust doctrine in all natural resources, as well as the environment, also is unprecedented in scope compared to the common law public trust doctrine and the public trust doctrines established by other Western states. There is no federal public trust doctrine. *See PPL Montana, LLC v. Montana*, _____ U.S. _____, 132 S. Ct. 1215, 1235 (2012). Although federal law determines the title to the riverbeds of navigable waters, each state has the power to define the scope of the public trust doctrine for the navigable waters within its borders. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *PPL Montana*, 132 S. Ct. at 1235.⁴ As explained in Petitioner Kemper's opening brief, Colorado has never recognized any form of the public trust doctrine, rejecting the concept as inconsistent with Colorado's constitution and prior

³ As explained in Mr. Kemper's Opening Brief, natural resources are not commonly understood to be part of the environment, and the proponents never made that contention before the Board. Mr. Gelender's rhetorical question on this point (*see Appendix B*, p. 9, l. 25 – p. 10, l. 1) reflects the perplexity created by combining separate subjects identified as "public trust resources" in Initiative #4.

⁴ At common law, the public trust doctrine was for navigable waters and submerged lands beneath those waters. *See Ill. Cent. R.R. Co.*, 146 U.S. at 435-36.

appropriation system. Initiative #4 proposes to institute the public trust doctrine at an unprecedented scale, encompassing not only navigable waters and their underlying beds, but also all other natural resources.

Initiative #4 is not only a striking departure from the common law public trust doctrine, it also proposes a more expansive form of a public trust doctrine than any recognized in the western United States. Hawaii currently has the broadest version of the doctrine, which encompasses more than water resources, but stops short of redefining property rights:

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.

Haw. Const. Art. 11, § 1. Initiative #4 adds a component not found in Hawaii's formulation of the public trust doctrine. It would not just govern "public natural resources," but would establish "common property" in all natural resources, including resources that currently are privately owned. Additionally, Initiative #4's scope creates binding obligations on the State of Colorado, a new cause of action for Colorado citizens, and a new criminal offense related to

manipulation of data, reports, or scientific information. A public trust doctrine so broad and far reaching cannot, and should not, constitute a single subject.

2. Initiative #4 contains multiple subjects and purposes that are not dependent upon or connected to each other.

If a proposed initiative “relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other,” it violates the single subject rule. *People ex rel. Elder v. Sours*, 74 P. 167, 177 (Colo. 1903). As described in Mr. Kemper’s Opening Brief, the Initiative contains at least three distinct subjects: (1) a new common property interest in all natural resources, mandating a constitutional public trust for preservation of these resources, (2) obligations on the State of Colorado to protect the environment, and (3) a requirement for referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources. These subjects serve separate purposes that are not dependent on or connected to each other, and cannot be connected under the theme of a public trust doctrine far broader than its traditional definition.

The Proponents claim that identifying these distinct subjects “artificially separate[s] the provisions of the initiative into more than one subject.” Proponents’ Opening Brief, at p. 5. In support of this argument, the Proponents cite two cases involving initiatives that were far narrower than Initiative #4.

Unlike the narrowly defined proposals in 1997–1998 Initiative #74 and 2007–2008 Initiative #61, Initiative #4’s multiple subjects are clear from reading the text and do not require “exacting levels of analytic abstraction” to uncover. *See Ballot Title 1997–1998 #74*, 962 P.2d at 929. This Court held that 1997–1998 Initiative #74 contained a single subject of a school impact fee. *Id.* at 928. It rejected arguments that additional language, which clarified how current law regarding school district initiatives and referenda would apply to policy decisions on school impact fees, constituted an additional subject. *Id.* 2007–2008 Initiative #61 sought to prohibit the “the state from discriminating against, and granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” *In re Title, Ballot Title and Submission Clause for 2007–2008 #61*, 184 P.3d 747, 748 (Colo. 2008). Although Initiative #61 also provided that the state’s authority was limited by federal authority regarding discrimination, this Court determined that Initiative #61 contained a single subject because “implicitly subjecting a provision to a limitation does not violate the single subject requirement.” *Id.* at 750. The limitation of federal authority on the same subject was directly related to the single subject of state discrimination in public sectors. *See id.*

Regarding Initiative #4, even the Proponents cannot articulate a single subject or explain how the components of the Initiative are dependent upon or

connected with each other. In the Proponents' Opening Brief, they state the subject is: "recognition of the Public Trust Doctrine and the duties required of government pursuant to the doctrine to protect vital natural resources for the public beneficiary" (*id.* at 4), "to establish the Public Trust Doctrine, clarifying the trust assets that are subject to the doctrine, and procedures for implementation" (*id.*), and "common ownership by all Coloradans of public trust resources" (*id.* at 7).

The Proponents attempt to characterize the separate subjects in the Initiative as implementing measures for the creation of a public trust doctrine. At the re-hearing, Mr. Doe testified: "We're against ownership of natural resources that belong to the public. . . . We're not trying to take away anybody's ownership. We're just trying to preserve what is ours and not sell it to somebody. How do you sell the air?" **Appendix B**, p. 26, ll. 12–14, 22–25. Chairwoman Staiert responded by observing "Well, the law may be contrary to the concept." *Id.* at p. 27, ll. 20–21. Although Mr. Doe testified that the goal of the Initiative is not to affect private ownership, its plain language declaring "common property" does just that. This exchange underscores the disconnect between the objects of preserving environmental values such as clean air and the creation of newly declared common property from privately-owned interests in natural resources. These concepts are not necessarily and properly connected with each other.

C. Initiative #4 is designed to gain support from many factions with different interests and will lead to voter surprise.

Initiative #4 is an “omnibus initiative” that manifests the two dangers associated with multiple subject initiatives: (1) “combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions” and (2) “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *In re Ballot Title 2011–2012 #45*, 274 P.3d at 580 (citation omitted).

By combining several separate subjects under the general theme of the public trust doctrine, the Initiative attempts to gain support from many factions with different interests and may lead to voter surprise. The purpose of the single subject rule is to protect voters from these dangers. *See, e.g., In re Ballot Title 2005–2006 #55*, 138 P.3d at 282. One of the primary purposes of the single subject rule is to “prevent[] the proponents from combining multiple subjects to attract a ‘yes’ vote from voters who might vote ‘no’ on one or more of the subjects if they were proposed separately.” *In re Ballot Title 2013–2014 #76*, 333 P.3d at 79. An initiative that combines incongruous subjects places voters in the unfortunate position of voting for a matter that they likely do not support to enact a matter that they do support. *See In re Ballot Title 2005–2006 #55*, 138 P.3d at 282.

This Court is obligated to examine the central theme of Initiative #4 to determine “whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme.” *Id.* at 279. This Court “may not address the merits of a proposed initiative or suggest how an initiative might be applied if enacted; however, [it] must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.” *In re Title, Ballot Title and Submission Clause for 2001–2002 #43*, 46 P.3d 438, 443 (Colo. 2002).

Initiative #4 is a prime example of the dangers of a multi-subject or omnibus initiative. The several subjects “coiled up in the folds” of Initiative #4 will lead to voter surprise and fraud. *See id.* at 442. For example, environmental protection is a goal that many voters will support. These voters may feel obligated to vote for Initiative #4 because it purports to further environmental protection. But the same voters might also irrigate land, benefit directly or indirectly from mineral development, hunt or fish on private property, or have other interests that depend upon established private property rights in natural resources. The multiple subjects in Initiative #4 present a real danger of voter confusion and surprise. At the January 6, 2015 Rehearing, dissenting Title Board member Gelender expressed concern that Initiative #4 is overly broad and will lead to voter confusion:

I just think that this particular initiative is too confusing. It offers too much opportunity for voter confusion. It is too difficult to determine exactly what it does and has too many affects [sic] that are not obvious on its face for me to find it to be a single subject.

Appendix B, p. 10, ll. 6–11.

The Proponents cannot save Initiative #4 by corralling its many subjects under the overarching theme of the public trust doctrine. *In re Ballot Title 2009–2010 #45*, 234 P.3d at 646. This tactic violates the single subject rule and exposes voters to the two dangers that this rule is designed to prevent: initiatives designed to appeal to many different factions and voter confusion and surprise.

II. Initiative #4’s Titles are Misleading and Omit Material Provisions.

A. Standard of Review.

The Proponents state that the Court’s review is limited to determining whether the titles are “insufficient, unfair, or misleading.” Proponents’ Opening Brief, p. 3 (citing *In re Title, Ballot Title, Submission Clause for 2011–2012 #3*, 274 P.3d 562, 565 (Colo. 2012)). While this statement summarizes the general standard, it stops short of describing the full scope of the Court’s review. The clear-title standard in C.R.S. § 1-40-106(3)(b) requires the Title Board to “consider the public confusion that might be caused by misleading titles,” and to “avoid titles for which the general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear.” *In re Ballot Title 2009–2010 #45*, 234 P.3d at 648. The Board cannot set

a title that requires voters to use ingenious reasoning, superior logic, or legal training to reveal the matter covered by an initiative. *See id.* at 647. The Court will “reverse the Board’s action in preparing [the titles] if they contain a material and significant omission, misstatement, or misrepresentation.” *In re Title, Ballot Title, and Submission Clause for 2007–2008 #62*, 184 P.3d 52, 58 (Colo. 2008); *see also In re Title, Ballot Title and Submission Clause 1999–2000 #258(A)*, 4 P.3d 1094, 1098–99 (Colo. 2000) (explaining that material omission is a fatal defect because the failure to disclose a key feature of the initiative can cause confusion and mislead voters about what the initiative proposes).

B. The Titles fail to disclose material features of the Initiative.

1. The Titles do not disclose creation of common property in natural resources.

The Titles fail to disclose the Initiative’s central declaration that public trust resources, including natural resources, “are the common property of all the people.” This declaration introduces an entirely new concept in Colorado law. *See* discussion *supra* Part I.B. By failing to acknowledge this fundamental change, the Titles do not clearly express the true meaning of the Initiative. The Proponents note that the Titles characterize the Initiative as concerning “common ownership of all Coloradans of public trust resources.” *See* Proponents’ Opening Brief, p. 7. However, the typical voter likely would not grasp that an initiative *concerning*

common ownership is really one *creating* or *declaring* common ownership of all natural resources, an ownership that does not now exist.

The Board's Titles could mislead voters to believe that Initiative #4 merely addresses an established public ownership right, and requires the state to take actions to protect that right. The Board may not set a title that requires voters to know the legal status of natural resource ownership and Colorado's rejection of the public trust doctrine in order to understand the significance of a yes or no vote. *See, In re Ballot Title 2009–2010 #45*, 234 P.3d at 648 (explaining that legal training should not be required to decipher a title). The Titles in this case fail to state a central point: that the Initiative *creates* or *declares* a new common property ownership in all natural resources.

2. The Titles do not disclose applicability to commercial dealings.

The Titles also fail to disclose that by its terms, the Initiative applies to any “commercial dealing that would violate it, regardless of the date of any applicable local, state, or federal permits.” Initiative #4, Section (5) (in **Appendix A** to Kemper Opening Brief). In response to this omission, the Proponents note that the Titles indicate the state's trust responsibilities apply “regardless of any prior federal, state, or local approval.” Proponents' Opening Brief, p. 8 (emphasis in original). While the Titles reveal that the Initiative empowers the

state, as trustee, to require proof that actions affecting natural resources are not harmful, they say nothing to indicate that this standard applies to private parties' previously permitted commercial activity.

Commercial dealings are commonly understood to be economic activities. *See, e.g. Black's Law Dictionary* (10th ed. 2014) (defining "commercial" to include "the buying and selling of goods . . . commerce or exchange . . . trade . . . [m]anufacture[] for the markets . . . [and] the ability of a product or business to make a profit..."). The Titles inform voters that despite prior government approvals, the Initiative requires the State to take certain actions to prevent substantial impairment to public trust resources and to seek damages, and authorizes citizens to sue the State for enforcement. However, these statements do not reveal that commercial activities by private parties are subject to the same standard. Thus, voters cannot discern from the Titles that a private transaction, lease, loan, or other commercial activity would be subject to attack.

The Petitioners inaccurately assert that the omission of commercial activities from the Titles merely concerns "how an initiative might be applied if enacted." Proponents' Answer Brief, p. 8. As Board Member Gelender observed at rehearing, the Initiative's phrase that includes "commercial dealing" is "an applicability clause" that specifies the nature of the transaction to which the Initiative applies. **Appendix B**, p. 36, ll. 18–22. The issue is not the manner in

which the Initiative *might* be construed or applied, but rather that the Initiative expressly applies to private commercial activities. By not disclosing this feature of the Initiative's text in the Titles, the Titles are misleading.

CONCLUSION

Initiative #4 contains multiple subjects. Despite the Proponents' efforts to unify the multiple subjects under the theme of a public trust doctrine, the theme as they have defined it is simply too broad to comply with the single subject requirement. This Court should reverse the Board's action in setting the Titles because Initiative #4 is not limited to a single subject and because the Titles are unclear and misleading.

Respectfully submitted this 24th day of February 2015.

BURNS, FIGA & WILL, P.C.

***(Original signature on file
at Burns, Figa & Will, P.C.)***

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The undersigned hereby certifies that a true and correct copy of the foregoing **ANSWER BRIEF** was served via ICCES on this 24th day of February 2015, as follows:

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1 BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

2 -----

DATE FILED: February 24, 2015 5:10 PM

3 In the Matter of the Title and Ballot Title and
4 Submission Clause Set for Initiative 2015-2016 No. 4

5 -----

6 MOTION FOR REHEARING

7 REQUESTED BY PETITIONER DOUGLAS KEMPER

8 -----

9 The Rehearing on the Proposed Title was held
10 in the Aspen Conference Room, 3rd Floor, Secretary
11 of State's Office at 1700 Broadway, Denver, Colorado
12 on Wednesday, January 6, 2015 at 1:12 p.m.

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16 APPEARANCES:

17 TITLE BOARD MEMBERS PRESENT:

18 Chairwoman Suzanne Staiert

19 David Blake, Esq.

20 Jason Gelender, Esq.

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APPEARANCES

For the Petitioner Douglas Kemper:

Stephen Leonhardt, Esq.

Douglas Kemper, Petitioner

Proponents present:

Phillip Doe

Barbara Mills-Bria

1 CHAIRWOMAN: Good afternoon. This is a
2 meeting of the Title Setting Board pursuant to
3 Article 40 of Title 1, C.R.S.

4 The time is 1:12, and the date is
5 Wednesday, January 6, 2015. We are meeting in the
6 Secretary of State's Aspen Room, 1700 Broadway,
7 Denver, Colorado.

8 The Title Setting Board today consists of
9 myself, Suzanne Staiert, Deputy Secretary of State
10 on behalf of Scott Gessler, David Blake, Deputy
11 Attorney General, designee of Attorney General John
12 Southers, and Jason Gelender, Senior Attorney
13 designee of Director of Office of Legislative Legal
14 Services, Dan Cartin.

15 Today we are meeting to consider a
16 rehearing on a proposed title. The general
17 procedures for a rehearing will be that first we
18 will ask the proponent of the rehearing, the
19 petitioner, to come up and present their case. And
20 then we'll have a response by the actual proponents
21 of the initiative.

22 And then there will be questions from the
23 Board and then the Board will determine, in the same
24 order that we did last time, first, the issue of
25 single subject, and then secondly, whether to grant

1 the rehearing with regard to that or with regard to
2 the title.

3 So the only item that we have on the agenda
4 is the proposed Initiative 2015-2016, No. 4.

5 If the petitioners of the rehearing would
6 like to come forward and identify yourselves and
7 state the basis for your rehearing request and any
8 other argument.

9 MR. LEONHARDT: Thank you, Madam Chair,
10 Members of the Board. I'm Stephen Leonhardt,
11 attorney for the petitioner, Mr. Kemper, who is also
12 in the room today.

13 The first and primary basis for our motion
14 for rehearing is that Initiative 4 contains multiple
15 subjects. We identified at least three subjects
16 that are set out in the motion.

17 First of all, the initiative would create
18 constitutional obligations for State regulations to
19 protect the environment.

20 This is similar to the subject that the
21 Board and the Court majority found for last year's
22 Initiative No. 89, which was creation of a public
23 right to Colorado's environment.

24 The environment might be considered to
25 include clean air and clean water as it did in

1 Initiative 89.

2 These are typical subjects of state
3 regulation under the state's police powers to
4 protect public health and other interests in the
5 environment.

6 And similar to Initiative 89, Initiative 4
7 would supplant the existing ownership and regulatory
8 scheme by creating a superseding public right in
9 protecting the environment.

10 As a second subject, Initiative 4 would
11 create a constitutional public trust doctrine based
12 on a newly created common property interest in
13 preservation of natural resources.

14 Section 1 of the initiative lumps together
15 preservation of natural resources and protection of
16 a clean environment under the broad label of public
17 trust resources. But these are not the same subject
18 and they cannot be united under this broad
19 declaration of a public trust.

20 Natural resources are the subject of
21 property rights that are currently owned by private
22 parties or governmental entities including numerous
23 local governments and special districts.

24 Natural resources include minerals such as
25 coal, natural gas, oil, sand and gravel. Natural

1 resources also include water and timber and could be
2 interpreted to include other resources as well.

3 Colorado has well established property laws
4 governing property rights and minerals and property
5 rights to water use as well as state agency
6 regulation of these resources that respects and
7 protects these property rights.

8 Creating a new inalienable right and common
9 property interest in the preservation of water and
10 minerals would supersede these constitutionally
11 grounded property rights regimes for natural
12 resources.

13 Initiative 4, thereby, would convert
14 property rights owned by private parties and local
15 governments into state-owned common property with a
16 mandate to preserve rather than develop these
17 natural resources.

18 Initiative 4 also would retroactively
19 re-examine previously granted permits to use natural
20 resources.

21 Section 5 talks about regardless of the
22 date of any applicable state and local and federal
23 permits, which further confirms that one of the
24 subjects of this initiative is converting property
25 interests to common property in natural resources.

1 As a third subject, Initiative 4 requires
2 referral for criminal prosecution of the
3 manipulation of data and other scientific
4 information in attempts to utilize the so-called
5 public trust resources for private profit.

6 This criminal prosecution of conduct is a
7 surreptitious subject that's coiled up in the folds
8 of Initiative 4 and is not necessary or proper to
9 either of the two primary purposes.

10 The Colorado Supreme Court recognized last
11 year with regard to Initiative 76, it's not
12 permissible to set a title for an initiative that
13 combines process changes with the substantive
14 changes that have no necessary or proper connection
15 to one another.

16 And Madam Chair, I take it you want to only
17 address the single subject issue at this point and
18 then proceed to title language if a single subject
19 is found?

20 CHAIRWOMAN: I think I would prefer to do
21 it that way just because that is the main issue
22 before us.

23 MR. LEONHARDT: Okay.

24 CHAIRWOMAN: Do you have anything else on
25 that?

1 MR. LEONHARDT: Only if there are any
2 questions.

3 CHAIRWOMAN: Questions? Do you have any?

4 (No response.)

5 Jason, any questions?

6 MR. GELENDER: No.

7 CHAIRWOMAN: Okay. All right. Thank you.

8 MR. LEONHARDT: Thank you.

9 CHAIRWOMAN: And if the proponents of the
10 initiative could come up and identify yourselves so
11 that we know you're both here for the record.

12 MS. MILLS-BRIA: I'm Barbara Mills-Bria.

13 MR. DOE: I'm Phillip Doe.

14 CHAIRWOMAN: And do you have anything you
15 would like to add or argue regarding the single
16 subject or supplement from last time?

17 MR. DOE: Well, I'll just repeat what we've
18 said over and over again. The subject is public
19 trust. And like the construction of a sentence, you
20 can't have public trust sitting by itself. That's
21 maybe an idea, but it needs a verb and maybe
22 modifiers.

23 And so what we've done here is we've taken
24 the subject, which is public trust, and tried to
25 describe what it is and what it will take to make it

1 workable.

2 As to the idea that we're creating
3 something new, we're not. What we're unhappy with
4 is the regulatory system that we have. We don't
5 think it functions very well, and this is an attempt
6 to protect that which is the public's.

7 We are not after anybody's property rights.
8 We're only trying to protect that which is ours, and
9 that's the water of this state, which is a public
10 property, the air of this state, which is clearly
11 public property, and the public land. That's what
12 we're trying to protect. And that is what this
13 initiative is all about.

14 CHAIRWOMAN: Okay. Any questions?

15 UNIDENTIFIED MALE: Uh, no.

16 CHAIRWOMAN: No? All right. Thank you.
17 Any discussion?

18 MR. GELENDER: Yeah. I'll just say I think
19 that I've looked more closely now at the opinion
20 upholding a somewhat semi-similar Measure No. 89 and
21 finding a single subject there. I still think that
22 this one is broader than that.

23 Between the potentially retroactive
24 prosecution, the addition of not just the
25 environment but also, and maybe it's part of the

1 environment, but natural resources as part of what
2 is subjected to the public trust doctrine, which in
3 this one is explicitly referenced, even though it
4 generally has applied in the past only to things
5 like water.

6 I just think that this particular
7 initiative is too confusing. It offers too much
8 opportunity for voter confusion. It is too
9 difficult to determine exactly what it does and has
10 too many affects that are not obvious on its face
11 for me to find it to be a single subject.

12 CHAIRWOMAN: And I think I stated last time
13 that much of my reasoning was also based on the
14 decision last year in No. 89.

15 I don't believe that this initiative does
16 have anything surreptitious in it. I don't think
17 there would be any surprise to the voter as to what
18 it does.

19 I mean, I think it is broad, but I don't
20 think that necessarily means it has multiple
21 subjects in it. And so I'm inclined to rule that it
22 is a single subject.

23 MR. BLAKE: Since, I guess, we're making
24 the record at this point since it appears there's
25 definitely going to be a split vote, again, my

1 apologies to the proponents of the rehearing and
2 proponents of the initiative for being tardy.

3 I did read these materials. I just didn't
4 have a chance to run back to my office first. I had
5 an additional point I think I'll just add to the
6 Chair's point, which was, I don't think there's
7 anything here that -- I don't see anything here
8 that's confusing.

9 And I also don't think that you can't, in
10 amending the constitution, create a subject of --
11 I'll keep trying to get it right here -- public
12 trust resources.

13 I think in the Constitution you can do that
14 as long as it's clearly defined within the
15 initiative.

16 In other words, I don't see the delineation
17 that the opponents are drawing that there are two
18 subjects here. I think there is one subject, and
19 it's clearly defined.

20 So to the extent that argument is the one
21 that carries the day for Mr. Gelender, then I just
22 disagree with it. And I read the opinion, so I also
23 find that there is a single subject.

24 CHAIRWOMAN: Do you want to make a motion?

25 MR. BLAKE: Sure. I would make a motion

1 that there is a single subject in --

2 CHAIRWOMAN: And deny the rehearing on that
3 topic?

4 MR. BLAKE: -- Initiative No. 4 and
5 recommend to deny the motion for rehearing that
6 there's more than one subject, and move forward to
7 set a title.

8 CHAIRWOMAN: Second. All those in favor?
9 Aye.

10 MR. BLAKE: Aye.

11 CHAIRWOMAN: Opposed?

12 MR. GELENDER: No.

13 CHAIRWOMAN: So that passes on a two to
14 one, which brings us to the rehearing on the title.
15 And if you want to come back up and we'll address
16 the title.

17 MR. LEONHARDT: With regard to the title, I
18 recognize the finding that the majority of the Board
19 has just made, but for the record let me point out
20 that the phrase "concerning public ownership of
21 natural and environmental resources" expresses two
22 separate subjects or a compound subject with regard
23 to public ownership of natural resources and
24 environmental resources. I question whether that is
25 proper for a title.

1 Also the phrase "environmental resources"
2 is one that does not appear in the initiative and I
3 believe it's inaccurate for that reason to use that
4 phrase in the title.

5 UNIDENTIFIED MALE: Just point me to where
6 that is quickly.

7 MR. LEONHARDT: Yes, in line 2 --

8 CHAIRWOMAN: In the beginning.

9 UNIDENTIFIED MALE: Just in the very front?

10 CHAIRWOMAN: Yeah.

11 MR. LEONHARDT: The first two lines say
12 "concerning public ownership of natural and
13 environmental resources".

14 UNIDENTIFIED MALE: Okay.

15 MR. LEONHARDT: The second point, there is
16 a material omission from the title in that it does
17 not mention the creation of common property rights
18 in the so-called public trust resources.

19 This common property right clearly is a
20 material feature of the initiative and should be
21 disclosed in the title.

22 The third point is lines 2 and 3, creating
23 a public trust in these resources, which include
24 clean air, clean water, and preservation of the
25 environment and natural resources.

1 I believe the word "include" in that
2 context is misleading. It is inconsistent with the
3 text of the initiative, which refers to these are
4 the public trust resources.

5 It doesn't say public trust resources
6 included. It doesn't suggest that public trust
7 resources may include anything other than clean air,
8 clean water, preservation of the environment and
9 natural resources.

10 Fourth point, the title does refer in three
11 different locations to public trust resources. I
12 believe that that's unclear and confusing because
13 the initiative's definition of public trust
14 resources is not disclosed in the title and is a
15 unique definition that I don't believe is either
16 facially obvious or derived from anything else in
17 Colorado law.

18 And then two more phrases in the title that
19 are fairly confusing, the phrase -- well, if you
20 look immediately after the phrase "which include
21 clean air, clean water, preservation of environment
22 and natural resources" there's a semicolon and then
23 a long, several lines before the next semicolon,
24 including a phrase that starts with requiring the
25 State as trustee to do certain things.

1 And then after "regardless of any prior
2 federal, state, or local approval" it continues
3 right on into "seek natural resource damages."

4 Then at the end of line 7, "and using
5 damages obtained to remediate the impairment". I
6 believe that phrase "to seek natural resource
7 damages from anyone who substantially impairs them
8 and using damages obtained to remediate the
9 impairment" is unclear and confusing as it's
10 currently worded.

11 And finally, the final phrase of the title,
12 "Requiring the manipulation of data reports or
13 scientific information in an attempt to use public
14 trust resources for private profit to be referred
15 for prosecution for any applicable criminal
16 offense." That phrase is unclear and misleading.

17 It doesn't say anything about -- well, it's
18 basically passive voice requiring a certain action
19 to be referred but doesn't say who's to do the
20 referring, et cetera.

21 I believe that these portions of the title
22 are defective and should not be included in the
23 Board's final action or should be corrected,
24 particularly in the case of the material omission of
25 common property.

1 CHAIRWOMAN: All right. Anyone else have
2 any questions? I have a couple.

3 The first part about the natural and
4 environmental resources, in Section 9 of the full
5 text, it says "Environment in natural resources."

6 When you say that that's not part of the
7 initiative, I guess I'm just trying to draw that out
8 a little bit.

9 MR. LEONHARDT: I'm saying that the word
10 environmental -- the phrase "environmental
11 resources" is --

12 CHAIRWOMAN: So if we changed it to say
13 environment and natural resources, as we do later?

14 MR. LEONHARDT: I think that would be more
15 consistent with the text. It's still a compound
16 subject, but it's more consistent with the text.

17 CHAIRWOMAN: Right. I mean, I tend to
18 agree with that. I suppose "environmental" could
19 have a different --

20 UNIDENTIFIED MALE: I had the same solution
21 because I thought it was in there, or at least I
22 believed it was in there. I went back. You're
23 right. They're swapped.

24 CHAIRWOMAN: Right. Okay.

25 UNIDENTIFIED MALE: Our intent was clearly

1 to convey that.

2 CHAIRWOMAN: And then the common property
3 rights that you talked about, I mean, I know it's in
4 there, but it seems that that is -- the affect of
5 that is only that the state is then tasked with
6 these certain things.

7 And so I'm concerned about saying this
8 common property right because that can mean much
9 more than what this is limited to, which is defining
10 then the state's role in protecting those.

11 If it was truly some common property right
12 as we know it in a common law sense, that would have
13 a lot of other impacts.

14 And so when you say you think that that
15 should be included in the title, what is it that you
16 think that phrase does that's not reflected in what
17 we've spelled out?

18 MR. LEONHARDT: Well, the initiative
19 declares that public trust resources are common
20 property of all the people.

21 And as I've pointed out earlier this
22 afternoon, Colorado does have private property
23 rights as well as local property rights in natural
24 resources, including particularly minerals and water
25 use.

1 And this seems to declare that all of the
2 so-called public trust resources are common
3 property. In his dissenting opinion on Initiative
4 89 last year, Justice Hobbs cited the Webster's
5 definition of common property.

6 Definition 1 is "Land in which all members
7 of the community hold equal rights." And definition
8 2, "Land or other property in which a person other
9 than the owner hold certain rights in common with
10 the owner."

11 This phrase of the initiative seems to be
12 part of the fundamental purpose of the initiative
13 and it clearly is one that is material in its effect
14 on property rights in natural resources.

15 CHAIRWOMAN: Okay. Anyone else?

16 MR. BLAKE: I had a couple of questions
17 and/or responses again, just to make the record.
18 I've one potential suggestion. I don't know whether
19 that will be acceptable to you or not.

20 If I understood one of your original points
21 it was that in the third line, the clause that says,
22 "which include clean air, clean water", et cetera,
23 you think that to be under-inclusive. Do I
24 understand your point correctly?

25 MR. LEONHARDT: No. My point is that the

1 word "include" suggests that it may include more
2 than those things and as defined in the initiative,
3 it does not.

4 CHAIRWOMAN: I think we could just -- my
5 thought on that was we could say creating a public
6 trust over clean air, water, and just strike "those"
7 or something like that.

8 MR. LEONHARDT: Just strike "those
9 resources which include"?

10 CHAIRWOMAN: Yeah, and then just say --

11 MR. LEONHARDT: I believe that would be an
12 improvement.

13 CHAIRWOMAN: -- in or for or something like
14 that.

15 MR. LEONHARDT: I believe that would be an
16 improvement.

17 UNIDENTIFIED MALE: And that leaves the
18 definition in the proposal to speak for itself. I
19 think I'm fine with that.

20 CHAIRWOMAN: Yeah.

21 UNIDENTIFIED MALE: I'm not sure I -- so
22 I'm fine with that solution.

23 CHAIRWOMAN: It does seem that we repeat
24 "the resources and environment". I mean, we repeat
25 that quite a bit -- probably clean it up.

1 MR. BLAKE: You had commented about the
2 public trust resources. Again, it's assumed that
3 the voter reads this, understands it. I think it is
4 defined in the bill.

5 You may disagree with its clarity of the
6 definition, but it is, so I'm not persuaded by that
7 particular argument.

8 I think it is clear who would be the
9 prosecuting entity as it's always the state who's
10 prosecuting criminal offenses. And I think it's
11 clear both in the initiative and the title that
12 these are state responsibilities.

13 And I wanted to ask the question. You had
14 commented that the second clause sandwiched between
15 two others "to seek natural resource damages from
16 anyone who substantially impairs them", you had said
17 that was unclear and/or misleading, but you didn't
18 say why. Because I think it's quite clear.

19 I'm not sure how else to define it since
20 that's virtually exactly what it says in the
21 initiative. And again, maybe I misunderstood. I'm
22 just giving you the opportunity. I thought I was
23 tracking all your points.

24 MR. LEONHARDT: What's confusing to me is
25 the "and to seek" in line 7 followed by "and using"

1 in line 8.

2 UNIDENTIFIED MALE: Well, they're related,
3 right?

4 MR. LEONHARDT: Or it should be "seeking
5 and using" or "and to seek and to use." But it
6 seems of the two it would be more clear if the two
7 were parallel.

8 UNIDENTIFIED MALE: Well, they're doing
9 different things, right? We're supposed to seek
10 damages. If we get them, we're supposed to use them
11 in the following way. They're related, but I think
12 different.

13 MR. LEONHARDT: Right. Okay. I see. I
14 guess the --

15 MR. BLAKE: You addressed the common
16 property question. I'm fine to swap the natural
17 environmental. I'm fine with your other solution
18 about the inclusion, including clause. And I think
19 I hit all your points, or at least I tried.

20 CHAIRWOMAN: Do you have any questions?

21 MR. GELENDER: On this? Not as much. I do
22 -- I hate to sort of reopen a lot of things, but I
23 think I might anyways.

24 Do we have any concern that the single
25 subject right at the top, public ownership, is

1 somewhat misleading in that?

2 When people think public ownership, they
3 think state ownership? And what the initiative
4 actually calls for is more like common ownership.

5 CHAIRWOMAN: Right. I think that should be
6 put up there in the top of the title. I mean, we
7 may have differing interpretations of what that
8 actually does, but we should at least put the public
9 on notice then of the common ownership issue.

10 MR. GELENDER: Let me just throw something
11 out as sort of a single subject and see what the
12 rest of the Board thinks, which would be an
13 amendment to the Colorado Constitution concerning
14 the establishment of common ownership by all
15 Coloradoans of public trust resources.

16 Then below we can say like defining public
17 trust resources as, and then we also get out of that
18 environment and natural --

19 CHAIRWOMAN: Yeah.

20 MR. GELENDER: -- resources sort of
21 compound subject.

22 CHAIRWOMAN: Common ownership over what?
23 Public --

24 MR. GELENDER: I'd say common ownership by
25 all Coloradans. I mean, that's what they're really

1 saying. Of public --

2 CHAIRWOMAN: Who is it -- Coloradoans or
3 Coloradans?

4 UNIDENTIFIED MALE: No, it's just an A. I
5 actually know that, believe it not.

6 CHAIRWOMAN: I was just asking him whether
7 it was Coloradoans or Coloradans. There was an
8 article on that just a couple of days ago.

9 MR. GELENDER: And then I would just say of
10 public, instead of "the environment and natural" I'd
11 say "of public trust resources".

12 CHAIRWOMAN: All right.

13 MR. GELENDER: And then for the trailer, I
14 would just start with defining public trust
15 resources. And then the rest is --

16 CHAIRWOMAN: Right.

17 MR. GELENDER: -- this thing starts to fall
18 a little better.

19 CHAIRWOMAN: Yeah. I actually like it.
20 How about we hear from both the rehearing proponent
21 and then the initiative?

22 MR. BLAKE: I'll just add one more thing
23 since you've now focused me on it. Does it ever say
24 ownership? I understand the argument. I understand
25 the takings argument. I understand all of that. I

1 understand your point. And I respect it.

2 Is it really creating an ownership? It's
3 creating a right in these things. The taking -- my
4 response to the taking argument is essentially that
5 that's going to be -- that's an implementation
6 issue, which the Board isn't entitled to look at.
7 That's my take on it. Rightly or wrongly, that's
8 it.

9 CHAIRWOMAN: Yeah.

10 UNIDENTIFIED MALE: That's a down, sorry
11 for the pun, that's a downstream question that has
12 yet to be answered by the courts. And I'm sure
13 people will challenge it.

14 So I guess when you all both come up to
15 address the question, is ownership even the right
16 word? It's the creation of -- or it would be at
17 least the acknowledgement of a right in these
18 things, in the creation of a common property
19 interest that the state is supposed to go and
20 protect in the interest of conservation.

21 But I don't think it creates an ownership.
22 I'm asking because you focused me on the word. Now
23 I'm responding, reacting.

24 CHAIRWOMAN: I'm just reading back --

25 MR. BLAKE: I welcome your reactions if

1 ownership is actually correct.

2 MR. LEONHARDT: Well, I look at the next to
3 the last sentence of Section 1 of the initiative
4 which says "Public trust resources are the common
5 property of all the people."

6 And "property of" certainly seems to
7 strongly imply ownership. So that is one word in
8 the previously set title that I don't think I would
9 question.

10 MR. GELENDER: And I think I'm inclined to
11 agree on that because -- I mean, it's been a long
12 time since law school, but it seems to me that the
13 act of possessing something is what makes it
14 property. I don't think you can have property if
15 someone doesn't own it.

16 UNIDENTIFIED MALE: You can have an
17 interest in trust and fiduciary (inaudible).

18 MR. BLAKE: Right. I don't want to get
19 into -- it's not a legal -- we're not here to debate
20 the legal question. We're here to debate whether or
21 not it's misleading and/or whether or not it
22 properly conveys the purpose of the folks that have
23 brought forward the initiative.

24 I guess I'd like to hear from you guys
25 about whether or not Mr. Gelender's proposal about

1 switching things around is one that you would
2 prefer. I'm okay with it.

3 CHAIRWOMAN: Let's hear from the proponents
4 for the initiative. Why don't you come on up and
5 let's hear your take on that. And address anything
6 else that you want with regard to the title.

7 MR. DOE: We don't use the word ownership.
8 I'm reminded of what Tecumseh, I think it was, said
9 about when he found out that the Indians had sold
10 Ohio. He said, you might as well sell the sea and
11 the sky.

12 We're against ownership of natural
13 resources that belong to the public. It's held in
14 common. It's held trust for future generations.
15 You can't sell it to future generations. You have
16 to preserve it for future generations.

17 That's why I would suggest on the first
18 part, "An amendment to the Colorado Constitution
19 concerning the public's interest in preserving the
20 natural and environmental resources."

21 I think it comes closer to what we're
22 trying to do here. We're not trying to take away
23 anybody's ownership. We're just trying to preserve
24 what it ours and not sell it to somebody. How do
25 you sell the air? We're not into selling the air.

1 And furthermore -- I thought it was fine,
2 which includes clean air, clean -- we're not in the
3 business of administering this thing. All we're
4 doing is writing legislation.

5 And I think we should leave it up to the
6 administering agencies as to how they interpret that
7 and what they have to do to make it work.

8 And so I like the idea, which includes,
9 rather than being so prescriptive that you're tying
10 their hands. I just don't believe we should be
11 doing that. That's just my feeling on the subject.

12 So I liked it better before, but I don't
13 like "ownership" because we're talking about a
14 trust, you know, that we have to future generations.
15 And we're trying to preserve that, what's left for
16 future generations.

17 And ownership is really kind of
18 antithetical to the concept, just as it was to
19 Tecumseh.

20 CHAIRWOMAN: Well, the law may be contrary
21 to the concept.

22 MR. DOE: Well, I'm no lawyer.

23 CHAIRWOMAN: I understand what you're
24 saying. All right. Anyone have any questions?

25 UNIDENTIFIED MALE: No.

1 CHAIRWOMAN: All right. Thank you.

2 MR. DOE: Yeah. Sure.

3 (Pause.)

4 MR. DOE: I have one more.

5 CHAIRWOMAN: Sure.

6 MR. DOE: As to the idea of common
7 property, I was at the Western Water Conference
8 speaking when Greg Hobbs was there. And he did a
9 short speech on water. And his first principle that
10 he borrowed from David Shore (phonetic), who I've
11 also read, the public owns all of water, the natural
12 streams of the state of Colorado -- the public.

13 CHAIRWOMAN: He used the word "owns".

14 MR. DOE: Yeah, I know. But I would have
15 changed it, but it wasn't my speech.

16 MR. BLAKE: I have no changes to propose.
17 I'm happy to hear yours, if you want to propose
18 them, but --

19 CHAIRWOMAN: I'm fine with the way it is
20 because I think even though it's contrary to the
21 concept that maybe the petitioners sort of wish was
22 true, I think the law does -- maybe it's hard to
23 sell air but clean air or water, I think there are
24 some ownership issues.

25 And saying it any other way may not state

1 what it does. If we said "common interest",
2 interest can mean a lot of things to a lot of
3 people. They're not going to take it as the legal
4 effect of what an interest is.

5 I actually think we should leave it the way
6 Mr. Gelender proposed and then continue with his
7 language where we define that as clean air, water,
8 because that tracks a little bit more closely with
9 the language of the initiative.

10 MR. BLAKE: I happen to agree. I think
11 public interest is more vague than ownership and I
12 understood the argument made by the proponent of the
13 rehearing.

14 So I'm fine with ownership where I was
15 convinced that it's okay even though it's not
16 expressly used in the initiative.

17 I don't think we have to define public
18 trust resources. It's defined, in my opinion,
19 clearly in the initiative and I assume voters read
20 it. And I think that's the position.

21 So again, I'm okay with it. I'm happy to
22 entertain Mr. Gelender's rough sketch. He'll have
23 to put the words on the screen if you --

24 CHAIRWOMAN: Right. Do you want to
25 continue with where we define?

1 MR. GELENDER: In that case, does the whole
2 first clause after the "therewith" just come out?
3 Because if we've said -- we've put right in the
4 single subject "the common ownership and public
5 trust."

6 And if you don't feel, Mr. Blake, that we
7 need to further define, then we can get right into
8 the enforcement, can't we?

9 CHAIRWOMAN: Well, I think we have to
10 define what those things are. I mean, we have to
11 say defining them as clear air, clean water. You
12 don't think we need to put that in?

13 MR. BLAKE: I was responding to the
14 proponents that the public trust interest resources
15 is misleading. I just don't think that it is. I
16 think it's defined.

17 That was my response to it. Now, that was
18 with the assumption that the other, including clean
19 air, clean water and those things were still in
20 there.

21 CHAIRWOMAN: Yeah.

22 MR. BLAKE: Which I think helps further
23 clarify.

24 CHAIRWOMAN: Otherwise, I mean --

25 MR. BLAKE: I don't think it hurts to

1 include it. In response to the idea that that
2 clause is and of itself misleading, I don't agree
3 with that.

4 CHAIRWOMAN: I think it's not misleading
5 because we then define it, I guess was my point.

6 UNIDENTIFIED MALE: Okay.

7 CHAIRWOMAN: So I think we have to define
8 it.

9 MR. GELENDER: Okay. Well, we don't need
10 to keep the language about creating a public trust.

11 CHAIRWOMAN: No.

12 UNIDENTIFIED MALE: I think we've said
13 that.

14 CHAIRWOMAN: Right.

15 UNIDENTIFIED MALE: So then I would just
16 sort of say, I guess, defining public trust
17 resources to include --

18 CHAIRWOMAN: Or as, because there isn't
19 anything beyond that, right?

20 UNIDENTIFIED MALE: Yeah. And I mean, it's
21 actually --

22 CHAIRWOMAN: So the rehearing motion -- I
23 mean, I guess it says "including". But it doesn't
24 say "including, not limited to".

25 MR. GELENDER: And actually I might have a

1 brief question for the proponents.

2 Is the intent when you are saying,
3 "referred to in this section as public trust
4 resources", does that go back to just the
5 environment and natural resources or does it go back
6 to the clean air, clean water and all that?

7 MR. DOE: The way we defined it in the
8 initiative was clean air, clean water, including --
9 well, and the preservation of the environment and
10 natural resources. That's the way we described it.

11 UNIDENTIFIED MALE: I just wanted to
12 clarify that for the record. That's what I thought,
13 but I wasn't entirely sure if it went to that whole
14 clause or just the last part of it.

15 MR. DOE: Okay. You have to tell them what
16 the public trust -- I mean, what's included in it.

17 CHAIRWOMAN: Yeah, I think so, too.

18 UNIDENTIFIED MALE: Well, should we just
19 track the initiative?

20 CHAIRWOMAN: Doesn't that track it?

21 UNIDENTIFIED MALE: I think it does.

22 MR. BLAKE: We have it already? Okay.

23 CHAIRWOMAN: Yeah.

24 UNIDENTIFIED MALE: Good.

25 CHAIRWOMAN: I would agree with that last

1 part. If we can clean up that passive voice, I
2 always thought that was a really -- it's an awful
3 lot of lines to say something that should be more
4 simple about the manipulation of the data.

5 MR. LEONHARDT: Okay.

6 UNIDENTIFIED MALE: Did you have a
7 recommended way to fix that, the passive voice? I'm
8 more than happy to entertain it.

9 CHAIRWOMAN: Yeah.

10 UNIDENTIFIED MALE: I'm happy to attack it,
11 but it was your concern. I'm happy to entertain
12 your proposed solution.

13 MR. LEONHARDT: Is one option maybe to say,
14 and requiring referral for prosecution of any
15 criminal offense involving --

16 CHAIRWOMAN: There we go.

17 MR. LEONHARDT: -- manipulation of data, et
18 cetera.

19 CHAIRWOMAN: I like that. We're way down
20 there. We're at 12, line 12. You just going to
21 move requiring or referral -- yeah, there we go.

22 MR. LEONHARDT: "Of any criminal offense
23 involving"?

24 CHAIRWOMAN: Yeah, here we go.

25 UNIDENTIFIED MALE: I have no objection to

1 that.

2 UNIDENTIFIED MALE: That's fine by me.

3 CHAIRWOMAN: Okay. Good, because my boss
4 doesn't allow me to use the phrase "to be" because
5 that is passive. All right. Anything else?

6 UNIDENTIFIED MALE: I have nothing else.

7 CHAIRWOMAN: All right. Let me go ahead
8 and read it into the record so that we can -- you
9 have something else?

10 MR. GELENDER: Well, I just want to look at
11 one --

12 CHAIRWOMAN: Sure.

13 MR. GELENDER: I'm thinking of that phrase
14 about the "regardless of the approval" is in the
15 wrong place on line 7 because that language is right
16 at the end of the initiative and it goes to sort of
17 an act -- any act in violation of the proposed
18 initiative.

19 And I don't think it's very clear that
20 that's what that does where we have it located.

21 CHAIRWOMAN: Where do you want to put it?

22 MR. GELENDER: -- well, that part I haven't
23 figured out yet, unfortunately.

24 UNIDENTIFIED MALE: It's supposed to come
25 with solutions, not problems.

1 CHAIRWOMAN: Where is it in the initiative?

2 MR. GELENDER: Right at the very end. And
3 we probably had some reason for putting it there
4 before, but I can't remember what that might have
5 been.

6 CHAIRWOMAN: That was a year ago. Do you
7 have a solution, suggestion for us?

8 MR. LEONHARDT: I guess my suggestion would
9 be to move it to the end and in the context in which
10 it arises in Section 5 of the initiative, which
11 would involve a semicolon after "private profit".

12 And then "And governing any public action
13 or commercial dealing regardless of any prior
14 federal, state or local approval."

15 CHAIRWOMAN: I mean, you could also put it
16 at the beginning of the question where -- well,
17 except that -- and then it basically is saying that
18 this common ownership and public trust is regardless
19 of any prior approval.

20 (Pause.)

21 But yeah, the "regardless" is a modifier
22 over the whole thing. And it kind of looks like
23 it's just a modifier over that one part at this
24 point.

25 UNIDENTIFIED MALE: Could we just strike it

1 from there?

2 UNIDENTIFIED MALE: Well, first of all, in
3 that sentence. Does this sentence look like a
4 series now, right?

5 So we're requiring the state, as trustee,
6 to conserve using the best science, comma, to seek
7 (inaudible) comma, and to use. I think that would
8 help --

9 CHAIRWOMAN: Right.

10 UNIDENTIFIED MALE: -- first of all. I
11 mean, what I might do is simply take out the "and"
12 at the end of line 11 and just tack this onto the
13 end, and specifying that any violation --

14 CHAIRWOMAN: Well, it's not even a
15 violation, is it? It's everything. I mean, you
16 could have a permit to do something that would --
17 right?

18 MR. GELENDER: Well, it says,
19 "self-enacting and self-executing applies to a
20 public action or commercial dealing that would
21 violate it regardless of a permit." So it's really
22 -- it's an applicability clause.

23 CHAIRWOMAN: Okay.

24 MR. GELENDER: I mean, I think, if I'm
25 correct, what it's really just saying is, is once

1 this passes, even if you were going to be allowed to
2 do something, you're not allowed to do it anymore if
3 it's a violation.

4 CHAIRWOMAN: Right. So you could have a
5 permit potentially to drill, I guess, or to --

6 UNIDENTIFIED MALE: Right. I'm just saying
7 if you have a permit, this passes, too bad.

8 CHAIRWOMAN: If it's a violation of this,
9 that permit has no --

10 UNIDENTIFIED MALE: Validity.

11 CHAIRWOMAN: Correct.

12 UNIDENTIFIED MALE: So you'd like me to
13 strike this (inaudible)?

14 UNIDENTIFIED MALE: (Inaudible.)

15 CHAIRWOMAN: No, we just need to add
16 that -- add, before regardless something.
17 Requiring? Is that what you said?

18 UNIDENTIFIED MALE: Yeah. Sorry, I'm just
19 reading through the whole thing.

20 CHAIRWOMAN: I mean, we could just say
21 we're applying the trust regardless of any, or
22 applying the --

23 UNIDENTIFIED MALE: The clause where you
24 have the cursor I think needs to be the very last
25 thing. I didn't mean for it for it to be inserted.

1 I mean you put it at the very end of the list.

2 Yeah. We'll just cut it for now.

3 UNIDENTIFIED MALE: Copy it?

4 UNIDENTIFIED MALE: Yeah. And there will
5 be an "and" and then we'll just tweak that language.

6 You also pulled "and" at the end of line
7 11. I think, and this would be a question for both
8 the proponents and opponents.

9 I think what would really -- all we really
10 have to say here is -- essentially, well, it sort of
11 gets circular, but it's basically prohibiting any
12 action that would violate the section even if
13 previously permitted.

14 I mean -- that's what we're saying, but it
15 just gets circular to say it that way.

16 MR. BLAKE: The way -- and now we're
17 getting into the merits of what the initiative is, I
18 think, which -- what I think it does is creates the
19 opportunity for all of that which exists out there
20 already permitted to be now tested against this.

21 UNIDENTIFIED MALE: Right.

22 MR. BLAKE: What is clean air? What is
23 clean water? What is the scope of the public trust
24 resource as defined here?

25 And how that all plays out, again, is how,

1 if this passes, there'll be a lot of -- I suspect a
2 lot of litigation about permit holders and what all
3 that stuff means. That's beyond the scope of what I
4 understand I'm trying to do and convey clearly what
5 this does.

6 It's not that it may ever lead to
7 litigation. It's that regardless of this it's now
8 subject to this. Regardless of a permit, it
9 pre-exists passage of this.

10 UNIDENTIFIED MALE: Right.

11 MR. BLAKE: It's now subject to this new
12 thing --

13 UNIDENTIFIED MALE: Yes.

14 MR. BLAKE: -- that the Constitution is now
15 embodied in the Constitution through adoption by the
16 voters.

17 And I just think that putting it at the end
18 is even more in the wrong place. I think it
19 actually should modify on line 5 "before requiring".

20 So it requires the state to do all of those
21 things regardless of prior federal, state, or local
22 approval.

23 UNIDENTIFIED MALE: Okay. I like --

24 UNIDENTIFIED MALE: Just because it comes
25 at the end of the initiative, it modifies the entire

1 initiative essentially. I agree. It's an enacting
2 clause kind of, but I think that's where -- what
3 it's modifying is what the state then has to do as
4 trustee to protect all of these things that we're
5 defining.

6 UNIDENTIFIED MALE: I'm on board with that.

7 UNIDENTIFIED MALE: You may disagree.

8 MR. LEONHARDT: I believe it would be
9 better placed at the end because Section 5 says
10 "that this section shall apply to a public action or
11 commercial dealing that would violate it regardless
12 with the prior approvals."

13 And thus, I believe it's broader than just
14 the requirements placed on the state.

15 MR. BLAKE: But do you disagree that it's
16 the state that is the actor here in all the
17 circumstances?

18 MR. LEONHARDT: The state is not the actor
19 in any commercial dealing.

20 MR. BLAKE: No, but they're the actor --
21 they're there for the fiduciary that has to then
22 enforce this new natural -- I keep getting it wrong,
23 this new public trust resource.

24 And admittedly, there's another mechanism
25 which is a private citizen can bring a suit, too.

1 That right of action is also created here, but --

2 UNIDENTIFIED MALE: Right.

3 MR. BLAKE: I mean, the commercial dealing
4 is simply saying even your private commercial
5 contracts become subject to this new test. That's
6 how I read it.

7 MR. LEONHARDT: That's right. And that's
8 why I think this section of the initiative is
9 broader than just the requirements placed on the
10 state as trustee.

11 MR. BLAKE: Still the state, though, would
12 enforce that, right? The state would then be
13 required to, if there's a commercial contract out
14 there that ran afoul of this new definition --

15 MR. LEONHARDT: Well, the state including
16 the judiciary.

17 MR. BLAKE: Sure. I presume that's where
18 this will get resolved.

19 MR. LEONHARDT: Right. It appears to me,
20 particularly from this phrase, that the defendants
21 in that lawsuit sometimes may be private parties,
22 may not only be the state.

23 CHAIRWOMAN: Yeah. So, I mean, what if we
24 did put it at the end and it was more -- I mean,
25 what would your proposal be before you leave?

1 I mean, I think it has to be regardless of
2 any prior federal, state, or local approval. But
3 wouldn't it be application of the trust shall apply
4 or what would it say?

5 MR. LEONHARDT: In parallel with the
6 phrases that begin with defining, and requiring, I
7 think you just say "and applying to public actions
8 and commercial dealings regardless of any prior
9 federal, state, or local approval."

10 CHAIRWOMAN: And applying to any --

11 MR. LEONHARDT: Applying to or and
12 governing was, I think, the suggestion I had
13 earlier.

14 CHAIRWOMAN: Just like it's in Section 5,
15 "applying to a public action or commercial dealing"?

16 MR. DOE: May --

17 CHAIRWOMAN: Sure, come on up. I think we
18 need to say what is applying. Applying what?

19 MR. DOE: I definitely don't like that
20 final at all. I think it's much better up above.

21 I want to go back to that first sentence
22 again, if I may. Could we -- I don't like the word
23 "concerning". It's so blah.

24 CHAIRWOMAN: We don't have any choice on
25 that.

1 MR. DOE: You don't?

2 CHAIRWOMAN: That's a statutory thing.

3 MR. DOE: Really?

4 CHAIRWOMAN: Yeah.

5 MR. DOE: You can't say acknowledging or
6 anything?

7 CHAIRWOMAN: No.

8 MR. DOE: Wow.

9 CHAIRWOMAN: We don't like it either, but
10 it's --

11 MR. DOE: It just kind of -- well.

12 CHAIRWOMAN: Yeah, we're not big fans of,
13 "in connection therewith" --

14 MR. DOE: Yeah. Okay.

15 CHAIRWOMAN: -- but there are certain
16 things that we don't --

17 MR. DOE: All right. So you know your job,
18 I don't. We just don't like that down at the end.
19 I think it's confusing. It makes it sound more
20 punitive than it is.

21 I would like to clarify one thing. Nowhere
22 in this initiative have we ever said that we would
23 go after people that were permitted prior to this
24 for changes.

25 That was said today I think by you and we

1 have never said that. We know that can't be done.
2 I mean, it's illegal.

3 CHAIRWOMAN: Well, but if you had a permit,
4 somebody could bring a private action, right, to
5 stop you from --

6 MR. DOE: Well, if this becomes, you know,
7 part of the Constitution, of course.

8 CHAIRWOMAN: Right.

9 MR. DOE: You might have a permit that's no
10 longer valid.

11 CHAIRWOMAN: Sure.

12 MR. DOE: But you couldn't be fined for
13 what was valid when you did it.

14 CHAIRWOMAN: Yeah.

15 MR. DOE: Okay. Just as long as we're
16 clear on that.

17 CHAIRWOMAN: Yeah, I understood that.

18 MR. DOE: Did you have anything to say,
19 Barb?

20 MS. MILLS-BRIA: Well, just this phrase
21 that we're struggling with about regardless of any
22 prior federal.

23 It actually is better in line 7 where it
24 was originally because that whole phrase is
25 requiring the state, as trustee, to do certain

1 things regardless of any prior federal, state, or
2 local approval.

3 CHAIRWOMAN: Yeah, but the problem is, is
4 that it's not just the state that has -- that that
5 section applies to.

6 I, as a private person, could bring an
7 action regardless of prior state, federal, or local
8 approval, right, not just the state.

9 If I don't -- you know, if somebody's going
10 to be drilling on a piece of land and I want to
11 bring an action, I can bring an action and their
12 permit is not -- the fact that they have a permit is
13 not going to be some vested right for them.

14 MR. DOE: Well --

15 CHAIRWOMAN: So it's not just the state.
16 It's me too or any other citizen.

17 MR. DOE: The way I see this, if the state
18 does its job, the citizen wouldn't be required to be
19 there.

20 CHAIRWOMAN: Sure. But that's an affect.
21 That's not the way it actually reads. I mean,
22 that's how we would see that playing out.

23 But there are more rights in the initiative
24 than maybe -- you know, I mean, we have to write it
25 for what it says, not what we think it's going to

1 do.

2 MR. GELENDER: There's no doubt that
3 paragraph 3 does that. There's just no --

4 CHAIRWOMAN: Yeah.

5 MR. GELENDER: I'm still with applying to
6 what? Or what are we applying, I guess, is really
7 the better question?

8 CHAIRWOMAN: Yeah.

9 MR. GELENDER: Can we just do it right --
10 as the first phrase after "in connection therewith"?
11 So we've established common ownership, public trust
12 resources. In connection therewith prohibiting
13 actions that would impair either public trust
14 resources or that common ownership, you know, and
15 then even if or including actions previously
16 permitted or previously the subject of permits or
17 something like that.

18 CHAIRWOMAN: Well, it could be a permit or
19 something -- I mean, approval could be a land use
20 approval. It could be --

21 UNIDENTIFIED MALE: Well, maybe approval is
22 the word then.

23 CHAIRWOMAN: Yeah.

24 MR. GELENDER: In connection therewith,
25 prohibiting actions, including previously approved

1 actions --

2 MR. BLAKE: What if you just put it in two
3 places? Again, not to make it longer. I'm trying
4 to make it shorter, actually.

5 But again, put it in -- where is it? On
6 line 5 before "requiring" and then again on line --
7 now at least before line 9 where it creates the
8 private right of action.

9 And I'm looking at the proponent of the
10 rehearing to see if I've now captured all of the --

11 MR. DOE: I'm having trouble even following
12 this.

13 CHAIRWOMAN: Yeah.

14 MR. BLAKE: Fair enough. I'm mumbling. So
15 you have it in 5, and then put it again. The same
16 exact clause "regardless of any prior federal,
17 state, or local approval --

18 UNIDENTIFIED MALE: Where at?

19 MR. BLAKE: Just that same phrase, place it
20 on line 10 before "allowing".

21 UNIDENTIFIED MALE: I guess you can take
22 out what I suggested on 3.

23 UNIDENTIFIED MALE: Because that paragraph,
24 right, applies to everything above it. And there's
25 two different enforcement mechanisms, one from

1 private right of action and then there's the state.

2 UNIDENTIFIED MALE: So you want --
3 punctuation-wise, you're wanting the "regardless"
4 after resources, with a semicolon after "approval",
5 right? Or is it the beginning of the next one?

6 MR. BLAKE: Yes. There would be a -- yes,
7 a comma after "approval" in line 10. And don't do
8 it yet, but then we'd strike that, everything on
9 line 15 at the end.

10 I understand your concern. Your concern is
11 it's broad, it's potentially all encompassing, it's
12 retroactive. I understand the concern. I
13 understand why you think it's important.

14 It was in there. I'm happy to keep it in
15 there. I understand your argument about it was too
16 narrowly applied vis-à-vis the state. I don't want
17 to restate the entire initiative in the title.

18 MR. DOE: But the state is the trustee.

19 MR. BLAKE: Yeah, but you've created
20 another entity, that is anybody in the state who can
21 enforce this same right because it's a common right.
22 And the proponent of the hearing is arguing that
23 that's not clearly conveyed here.

24 MR. DOE: I think it is.

25 MR. LEONHARDT: What's troubling to me

1 that's explicit in the initiative but not clear with
2 this revision of the title is the application of
3 commercial dealings.

4 UNIDENTIFIED MALE: I'll just ask how or
5 why? This is pretty broad.

6 UNIDENTIFIED MALE: Right.

7 UNIDENTIFIED MALE: Again, I go back to my
8 -- it's assumed that the voter reads and understands
9 the title is simply the mechanism that appears on
10 the ballot.

11 But it's assumed through the blue book that
12 they have the information and we assume that they
13 read it and we assume that they understand it.

14 So we can't include every single word in
15 the initiative in the title. Otherwise, we don't
16 need a title. And this doesn't exclude commercial.
17 That's clear.

18 CHAIRWOMAN: I mean, I would think most of
19 these actions are going to be commercial dealings.

20 UNIDENTIFIED MALE: I agree.

21 CHAIRWOMAN: They're probably not going to
22 be public.

23 MR. BLAKE: They're going to be commercial
24 transactions that also have a permit, which is why
25 we don't -- I wasn't here when approval was used, or

1 created. That was in 89 or 103?

2 MR. GELENDER: I guess I'll just ask a
3 really basic question. Put aside commercial, are we
4 addressing the two constituencies that you were
5 concerned about having enforcement ability
6 regardless of time?

7 Because now you're arguing there would be a
8 third thing put in or another concept of commercial.

9 MR. LEONHARDT: Yeah, I think it does place
10 the loosening of the bonds of any prior approvals in
11 the two main places in the title where it comes into
12 play, the requirement of the state as trustee and
13 the allowing enforcement actions. Just the omission
14 of commercial dealings strikes me as material.

15 MR. GELENDER: Here's a question. I don't
16 know the answer. Notwithstanding the initiative
17 talks about applies to a public action or commercial
18 dealing that would violate and then regardless of
19 these permits, which is what we're doing.

20 I mean, are the public actions -- I guess
21 we're talking -- well, yeah, I guess public entities
22 have to be approved too sometimes. Never mind. So
23 I guess the Feds have to approve the state or the
24 state has to approve the local or whatever
25 sometimes.

1 CHAIRWOMAN: Right, yeah. That's not going
2 to be where all the litigation is.

3 UNIDENTIFIED MALE: Steve, on line 5, just
4 put a common in after "approval".

5 MS. MILLS-BRIA: So I'd just like to say
6 that if you have that phrase "regardless of any
7 prior federal, state or local approval" three times
8 in the title --

9 CHAIRWOMAN: Well, I think we're going to
10 take it out at the bottom there.

11 UNIDENTIFIED MALE: We'll take it out at
12 the end.

13 MS. MILLS-BRIA: I think it should be in
14 there once.

15 UNIDENTIFIED MALE: Well --

16 MS. MILLS-BRIA: And otherwise we're going
17 to be focusing on that, which is not the focus of
18 the initiative.

19 MR. DOE: It does tend to change the focus.
20 The focus where somebody else is taking our
21 initiative and made it something we didn't intend.

22 All we intended here was that if, with this
23 initiative, the public trust has to be protected.

24 And that's regardless of any prior approvals.

25 That's all we're -- you know, and the

1 mechanisms are, first of all, the state. But the
2 public has a right to challenge the state if it
3 doesn't do its job. I mean, that's the problem we
4 have now.

5 MR. BLAKE: Let me stop you there. I
6 appreciate it. I don't it changes the focus. And
7 what you've just articulated is, the state should
8 did its job first. If the state fails, there's a
9 second mechanism to back up state failure.

10 So you have in this created two enforcement
11 mechanisms. And the paragraph 5, which weighs
12 timeliness of when those actions can be brought and
13 applied, applies to both of those enforcement
14 mechanisms.

15 That's proponent's -- that's part of the
16 rehearing's argument, and I'm sympathetic to it.

17 So the question is, how do you structure
18 it? Both of those -- those two entities have
19 different things under the initiative, but what they
20 share is regardless of the date of the applicable
21 approval. So that is shared by both of these two
22 entities that can act under this new public trust
23 resource.

24 MR. DOE: But they wouldn't be acting if
25 the state followed its actions as a trustee.

1 MR. BLAKE: That's irrelevant. They still
2 can if the state doesn't.

3 MR. DOE: Fine. But it's the fallout.
4 It's a fallout position. I mean, our argument is
5 the state cannot circumvent this initiative by
6 saying they already have a permit. That is our only
7 intent.

8 I mean, otherwise I can see, you know,
9 administratively this thing -- well, whatever goes
10 before this date is what goes. And that is not our
11 intent.

12 MR. BLAKE: I understand. Fair enough.
13 But that may or may not be what the words say on the
14 paper. And we've copied the words from the paper.

15 MR. DOE: Well --

16 MR. BLAKE: Because you've created a
17 private right of action --

18 MR. DOE: Right.

19 MR. BLAKE: -- independent of what the
20 state does. It's not contingent on --

21 MR. DOE: That's the only (inaudible) we
22 have.

23 MR. BLAKE: Well, but it's not contingent
24 upon the state. The state does its job. You're
25 right. There's no reason that somebody else, but if

1 somebody's unhappy with what the state does or the
2 state fails to do what you expect them to do, then
3 you can step into the state's shoes under the plain
4 language of this and do it regardless of the time.

5 We have in the title bifurcated that
6 because there are different ways to enforce and I
7 think the "regardless" phrase, which is at the end,
8 applies to all which proceeds it. And that's what
9 we're trying to convey.

10 I'm sympathetic to the proponent of the
11 rehearing's concern. That's my -- in order to make
12 the record clear, why I'm making the suggestion I
13 am, that it appear twice. Because it does, in fact,
14 apply in two different significant places in the
15 initiative.

16 UNIDENTIFIED MALE: All right.

17 UNIDENTIFIED MALE: I'm good with the title
18 as it appears, I think. I'll want to look at it
19 clean, but I think we're set from our perspective.

20 CHAIRWOMAN: Okay. And do you want to
21 clean it and I'll read it?

22 UNIDENTIFIED MALE: All right.

23 CHAIRWOMAN: This is an amendment to the
24 Colorado Constitution concerning common ownership by
25 all Coloradans of public trust resources and in

1 connection therewith defining public trust resources
2 as clean air, clean water, and the preservation of
3 the environment and natural resources.

4 Regardless of any prior federal, state, or
5 local approval requiring the state, as trustee, to
6 conserve and maintain public trust resources by
7 using the best science available to protect them
8 against any substantial impairment, to seek natural
9 resource damages from anyone who is substantially
10 impairs them and to use damages -- from anyone who
11 substantially impairs them and to use damages
12 obtained to remediate the impairment.

13 Regardless of any prior federal, state, or
14 local approval allowing Colorado citizens to file
15 enforcement actions in court, requiring anyone who
16 is proposing an action or policy that might
17 substantially impair public trust resources to prove
18 that the action or policy is not harmful, requiring
19 referral for prosecution of any criminal offense
20 involving the manipulation of data, reports, or
21 scientific information in an attempt to use public
22 trust resources for private profit.

23 UNIDENTIFIED MALE: And other than that, we
24 just (inaudible) an "and" on line 11 after
25 "harmful".

1 UNIDENTIFIED MALE: I don't have any
2 further comments.

3 CHAIRWOMAN: Okay.

4 MR. GELENDER: My only comment is just for
5 the record indicate that I will be voting no on the
6 motion just because I don't agree that we should be
7 setting a title, but I do think that this title is
8 quite a bit an improvement over what we had before.

9 CHAIRWOMAN: All right. Then do you want
10 to make the motion?

11 MR. BLAKE: I would make a motion to adopt
12 the title as it appears on the screen.

13 CHAIRWOMAN: Okay. And can we just deny
14 the rehearing except to the extent that we're
15 adopting?

16 MR. BLAKE: And to deny the rehearing --

17 CHAIRWOMAN: You're denying the rehearing
18 except to the extent that we have changed the title.

19 MR. BLAKE: And denying the rehearing
20 except to the extent that we have modified the
21 title.

22 CHAIRWOMAN: Right. Second. All those in
23 favor? Aye.

24 MR. BLAKE: Aye.

25 CHAIRWOMAN: Opposed?

1 MR. GELENDER: No.

2 CHAIRWOMAN: All right. Okay. That
3 concludes the meeting of the Title Board. And the
4 time is 2:25. And we are adjourned until the next
5 session. Thank you.

6 (The hearing was concluded at 2:25 p.m.)

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF ADAMS)

I, Geneva T. Hansen, do hereby certify that
I am a Professional Shorthand Reporter and Notary
Public within the State of Colorado.

I further certify that the foregoing
transcript constitutes a true and correct transcript
to the best of my ability to hear and understand the
audio recording.

I further certify that I am not related to,
employed by, nor of counsel for any of the parties
or attorneys herein, nor otherwise interested in the
result of the within action.

IN WITNESS WHEREOF, I have affixed my
signature and seal this 19th day of January, 2015.

My commission expires 11-18-15.

 GENEVA T. HANSEN
 (303-465-9004)

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