DATE FILED: February 4, 2015 5:33 PM

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) Appeal from the Title Board	
IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2015-2016 #4 **Petitioner:** DOUGLAS KEMPER, as Registered Elector of the State of Colorado; v. **Title Board:** SUZANNE STAIERT, JASON GELENDER, and DAVID BLAKE; and **Respondents:** PHILLIP T. DOE and BARBARA MILLS-BRIA	▲ **COURT USE ONLY** ▲
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OPENING BRIEF

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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, not to an entire document, where the issue was raised and ruled on.

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ISSUES PRESENTED

1. Whether the Title Board ("Board") incorrectly determined that Initiative 2015-2016 #4 (the "Initiative") is limited to a single subject,[1] as required by article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5, in light of the multiple objectives of this measure to:

- Create a common property interest in natural resources, including water and minerals;
- Impose obligations for the State to protect the environment; and
- Require referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources.

2. Whether the Board's title and ballot title and submission clause (collectively, the "Titles") for Initiative 2015-2016 #4 are misleading and likely to create confusion among the voters, and are unfair and do not fairly express the true intent of the Initiative because:

- The Titles improperly omit any mention of the creation and declaration of "common property" rights in specified resources, which

[1] The Board identified the measure's subject in the Title as "common ownership by all Coloradans of public trust resources."

is a material feature of the Initiative that must be disclosed in the Titles;

- The "concerning" phrase is misleading in that it uses the Initiative's specially-defined phrase, "public trust resources," to conceal the multiple subjects contained therein.
- The Titles improperly omit mention that the Initiative's retroactive effect deals with commercial dealings as well as public actions.

STATEMENT OF THE CASE

A. Statement of Facts.

Phillip Doe and Barbara Mills-Bria ("Proponents") proposed Initiative #4, a copy of which is attached as **Appendix A**. Mr. Doe and Ms. Mills-Bria previously proposed 2013-2014 Initiative #103, the text of which is nearly identical to Initiative #4. On procedural grounds that are not at issue here, this Court held that Title Board lacked statutory authority to set a title for Initiative #103. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103,* 328 P.3d 127, 128 (Colo. 2014). Because of the procedural issues, the Court did not consider whether Initiative 2013-2014 #103 contained a single subject.

Initiative #4, like Initiative 2013-2014 #103 before it, would amend article XVI of the Colorado Constitution by adding a new Section 9, containing six subsections. Subsection (1) declares that the people of Colorado have an "inalienable right to clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources . . .." These resources are collectively defined in subsection (1), and are referred to in the Initiative, as "public trust resources." Subsection (1) goes on to declare that these public trust resources are the "common property of all the people, including generations yet to come," and then the subsection obligates the state to "conserve and maintain [these resources] for the benefit of all the people."

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

Subsection (3) of the initiative allows any Colorado citizen, "as beneficiary of public trust resources," to petition in court "to defend and preserve such resources against substantial impairment," and to "ensure that the state is meeting its obligations as trustee." Subsection (3) also addresses the remedies that may be granted in these citizen suits.

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

Subsection (5) declares that this new Section of the Constitution is self-enacting and self-executing, but further states that it shall apply to a public action or commercial dealing that violates the provision of the new Section, "regardless of the date of any applicable local, state, or federal permits." Finally, subsection (6)

provides that laws may be enacted to "enhance, but cannot be contrary to" the new Section.

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

The Board conducted a public hearing (the "Initial Hearing") on December 17, 2014, pursuant to C.R.S. § 1-40-106. The Board then considered Initiative #4, determined by majority vote (two to one) that it consisted of a single subject, and set the Titles. Petitioner Douglas Kemper, a registered elector of the state of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on December 24, 2014. The Motion for Rehearing was heard at the next scheduled meeting of the Board (the "Rehearing") on January 7, 2015. The Board denied the Motion for Rehearing by majority vote, except to the extent that the Board made changes to the Titles. Board member Jason Gelender voted to grant the Motion on grounds that the Initiative was not a single subject. The Board designated and fixed the following title at the Rehearing:

> An amendment to the Colorado constitution concerning common ownership by all Coloradans of public trust resources and, in connection therewith, defining public trust resources as clean air, clean water, and the preservation of the environment and natural resources; regardless of any prior federal, state, or local approval, requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, to seek natural resource damages from

> anyone who substantially impairs them and to use damages obtained to remediate the impairment; regardless of any prior federal, state, or local approval, allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and requiring referral for prosecution of any criminal offense involving the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

Title as set at Rehearing on January 7, 2015, Appendix A at 12-13. The ballot title and submission clause as designated and fixed by the Board is substantially the same as the title, except that it begins with the phrase, "Shall there be," and ends with a question mark. Mr. Kemper seeks review of the final action of the Board pursuant to C.R.S. § 1-40-107(2).

SUMMARY OF THE ARGUMENT

Initiative #4 has multiple subjects. Not only does it create a constitutional public trust doctrine, linked to a broad declaration of common property in the environment and natural resources, it also: (1) creates a new common property interest in natural resources, including water and minerals, to mandate preservation of these resources; (2) imposes obligations on the State to protect the environment; and (3) requires referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources. These subjects, hidden under

the broad umbrella of a public trust, lack any necessary or proper connection and must be pursued as separate initiatives.

Even if the Board had jurisdiction to set a title, the Titles set by the Board do not fairly express the true intent and meaning of Initiative #4. The Titles fail to describe one of the Initiative's central features, its creation and declaration of "common property" rights in specified resources, mentioning only that the initiative is one "concerning" common ownership. The Titles improperly use the Initiative's specially defined phrase, "public trust resources," to encompass multiple subjects as summarized above. Moreover, the Titles fail to state that the Initiative's retroactive effect on previously permitted activities extends to commercial dealings, not only to state government and court actions.

LEGAL ARGUMENT

I. Initiative #4 violates the single subject rule because it attempts to accomplish multiple discrete purposes.

This Court should reverse the Board's decision to set titles for Initiative #4 because it violates the single subject rule. It contains at least the following distinct subjects and purposes:

- To create a common property interest in natural resources, including water and minerals;

- To impose obligations for the State to protect the environment; and
- To require referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources.

A. Standard of Review.

The Colorado Constitution prohibits the Board from setting a title for a proposed initiative that contains more than one subject. *In re Title, Ballot Title, and Submission Clause for 2007-2008 #61*, 184 P.3d 747, 749 (Colo. 2008). A proposed initiative violates the single subject requirements of article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5 when it "relate[s] to more than one subject and . . . [has] at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 253 (Colo. 2000) (quoting *In re Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1078-79 (Colo. 1995)) (brackets in original). In contrast, a proposed measure that "tends to effect or to carry out one general objective or purpose presents only one subject." *In re Title, Ballot Title, Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). Mr. Kemper raised this issue in his Motion for Rehearing. Appendix A at 7.

Generally, the Board's actions are treated as presumptively valid. *In re Title, Ballot Title, Submission Clause, and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1222 (Colo. 2000). Nonetheless, the "court must sufficiently examine an initiative to determine whether a measure violates the single subject rule." *In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). When necessary, the Court may characterize a proposal sufficiently to enable review of the Board's actions. *Id*. The Court must "examine sufficiently an initiative's central theme, as expressed, to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme." *Id*. at 279. In the event the Court determines an initiative contains multiple subjects, it must overturn the Title Board's finding that the initiative contains a single subject. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014).

B. Initiative #4 is so broad that it is impossible to define a single subject.

In order to present a single subject, a proposed measure must "effect or . . . carry out one general objective or purpose." *In re Ballot Title 1999-2000 #25*, 974 P.2d at 463. This Court has held that a common theme of "water" is too broad to constitute a single subject. *See In re Proposed Initiative "Public Rights in Waters*

II," 898 P.2d 1076, 1080 (Colo. 1995). It has also held that "environmental conservation" was too broad to contain a single subject. *In re Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 875-76 (Colo. 2007).

Although the Court recently held that a public right in Colorado's environment was a single subject (*In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 183 (Colo. 2014)), Initiative #4 encompasses much broader subject matter than Initiative 2013-2014 #89 did. In addition to requiring protection of the environment, it creates a new common property interest in natural resources and water that are currently privately held and requires criminal prosecution referral for certain activities. It is unclear whether the primary purpose of Initiative #4 is to force environmental regulation, preserve natural resources, or eliminate private ownership of natural resources. That the initiative seeks to unify these concepts (and criminal prosecution) under the broad theme of a public trust doctrine does not make them a single subject. Initiative #4 contains at least three separate subjects that are not dependent upon or connected with one another.

1. **The Initiative creates a new common property interest and public trust in all natural resources.**

The Initiative defines "Public Trust Resources" to include clean air, clean water and the environment and natural resources. Appendix A, Subsection (1). It then declares that Public Trust Resources "are the common property of all the people." *Id*. The Initiative does not define the term "natural resources." Black's Law Dictionary (9th ed. 2009) defines "natural resource" as "[a]ny material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife." As in Initiative 2013-2014 #89, the term "common property" is also undefined in the Initiative. As Justice Hobbs recently noted, the ordinary meaning of "common property" is: "1: land in which all members of the community hold equal rights; 2: land or other property in which a person other than the owner holds certain rights in common with the owner." *In re Ballot Title 2013-2014 #89*, 328 P.3d 172, 182 (Colo. 2014) (Hobbs, J., dissenting) (*citing Webster's Third New International Dictionary 459 (1971)*). Thus, common property is distinct from the traditional "bundle of sticks" property rights held by private property owners. *See id*. Creation of a common property interest in natural resources such as water and minerals is at odds with Colorado's

established legal regime and, therefore, is a separate subject from creating an inalienable right to environmental protection.

The text of Initiative #4 blurs the boundary between creation of a common property interest in natural resources and environmental regulation, making the two sound like a unified subject. However, the differences between these themes are substantial, and the unifying phrase "public trust resource" cannot make them a single subject. This Court has routinely held that initiatives that pertain to different requirements within TABOR or broadly seek to amend multiple TABOR provisions violate the single subject requirement despite the theme of amending or repealing TABOR. *See, e.g., In re Title, Ballot Title and Submission Clause for 2001-2002 # 43*, 46 P.3d 438, 447 (Colo. 2002) (holding that an initiative to repeal TABOR contained multiple subjects). Just as modification of TABOR is too broad to be a single subject, overhauling the state's ownership of natural resources is too broad to constitute a single subject because of the variety of different resources, statutory and regulatory schemes affected.

a. <u>The conversion of natural resources to common property is not connected with the other subjects of the initiative</u>.

Under current Colorado law, minerals and other natural resources are owned as private property, as are rights to use water. Converting the ownership of these

resources to common property is a subject of its own that cannot permissibly be combined with the other subjects in the Initiative. The right of private and public entities to beneficial use of water has been recognized since Colorado's statehood. *See* Colo. Const. art. XVI, § 5 ("The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."); Colo. Const. art. XVI, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). Only unappropriated water is the public's property; others acquire property rights in this resource by appropriation and beneficial use. *See La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 25 P.2d 187 (Colo. 1933). An appropriative water right is a "most valuable property right" to use a certain amount of water, subject only to the amount of water physically available for appropriation and the amount taken to satisfy senior priorities. *Navajo Dev. Co., Inc. v. Sanderson*, 655 P.2d 1374, 1378 (Colo. 1982) (internal citation omitted).

It is also well settled in Colorado law that mineral rights are subject to private ownership and may be sold independent of the overlying property. *See, e.g. Mitchell v. Espinosa*, 243 P.2d 412, 416 (Colo. 1952); *Calvat v. Juhan*, 206

P.2d 600, 603 (Colo. 1949). The Colorado State Land Board owns significant mineral interests "in a perpetual, inter-generational public trust for the support of public schools," and is obligated to ensure that those interests "produce reasonable and consistent income over time" while "[m]anaging the development and utilization of natural resources in a manner which will conserve the long-term value of such resources . . .." Colo. Const. art. IX, § 10(1)(b)(III); *see also* C.R.S. §§ 36-1-113-15, 138, 140, 147 (including provisions for mineral leasing and location). In fact, whenever the State Land Board sells trust property, it is required to "reserve to the state all rights to all minerals, ores, and metals of any kind and character, and all coal, asphaltum, oil, gas, or other like substances in or under such land, and all geothermal resources and the right of ingress and egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances." C.R.S. § 36-1-125(1). Declaring that these natural resources are the common property of all the people would be a dramatic change in the nature of both private property and state trust property.

Numerous regulatory agencies in Colorado protect the environment while acknowledging and respecting private ownership, development and use of natural resources. For example, The Colorado Water Quality Control Act provides that:

> No provision of this article shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of article XVI of the constitution of the state of Colorado, compacts entered into by the state of Colorado, or the provisions of articles 80 to 93 of title 37, C.R.S., or Colorado court determinations with respect to the determination and administration of water rights.

C.R.S. § 25-8-104(1). The Colorado Mined Land Reclamation Act provides that:

> It is the intent of the general assembly by the enactment of this article to foster and encourage the development of an economically sound and stable mining and minerals industry and to encourage the orderly development of the state's natural resources, while requiring those persons involved in mining operations to reclaim land affected by such operations so that the affected land may be put to a use beneficial to the people of this state. It is the further intent of the general assembly by the enactment of this article to conserve natural resources, to aid in the protection of wildlife and aquatic resources, to establish agricultural, recreational, residential, and industrial sites, and to protect and promote the health, safety, and general welfare of the people of this state.

C.R.S. § 34-32-102(1). The Colorado Oil and Gas Conservation Act provides that:

> It is declared to be in the public interest to . . . Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner

> consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources. [2]

C.R.S. § 34-60-102(1)(a)(I).

Colorado has never treated environmental protection and ownership of natural resources as a single intertwined notion. Colorado's state government has a Department of Natural Resources, with divisions and boards involved in water rights administration and conservation, oil and gas, mined land reclamation, and parks and wildlife. *See* C.R.S. § 24-1-124. It has a separate Department of Public Health and the Environment with divisions charged with regulation to protect clean air, clean water and the environment (along with other public health-related functions). *See* C.R.S. § 24-1-119. Initiative #4's conversion of private property to common property, coupled with the adoption of a public trust doctrine, has no necessary or proper connection to the creation of an inalienable right to clean air and clean water.

[2] The Precautionary Principle mandated by Initiative #4 prohibits this type of balancing of policy and thus could require a wholesale change in the manner in which these agencies regulate.

b. The Initiative creates a public trust in natural resources that is broader than the common law public trust doctrine.

Subsection (2) of the Initiative requires the state to act as trustee of the public trust resources and to protect these resources from substantial impairment. The Initiative's designation of "Public Trust Resources" and corresponding trustee obligations would impose a public trust for preservation of all the state's natural resources, including mineral and water rights. The public trust created by Initiative #4 is broader than the public trust over water that this Court has previously considered and held to be its own subject. *See In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562 (Colo. 2012).

In its traditional common law form, the public trust doctrine declared that the State holds its navigable waters and the lands underneath them in trust for the people. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Some states have adopted this doctrine, either by constitutional provisions or judicial development of common law. For example, the California Supreme Court has held that the state has public trust obligations to preserve tidelands "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and

which favorably affect the scenery and climate of the area." *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). Some states have even expanded the public trust to apply to all waters of the state, to beaches, wildlife and state parks. *See* Charles F. Wilkinson, "The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine." 19 Env.L. 425, 465-66 (1989).

Colorado, by contrast, has never recognized any form of public trust doctrine, having rejected such a concept as inconsistent with Colorado's constitution and prior appropriation doctrine. *People v. Emmert*, 597 P.2d 1025, 1027-28 (Colo. 1979); *see also In re Ballot Title 2011-2012 #3*, 274 P.3d at 573 (Hobbs, J., dissenting); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1263 (Colo. 1995) (Mullarkey, J., dissenting). While this Court has held that an initiative may propose adoption of a public trust doctrine in water, it must do so as a single subject that stands on its own. *See In re Ballot Title 2011-2012 #3*, 274 P.3d 562; *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *Public Rights in Water II*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994). Initiative # 4 proposes to create an entirely unprecedented form of public trust duty placing all natural resources, including air, water and minerals, in a public trust. Subsections (1) and (2). This

public trust is far broader than the traditional common law notion of a public trust in that it applies not only to navigable waters, but other resources as well. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L.REV. 1437, 1439–40 (2013) (explaining that many states that have embraced a public trust doctrine applicable to navigable waters have not embraced a public trust duty to protect other natural values such as wildlife). Even if creation of such a broad public trust can be considered a single subject, it is not necessarily and properly connected to the creation of an inalienable right to clean air and clean water.

2. <u>The initiative imposes sweeping new obligations for the State to protect the environment.</u>

The initiative fundamentally changes Colorado's environmental protection system by: (1) creating a new inalienable right to Colorado's environment; (2) redefining standards for environmental protection; and (3) requiring the State to seek natural resource damages. Even if these three objectives can be considered an implementation mechanism for increased environmental protection, they are not necessarily and properly connected to the creation of common property rights subject to a public trust, or to requiring those who manipulate data to be referred for criminal prosecution.

a. The initiative creates a new inalienable right to Colorado's environment.

Initiative #4 defines a new "inalienable right" to Colorado's environment, and requires the state to protect that right. This is essentially the same subject that the Court found to exist in *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177 (Colo. 2014). In 2013-2014 #89, however, each provision was expressly linked to the unifying theme of "Colorado's environment," so the Board and the Court majority found this was the Initiative's only subject. *Id*. State agencies currently regulate many aspects of the environment, including air and water quality. *See, e.g.*, Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101 *et seq.*; Colorado Water Quality Control Act, C.R.S. § 25-8-101, *et seq*. The recognition of a new inalienable right in the environment, including clean air and clean water, represents a fundamental shift in the nature of environmental regulation.

Inalienable rights are the subject of Section 3 of the Colorado Bill of Rights, which provides that "all persons have certain natural, essential and inalienable rights," including life, liberty, possessing property, and seeking happiness. Colo. Const. art. II, § 3. Inalienable rights are recognized, not granted, by the Constitution and have their origin in nature independent of any express provision

of law. *Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 760 (Colo. App. 2002). Inalienable rights are considered to be of fundamental significance. *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531, 542 (Colo. 1992) (Kirshbaum, J. dissenting).

Subsection (3) of the Initiative provides a direct cause of action against the state for failure to protect the environment, reflecting the notion that inalienable rights are self-executing and require no specific statutory remedy. *See Herbertson v. Russell*, 371 P.2d 422, 429 (Colo. 1962). Consistent with the creation of this inalienable right, the Initiative proposes sweeping changes to Colorado's environmental protection system. These changes, however, are not necessarily or properly connected with creation of common property interests or criminal business activities.

b. <u>The initiative redefines standards for environmental protection.</u>

The Initiative requires the state to protect the public's inalienable right to Colorado's environment from "substantial impairment." The standards set forth in the Initiative are a fundamental shift in approach to environmental regulation and management. The state must "use the best science available in any process or proceeding in which public trust resources may be affected." Subsection (4). The

state must also employ the "precautionary principle," described as: "if an action or policy has a suspected risk of substantially impairing public trust resources, in the absence of scientific consensus that the action or policy is harmful, the burden of proof that it is not harmful falls on those proposing to take the action." Subsection (2). Colorado's environmental laws provide for standards and regulations tailored to the nature and degree of risk, rather than a single unifying standard such as the precautionary principle.[3] By setting a uniform constitutional standard for all environmental regulations, the Initiative introduces a subject that is not necessarily or properly connected to common ownership of natural resources or referring parties for criminal prosecution.

c. The Initiative requires the State to seek natural resource damages from entities.

The Initiative also directs the state to pursue "natural resource damages from those entities that cause substantial impairment of public trust resources"

[3] *See*, *e.g.* C.R.S. § 25-1-301.52(c)(IV) (hazardous waste program employs "[r]ealistic cleanup standards that address actual risk to human health and the environment on a site-specific basis."); C.R.S. § 25-7-106(1)(a)-(c) (air quality control program classifies "attainment, nonattainment, and unclassifiable areas," defines "different degrees or types of pollution," and enacts "[e]mission control regulations that are applicable to the entire state . . . specified areas or zones of the state, or . . . when a specified class or pollution is present."); C.R.S. §§ 25-8-202(1)(a)-(b), 25-8-203-205 (water quality control program classifies state waters based on beneficial uses, and promulgates water quality standards and regulations to protect those beneficial uses).

subsection (2). The Initiative does not define "natural resource damages," but presumably they are similar to the damages that federal and state trustees may collect pursuant to the Comprehensive Environmental Response, Compensation & Liability Act of 1980 ("CERCLA"). 42 U.S.C. § 9607(a)(4)(C) (authorizing claims for "damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss . . . "). While this could be considered part of the change in direction of environmental regulation, it is not necessarily or properly connected with the Initiative's subjects involving property rights and criminal prosecution.

3. Initiative #4 requires referral for prosecution of data manipulation.

Not only would the Initiative impose trust responsibilities altering private property rights that have long been recognized and protected in Colorado, but it would modify criminal law in a way that is not necessary or connected to "public ownership of natural and environmental resources." Subsection (4) requires the state to refer "for prosecution for any criminal offenses that may apply" any person, corporation, or other entity found to be "manipulating data, reports, or scientific information in any attempt to utilize public trust resources for private profit." There is no such crime under Colorado law entailing the specific elements

of "manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit."

By subjecting someone to potential criminal prosecution for any such act, Initiative #4 brings criminal law into its mix of subjects. Criminalizing the manipulation of certain data in order to generate private profit has no necessary or proper connection to the adoption of a public trust doctrine. Neither does it have a necessary or proper connection to the creation of an inalienable right to clean air and clean water.

C. Initiative #4 improperly combines unrelated substantive and procedural changes, and would cause voter surprise.

This Court has held that unrelated substantive and procedural changes cannot be combined in a single initiative. *In Re Ballot Title 2013-2014 #76*, 333 P.3d at 81-82. Initiative 2013-2014 #76 proposed to revamp constitutional provisions governing the manner in which state and local recall elections are triggered and conducted, and also to create a new constitutional right to recall non-elected state and local officers. *Id*. at 78. The proponents of that initiative argued that substantive and procedural changes were elements of as single overarching theme, "recall of government officers." *Id*. at 79. The Court rejected that argument, holding that an "umbrella phrase" did not unify the initiative, and that it

was impermissible "to set a title for an initiative that combines process changes with other substantive changes that have no necessary or proper connection with each other." *Id*. at 86. Initiative #4 proposes substantive changes in the nature of property ownership, combined with procedural changes to the manner in which the state regulates to protect the environment, and a new referral requirement for criminal prosecution. Similar to Initiative 2013-2014 #76, the procedural changes in this measure are not necessarily or properly connected to the substantive creation of common ownership.

Even where two or more subjects are related, they must not be so different as to confuse the voters, or to enact one issue surreptitiously disguised by another. This Court has recognized the dangers that arise if a broad initiative contains multiple subjects. Multiple subjects within an initiative set up the kind of "logrolling" that voters intended to prevent when adopting the single-subject constitutional requirement in 1994. *In re Title, Ballot Title, and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1079 (Colo. 2010). Another danger is the "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex issue." *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009) (*quoting In*

re Title, Ballot Title and Submission Clause for 2007-2008 #17, 172 P.3d 871, 875 (Colo. 2007)).

Initiative #4 presents this danger of voter surprise and fraud by logrolling three distinct purposes hidden under a broad theme of preserving the environment and natural resources. Perhaps the most surreptitious aspect of the Initiative is manner in which it defines and recognizes a new inalienable right in natural resources. Subsection (1) declares that "the people of Colorado have an inalienable right to clean air, clean water, and the preservation of the environment and natural resources." A voter would be understandably surprised to learn that, by voting to acknowledge a new inalienable right in clean air and clean water, he or she is voting to abolish private property rights in natural resources that have existed for over 150 years. Similarly, a voter who supported increased protection of the environment may not support making private property rights common property, or requiring criminal prosecution of currently permitted activities. The single subject requirement is intended to avoid garnering support from differing factions, each with differing political supporters. *See In re Title, Ballot Title, Submission Clause, and Summary for 1997-1998 #30*, 959 P.2d 822, 827 (Colo. 1998) (holding that voter surprise would result if the initiative passed because

voters would be enticed by a tax cut not realizing that the initiative would also add new criteria applicable to ballot measures regarding revenue and spending increases). To avoid such voter confusion, this Court should overturn the Title Board's finding of a single subject.

II. The Titles set for Initiative #4 do not fully express the Initiative's true meaning and intent.

The Titles should be "a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative." C.R.S. § 1-40-102(10). In setting titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b). The Titles fail to meet these standards because they describe Initiative #4's subject as "concerning common ownership of all Coloradans of public trust resources," and improperly omit material provisions of the Initiative.

A. Standard of Review.

In reviewing titles, the Court must "engage all legitimate presumptions in favor of the propriety of the Title Board's actions. . . ." *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). While

the Court may not rewrite the titles or submission clause for the Board, it must determine whether the prohibition against unclear titles has been violated. *Id*. The Court will "reverse the Board's action in preparing [the titles] if they contain a material and significant omission, misstatement, or misrepresentation." *Id*. (quotations omitted). Ballot titles "'shall correctly and fairly express the true intent and meaning' of the initiative," unambiguously stating the principle of the amendment. *Id*. (quoting C.R.S. § 1-40-106(3)(b)). Further, the Colorado constitution also requires that the title clearly express the initiative's single subject. *In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 647-48 (Colo. 2010).

> The matter covered by [the initiative] is to be clearly, not dubiously or obscurely, indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind.

Id. (citation omitted) (bracket in original). Mr. Kemper raised this issue in his Motion for Rehearing. Appendix A at 9-10.

B. The Titles Improperly Fail To Mention the Creation and Declaration of "Common Property" Rights in Specified Resources.

Titles must provide voters sufficient information that they can determine intelligently whether to support or oppose the proposal. *In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850 (Colo. 1994). Titles are rendered misleading by a "material omission," because the failure to disclose a key feature of the initiative can cause confusion and mislead voters about what the initiative proposes. *In re Title, Ballot Title and Submission Clause, and summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1098-99 (Colo. 2000). Such an omission is a "fatal defect." *Id*. at 1099.

Here, the Initiative's declaration of "common property" in preservation of all natural resources is a key feature. As discussed above, this constitutional declaration of "common property" would apply to resources, including water and minerals, in which private parties and local communities commonly hold property rights based on longstanding provisions of the Colorado Constitution.

However, the only mention of common property in the Titles is in the opening phrase, presenting the constitutional amendment as one "concerning common ownership by all Coloradans of public trust resources." This phrase does

not inform voters that the initiative would create common property rights in all public trust resources, or even that it declares such resources to be "common property." Lacking such information in the Titles, many voters likely will conclude that the initiative merely "concerns" common ownership that already exists under Colorado law. This omission is material and is likely to mislead voters.

C. The Titles Improperly Use the Phrase "Public Trust Resources" to Encompass Multiple Subjects.

The Titles' opening phrase states that the proposed amendment is one "concerning common ownership by all Coloradans of public trust resources." The Titles then proceed to summarize the Initiative's special definition of "public trust resources."

As discussed above, there is no public trust doctrine in current Colorado law, let alone any definition of "public trust resources." Moreover, the Initiative's definition of "public trust resources" encompasses the disparate subjects of environmental protection and preservation of natural resources, contrary to the requirement that every initiative be limited to a single subject. In summarizing the Initiative's subject matter with the phrase "concerning common ownership by all Coloradans of public trust resources," the Titles create several misleading

implications: that certain resources are currently understood to be "public trust resources"; that such resources are subject to common ownership under current law; and that such resources can be categorized together as a single subject. Use of such language is improper in the Titles, as it cannot be clearly understood by the voters.

D. The Titles Improperly Omit Mention that the Initiative's Retroactive Effect Pertains to Commercial Dealings, Not Only to Public Actions.

Section (5) of the Initiative specifies that this measure's provisions "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 Title ignores this provision's direct application to any "commercial dealing" that would violate the Initiative.

The Board's Title does note that the Initiative would require the state to take certain actions as trustee, "regardless of any prior federal, state, or local approval." Similarly, it states that Colorado citizens would be allowed to file enforcement actions in court "regardless of any prior federal, state, or local approval." However, the Title is silent with regard to the Initiative's express applicability (including retroactive applicability) to commercial dealings that would violate the terms of the

initiative. Such commercial dealings may include contracts that have been executed and performed before the Initiative takes effect. Such dealings may also include conveyances of property rights executed and recorded before enactment of the Initiative. Section (5) states that such commercial dealings would be in jeopardy, even where any necessary federal, state, or local permits were obtained before enactment of the Initiative.

The Title recognizes that certain provisions of the Initiative apply "regardless of any prior federal, state, or local approval." However, this phrase is connected only to the state's obligations as trustee, and to the authorization of judicial enforcement actions. It fails to alert the voters that any previously permitted commercial dealings would be in jeopardy.

CONCLUSION

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 4th day of February 2015.

BURNS, FIGA & WILL, P.C.

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

By: *s/Stephen H. Leonhardt*
Stephen H. Leonhardt
Alix L. Joseph
Attorneys for Petitioner, Douglas Kemper

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **OPENING BRIEF** was served via ICCES on this 4th day of February 2015, as follows:

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s/Michelle G. Trujillo
Michelle G. Trujillo

DATE FILED: February 4, 2015 5:33 PM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

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

the attached are true and exact copies of the filed text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2015-2016 #4 'Public Trust Resources'".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand .....
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 8th day of January, 2015.

SECRETARY OF STATE

Be it Enacted by the People of the State of Colorado

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

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

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

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

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

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

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

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

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Ballot Title Setting Board

Proposed Initiative 2015-2016 #4[1]

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

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

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

Shall there be an amendment to the Colorado constitution concerning public ownership of natural and environmental resources, and, in connection therewith, creating a public trust in those resources, which include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, regardless of any prior federal, state, or local approval and to seek natural resource damages from anyone who substantially impairs them and using damages obtained to remediate the impairment; allowing Colorado citizens to file

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[1] Unofficially captioned **"Public Trust Resources"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and requiring the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit to be referred for prosecution for any applicable criminal offense?

Hearing December 17, 2014:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 1:45 p.m.

BEFORE THE TITLE BOARD, STATE OF COLORADO

MOTION FOR REHEARING

IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2015-2016 #4

Petitioner, Douglas Kemper, a registered elector of the State of Colorado, by and through his counsel, Burns, Figa & Will, P.C., hereby requests a rehearing and reconsideration of the title and ballot title and submission clause (collectively the "Titles") set by the Title Board on December 17, 2014, for Initiative 2015-2016 #4 (the "Initiative"), which would amend the Colorado constitution.

I. Grounds for Reconsideration

Reconsideration is requested for the following reasons:

1. The Initiative and Titles do not conform to the single-subject requirements of art. V, section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5.

2. The Title Board's chosen subject phrase is too broad and vague and would cause public confusion regarding the effect of a "yes/no" vote on the Initiative in violation of C.R.S. § 1-40-106.

3. The Titles are misleading and do not express the true intent of the Initiative.

The Initiative violates the single-subject requirements of the Colo. Const. art. V, § 1(5.5) and C.R.S. § 1-40-106.5, by having these three separate, distinct, and unrelated subjects veiled by the overly broad term "concerning public ownership of natural and environmental resources":

1. Imposing obligations for regulation to protect the environment.

2. Creating a common property interest in natural resources, including water and minerals, to mandate preservation of these resources.

3. Requiring referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources.

These subjects are not necessarily and properly connected. Thus, the Title Board should not set titles for the Initiative.

II. The Initiative is so broad that it is impossible to define a single subject or to set a title that accurately reflects the true purposes of the measure.

The Title Board must examine an initiative's central theme "to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme." *Gonzalez-Estay v. Lamm*, 138 P.3d 273, 279 (Colo. 2006). An initiative does not satisfy the single-subject requirement if its provisions contain separate and unconnected purposes, despite the proponents' efforts to unite them under the same general area of the law. *In re Title, Ballot Title, and Submission Clause, and Summary for 1999–2000 # 200A*, 992 P.2d 27, 30 (Colo. 2000). The Colorado Supreme Court has held that "water" was too broad a theme to satisfy the single-subject requirement, *Public Rights in Water II*, 898 P.2d 1076, 1080 (Colo. 1995). Similarly, it has held that "environmental conservation" was too broad to contain a single subject. *In re Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 875-76 (Colo. 2007). "Public ownership of natural and environmental resources" is too broad to reflect the separate subjects and purposes contained in the Initiative. The proponents' use of the defined phrase "Public Trust Resources," to combine the separate issues of environmental protection and natural resource preservation, does not unite the two into a single subject.

The Initiative contains at least these three subjects:

A. Imposing obligations for regulation to protect the environment.

State agencies currently regulate many aspects of the environment including air and water quality. *See e.g.*, Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101 *et seq.*; Colorado Water Quality Control Act, C.R.S. § 25-8-101 *et seq*. The initiative would create an inalienable constitutional right to clean air and clean water. (Initiative, Sec. (1)). The Initiative would impose new obligations of protection for these resources, such as require the State to have the person proposing to take an action to prove that the action is not harmful. (*Id.*, Sec. (2)). This change in standards for regulation is not necessarily and properly connected with either creating common ownership of natural resources or requiring criminal prosecution referral for data manipulation.

B. Creation of a common property interest in natural resources, including water.

Section (1) defines "Public Trust Resources," which appears to include clean air, clean water and environment and natural resources. It then declares that Public Trust Resources are the common property of the people. As in 2013-2014 #89, the term "common property" is undefined in the initiative. As Justice Hobbs noted in *In re Title, Ballot Title, and Submission Clause for 2013-2014* #89, 328 P.3d 172, 183 (Colo. 2014)(dissenting), the ordinary meaning of "common property" is: "1: land in which all members of the community hold equal rights; 2: land or other property in which a person other than the owner holds certain rights in common with the owner. Webster's Third New International Dictionary 459 (1971)." Thus, common property is distinct from the traditional "bundle of sticks" property rights held by private property owners. *See id.* at 182.

Similarly, the Initiative does not define the term "natural resources." Black's Law Dictionary defines "natural resource" as "any material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife." (9th ed. 2009). It is well settled in Colorado law that mineral rights are subject to private ownership and may be sold independent of the overlying property. *See e.g., Mitchell v. Espinosa*, 243 P.2d 412, 416 (Colo. 1952) (holding the deed created a reservation for oil and gas); *Calvat v. Juhan*, 206 P.2d 600, 603 (Colo. 1949) (holding that a reservation of oil, gas, and mineral rights precluded possession of the severed mineral estate by the surface possessor). Declaring that these mineral resources are the common property of all the people would be a dramatic change to Colorado law. Declaring all natural resources (including mineral rights) to be common property is not necessarily and properly connected to either protecting the environment or requiring prosecution for impairment of natural resources.

As part of the common ownership of the so-called Public Trust Resources, Section (2) of the Initiative imposes upon State government a trusteeship over these resources (including water and minerals) to protect against substantial impairments. The Initiative's designation of "Public Trust Resources" and corresponding trustee obligations would impose a public trust over all the State's natural resources, including water rights. In its traditional common law form, the public trust doctrine declared that the State holds its navigable waters and lands underneath them in trust for the people. *See Ill. Cent. RR. Co. v. Illinois*, 146 U.S. 387, 452 (1892). However, Colorado has never adopted a public trust doctrine or applied such a doctrine to water rights within the State due to the express protection of private property rights in water use contained in art. XVI of the Colorado Constitution. *People v. Emmert*, 597 P.2d 1025, 1029-30 (Colo. 1979) (holding Colo. Const. art. XVI, § 5 does not impose a public trust but protects private property rights in appropriation of Colorado waters and ownership of adjoining lands).

By adopting a broad form of the public trust doctrine for all natural resources, the Initiative would enact a constitutional provision in conflict with property rights in these resources, including water rights under the prior appropriation doctrine. This sweeping change would subrogate State-recognized appropriative water rights to new "common property" rights to be managed for preservation by the State government. The Initiative would effectively dismantle water rights and water laws that have been held intact as a property rights regime based on Colorado's constitutional, statutory, and case law for more than 150 years. While the Court has held that an initiative may propose adoption of a public trust doctrine in water, it must do so as a single subject that stands on its own. *See Kemper v. Hamilton*, 274 P.3d 562 (Colo. 2012); *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *Public Rights in Water II*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994). The Initiative inappropriately connects a public trust and common ownership of water and other resources with regulation of the environment and prosecution of data manipulation.

C. Requiring referral for prosecution of data manipulation.

Section (4) of the Initiative requires the State, in exercising its fiduciary duty as trustee of so-called Public Trust Resources, to use the "best science available in any process or proceeding

in which public trust resources may be affected." The Section then departs from its discussion of the State's fiduciary duty, however, by requiring that any person found to be manipulating data, reports or scientific information in an attempt to utilize Public Trust Resources for private profit be referred for prosecution for any criminal offenses that may apply.

This requirement to refer for criminal prosecution is particularly surreptitious given the retroactive nature of the Initiative. Section (5) of the Initiative provides that the newly-created process and proceeding requirements of Section (4) shall apply to any public action or commercial dealing "regardless of the date of any applicable local, state, or federal permits." Thus, a person acting in accordance with a valid permit, could still be subject to criminal prosecution for actions taken in reliance on that permit or for earlier actions in obtaining the permit. The requirement to refer such actions for criminal prosecution is not necessarily connected with either of the other subjects within the Initiative.

III. The Initiative contains multiple subjects that would cause voter surprise.

Even where two or more facets of an initiative are related, they must not be so different as to confuse the voters, or to enact one issue surreptitiously disguised by another. Multiple subjects within an initiative set up the kind of "logrolling" that the voters intended to prevent when adopting the 1994 single-subject constitutional requirement. *In re Title, Ballot Title, Submission Clause for 2009-2010 # 91*, 235 P.3d 1071, 1079 (Colo. 2010). A proposed initiative violates the single-subject rule if its text "relate[s] to more than one subject" and has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *Public Rights in Water II*, 898 P.2d at 1078-79 (citing the single-subject test of *People ex rel. Elder v. Sours*, 31 Colo. 369, 403 (1903), to analyze ballot initiatives). The Title Board should examine an "initiative's central theme to determine whether it contains hidden purposes under a broad theme." *In re 2007-2008, #17*, 172 P.3d at 875 (internal citations omitted).

Sections 1 and 4 of the Initiative present this danger of voter surprise and fraud posed by logrolling three distinct purposes hidden under a broad theme of preserving the environment and natural resources. The Initiative's structure seeks to disguise these separate aims by lumping together environmental protection and preservation of natural resources as "Public Trust Resources," declaring all of these resources to be "common property," and then tying criminal prosecution to the State's fiduciary duties to protect these resources against impairment. However, creating a common property right to the environment that eviscerates private property interests is not dependent upon or connected with the regulation of activities that effect the environment. Moreover, neither of these purposes is dependent upon or connected with requiring criminal prosecution of unspecified actions. Voters would be surprised at the breadth of the Initiative and its reordering of property rights and incursion into criminal law, all under the guise of environment protection. Accordingly, the Title Board should decline to set a title.

IV. The Titles are misleading and do not express the true intent of the Initiative.

An initiative's ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. C.R.S. § 1-40-106(3)(b). The title should clearly

express the initiative's single subject. *In re Title, Ballot Title, and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 647-48 (Colo. 2010). In setting titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b).

The Initiative's title was set as follows:

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

As drafted, the Titles are misleading because:

1. The "concerning" phrase expresses two separate subjects of public ownership in natural resources and in environmental resources, contrary to the single-subject requirement. Moreover, the phrase "environmental resources" does not appear in the Initiative and is, therefore, inaccurate in the Titles.

2. The Titles improperly omit any mention of the creation of "common property" rights in specified resources. This common property right is a material feature of the Initiative that must be disclosed in the Titles.

3. The Titles are unclear and misleading in using the phrase "public trust resources" without disclosing the Initiative's unique definition of that phrase.

4. The phrases involving "natural resource damages" and "referred for prosecution" are not clear and are misleading in their current form.

For these reasons, the Titles do not conform to the statutory requirements of C.R.S. § 1-40-106(3)(b).

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing and reconsideration of the title, ballot title and submission clause set by the Title Board on December 17, 2014, for Initiative 2015-2016 #4.

Respectfully submitted this 24th day of December 2014.

BURNS, FIGA & WILL, P.C.

By: _____

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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION FOR REHEARING was served via email and U.S. Mail on this 24th day of December 2014, as follows:

Phillip T. Doe
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Barbara Mills-Bria
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_____
Nancy Vatter

Ballot Title Setting Board

Proposed Initiative 2015-2016 #4[1]

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

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

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

Shall there be An amendment to the Colorado constitution concerning common ownership by all Coloradans of public trust resources, and, in connection therewith, defining public trust resources as clean air, clean water, and the preservation of the environment and natural resources; regardless of any prior federal, state, or local approval, requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, to seek natural resource damages from anyone who substantially impairs them and to use damages obtained to remediate the impairment; regardless of any prior federal, state, or local

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[1] Unofficially captioned **"Public Trust Resources"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

approval, allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and requiring referral for prosecution of any criminal offense involving the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit?

Hearing December 17, 2014:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 1:45 p.m.

Rehearing January 7, 2015:
Motion for rehearing denied except to the extent that the Board made changes to the titles.
Hearing adjourned 2:25 p.m.