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BEFORE THE TITLE BOARD, STATE OF COLORADO

MOTION FOR REHEARING

IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE
2007-08 #17

Petitioners, Douglas Kemper and Stuart A. Sanderson, both registered electors of the State of Colorado, by and through their counsel, Burns, Figa & Will, P.C., hereby request a rehearing and reconsideration of the title and ballot title and submission clause (collectively the "Titles") set by the Title Board on June 6, 2007 for Initiative 2007-08 #17 (the "Initiative"), which would add a new Article XXX to the Colorado Constitution. Reconsideration is requested for the following reasons:

1. The Initiative and Titles do not conform to the single-subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5.
2. The Titles do not adequately and fairly express the true intent and meaning of the Initiative.

Specifically, the Initiative and Titles are defective in at least the following respects:

I. The Initiative and Titles Violate the Single Subject Requirement.

The 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. In addition to consolidating certain state departmental divisions, boards and agencies into a newly created Colorado Department of Environmental Conservation (the "Department"), and establishing the Department's governance, powers and duties, the Initiative contains at least the following separate, distinct and unrelated subjects and purposes, which would create substantive changes to several aspects of Colorado law:

1. The plain language of Initiative Section 8(3) would not only exempt revenues generated by the Department from TABOR (as Article X, Section 20 of the Colorado Constitution is more commonly known), but also would exempt monies provided to the Department from the state general fund from all of the restrictions of TABOR.
2. Section 7 of the Initiative would alter substantive Colorado law by imposing trust responsibilities while preempting all other state Constitutional provisions found to

conflict, including those Constitutional provisions that protect private property rights in water and land.

3. The Initiative would substantially alter the manner and procedure in which officials are appointed to serve on certain state boards, councils and departments, removing the General Assembly's confirmation power over those appointments.

A. The Initiative Exempts all Funds Allocated to or Generated By the Department from TABOR Requirements.

In addition to specifying the duties and powers of the Department, the Initiative would exempt all funds allocated to or generated by the Department from the requirements of TABOR. Section 8(3) of the Initiative provides that, "No manner of fiscal regulation contained within Section 20 of Article X of the Colorado Constitution... shall apply to the *operation, funding, reserves or expenditures* of the Colorado Department of Environmental Conservation." (emphasis added). Furthermore, Section 8(2) of the Initiative expressly allows for an allocation of operating funds from the General Assembly. Thus, the Initiative's plain language not only would allow funds generated by and through the Department to be exempt from TABOR, but also would make any funds that may be provided to the Department from the state's general fund exempt from all TABOR restrictions.

TABOR imposes restrictions aimed to limit governmental growth including restrictions on governmental revenue collection, governmental spending and requiring voter approval for the imposition of several forms of new or increased taxes or the creation of any multiple-fiscal year direct or indirect debt or financial obligation. Colo. Const. Art. X, §§ 20(4), (7), and (8). The Colorado Supreme Court has held that TABOR itself contains multiple subjects. *See, e.g. In re Proposed Initiative 2001-02 #43*, 46 P.3d 438, 447 (Colo. 2002) (holding that because TABOR contains multiple subjects, an initiative seeking to prevent the repeal of TABOR contains multiple subjects). Accordingly, the broad exemption from TABOR contained in the Initiative would substantially alter the TABOR treatment of the Department and the state budget, and encompass separate and distinct subjects from the creation and administration of the Department. *See, In re Amend TABOR 25*, 900 P.2d 121 (Colo. 1995) (holding initiative that proposed to make both procedural and substantive changes to TABOR violates the single subject rule).

B. The Trust Responsibilities Given to the Department Combined with the Explicit Preemption of all Other Constitutional Provisions Make Substantive Changes to the Law.

Section 7 of the Initiative charges the new Department with several "trust" or "stewardship" responsibilities, providing that any conflict of such responsibilities with economic interest "shall be resolved in favor of public ownerships and public values." The Initiative further provides in Section 2 that Article XXX "shall be held dominant over other, previous constitutional provisions" if found to conflict. These related features of the Initiative would greatly alter substantive Colorado law under existing constitutional provisions, such as those

provisions protecting private property rights in water and land, by establishing public trust requirements not currently recognized in Colorado.

A public trust doctrine declares 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). Colorado has never applied the public trust doctrine to water rights within the state due to the express protection of private property rights contained in Article XVI of the Colorado Constitution. *People v. Emmert*, 597 P.2d 1025, 1029-1030 (Colo. 1979) (holding Colo. Const. Art. XVI, Section 5 does not impose a public trust but protects private property rights in appropriation of Colorado waters and ownership of adjoining lands). This is likely because of the adverse impacts that doctrine would have on existing water rights under the prior appropriation doctrine. *See Gregory J. Hobbs, Jr. and Bennett W. Raley, Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 855-56 (1989). By creating trust responsibilities, dictating how conflicts are resolved, and preempting any contrary provisions in Article XVI of the Constitution, the plain language of the Initiative would establish a public trust doctrine contrary to current Colorado law.¹

Similarly, applying the substantive policy directive in Section 7 will require the Department (and any entity or court that may later review Departmental actions) to “have, as priority, the responsibilities to steward and protect the public ownership and public conservation values in lands, waters, public resources, and wildlife. Conflict between economic interest and conservation stewardship responsibilities to, and for, the public’s resources and resource conservation values shall be resolved in favor of public ownerships and public values.” Given the broad range of state divisions and boards being consolidated into the Department, and the range of duties and responsibilities the Department is charged with, this substantive policy directive will affect separate and distinct governmental activities and issues, including issues pertaining to hazardous waste, pollution prevention, water conservation, wildlife issues and oversight of the local government permitting process regarding matters of statewide concern. Because this policy directive applies to separate and distinct aspects of state government, it necessarily encompasses multiple subjects.

C. The Initiative Modifies the Method of Appointing Certain Governmental Officers.

Several of the boards, commissions, and councils that would be transferred to the Department currently consist of members or officers that are appointed to those positions by the Governor and then legislatively confirmed. For example, Article IX, § 9 of the Colorado Constitution provides that the members of the state board of land commissioners are appointed by the Governor and confirmed by the Senate. This appointment and confirmation process

¹ Proponent Richard Hamilton has previously proposed a series of initiatives that would expressly adopt a “public trust doctrine” in the Colorado Constitution provisions governing water, Art. XVI, Section 5. *See MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076 (Colo. 1995); *In re Proposed Initiative on Water Rights*, 877 P.2d 321 (Colo. 1994); *see also* 2001-2002 Proposed Initiative #135.

would be changed as Section 7(2) of the Initiative provides that the Board of Commissioners within the Department would unilaterally appoint such officers and members, with no legislative confirmation. Thus, the Initiative not only would reorganize the executive branch of state government and create new powers and duties in the Department, but also would remove powers currently vested in the General Assembly for confirmation of certain appointed state officers.

II. The Titles do not Fully Express the Initiative's True Intent and Meaning.

In addition to the separate, distinct and unrelated subjects and purposes contained within the Initiative, the Initiative's ballot title also does not fully express the initiative's true intent and meaning. The title 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 a title, 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' or 'no' vote will be unclear." C.R.S. § 1-40-106(3)(b). The Board's title for the Initiative fails to meet these standards, in that (1) it does not fully express the Initiative's intent and meaning regarding appointment of certain officers, and (2) it contains a catch-phrase.

The title set by the Board states that in connection with the creation of the Department, the Initiative transfers "to the board of commissioners the authority to appoint members of certain boards and commissions relating to those programs and entities." This implies that the power is transferred from some similar body, and does not clearly state that the Initiative removes the power to appoint such officers from the Governor, or that the Initiative specifically precludes "any manner of legislative confirmation" for such appointments. Without such clarification, it is likely that voters would be surprised by the fact that the Governor is no longer entitled to appoint, nor the Senate to confirm, certain executive officers. This is the type of confusion that the title should avoid.

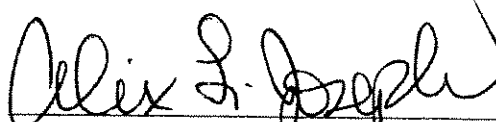
Moreover, the title set by the Board contains an impermissible catch phrase. The ballot title for the Initiative contains the phrase "conflicts between economic interests and conservation stewardship will be resolved in the favor of public ownership and public values." This phrase may prejudice electors to vote for or against the Initiative by virtue of the fact that the phrase is likely to appeal to a voter's emotions and could be used to form the basis for a slogan for or against the Initiative. Therefore, the title contains an impermissible "catch phrase." *See In re Ballot Title 1999-2000 # 258(A)*, 4 P.3d 1094, 1110 (Colo. 2000) (holding that a ballot title impermissibly contained a catch phrase even though the language at issue appeared in the initiative).

WHEREFORE, Petitioners, Douglas Kemper and Stuart A. Sanderson, respectfully request a rehearing and reconsideration of the title and ballot title and submission clause set by the Title Board on June 6, 2007 for Initiative 2007-08 #17.

Respectfully submitted this 13th day of June, 2007.

BURNS, FIGA & WILL, P.C.

By:

A handwritten signature in cursive script, appearing to read "Alix L. Joseph", written over a horizontal line.

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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 U.S. mail on this 13th day of June, 2007, as follows:

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