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Before the Colorado Title Setting Board

APR 28 2010

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Colorado Secretary of State

**MOTION FOR REHEARING**

IN THE MATTER OF THE TITLE AND THE BALLOT TITLE AND SUBMISSION  
CLAUSE SET FOR INITIATIVE 2009-2010 #87

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 Board's actions in this matter in setting the title and ballot title and submission clause (collectively the "Titles") on April 21, 2010, for Initiative #87 (the "Initiative"), which would amend Article XVI of the Colorado Constitution by adding a new Section 9 entitled "Rights of Use – Natural Streams."

Reconsideration is requested for the following reasons:

1. The Title Board lacks jurisdiction over this measure as the initiative violates the single-subject requirement. Colo. Const., art. V, sec. 1 (5.5).
2. The Titles violate C.R.S. § 1-40-106(3)(b) because they are misleading, likely to create confusion among the voters, do not correctly and fairly express the true intent and meaning of the initiative, contain a catch phrase, and fail to unambiguously state the principle of the provision sought to be added to the Constitution.

**I. The Initiative Violates the Single-Subject Requirement.**

The subjects of this measure include:

- a. Granting the public the rights to float any craft upon any natural stream that is capable of such use, regardless of the landowner's consent, and while doing so, to fish and to make contact with private property underlying a natural stream below the "high water mark"; and
- b. Declaring, in direct opposition to the rule of law established in *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979), that the right to use waters of natural streams "historically included" this right to float any craft upon any natural stream overlying private property that is capable of such use, including the specified rights to fish and to make contact with the stream bed and banks on private property.

In *People v. Emmert*, the Colorado Supreme Court held that “the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner.” *Id.*, 597 at P.2d 1030.

In support of its decision, the Colorado Supreme Court further declared:

- i. “Section 5, Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation.” *Id.*, 597 P.2d at 1028;
- ii. “Constitutional provisions historically concerned with appropriation, therefore, should not be applied to subvert a riparian bed owner’s common law right to the exclusive surface use of waters bounded by his lands.” *Id.*, 597 P.2d at 1029; and
- iii. The “common law rule” of private ownership is “of more force and effect, . . . given its longstanding recognition in this state,” than competing rationales such as “the creation of a public trust based on usability.” *Id.*, 597 P.2d at 1027.

The measure seeks not only to overturn, but to expunge, this precedent by decreeing that Colorado’s constitutional right “historically included” the opposite principles.

## **II. The Titles Violate C.R.S. § 1-40-106(3)(b).**

The Titles are improper and violate C.R.S. 1-40-106(3)(b) in the following respects:

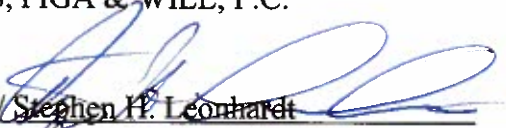
- a. The omission of the following material features of the Initiative render the Titles misleading:
  - i. “The right to use the water of every natural stream within the state of Colorado historically included . . . [the rights granted in the measure].”
  - ii. “The people of Colorado . . . further acknowledge that the public’s exercise of such rights does not adversely affect property interests of landowners whose properties are adjacent to natural streams.”
- b. The “right to float” is a prohibited catch phrase that is intended to prejudice public consideration of the measure.
- c. The Titles set for the Initiative are likely to create voter confusion in that they are identical to the titles set for 2009-2010 Initiative #88,

even though the text of Initiative #88 differs from that of this Initiative (#87) in material respects. The text of Initiative #88 does not include the phrase “[t]he right to use the water of every natural stream within the state of Colorado **historically included and shall continue to include. . .**”; whereas, the text of this Initiative (#87) does include this phrase.

WHEREFORE, the Petitioner, Douglas Kemper, respectfully requests a rehearing and reconsideration of the Title Board’s actions in setting titles for Initiative 2009-2010 #87.

Respectfully submitted this 28<sup>th</sup> day of April, 2010.

BURNS, FIGA & WILL, P.C.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 28th day of April, 2010, a true and correct copy of the foregoing **MOTION FOR REHEARING** was served on the following via LexisNexis File & Serve or by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

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