

RECEIVED

DEC 28 2011

S. WARD

Colorado Secretary of State
BEFORE THE TITLE BOARD, STATE OF COLORADO

MOTION FOR REHEARING

IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR
INITIATIVE 2011-12 #3

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 21, 2011 for Initiative 2011-12 #3 (the "Initiative"), which would amend the Colorado Constitution by adding several provisions to Article XVI, § 5. Reconsideration is requested because 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.

The Initiative and Titles Violate the Single Subject Requirement

The subjects of this measure include:

1. The adoption of a "Public Trust Doctrine" elevating public ownership over water use rights; and
2. Transfer of real property adjacent to and beneath all natural streams from private landowners to the public.

Thus, 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, by having these two separate, distinct and unrelated subjects.

- A. The stated purpose of the Initiative is to adopt the Public Trust Doctrine, which would subrogate existing water rights to the rights of the public.**

The Initiative would add six subsections to Article XVI, § 5 of the Constitution, numbered as Subsections (2) – (7). Subsection (2) would expressly adopt the "Colorado public trust doctrine" to "defend the public's water ownership rights of use and public enjoyment." According to Subsection (3), the Colorado Public Trust Doctrine "provides that the public's estate in water in Colorado has a legal authority superior to rules and terms of contracts or property law." Finally, Subsection (4) addresses water appropriation rights under Section 6 of Art. XVI, spelling out ways in which such rights will be subordinate to the "public's estate." In particular, Subsection 4(a) of the Initiative provides that "the use of the public's water by the

manner of appropriation . . . is a usufruct property right” which survives “under the legal condition that the appropriator is aware that a usufruct right is servient to the public’s dominant water estate and is subject to terms and conditions of this Colorado public trust doctrine.” Subsections 4(c) and (e) spell out the state government’s stewardship duties which include managing not only the state’s water rights, but also others’ water rights to protect the natural environment and public water use. Thus, this Initiative would subrogate the rights of those who hold water rights by appropriation to the favored “public interest” in Colorado’s water for environmental protection and public use.

Colorado water law is grounded in the right of prior appropriation, which is constitutionally guaranteed. Unlike most other states, Colorado’s constitution reserves water for use by private parties who appropriate such water and place it to beneficial use. 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.”) Thus, the Constitution “simply and firmly establishes the right of appropriation in this state.” *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979). This right is further protected in Section 6 of Article XVI which states, “[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.” Colo. Const. art. XVI, § 6.

Colorado has not applied the Public Trust Doctrine to water rights. *See Emmert*, 597 P.2d. at 1029-30. Instead, Colorado courts have emphasized the property nature of appropriative water rights, holding that an appropriation creates a “most valuable property right” in the exclusive use of water. *Navajo Devel. Co. v. Sanderson*, 655 P.2d 1374, 1377-78 (Colo. 1982). This distinction recognizes the adverse impacts that the Public Trust 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 adopting the public trust doctrine, the Initiative would necessarily and expressly subrogate the rights of those who hold appropriative water rights from the state to the rights of the public to be managed by the state government.¹

B. The conveyance of lands adjacent to and beneath natural streams from private landowners to the public is a separate subject from adopting the Public Trust Doctrine.

Subsection 5 of the Initiative would create the right of “[a]ccess by the public along, and on, the wetted natural perimeter of a stream bank of a water course of any natural stream in Colorado.” Colorado landowners currently own the land beneath the non-navigable streams adjacent to their land. *Emmert*, 597 P.2d at 1027 (“the land underlying non-navigable streams is

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.

the subject of private ownership and is vested in the proprietors of the adjoining lands.”) Ownership rights of land along a streambed are distinct from the rights of appropriation. *See id.* at 1029. The Initiative would remove these property rights of landowners and give them to the people of Colorado for the state government to enforce. The question of property rights along natural streams was the subject of numerous proposed initiatives in 2010. *See* 2009-2010 Proposed Initiatives ## 69-81 and 84-90.

Among the purposes of single-subject requirement is to prevent the practice of putting together in one measure multiple subjects “for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits. *In re 2009-2010 # 45*, 234 P.3d at 646 (stating that the single-subject rule seeks “to prevent proponents from joining incongruous subjects in the same measure, thereby ensuring that each proposal depends on its own merits for passage” (quoting *In re # 43*, 46 P.3d at 441)). Initiative #3 inappropriately joins subjects relating to appropriation of water and landowner rights in an attempt to garner support from two distinct interest groups. This, it violates the single subject requirement, and the Title Board should not set Titles for the Initiative.

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing by the Title Board and reconsideration of the Title Board’s actions in setting a title and ballot title and submission clause on December 21, 2011 for Initiative 2011-12 #3.

Respectfully submitted this 28th day of December, 2011.

BURNS, FIGA & WILL, P.C.

By: 

Stephen H. Leonhardt, #15122

Alix L. Joseph, #33345

6400 S. Fiddlers Green Circle, Suite 1000
Greenwood Village, CO 80111

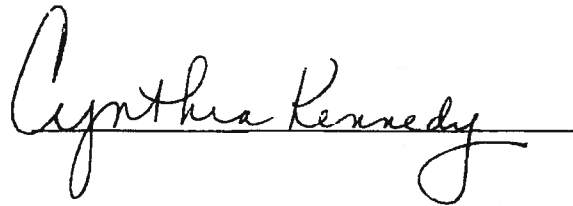
**Attorneys for Petitioner,
Douglas Kemper**

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 and E-mail on this 28th day of December 2011, as follows:

Mr. Richard Hamilton
531 Front Street
Fairplay, CO 80440
rghamilton@skybeam.net

Mr. Phillip Doe
7140 S. Depew Street
Littleton, CO 80128
ptdoe@comcast.net

A handwritten signature in cursive script that reads "Cynthia Kennedy". The signature is written in black ink and is positioned to the right of the contact information for Mr. Phillip Doe. A horizontal line is drawn across the end of the signature.