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JAN 11 2012

BEFORE THE TITLE BOARD, STATE OF COLORADO

ELECTIONS/LICENSING  
SECRETARY OF STATE

S. WARD  
*aj*

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**MOTION FOR REHEARING**

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IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR  
INITIATIVE 2011-12 #45

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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 January 4, 2012 for Initiative 2011-12 #45 (the "Initiative"), which would amend Article XVI, § 6 of the Colorado Constitution by adding provisions and deleting several words from the current text. 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 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 at least these three separate, distinct, and unrelated subjects:

1. Subordination of both past and future water diversion and use rights to a dominant public water estate;
2. Expansion of the scope of water appropriation under the current Constitution, removing the limit to "unappropriated water" and inclusion of appropriated non-tributary groundwater without consent of the overlying landowner; and
3. Imposition of a requirement that water be returned by appropriators unimpaired to the stream.

**A. The Stated Purpose of Subordination of Water Diversion And Use Rights to a Dominant Public Water Estate**

Subsection (1) of the Initiative would amend Article XVI, Section 6 of the Colorado Constitution by adding that the right to divert water to beneficial uses "may be limited, or curtailed, so as to protect natural elements of the public's dominant water estate by holding unlawful any usufruct use of water causing irreparable harm to the public's estate." This provision subordinates the rights of those who hold water rights by appropriation to the asserted

interests of the public in Colorado's water. The proponents asserted that the subject of the Initiative is "[t]o change the Colorado constitution to require water use rights be limited [sic], or curtailed, when necessary, to prevent any irreparable harm to natural elements of the public's dominant water estate." SPONSOR'S ANSWERS TO THE REVIEW AND COMMENT MEMORANDUM OF NOVEMBER 29, 2011, at 6. Subsection (5) of the Initiative would provide citizen standing to sue to compel enforcement of the Initiative's protective mandates.

This feature of the Initiative follows the theme of several past initiatives proposed by Proponent Richard Hamilton that would expressly adopt a "public trust doctrine" in the Colorado Constitution provisions governing water. *See* Colo. Const. Art. XVI, Section 5. *See also 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. Colorado has never applied such subordination principles 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 such a 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 subordinating the rights of appropriators to the rights of the public, the Initiative would tacitly be a "public trust doctrine" such as these proponents have asserted elsewhere. But the proposed Initiative also addresses two additional subjects.

#### **B. Expansion of the Current Constitutional Scope of Water Appropriation by Removing the Limitation to Unappropriated Waters of Any Natural Stream**

The Colorado Constitution currently provides that "the right to divert the *unappropriated waters of any natural stream* to beneficial uses shall not be denied." Colo. Const. Art. XVI, § 6 (emphasis added). The Initiative would delete the phrase "unappropriated waters of any natural stream" from this section and thus extend the right to all waters within the State, whether or not appropriated or part of a stream system. This widens the scope of rights being authorized by this section. Instead of protecting the right to divert only unappropriated stream water, the amendment would expand the right to divert to already-appropriated water and to nontributary groundwater, so long as it is consistent with other provisions in the initiative.

Applying the existing language of Article XVI, §6, the Colorado Supreme Court has held that "underground waters which are not tributary to any natural stream are not subject to the doctrine of appropriation." *Whitten v. Coit*, 385 P.2d 131, 140 (Colo. 1963). Based on this decision, the General Assembly has provided for allocation of rights to nontributary groundwater based on the overlying landowner's consent. C.R.S. §37-90-137(4)-(8); *see also Chatfield East Well Co. v. Chatfield East P.O.A.*, 956 P.2d 1260 (Colo. 1998). The Initiative would overturn the basis for this holding and the legal allocation of such water.

Unlike other provisions of the Initiative, the deletions from the existing constitutional text would expand the scope of water subject to appropriation. This is a separate and distinct issue from the two other issues addressed by this Initiative.

### **C. Requiring that Appropriators Return Water Unimpaired to the Stream**

The third topic encompassed by the proposed initiative is a mandate on the manner by which appropriators must discharge their water after use. Subsection (2) of the Initiative would require appropriators to “return water unimpaired to the public, after use.” This requirement is separate and distinct from the previous two topics because it alters a different set of rights and obligations. Furthermore, the sponsors implicitly acknowledged that this “unimpaired” requirement would be a separate subject (*see* their review and comment responses quoted below).

Under current law, appropriators may discharge water after use, or if they use “foreign water,” they are not required to return any water to the stream at all, because such water may be used to extinction in their operations. The Initiative’s “unimpaired” requirement would effectively make the reuse of appropriated “foreign water” unconstitutional, and would greatly restrict the ways that discharging appropriators return water to the stream.

The sponsors were asked about this provision in the review and comment memorandum, to which they have provided a written response quoted below:

[QUESTION]

**5. Regarding subsection (3):**

...

**b. What is the effect of the requirement that the water must be returned “unimpaired”?**

RESPONSE:

The effect of the requirement that the water must be returned “unimpaired” is included within the initiative so as to provide a guarantee to the public that the their [sic] waters might be available, after appropriator use, such that the people’s interests in their waters will not have been irreparable [sic] injured or harmed.

[QUESTION]

**Does it restrict uses that consume part of an appropriation through evaporation, plan uptake, or other mechanisms? Under current law, certain types of water, called foreign water, may be used to extinction. Does this measure affect the use of foreign water, including water imported into a basin and nontributary ground water?**

RESPONSE:

*The "single subject" rule for initiated measures precludes the sponsors from including, within the current proposed measure, discussions of different issues not relating to the single purpose of the initiative.*

SPONSOR'S ANSWERS TO THE REVIEW AND COMMENT MEMORANDUM OF NOVEMBER 29, 2011, at 13 (emphasis added). Thus, the proponents have all but conceded that the separate purposes of the proposed Initiative violate the single-subject requirement.

**THE THREE SUBJECTS ENCOMPASSED BY THE INITIATIVE  
ARE SEPARATE AND DISTINCT, AND TITLES SHOULD NOT BE SET**

Even where two or more facets of an initiative are related, they must not be so different as to confuse the voters, or to pass one facet surreptitiously disguised by another. The Colorado Supreme Court held in 2007 that, "An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *In re Title, Ballot Title and Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007) (internal citations omitted). This danger of voter surprise and fraud posed by two hidden purposes presented under a broad theme of limitations on diversion rights is what Initiative #45 presents, and for this reason, the Initiative fails to meet the single-subject requirement.

Further, the Title Board must examine an initiative's central theme "to determine whether it contains hidden purposes or incongruous measures under a broad theme." *Gonzalez-Estay v. Lamm (2005-06 #55)*, 138 P.3d 273, 279 (Colo. 2006). And as 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), it follows that "Diversion Rights" is similarly too broad to encompass the three topics outlined above as contemplated by the single-subject requirement. The Title Board's chosen subject phrase in the Titles, "concerning public control of water," is too broad and vague to state a single subject, yet fails to encompass the measure's provisions that would expand the scope of water appropriation from the current constitution.

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing and reconsideration of the title and ballot title and submission clause set by the Title Board on January 11, 2012 for Initiative 2011-12 #45.

Respectfully submitted this 11<sup>th</sup> day of January, 2012.

BURNS, FIGA & WILL, P.C.

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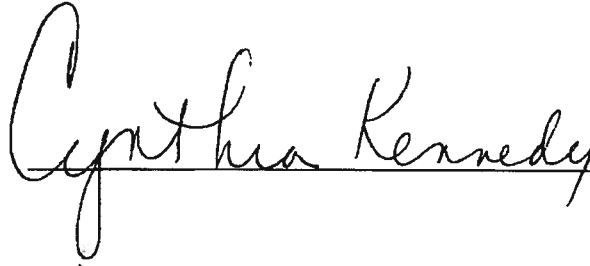
**Attorneys for Petitioner,  
Douglas Kemper**

**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 on this 11th day of January, 2012, as follows:

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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 recipient information.