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Colorado Secretary of State
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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 2013-14 #103

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 April 16, 2014, for Initiative 2013-14 #103 (the "Initiative"), which would amend 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 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 fail to describe important aspects of the Initiative and are therefore misleading in violation of C.R.S. § 1-40-106.

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 four separate, distinct, and unrelated subjects:

1. The creation of a common property interest in specified resources, consisting of "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources";

2. The adoption of a public trust doctrine, which would create rights of the public inherently conflicting with current water appropriation rights vested under constitutional provisions;

3. The criminalization of any manipulation of data, reports or scientific information in an attempt to use public trust resources for private profit; and

4. The retroactive application of conditions and requirements to "any applicable local, state or federal permits," regardless of the date of such permits, subjecting current property interests to a taking.

A. Creation of a Common Property Right to Natural Resources

Section (1) of the Initiative creates an inalienable right of the people to "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources," which Section (1) defines as "public trust resources" and declares to be the "common property of all the people, including generations yet to come."

Taken alone, the Initiative's definition of public trust resources extends its reach beyond a single subject by changing the legal relationship between Colorado's citizens and the separate and distinct resources within the definition. With particular regard to surface water in Colorado, the public has no right to waters that overlie private lands without the landowner's consent. *See People v. Emmert*, 198 Colo. 137, 144, 597 P.2d 1025, 1030 (1979). The banks and beds of non-navigable streams in Colorado are not owned by the State of Colorado or the public at large, but by the adjoining landowners. *See id.* at 141. By creating a new common property interest in these surface waters, the Initiative completely subverts private property interests in water that are held by citizens throughout the state.

B. Adoption of a Public Trust Doctrine

Sections (1) and (2) of the Initiative impose upon the state and its agents a trusteeship over public trust resources, which are defined in Section (1) as "clean air, clean water, *including ground and surface water*, and the preservation of the environment and natural resources" (emphasis added). As trustee, the state would be required to conserve and maintain public trust resources for the benefit of all the people, as well as to protect them against "substantial impairment," which would include "pollution from external sources." Because of the nature of the trustee obligations the Initiative would impose upon the state with regard to the state's surface and ground water, among other forms of natural resources, the effect of this Initiative would be to adopt a public trust doctrine in Colorado.

In its traditional common law form, 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 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 contained in Article XVI of the Colorado constitution. *Emmert*, 597 P.2d at 1029-30 (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 a 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). The "Colorado Doctrine" of water rights developed out of the "imperative necessity" of water

scarcity in the western region. *In re Title, Ballot Title, Submission Clause for 2011-12 No. 3*, 274 P.3d 562, 574 (Colo. 2012) (Hobbs, J., dissenting). The break from the common law was so complete in Colorado as to make "all surface water and groundwater in the state, along with the water-bearing capacity of streams and aquifers, a public resource dedicated to the establishment and exercise of water use rights created in accordance with applicable law." *See, id.*, at 573-4.

By adopting a public trust doctrine, the Initiative would enact a constitutional provision in conflict with the prior appropriation doctrine, subrogating the rights of those who hold appropriative water rights from the state to the rights of the public to be managed restrictively by the state.[1] 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.

C. Creation of a New Crime

Section (4) of the Initiative requires the state, in exercising its fiduciary duty as trustee of public trust resources, to use the "best science available in any process or proceeding in which public trust resources may be affected." The Section departs from its discussion of the state's fiduciary duty, however, by criminalizing any act of "manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit."

D. Retroactive Application of Permitting Requirements

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." This retroactivity of the Initiative's new requirements would threaten pre-existing private property interests in natural resources within the state if the "process or proceeding" by which a private party obtained a valid permit to use those resources were later found to violate these requirements. Such a threat to private property interests in these permits would constitute a violation of the Takings Clause of both the Fifth Amendment to the United States Constitution and Article II, Section 15 of the Colorado constitution.

[1] Previously proposed initiatives would have expressly adopted a "public trust doctrine" in the Colorado constitution provisions governing water, Art. XVI, Section 5. *See Kemper v. Hamilton*, 274 P.3d 562 (Colo. 2012); *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994).

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

A. 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 pass one facet 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. *See In re Title, Ballot Title, Submission Clause for 2009-10 No. 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." *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076, 1078-79 (Colo. 1995) (citing the single subject test of *People ex rel. Elder v. Sours*, 31 Colo. 369, 403 (1903), to analyze ballot initiatives). The Colorado Supreme Court held in 2007 that "[a]n 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).

Initiative 2013-2014 #103 presents this danger of voter surprise and fraud posed by disguising hidden purposes presented under a broad theme of creating a public trust in environmental resources. Imposing a public trust doctrine over the state's air, water resources, and other natural resources is separate and distinct from creating a common property interest in such resources. Both of these subjects are completely separate and distinct from the creation of a new crime in Colorado, as well as the retroactive application of permitting requirements that would pose a threat to private property interests currently held by Coloradans. These multiple subjects are a clear example of surreptitious provisions coiled up in the folds of a complex initiative.

B. The Measure is So Vague That it is Impossible To Set A Title That Accurately Reflects the True Purpose of the Measure

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 "public trust in environmental resources" is similarly too broad to encompass the multiple topics outlined above as contemplated by the single-subject requirement. The Title Board's chosen subject phrase in the Titles, "concerning a public trust in environmental resources," is too broad and vague to state a single subject, and would cause public confusion regarding the effect of a "yes/no" vote on the

Initiative. It fails to encompass the measure's separate and distinct provisions that would subvert private property interests in natural resources in the state, threaten Colorado citizens with criminal prosecution for a new crime, and threaten private property interests in permits through retroactive permit conditions, none of which has any necessary connection with the imposition of trustee obligations on the state and its agents.

C. The Titles Fail to Describe Important Aspects of the Measure And Are Therefore Misleading

An initiative's ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. COLO. REV. STAT. § 1-40-106(3)(a). "[A] material omission can create misleading titles." *Garcia v. Chavez*, 4 P.3d 1094, 1098 (Colo. 2000). Here, the Initiative's title was set as follows:

> An amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to 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 substantial impairment, seeking 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 criminalizing 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 were set as follows:

> Shall there be an amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to 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 substantial impairment, seeking 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 criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit?

As drafted, the Titles are misleading because they fail to describe at least two important aspects of the Initiative:

(a) The Titles improperly omit the Initiative's provision creating an inalienable right to clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources. (Init. #103, § (1)). This is a material omission of a key provision because an inalienable right to anything is, by definition, not transferable to any other person or capable of condemnation. Such a right would be held superior to other rights.

(b) The Titles improperly omit the Initiative's retroactive application of its newly-created requirements to any previously permitted activity, including public actions and commercial transactions. (Init. #103, § (5)). This is a material omission of a key provision because any retroactively effective provision that impairs private property interests is a direct violation of the Takings Clause of both the United States Constitution and the Colorado constitution.

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

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 April 16, 2014, for Initiative 2013-14 #103.

Respectfully submitted this 23rd day of April, 2014.

BURNS, FIGA & WILL, P.C.

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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 23rd day of April, 2014, as follows:

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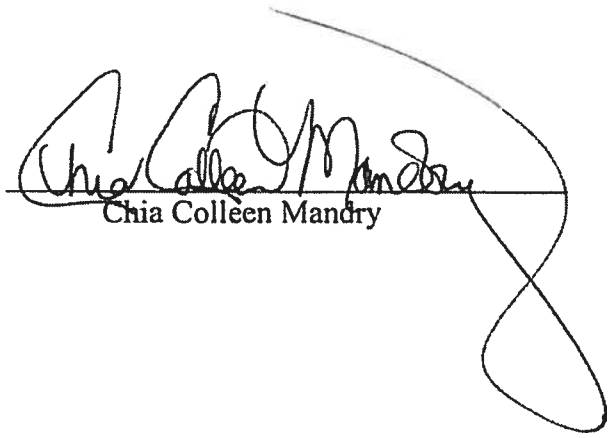

Chia Colleen Mandry