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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 #89

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 3, 2014, for Initiative 2013-14 #89 (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 three separate, distinct, and unrelated subjects:

1. The creation of a common property right to the environment, defined as consisting of "clean air, pure water, and natural and scenic values;"

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

3. The imposition of local control over environmental regulations with the authority to supersede any less restrictive state environmental regulations.

A. Creation of a Common Property Right to the Environment

Section (1) of the Initiative declares that the environment, defined to include clean air, pure water, and natural and scenic values, "is the common property of all Coloradans." Additionally, Section (1) proclaims that conservation of the environment is a "fundamental" right belonging to all Coloradans, including generations "yet to come."

Taken alone, the Initiative's definition of the environment extends its reach beyond a single subject by changing the legal relationship between Colorado's citizens and each of the separate and distinct factors within the definition. Natural and scenic views, for instance, may already be preserved under Colorado law through the creation of conservation easements. *See* COLO. REV. STAT. § 38-30.5-104. Such easements are actual property interests in the land that may only be created by the record owner of the surface. *See id.* The Initiative's creation of a fundamental right in natural and scenic views would subrogate the landowner's property interest in these easements by transferring ownership of the preservation of scenic views to the public at-large without any compensation to the landowner.

B. Adoption of a form of Public Trust Doctrine

Section (2) restates the right of all Coloradans to the environment, and then proceeds to impose upon state and local governments a trusteeship over the environment for the benefit of the people. While the Initiative stops just short of using the phrase "public trust doctrine," the effect of the Initiative's language would impose just such a doctrine over the state's water rights as well as other natural resources. The Titles recognize, in fact, that the Initiative concerns "creation of a *public trust* over the environment" (emphasis added).

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. *People v. Emmert*, 597 P.2d 1025, 1029-30 (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). 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 form of 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 and local governments.[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. Imposition of Local Control over Environmental Regulations with Authority to Supersede Any Less Restrictive State Environmental Regulations

Section (3) provides that local governments have the power to enact laws, regulations, ordinances, and charter provisions that are more restrictive and protective of the environment than those that are enacted or adopted by the state government. Further, Section (3) provides that any local law or regulation adopted pursuant to this power shall govern over any conflicting state law or regulation whenever the local law or regulation is more restrictive or protective. This "local control" theme is the primary subject of several other current proposed initiatives, apart from any consideration of a public trust.[2]

In Colorado, many local government bodies are merely subdivisions of the state and may not exercise any authority not delegated to them by the General Assembly. Even those local governments that adopt home rule charters are limited in authority to those issues solely of local concern. Also, many local governmental boundaries in Colorado overlap. The Initiative does not differentiate between or among the various local government entities that exist within the state; nor does it provide guidance with regard to the relationship those local governments would have with each other or with the state, except to require that any environmental law or regulation adopted by a local government would supersede against a less restrictive law or regulation adopted by the state. Such a rule would overturn the subordinate relationship currently held by local governments vis-à-vis the state, and potentially create chaos in the determination of which locally-adopted law or regulation would prevail if a conflict were to exist between two or more overlapping local governments.

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[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).

[2] *See, e.g.*, Initiatives 2013-14 Nos. 75, 82, 90, and 91.

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

A. The Initiative Contains Multiple Subjects That Are Unrelated but Combined for Improper Purposes

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. *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 89 presents this danger of voter surprise and fraud posed by logrolling three hidden purposes presented under a broad theme of creating a public trust over the environment. At least two of those purposes have been pursued as separate subjects in separate recent ballot initiatives, and this Initiative seeks to "log-roll" by carrying support from those favoring the separate agendas of public trust and local control. Creating a common property right to the environment that eviscerates private property interests is not dependent upon or connected with the adoption of a form of public trust doctrine that subverts over 150 years of Colorado water law, and neither of these purposes is dependent upon or connected with the imposition of local control over environmental regulations that have the authority to supersede any less restrictive state environmental regulations. For these reasons, the Initiative fails to meet the single-subject requirement.

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 over Colorado's environment" 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 creation of a public trust over Colorado's environment," is too broad and vague to state a single subject. It fails to encompass the measure's provisions that would substantially alter the relationship between local governments and the state, and those that would convert Colorado's environmental resources, including natural and scenic views and appropriative water rights, into "common property."

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 the creation of a public trust over Colorado's environment, and, in connection therewith, declaring that Colorado's environment is the common property of all Coloradans; specifying that the environment includes clean air, pure water, and natural and scenic values; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs.

The ballot title and submission clause were set as follows:

> Shall there be an amendment to the Colorado constitution concerning the creation of a public trust over Colorado's environment, and, in connection therewith, declaring that Colorado's environment is the common property of all Coloradans; specifying that the environment includes clean air, pure water, and natural and scenic values; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs?

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

(a) The Initiative's title and ballot title and submission clause improperly omit the Initiative's provision creating a fundamental right to conservation of the environment. (Init. #89, § (1)). This is a material omission of a key provision because a fundamental right is held to the highest level of scrutiny whenever a legislative body would attempt to alter or limit it in any way.

(b) The Initiative's title and ballot title and submission clause improperly omit the Initiative's requirement to preserve the environment for future generations. (Init. #89, § (1)). This is a material omission of a key provision that establishes a vested property right in the preservation of the environment for all future generations—a novel interest in property otherwise unknown to the law.

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 3, 2014, for Initiative 2013-14 #89.

Respectfully submitted this 10th 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 electronic mail on this 10th day of April, 2014, as follows:

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