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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 2015-2016 #4

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 17, 2014, for Initiative 2015-2016 #4 (the "Initiative"), which would amend the Colorado constitution.

I. Grounds for Reconsideration

Reconsideration is requested for the following reasons:

1. The Initiative and Titles do not conform to the single-subject requirements of art. 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 are misleading and do not express the true intent of the Initiative.

The Initiative violates the single-subject requirements of the Colo. Const. art. V, § 1(5.5) and C.R.S. § 1-40-106.5, by having these three separate, distinct, and unrelated subjects veiled by the overly broad term "concerning public ownership of natural and environmental resources":

1. Imposing obligations for regulation to protect the environment.

2. Creating a common property interest in natural resources, including water and minerals, to mandate preservation of these resources.

3. Requiring referral for prosecution of any criminal offenses involved in manipulating data to profit from specified resources.

These subjects are not necessarily and properly connected. Thus, the Title Board should not set titles for the Initiative.

II. The Initiative is so broad that it is impossible to define a single subject or to set a title that accurately reflects the true purposes of the measure.

The Title Board must examine an initiative's central theme "to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme." *Gonzalez-Estay v. Lamm*, 138 P.3d 273, 279 (Colo. 2006). An initiative does not satisfy the single-subject requirement if its provisions contain separate and unconnected purposes, despite the proponents' efforts to unite them under the same general area of the law. *In re Title, Ballot Title, and Submission Clause, and Summary for 1999–2000 # 200A*, 992 P.2d 27, 30 (Colo. 2000). 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). Similarly, it has held that "environmental conservation" was too broad to contain a single subject. *In re Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 875-76 (Colo. 2007). "Public ownership of natural and environmental resources" is too broad to reflect the separate subjects and purposes contained in the Initiative. The proponents' use of the defined phrase "Public Trust Resources," to combine the separate issues of environmental protection and natural resource preservation, does not unite the two into a single subject.

The Initiative contains at least these three subjects:

A. Imposing obligations for regulation to protect the environment.

State agencies currently regulate many aspects of the environment including air and water quality. *See e.g.*, Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101 *et seq.*; Colorado Water Quality Control Act, C.R.S. § 25-8-101 *et seq*. The initiative would create an inalienable constitutional right to clean air and clean water. (Initiative, Sec. (1)). The Initiative would impose new obligations of protection for these resources, such as require the State to have the person proposing to take an action to prove that the action is not harmful. (*Id.*, Sec. (2)). This change in standards for regulation is not necessarily and properly connected with either creating common ownership of natural resources or requiring criminal prosecution referral for data manipulation.

B. Creation of a common property interest in natural resources, including water.

Section (1) defines "Public Trust Resources," which appears to include clean air, clean water and environment and natural resources. It then declares that Public Trust Resources are the common property of the people. As in 2013-2014 #89, the term "common property" is undefined in the initiative. As Justice Hobbs noted in *In re Title, Ballot Title, and Submission Clause for 2013-2014* #89, 328 P.3d 172, 183 (Colo. 2014)(dissenting), the ordinary meaning of "common property" is: "1: land in which all members of the community hold equal rights; 2: land or other property in which a person other than the owner holds certain rights in common with the owner. Webster's Third New International Dictionary 459 (1971)." Thus, common property is distinct from the traditional "bundle of sticks" property rights held by private property owners. *See id.* at 182.

Similarly, the Initiative does not define the term "natural resources." Black's Law Dictionary defines "natural resource" as "any material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife." (9th ed. 2009). It is well settled in Colorado law that mineral rights are subject to private ownership and may be sold independent of the overlying property. *See e.g.*, *Mitchell v. Espinosa*, 243 P.2d 412, 416 (Colo. 1952) (holding the deed created a reservation for oil and gas); *Calvat v. Juhan*, 206 P.2d 600, 603 (Colo. 1949) (holding that a reservation of oil, gas, and mineral rights precluded possession of the severed mineral estate by the surface possessor). Declaring that these mineral resources are the common property of all the people would be a dramatic change to Colorado law. Declaring all natural resources (including mineral rights) to be common property is not necessarily and properly connected to either protecting the environment or requiring prosecution for impairment of natural resources.

As part of the common ownership of the so-called Public Trust Resources, Section (2) of the Initiative imposes upon State government a trusteeship over these resources (including water and minerals) to protect against substantial impairments. The Initiative's designation of "Public Trust Resources" and corresponding trustee obligations would impose a public trust over all the State's natural resources, including water rights. In its traditional common law form, the public trust doctrine declared 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). However, 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 in water use contained in art. XVI of the Colorado Constitution. *People v. Emmert*, 597 P.2d 1025, 1029-30 (Colo. 1979) (holding Colo. Const. art. XVI, § 5 does not impose a public trust but protects private property rights in appropriation of Colorado waters and ownership of adjoining lands).

By adopting a broad form of the public trust doctrine for all natural resources, the Initiative would enact a constitutional provision in conflict with property rights in these resources, including water rights under the prior appropriation doctrine. This sweeping change would subrogate State-recognized appropriative water rights to new "common property" rights to be managed for preservation by the State government. 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. While the Court has held that an initiative may propose adoption of a public trust doctrine in water, it must do so as a single subject that stands on its own. *See Kemper v. Hamilton*, 274 P.3d 562 (Colo. 2012); *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *Public Rights in Water II*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994). The Initiative inappropriately connects a public trust and common ownership of water and other resources with regulation of the environment and prosecution of data manipulation.

C. Requiring referral for prosecution of data manipulation.

Section (4) of the Initiative requires the State, in exercising its fiduciary duty as trustee of so-called Public Trust Resources, to use the "best science available in any process or proceeding

in which public trust resources may be affected." The Section then departs from its discussion of the State's fiduciary duty, however, by requiring that any person found to be manipulating data, reports or scientific information in an attempt to utilize Public Trust Resources for private profit be referred for prosecution for any criminal offenses that may apply.

This requirement to refer for criminal prosecution is particularly surreptitious given the retroactive nature of the Initiative. 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." Thus, a person acting in accordance with a valid permit, could still be subject to criminal prosecution for actions taken in reliance on that permit or for earlier actions in obtaining the permit. The requirement to refer such actions for criminal prosecution is not necessarily connected with either of the other subjects within the Initiative.

III. 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 enact one issue 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 2009-2010 # 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." *Public Rights in Water II*, 898 P.2d at 1078-79 (citing the single-subject test of *People ex rel. Elder v. Sours*, 31 Colo. 369, 403 (1903), to analyze ballot initiatives). The Title Board should examine an "initiative's central theme to determine whether it contains hidden purposes under a broad theme." *In re 2007-2008, #17*, 172 P.3d at 875 (internal citations omitted).

Sections 1 and 4 of the Initiative present this danger of voter surprise and fraud posed by logrolling three distinct purposes hidden under a broad theme of preserving the environment and natural resources. The Initiative's structure seeks to disguise these separate aims by lumping together environmental protection and preservation of natural resources as "Public Trust Resources," declaring all of these resources to be "common property," and then tying criminal prosecution to the State's fiduciary duties to protect these resources against impairment. However, creating a common property right to the environment that eviscerates private property interests is not dependent upon or connected with the regulation of activities that effect the environment. Moreover, neither of these purposes is dependent upon or connected with requiring criminal prosecution of unspecified actions. Voters would be surprised at the breadth of the Initiative and its reordering of property rights and incursion into criminal law, all under the guise of environment protection. Accordingly, the Title Board should decline to set a title.

IV. The Titles are misleading and do not express the true intent of the Initiative.

An initiative's ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. C.R.S. § 1-40-106(3)(b). The title should clearly

express the initiative's single subject. *In re Title, Ballot Title, and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 647-48 (Colo. 2010). In setting titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b).

The Initiative's title was set as follows:

> An amendment to the Colorado constitution concerning public ownership of natural and environmental resources, and, in connection therewith, creating a public trust in those resources, which 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 any substantial impairment, regardless of any prior federal, state, or local approval, to seek 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 requiring the manipulation of data reports or scientific information in an attempt to use public trust resources for private profit to be referred for prosecution for any applicable criminal offense.

As drafted, the Titles are misleading because:

1. The "concerning" phrase expresses two separate subjects of public ownership in natural resources and in environmental resources, contrary to the single-subject requirement. Moreover, the phrase "environmental resources" does not appear in the Initiative and is, therefore, inaccurate in the Titles.

2. The Titles improperly omit any mention of the creation of "common property" rights in specified resources. This common property right is a material feature of the Initiative that must be disclosed in the Titles.

3. The Titles are unclear and misleading in using the phrase "public trust resources" without disclosing the Initiative's unique definition of that phrase.

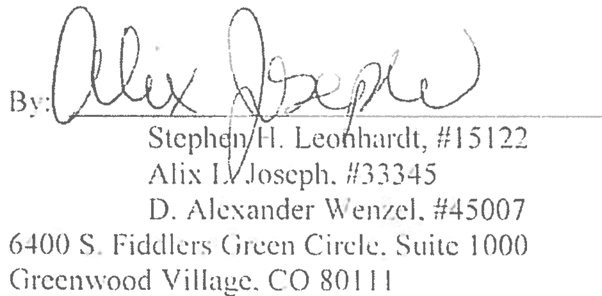
4. The phrases involving "natural resource damages" and "referred for prosecution" are not clear and are misleading in their current form.

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

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing and reconsideration of the title, ballot title and submission clause set by the Title Board on December 17, 2014, for Initiative 2015-2016 #4.

Respectfully submitted this 24th day of December 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 email and U.S. Mail on this 24th day of December 2014, as follows:

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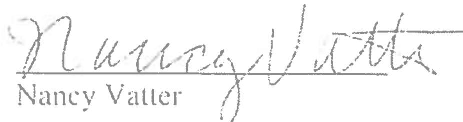

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