(N. B. Section 1-40-101(1), Colorado Revised Statutes, requires the Directors of the Colorado Legislative Counsel and the Office of Legislative Legal Services to "review and comment" initiated petitions for proposed amendments to the Colorado Constitution.) To wit:

MEMORANDUM

April 12, 2010

TO: Phillip Doe and Richard Hamilton

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #2, concerning the public trust doctrine

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SPONSOR'S ANSWERS TO THE "REVIEW AND COMMENTS" QUESTIONS

FROM THE STAFF OF COLORADO LEGISLATIVE COUNSEL

AND THE COLORADO OFFICE OF LEGISLATIVE LEGAL SERVICES

INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE

Be it Enacted by the People of the State of Colorado:

Section 5 of article XVI the constitution of the state of Colorado is amended to read:

SECTION 5. WATER OF STREAMS PUBLIC PROPERTY - PUBLIC TRUST DOCTRINE. (1) 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.

(2) THIS COLORADO PUBLIC TRUST DOCTRINE IS ADOPTED, AND IMPLEMENTED, BY THE PEOPLE OF THE STATE OF COLORADO TO PROTECT THE PUBLIC'S INTERESTS IN THE WATER OF NATURAL STREAMS AND TO INSTRUCT THE STATE OF COLORADO TO DEFEND THE PUBLIC'S WATER OWNERSHIP RIGHTS OF USE AND PUBLIC ENJOYMENT.

(3) THIS 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.

(4) (A) THE PUBLIC CONFERS THE RIGHT TO THE USE OF ITS WATER, AND THE DIVERSION OF THE WATER UNDER SECTION 6 OF THIS ARTICLE, TO AN APPROPRIATOR FOR A BENEFICIAL USE AS A GRANT FROM THE PEOPLE OF COLORADO TO THE APPROPRIATOR FOR THE COMMON GOOD.

(B) THE USE OF THE PUBLIC'S WATER BY THE MANNER OF APPROPRIATION, AS GRANTED IN THIS ARTICLE, IS A USUFRUCT PROPERTY RIGHT ASSOCIATED WITH THE USE OF WATER. USUFRUCT RIGHTS FOR THE USE OF WATER SURVIVE 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.

(C) USUFRUCT WATER RIGHTS SHALL NOT CONFER OWNERSHIP TO WATER OTHER THAN USUFRUCT RIGHTS TO THE APPROPRIATOR.

(D) USUFRUCT WATER RIGHTS, CONFERRED BY THE PUBLIC TO AN APPROPRIATOR FOR USE, MAY BE MANAGED BY THE STATE GOVERNMENT, ACTING AS A STEWARD OF THE PUBLIC'S WATER, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND TO PROTECT THE PUBLIC'S ENJOYMENT AND USE OF WATER.

(E) A USUFRUCT WATER USER IS IMPRESSED UNDER THE CONDITION THAT NO USE OF WATER HAS DOMINANCE OR PRIORITY OVER NATURAL STREAM OR PUBLIC HEALTH WELL-BEING.

(F) WATER RIGHTS, HELD BY THE STATE OF COLORADO FOR GOVERNMENT OPERATIONS, SHALL BE HELD IN TRUST FOR THE PUBLIC BY THE STATE OF COLORADO WITH THE STATE ACTING AS THE STEWARD OF THE PUBLIC'S WATER ESTATE. WATER RIGHTS HELD BY THE STATE OF COLORADO SHALL NOT BE TRANSFERRED BY THE STATE OF COLORADO FROM THE PUBLIC ESTATE TO PROPRIETARY INTEREST.

(5) (A) ACCESS BY THE PUBLIC ALONG, AND ON, THE WETTED NATURAL PERIMETER OF A STREAM BANK OF A WATER COURSE OF ANY NATURAL STREAM IN COLORADO IS A RIGHT OF THE PUBLIC TO THE USE OF ITS OWN WATER IN CONCERT WITH PROVISIONS OF THIS COLORADO PUBLIC TRUST DOCTRINE.

(B) THE RIGHT OF THE PUBLIC TO THE USE OF THE WATER IN A NATURAL STREAM AND TO THE LANDS OF THE BANKS OF THE STREAMS WITHIN COLORADO SHALL EXTEND TO THE NATURALLY-WETTED HIGH WATER MARK OF THE STREAM AND IS IMPRESSED WITH NAVIGATION SERVITUDE FOR COMMERCE AND PUBLIC USE AS RECOGNIZED IN THIS COLORADO PUBLIC TRUST DOCTRINE.

(C) THE WATER OF A NATURAL STREAM AND ITS STREAMBED, AND THE NATURALLY-WETTED LANDS OF THE SHORES OF THE STREAM, SHALL NOT BE SUBJECT TO THE LAW OF TRESPASS AS THE WATER OF NATURAL STREAMS AND THE BANKS OF THEIR STREAM COURSES ARE PUBLIC HIGHWAYS FOR COMMERCE AND PUBLIC USE.

(D) PUBLIC USE OF WATER, RECOGNIZED AS A RIGHT IN THIS COLORADO PUBLIC TRUST DOCTRINE, SHALL NOT BE CONTROLLED IN LAW AS A USUFRUCT BUT SHALL BE A RIGHT OF THE PUBLIC TO PROTECT AND ENJOY ITS OWN WATER.

(6) ENFORCEMENT AND IMPLEMENTATION OF PROVISIONS CONTAINED WITHIN THIS COLORADO PUBLIC TRUST DOCTRINE TO PROTECT THE PUBLIC'S RIGHTS AND INTERESTS IN WATER IS

MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT AS STEWARDS TO PROTECT THE PUBLIC'S INTERESTS IN ITS WATER ESTATE. ANY CITIZEN OF THE STATE OF COLORADO SHALL HAVE STANDING IN JUDICIAL ACTIONS SEEKING TO ENFORCE THE PROVISIONS OF THIS SECTION.

(7) PROVISIONS OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING.

SPONSOR ANSWERS TO THE C. R. S. 1-40 "REVIEW AND COMMENT" QUESTIONS FROM THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE COUNSEL AND THE COLORADO OFFICE OF LEGISLATIVE LEGAL SERVICES.

Section 1-40-101(1), C. R. S., requires the Directors of the Colorado Legislative Counsel and the Office of Legislative Legal Services to "review and comment" on initiated petitions for proposed amendments to the Colorado Constitution. The first objective of the hearing is to permit the staffs of both offices to ask questions concerning the intent and objective regarding the proposed amendments. The Hearing is a legal proceeding to establish the sponsor's Constitutional intent regarding the proposed Constitutional modification.

The answers provided here from the initiative sponsors to the "review and comment" inquiries are to be considered the formal record of the sponsor's intent concerning the constitutional modification to the constitution by the sponsors of the Colorado Initiative # 2, 2011-2012 – "INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE".

The convention used in the following document shall be as follows:

• **Questions and comments from the staffs of the Legislative Council (L. C.) and Legislative Legal Services (L. L. S.) shall be presented in BOLD FACE TYPE AND UPPER CASE LETTERING.**

• Responses to the questions by the sponsors shall appear in lower case lettering using normal appearing typeface.

(**N. B**. At certain places within these L. C. and L. L. S. "review and comment" questions, the sponsors have taken the liberty to re-structure the question, as it was proposed, so as to enable a single answer to a single question. The "review and comment" questions, as modified, do not change the intent of the "review and comment" question but merely permit a response to elements of the question in a serial, non-overlapping manner so as to add clarity to both the question and the response. Modification of the L. C. and L. L. S. questions shall be identified by the addition of three (3) asterisks as a convention ***.)

• Sponsors have made as a part of this response to the April 12, 2010 C. R. S. 1-40 Initiative "review and comment" MEMORANDUM a prior response to an earlier C. R. S. 1-40 "review and comment" MEMORANDUM, dated May 1, 1972, which was at that time requested to be considered as the formal record of the sponsor's intent of the Colorado Initiative 2002 # 135 – "Public Ownership and Use of Water", which proposed that Colorado be required to *"ENFORCE AND DEFEND A PUBLIC TRUST DOCTRINE THAT PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATERS, AND PROTECTS THE NATURAL ENVIRONMENT."* The May 1, 2002 response was offered as the written intent of the sponsors of the Colorado Initiative 2002 # 135 – "Public Ownership and Use of Water". The May 1, 2002 response is added to this April 12, 2010 response of the sponsors of the Colorado Initiative # 2, 2011-2012 – "INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE" as part of the record of the sponsor's intent. The response of the sponsors of the Colorado Initiative 2002 # 135 – "Public Ownership and Use of Water" (added at the end of the 2010 "review and comment" response, in whole) is to be made a part of the record for the Colorado Initiative # 2, 2011-2012 – "INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE" with the understanding that the language and elements of the 2002 Initiative "response" in no way impresses the language or elements of the 2010 Initiative.

SUBSTANTIVE COMMENTS AND QUESTIONS.

The substance of the proposed initiative raises the following comments and questions:

1. ARTICLE V, SECTION 1 (5.5) OF THE COLORADO CONSTITUTION REQUIRES ALL PROPOSED INITIATIVES TO HAVE A SINGLE SUBJECT. WHAT IS THE SINGLE SUBJECT OF THE PROPOSED INITIATIVE?

The single subject of the Initiative is to oblige the recognition and the necessity of enforcement of the provisions of this Colorado Public Trust Doctrine at, and from, all governmental levels in Colorado.

2. AS A CHANGE TO THE COLORADO CONSTITUTION, THE PROPOSED INITIATIVE MAY BE AMENDED ONLY BY A SUBSEQUENT AMENDMENT TO THE CONSTITUTION. IS THIS YOUR INTENTION?

Yes.

3. WHAT WILL BE THE EFFECTIVE DATE OF THE PROPOSED INITIATIVE?

The "effective date" for the implementation of this Colorado Public Trust Doctrine is the date at which the Colorado electorate affirmatively votes to adopt the initiative. The Colorado Constitution modification at ARTICLE XVI, Section 5 (7), as proposed in the *Initiative to Adopt the Colorado Public Trust Doctrine*, stipulates that the "PROVISIONS OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING."

The intent of the Initiative sponsors by including the specific stipulations of self-enactment and self-execution within the Initiative is to assert that not only is the language of the Initiative legally obliging the State of Colorado to accept the provisions of the Colorado Public Trust Doctrine as enacted and as enforceable at the time of electorate approval, but, also, that the State of Colorado is obliged to initiate measures from the time of voter election approval to defend the public's water ownership rights including the obligation to defend the public's right to use and the public's right to enjoyment of the waters of Colorado as a stipulation within the state constitution. Then, also, the newly-adopted constitutional language impresses upon the Colorado Legislature, the Colorado judiciary, the Colorado State Executive, and any other, and all other, state or local governmental entities in Colorado that they are precluded from modifying any of the provisions within this Colorado Public Trust Doctrine.

4. DOES THE PROPOSED INITIATIVE REFER TO ALL ELEMENTS OF THE PUBLIC TRUST DOCTRINE, OR WOULD THE ADOPTION OF THE PROPOSED INITIATIVE RESULT IN THE ENACTMENT, BY IMPLICATION, OF ELEMENTS OF THE PUBLIC TRUST DOCTRINE THAT ARE NOT STATED HERE OR OTHERWISE CAUSE CONSEQUENCES THAT ARE ONLY IMPLIED BY THE DOCTRINE?

The purported and espoused purpose of the "review and comment" C. R. S. 1-40 requirements, here being responded and characterized, is that this process attempts to assure that the initiative sponsors, seeking to modify the Colorado Constitution, propose constitutional modification language and intent that is clearly enunciated.

A "public trust doctrine" concept is largely a broad, and relatively sweeping, somewhat undefined, concept of natural resource law and regulation that has, at its core, a concept that the state is to be directed to acknowledge the state's stewardship responsibilities regarding the public's ownership and interests in the public's estate. The 2010 *Initiative to Adopt the Colorado Public Trust Doctrine* offers a constitutional modification of ARTICLE XVI, Section 5 - **WATER OF STREAMS PUBLIC PROPERTY - PUBLIC TRUST DOCTRINE,** and in so doing is a public trust doctrine that is specific to Colorado as an impressment upon Colorado water constitutional and other legal provisions as those constitution guarantees affect the aquatic environment and the laws and stipulations relating to Colorado water and to the public ownership thereof.

In the shaping article reviewing the public trust doctrine, see Professor Joseph Sax in *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970), states, at 475, in Section I – THE NATURE OF THE PUBLIC TRUST DOCTRINE –

HISTORICAL BACKGROUND: "The source of the modern public trust law is found in a concept that received much attention in Roman and English law – the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature (see *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* 182 – 85 (2 d. ed. 1932) …indicating that two points should be emphasized: *First*, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes were distinguished from general public property which the sovereign could routinely grant to private owners. *Second*, while it was understood that in certain common properties – such as the seashore, highways, and running water - where "perpetual use was dedicated to the public" - it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government." … "It has rather been the general rule that land titles from the federal government run down only to the high water mark, with title seaward of that point remaining in the states, which, upon their admission to the Union, took such shorelands in "trusteeship" for the public (see, generally, P. Gates, *History of Public Land Law Development* (1968). Whether, and to what extent, that trusteeship constrains the states in their dealings with such lands has, however, been a subject of much controversy. If the trusteeship puts such lands wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right is quite an extraordinary one, restraining government … ". "The question, then, is whether then the public trust concept has some meaning …, whether there is in the name of the public trust any judicially enforceable right which restrains governmental activities dealing with particular interests such as shorelands or parklands, and which is more stringent than are the restrains applicable to governmental dealings generally."

"Three types of restrictions on governmental authority are often thought to be imposed by the public trust (this threefold formulation is suggested by broad language which commonly appears in public trust cases: 'This title is held in trust for the people for the purposes of navigation, fishing, bathing, and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically, it is a trust property and should be devoted to the fulfillment of purposes of the trust, to wit: the service of the people.'- see *Hayes V. Bowman*, 91 S.2d. 795, 799 (Fla. 1957); *first*, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; *second*, the property must not be sold, even for a fair cash equivalent; and *third*, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses particular to that resource." "Confusion has arisen from the failure of many courts to distinguish between the government's general obligation to act for the public benefit, and the special, and more demanding obligation which it may have as a trustee of certain public resources."

***** IF THE LATTER, WHAT ARE SOME OR ALL OF THOSE IMPLIED CONSEQUENCES?**

Modern understanding of elements within the prevue of a contemporary public trust doctrine are demonstrated and summarized, in particular, in the discussion within *Marks v. Whitney*, 6 Cal. 3d. 25, 259 491 P.2d. 374,380, 98 Cal. Rprt. 790, 796 (1972) (holding that the public has standing to sue to enforce trust, and that public uses are varied in context) – (see SYMPOSIUM COMMENTS: *The Public Trust After LYONS and FOGERTY: Private Interests and Public Expectations,* 16 U. C. Davis L. Rev. 631 (1982- 1983)):

> "(p)ublic easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes ... " "(t)he traditional triad of uses – navigation, commerce and fisheries – does not limit the public interest in the trust reservation..." "(t)he public uses to which lands and waters are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of lands and waters is the preservation of those lands and waters in their natural state so that they may serve as ecological units... as open space, and as environments which provide food and habitat for birds and (wildlife), and which favorably affect the scenery and climate of the area."

The question of public "uses" of waters does not seek a classification of "uses", but rather pronounces and incorporates public desires associated with its ownership of waters and the protections of the natural environment. The primary focus issue within this Colorado Public Trust Doctrine is that the people of the state of Colorado own the water in Colorado as provided for in ARTICLE XVI, Section 5, and, as such, may seek water- related activities as owners of their estate. Also, as "it has never been clear whether the public had an enforceable right to prevent infringement of those interests", the adoption this Colorado Public Trust Doctrine and of the obliging nature of public statements requiring the State of Colorado to "protect and defend" the public's waters, this Colorado Public Trust Doctrine will provide direction in law for the state to become, and continue to be, the quasi-sovereign responsible for the stewardship of the public's ownerships rights in water. The elements contained within the adopted Colorado Public Trust Doctrine are not limited to a narrow compliance of the rights and responsibilities of the state as administrator to enforce regulation, but they also include the surety for the public to have the benefit that state enactment of legislation and state judicial determination are undertaken and pronounced with an intent to preserve and protect the public's valued estate. Various public uses, including the navigation servitude, need not be determined solely on the basis of the amount of water flowing, but may be impressed under the public ownership of water, the dedication of streams and rivers and water courses as public highways, and the public desire to use the water for public purpose(s).

Emphatically, this Colorado Public Trust Doctrine is not a "use" doctrine in the aspect of an "appropriation" as presented in the Colorado Constitution at ARTICLE XVI, Section 6 – **Diverting unappropriated water - priority preferred uses.** This Colorado Public Trust Doctrine is not conditioned by, not impressed by, nor constrained in any manner by any provision or decision rendered pertaining to ARTICLE XVI, Section 16 save for the provision in ARTICLE XVI, Section 5: "… *subject to appropriation as hereinafter provided*." The Colorado Public Trust Doctrine is a statement of ownership of water in the people, and is a statement of the prerogatives of the public in water as is stipulated in ARTICLE XVI, Section 5 of the Colorado Constitution.

5. WHAT ARE THE "USES" ALLOWED BY THE "PEOPLE OF THE STATE" UNDER THIS SECTION?

The "uses" allowed by the people under this section are those uses for a public purpose which must be held available for use by the general public.

6. HOW ARE APPROPRIATIVE WATER RIGHTS SERVIENT TO THE DOCTRINE?

The usufruct property right, defined and amplified in the Colorado Constitution at ARTICLE XVI, Section 6 – **Diverting unappropriated water - priority preferred uses,** and referred to as an appropriative water right, is currently implied, and applied, within the following legal determinations that would be reversed, or re-structured, under this Colorado Public Trust Doctrine which, when installed, would protect public rights in the ownership of water.

The following review of cases, and of the legislative aspects of appropriative water rights legalities, are issues that the adoption and enactment of this Colorado Public Trust Doctrine would address include, but would not be limited to:

(a) the concepts that a water right is not absolute (see *City & County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981), aff'd in part, rev'd on other grounds, 695 F.2d. 465 (10th. Cir. 1982));

SPONSOR'S COMMENT: ARTICLE XVI, Section 6 – **Diverting unappropriated water - priority preferred uses –** insinuates that the policy enunciated in the Colorado Constitution was that the "bedrock principal of prior appropriation was that "beneficial use is the basis, the measure, and the limit of a water right". (see Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. J. 919, 923-26 (1998). The adoption of this Colorado Public Trust Doctrine would infer that not only is a water right not absolute, but, also, that a water right is a usufruct right that is servient to the public's water estate as a matter of law, and that by leaving of water in-place, rather than it being diverted, could be a valued element of the public's interests in their water.

(b) that there is currently a navigation denial pronounced by the Colorado Supreme Court that consent to use of streams is necessary from a riparian property owner in certain circumstances (see *People v, Emmert*, 198 Colo. 137, 597 P.2d. 1025 (1979));

SPONSOR'S COMMENT: The *Emmert* Decision by the Colorado Supreme Court was a flawed decision: – point one is that the *Emmert* was decided as a property "trespass" issue rather than a constitutional water law review; and, point two, the Colorado Supreme Court erred in the decision by stating: "We here reaffirm, therefore, that section 5 Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to water for purposes other than appropriation."

There was no "ancient" appropriations doctrine, anywhere detailed or defined, before the Colorado Appropriations Doctrine was established - see J. Bailey's dissent in *Hartman v Tresise,* 36 Colo. 146, 84 P. 685 (1906) for an extensive and learned comment. See, also, *Yunker v. Nichols***,** 1 Colo. 551 (1872) wherein C. J. Hallett, Colorado Territorial Supreme Court, stated : "*In a dry and thirsty land it is necessary to divert the waters of the streams from the natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law."* These words, written by Chief Justice Moses Hallett in his Territorial Supreme Court Opinion in *Yunker v. Nichols* (1872) were the first words of the first Colorado Supreme Court decision regarding water and are the basis for the contention that the 1979 Colorado Supreme Court erred in the water use / trespass decision in *Emmert*.

"It became obvious" continues the Colorado Archives memorandum on the 1872 *Yunker* decision [*Yunker v Nichols* http://www.colorado.gov/dpa/doit/archives/digital/waterlaw.htm,] "in the dispute [between Yunker and Nichols], that the doctrine of riparian rights that had evolved in English common law, and was practiced in the eastern states, was inapplicable in the arid American West. The traditional [riparian] law had two central principles - that the right to use water lay only with the owners of land along a water course, and that a user could not appreciably alter the flow of a stream. Either principle would have made western irrigation impossible, as the entire purpose of canal building was to bring water (1) to properties away from the stream and (2) to allow [water] to soak into the fields."

The Colorado Archives memorandum continues: "Hallett revolutionized existing doctrine by breaking from the Riparian Rights system by creating the doctrine of Prior Appropriation, which would come to be known as "The Colorado system" and be practiced throughout the western states. In simple terms this meant that an appropriator could capture water from a stream and transport it to another watershed, using streams in both watersheds to convey the appropriated water to its place of beneficial use. Hallett's ideas were used four years later, in 1876, when the Colorado Constitutional Convention met with the intention of resolving existing and potential disputes by constitutional law. At the Colorado Constitutional Convention 1875-1876, Hallett's opinion on water law was incorporated into the Colorado Constitution." EXCERPTS FROM THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF COLORADO (pg. 700)."

In 1903 the State Legislature passed a law saying, "the public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such stream." But in the 1906 case of *Hartman v. Tresise*, state courts held that this law, by allowing the public to fish on non-navigable streams passing through private land, was unconstitutional under the Fifth Amendment, as a "taking of private property without just compensation." Regarding the State Constitution's guarantee of public rights to use "every natural stream," the court held that these rights were not just subject to appropriation, but rather that appropriation was the only use the people could make of streams. (A dissenting judge, J. Bailey, held that the Constitution means that streams "are dedicated to the use of the people, to be used by them in such manner as they see fit," not just for appropriation.)

However, due to the separation of powers in government, courts do not usually overrule legislation and let standing the presumption that streams were private property. Streams do not pass from public to private ownership simply because the adjacent uplands pass to private ownership.

The Colorado Constitution had pronounced, and affirmed, public rights to use streams Over thirty years earlier the U.S. Supreme Court had affirmed public fishing rights in *Martin v. Waddell*, 41 U. S. (16 Pet.) 367, 410 (1842), while other public trust and Public Trust Doctrine cases, based on Roman and English law, recognized public rights elsewhere.

The Colorado State Legislature had never granted streams, or fishing rights, to private ownership or control. Such a grant would have violated public trust guarantees (see *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387 (1892)). Consequently, there was no legal basis for the court's assumption that the right to fish in streams had passed to private ownership, and therefore no legal basis for the claim that allowing the public to fish on streams was a "taking" of private property. See especially Colo. Sess. Laws, 1903, ch. 112, section 7 at 233 (see J. Bailey's dissent: *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1906)).

(c) that current legal status indicates that vested rights to water may be acquired in natural streams (see *Archuleta v. Boulder & Weld County Ditch Co*., 118 Colo. 43, 192 P.2d. 891 (1948));

SPONSOR'S COMMENT: In a constitutional system that declares: "*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."* judicial implication that the current legal status in Colorado provides for vested rights to water in natural streams is in opposition to the public ownership of water in streams (see J. Bailey's dissent: *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1906)).

(d) that judicial rulings in this section have determined that common-law doctrine of continuous flow of a natural stream is inapplicable to conditions in this state and is abolished (see *Sternberger v Seaton Mt. Elec. Light, Heat & Power Co*., 45 Colo. 40, 102 P. 168 (1909));

SPONSOR'S COMMENT: The abolishment of the common-law doctrine of continuous flow of a natural stream is an improper judicial declaration in light of a public trust obligation to protect the public's waters.

(e) that the State of Colorado has pronounced that state grants to the appropriator to the use of water is in perpetuity (see *Cherokee Water Dist. v. Colorado Springs*, 184 Colo. 161, 519 P.2d. 339 (1974));

SPONSOR'S COMMENT: Adoption of this Colorado Public Trust Doctrine will mandate and necessitate review of water rights allocated where the public's waters have been put to use through the appropriation system. It is anticipated that not every water use right will be found to be protective of provisions declared in this Colorado Public Trust Doctrine necessary to protect the natural environment (see *Marks v. Whitney*, 6 Cal. 3d. 25, 259 491 P.2d. 374,380, 98 Cal. Rprt. 790, 796 (1972) (holding that the public has standing to sue to enforce trust, and that public uses are varied in context). "… In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of lands and waters is the preservation of those lands and waters in their natural state so that they may serve as ecological units... as open space, and as environments which provide food and habitat for birds and (wildlife), and which favorably affect the scenery and climate of the area." – *ibid.*

(f) that the judicial rendering that "…this section was designed to prevent waste of a most valuable but limited natural , and to confine the use to needs …" (see *Empire Water & Power Co. v Cascade Town Co.*, 205 F. 123 (8th. Cir. 1913));

SPONSOR'S COMMENT: The use provisions (beneficial use) contained within section 6 of art. XVI of the State of Colorado Constitution are applicable to the appropriations usufruct property rights. The use determinations contained within *Empire Water* are inapplicable to "public rights in water" as memorialized in section 5 of art. XVI, and are remnants of the concept that the waters of the public are subject to the concept of use rather than being absolute and protected as a public estate. Public ownership rights in water are not constrained, ever, by the concept of abandonment for lack of use. (see Dan Turlock, et. al., *Water Resource Management: A Casebook in Law and Public Policy* 257-259 (5th. Ed. 2002).

(g) that judicial determination has been made in Colorado that elements within this section must be construed so as to harmonize with § 15 of art. II, Colo. Constit., to wit: "that private property shall not be taken or damaged for public or private use without just compensation" (see *Armstrong v. Larimer County Ditch Co.*. 1 Colo. App. 49, 27 P. 235 (1891));

SPONSOR'S COMMENT: The concept of "private property takings", if and when this Colorado Public Trust Doctrine mandates as a matter of concern of this Colorado Public Trust Doctrine that certain lands uses and certain water uses are contravening the intent and the purposes of this Colorado Public Trust Doctrine and are, therefore, to be rejoined in the public estate and within the protections of *jus publicum*, is a matter nullified at law for the appropriations users and land users had, from time immemorial, the uses of those

lands and waters with the understanding that those uses had been, and are, impressed with a pre-existing condition of the dominance of the public ownership right of water, and with an acknowledgement of the valid claim of the public ownership in its continued estate.

"The court in *Coffin* (see *Coffin v. The Left Hand Ditch Company,* 6 Colo. 443 (1882)) made oblique reference to the question but avoided it with the assertion, 'we are relieved from any extended consideration of this subject by the decision in *Broder v. Natoma W[ater] & M[ining] Co., [101 U. S. 274 (1879)]."* see *Coffin* at 449.

"*Broder* was a decision of the United States Supreme Court on an action for damages on land acquired by the plaintiff. 'It is the established doctrine of this court that … for the purposes of agricultural irrigation , in the region where such artificial use of the water was an absolute necessity, … rights which the government had, by its conduct recognized and encouraged and was bound to protect, before the act of 1866, we are of the opinion that [section 9] of the act … was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, rather than the establishment of a new one." See Dale D. Goble, MAKING THE WEST SAFE FOR THE PRIOR APPROPRIATIONS DOCTRINE – *Coffin v.The Left Hand Ditch Company,* College of Law, University of Idaho. "We think the [appropriation] doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state." "The common-law riparian doctrine was not the law because of necessity defined the law: *'The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufruct estate, or right of property." Coffin* at 446. The common-law riparian doctrine is "inapplicable to Colorado, the court concluded, because of the "[i]mperative necessity" of the states climate. see *Coffin* at 447. The court had determined that the riparian doctrine had never existed in the state."

For another treatment of the question regarding the potential for a "takings" of property that originally had been within the public ownership, the California Supreme Court provided guidance in *People v. California Fish Co*., 166 Cal. 576, 597 (Calif. 1913) to wit:

> "(S)tatutes purporting to authorize an abandonment of ... public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed. And if the interpretation of statute is reasonably possible which would not involve a destruction of public use or an intention to terminate in violation of the trust, the courts will give the statute such interpretation."

Would then such administration and control of public water use and the public trust to enter upon and possess another party's interest for the preservation and advancement of public uses, and to make such improvements and changes as may be deemed advisory for those purposes, be a "taking", and subject to claims for compensation? Again seeking answers in *People v. California Fish Co*., 166 Cal. 576, 597 (Calif. 1913), the California Court rejected the claims for "takings" compensations,

noting that: "they had not lost title to their interests, but retained titles subject to the public trust" and, "We do not divest anyone of title to property; the consequence of our decision will be only that some predecessors in interest acquired property .... and hold it subject to the public trust." see *Berkeley v. Superior Court*, 26 Cal. 3 d. 515, 532.

(h) that judicial ruling has indicated that historical provisions of the appropriation provisions should not be applied to subvert a riparian owner's common-law right to the exclusive surface use of waters bounded by his lands (see *People v, Emmert*, 198 Colo. 137, 597 P.2d. 1025 (1979))**;**

SPONSOR'S COMMENT**:** Dicta was issued in the controlling case in Colorado, *People v. Emmert*, 597 P.2d 1025, Aug. 13, 1979, when the Colorado Supreme Court opined that the defendants were guilty, and convicted them of third-degree criminal trespass*: "The validity of the conviction depends upon our [Colorado Supreme Court] determination of the following question: Did the defendants have a right under section 5 of Article XVI of the Constitution of Colorado to float and fish on a non-navigable natural stream* (see "navigation discussion" in the Supreme Court of the United States decision in *Economy Light & Power Co. v. U S*, 256 U.S. 113 (1921),. No. 104, Argued Dec. 17, 1921. Decided April 11, 1921*) as it flows through, across and within the boundaries of privately owned property without first obtaining the consent of the property owner? We answer this question in the negative, and therefore affirm the conviction."* The Colorado court in *Emmert* was relying on another, earlier Colorado court decision, *Hartman v Tresise* (36 Colo. 146, 84 Pac. 685, 686-687 (1905), wherein the Colorado judges in 1905 had determined "The common law rule holds that he who owns the surface of the ground has the exclusive right to everything which is above it ("*cujus est solum, ejus est usque ad coelum*") Applying this rule (in *Emmert*), the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations."

With this legal presumption of private ownership from the surface of the ground to the top of the sky, the Colorado court in the 1979 *Emmert* decision held the exclusive right of fishery in the waters flowing over a streambed intrudes upon the space above the surface of the land, and, therefore, without the permission of the owner, whether it be for fishing or for other recreational purposes, such as floating, the public user commits trespass.

The Colorado court continued in *Emmert*: "The defendants in the *Emmert* case claimed that section 5 of Article XVI of the Colorado Constitution establishes the public right to recreational use of all waters in the state. Section 5 of Article XVI of the Colorado Constitution reads: "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."

And it is at this point where the Colorado Supreme Court in the *People v. Emmert* decision erred. The judges in *Emmert* then stated: "This provision of the Colorado Constitution, upon which the defendants so heavily rely, simply and firmly establishes the right of appropriation in this state… ." As contained in the prior statement, it is clear

that the Colorado court decided the *Emmert* case not using the precepts of water constitutional provisions but using, for their decision, property law and trespass law while disregarding the fact that water law had been determined since Colorado statehood to be superior and dominant law over the less-in-stature, and servient, property and contract provisions within the Colorado Constitution. In Colorado, water constitution provisions hold a superior space in Constitutional stature over and above property and contract rights.

The Colorado court in *Emmert* continued: "We here reaffirm, therefore, that section 5 Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to water for purposes other than appropriation." In this single sentence, the Colorado Supreme Court gave the public's waters to the users so that now a private property water usufruct-right user has a greater "right" in water than do the real owners of the water - the public.

(i) that the state is justified in asserting ownership of all natural streams since all natural streams in Colorado are non-navigable (see *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912));

SPONSOR'S COMMENT: The U. S. Supreme Court held in *Economy Light & Power Co. v. U S,* 256 U.S. 113 (1921), No. 104, Argued Dec. 17, 1921. Decided April 11, 1921): *"*A purpose to preserve the rights of public highway in the navigable rivers was again manifested in section 9 of Act of May 18, 1796 (chapter 29, 1 Stat. 464, 468 [Comp. St. 4918])." ... "The public interest in navigable streams of this character in Illinois and neighboring states, and the federal authority over such as are capable of serving commerce among the states, does not arise from custom or implication, [256 U.S. 113, 119] but has a very definite origin. By article 4 of the compact in the Ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio, it was declared:

"'The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.' 1 Stat. 51, 52, note; Rev. Stat. U. S. (1878 Ed.) pp. 13, 16. (emphasis added.)

"This was under the Confederation; but the first Congress under the new Constitution expressed a design to have it continue in full effect, in the Act of August 7, 1789 (chapter 8, 1 Stat. 50). A purpose to preserve the rights of public highway in the navigable rivers was again manifested in section 9 of Act of May 18, 1796 (chapter 29, 1 Stat. 464, 468 [Comp. St. 4918]).

"Nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the states may have done, from assuming entire control in the matter. In short, that the rule laid down *in Willson v. Black Bird Creek Marsh Co*., 2 Pet. 245, 252, *and Gilman v. Philadelphia*, 3 Wall. 713, 731, applies to states formed out of the Northwest Territory as well as to others. Navigability, in the sense of the law, is not

destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."

"But, so far as it established public rights of highway in navigable waters capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power [256 U.S. 113, 121] of Congress to regulate commerce with the Indian tribes. see *Pollard's Lessee v. Hagan*, 3 How. 212, 229, 230."

The meaning of all this has been, and remains to be, that any stream or watercourse over which any commerce has ever been conducted, using the watercourse, is a "public highway", and no change in that trust element is occasioned merely by a state or some political jurisdiction changing the physical condition of that public highway even if that "change" was so severe as to cause the waterway / watercourse / public highway, as defined under federal law and protection, to be completely dried up. And with the statement by the U. S. Supreme Court that: "applies to states formed out of the Northwest Territory as well as to others. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water". Federal supremacy in navigation pertains to all states.

(j) that the judicial interpretation of Colorado constitutional provisions that "the property of the public" and "dedicated to the use of the people of the state, subject to appropriation" does not mean that the ownership of water should remain inalienable in the public but should pass to the people by the first appropriation" (see *Wyatt v. Larimer & Weld Irrigation Co.*, 1 Colo. App. 480, 29 P. 906 (1892) rev'd on other grounds, 18 Colo. 298, 33 P. 144 (1893));

SPONSOR'S COMMENT: Alienation of water owned by the public and used for public purpose and enjoyment is in no manner contemplated or permitted within public trust considerations (see the 1892 U. S. Supreme Court decision *Illinois Central R. Co. v. State of Illinois*, 146 U.S. 387 (1892), 13 S. Ct. 110 (December 5, 1892). The Illinois Legislature in 1869 had passed legislation that had provided much of the waterfront of Lake Michigan in Chicago to the Illinois Central Railroad as a fee simple absolute ownership. When a newly-elected Illinois Legislature passed legislation to overturn the grant from the 1869 Legislature to the Illinois Central Railroad, subsequent legal actions passed through the courts until the 1892 United States Supreme Court decision. In his majority opinion, Justice Field, commenting on the "common law doctrine" being discussed opined in the following manner:

"... this doctrine has been often announced by this court, and is not questioned by counsel of the parties."

"The Doctrine is founded upon the necessity of preserving for the public the use... of waters from private interruption and encroachment.... We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of ... waters are subject to the same trusts and limitations."

> "The question, therefore, to be considered, is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and the consequent control of it waters... "
>
> "The state holds the title to the lands by common law, which we have already shown."
>
> "It is a title different in character from that which the state holds lands intended for sale. It is different from the title which the United States hold in the public lands which are open for preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry over commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties."
>
> "*... the exercise of that trust requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of property. the control of the state for purposes of the trust can never be lost ..."*

(k) that the dicta recited that it is implicit in this section that, along with vested rights, there shall be a maximum utilization of the water of this state (see *Fellhauer v. People*, 167 Colo. 320, 447 P.2d. 268 (1968); see, also, *Kuiper v. Well Owner's Conservation Ass'n*, 176 Colo. 119, 490 P.2d. 268 (1971));

> SPONSOR'S COMMENT: The statement condition within *Fellhauer* reaffirming the Colorado Doctrine of Maximum Utilization is a particular aspect of section 16 of art. 5 of the Colorado Constitution regarding appropriation and use. This Colorado Public Trust Doctrine is not a "use" doctrine, and is, by law, dominant over and superior to property law and contracts which are the bedrock of the appropriations doctrine. The Public Trust Doctrine is not a "use" doctrine; it is, rather, a statement and a re-emphasis of ownership of water by the people as was stipulated in Article XVI, Section 5 of the Colorado Constitution. This Colorado Public Trust Doctrine is not conditioned by, not impressed by, nor constrained in any manner by any provision or decision rendered pertaining to ARTICLE XVI, Section 16 save for the provision in ARTICLE XVI, Section 5: "… *subject to appropriation as hereinafter provided*."

(l) that the delegation of water adjudication management and jurisdiction has been the within the province of the courts, there is nothing in the constitution or this section to prevent the general assembly from placing such jurisdiction and management in a different state agency (see *In Re Water Rights in Irrigation Dist. No. 1, Irrigation Dist. No. 1,* 181 Colo. 395, 510 P.2d. 323 (1973));

> SPONSOR'S COMMENT: The management of public water for public use and enjoyment, and the application of all provisions within this Colorado Public Trust Doctrine, must be visible activities emanating from all levels and branches of state, local and special governments in Colorado.

(m) that the ruling regarding the Ground Water Management Act (see Title 37, Article 90, C. R. S.), is not unconstitutional in violation of section 5, art. XVI, as said act applies to tributary groundwater (see *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d. 1328 (1974), appeal dismissed 421 U. S. 996, 95 S. Ct. 2391, 44 L. Ed.2d. 663 (1975));

SPONSOR'S COMMENT: The Colorado Water Quality Act, at C. R. S. 25-8-102, in the "Legislative Declaration", indicates that it is the *"to be the public policy of this state to conserve state waters and to protect, maintain, and improve, where necessary* ***and reasonable****, the quality thereof for public water supplies, for protection and propagation of wildlife and aquatic life, for domestic, agricultural, industrial, and recreational uses, and for other beneficial uses, taking into consideration the requirements of such uses; to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary* ***to reasonably*** *protect the legitimate and beneficial uses of such waters.*" The Legislative Declaration of the Colorado Water Quality Act is in conflict with proposed provisions of this Colorado Public Trust Doctrine due to the declaration in the act that there is a requirement to "reasonably protect" the … uses of such waters. No declaration of "economic reasonableness", permitting the contamination or pollution of the waters that could limit public enjoyment of their resource, is to be permitted. No actions or deliberations of the Colorado Water Quality Control Commission, or of the Colorado Department of Health and Environment, would be acceptable that would impair, injure, damage, contaminate or pollute the public's water resource, be that surface water or tributary groundwater. No governmental action that adversely impacts the natural environment, or impacts the people's aesthetic enjoyment of their resources, or affects the public's health would be without error.

(n) that the ruling that a water right is fully protected by the constitution in that a priority to the use of water for irrigation or domestic purposes is a property right, and as such, is fully protected by the constitutional guarantees relating to property in general (see *Strickler v. City of Colorado Springs,* 16 Colo. 61, 26 P. 313 (1891); *Farmers Irrigation Co. v. Games and Fish Comm'n,* 149 Colo. 318, 369 P.2d. 557 (1962));

SPONSOR'S COMMENT: Provisions within the decision in *Strickler v. City of Colorado Springs* (1891) delineating that a water right is fully protected by the constitution and as such is fully protected by the constitutional guarantees relating to property in general are in conflict with this Colorado Public Trust Doctrine. This Colorado Public Trust Doctrine means to distinguish, particularly, the difference in property law of *jus publicum*, public rights in property, and *jus privatum*, a right of private ownership. (see *Martin v Lessee of Waddell*, 41 U. S. 367, 102 L. Ed. 997 - Supreme Court 1842. - see, also by reference, *Arnold v. Mundy*, 6 NJL 1 (Sup. Ct. 1821) decided in the Supreme Court of New Jersey, 1 Halst. 1, in which it is held that navigable rivers, and where the tide ebbs and flows, and the ports, bays, and coasts of the sea, including both the waters and the land under the water, are common to the people of New Jersey). In *Arnold v. Mundy* the chief justice says, upon the (American) Revolution all these rights became vested in the people of New Jersey as the sovereign of the country, and are now in their hands; and the legislature may regulate them, &c. But the power which may be exercised by the sovereignty of the state, is nothing more than what is called the *jus regium* - the right of

> regulating, improving, and securing the same, for the benefit of every individual citizen. The sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people. For the *jus privatum* that is acquired to the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use, (22) - as the soil of an highway in which, though in point of property, may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified, (36). These rules, as laid down by Lord Hale, have always been considered as settling the law upon the subjects to which they apply, and have been understood by all elementary writers as governing rules, and have been recognized by Courts of justice as controlling doctrines. They establish that by the common law the king is the owner of all navigable rivers, bays, and shores. That he owns them in full dominion and propriety, and has full power and authority to convey the same; that he may grant a several fishery in a navigable stream, and the common law has annexed only two limitations upon this power. That these waters shall remain highways for passage and navigation, and that whilst they remain ungranted, there is a common right of fishery in them."
>
> and;

(o) that the judicial determination that ARTICLE XVI, Section 5 was "intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation" (see *People v*, *Emmert*, 198 Colo. 137, 597 P.2d. 1025 (1979)).

> SPONSOR'S COMMENT: The Colorado Supreme Court, in its *Emmert* decision concluded: *"We here reaffirm, therefore, that section 5 Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to water for purposes other than appropriation."* In this single sentence, the Colorado Supreme Court gave the public's waters to the water users so that now the private property usufruct water right holder has a greater right in water than does the owners of the water - the public.
>
> How might anyone step forward and contend that the Colorado Supreme Court erred regarding one of the most important natural resource issues of our state. Discussions regarding the use of water have existed starting from the earliest legal deliberations in Colorado - water is truly the essence of existence in a "dry land". The ability of a commentator to contend that the Colorado Supreme Court erred in *Emmert* derives from the historical record of not only the adoption of the Colorado constitution but also from prior state supreme court decisions that established precedent and established the rule of law in water matters. Precedent holdings in law are covered by the precept of *stare decisis* - "to adhere to precedents, and not to unsettle things which are established. 87 Pa. 286; Ballard County v. Kentucky County Debt commission, 290 Ky.

770, 162 S.W.2d. 771, 773." (Black's Law Dictionary - Revised Fourth Addition).

In the first Colorado Territorial Supreme Court decision regarding the duty of water, and that proposed elements within the judicial decree relating to uses of water and the rights of water users, Chief Justice Moses Hallett, declared in *Yunker v. Nichols*, (1 Colo. 551, 555, 570 **(***1872***):** *"In a dry and thirsty land it is necessary to divert the waters of the streams from the natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law."* It is in this decision that the words written by Chief Justice Moses Hallett in his Territorial Supreme Court opinion formulated the Colorado's doctrine stipulating water law as the dominant legal estate, and it is here where the basis exists for the contention that the 1979 Colorado Supreme Court erred in the water use / "trespass" decision in *Emmert*.

"It became obvious" asserts the Colorado Archives MEMORANDUM on the 1872 Yunker decision [see Colorado Constitutional Convention history at http://www.colorado.gov/dpa/doit/archives/digital/waterlaw.htm,] "in the dispute [between Yunker and Nichols], that the doctrine of riparian rights that had evolved in English common law, and was practiced in the eastern states, was inapplicable in the arid American West. The traditional [riparian] law had two central principles - that the right to use water lay only with the owners of land along a water course, and that a user could not appreciably alter the flow of a stream. Either principle would have made western irrigation impossible, as the entire purpose of canal building was to bring water (1) to properties away from the stream and (2) to allow [water] to soak into the fields."

The Colorado Archives MEMORANDUM continues: "J. Hallett revolutionized existing doctrine by breaking from the riparian rights system by creating the Doctrine of Prior Appropriation, which would come to be known as "The Colorado system" and be practiced throughout the western states. In simple terms this meant that an appropriator could capture water from a stream and transport it to another watershed, using streams in both watersheds to convey the appropriated water to its place of beneficial use. Hallett's ideas were used four years later, in 1876, when the Colorado Constitutional Convention met with the intention of resolving existing and potential disputes by constitutional law. At the Colorado Constitutional Convention 1875-1876, Hallett's opinion on water law was incorporated into the Colorado Constitution." Excerpts from the *Proceedings of the Constitutional Convention for the State of Colorado*, pg. 700."

Further reading of Chief Justice Moses Hallett's historic and precedent setting opinion in *Yunker* for the Colorado Supreme Court of 1872 (1 Colo. 551, 555, 1872) reveals some dramatic and profound statements. "The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different [countries]. … but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence." *"But here the law has made provision for this necessity - (the need to apply water to dry land to make it productive) – by WITHHOLDING from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of taking needed supplies of water. …"* "*So, also, the common law recognizes an easement where it is especially necessary to the enjoyment of the dominant estate.*" (1 Colo. 554). "All the lands in this territory

[Colorado] which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them useful." "Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself. They are super-induced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation.". "When the lands of this territory were derived from the general government, they were subject to the laws of nature, which holds them barren until awakened to fertility by nourishing streams of water …"

The earliest Colorado Supreme Court decision regarding the public uses of water and the dominion over the private property owner in control of private land stipulated that private property owners do not have complete control over their lands when the subject of water is brought. Water laws and water uses were held dominant over property and contracts. *And comments were made that the common law also protects the easement "where it is especially necessary to the enjoyment of the dominant estate."* The Colorado Supreme Court erred in *People v. Emmert* by deciding the case as a trespass / property rights issue - when the appropriate legal venue for the discussion of the public use of water in a stream in *Emmert* would have been as a water use / water ownership / public enjoyment issue. If the case had been formatted as a use of water question, the public would now have an unencumbered use of streams in this state.

***** COULD THE PROPOSED INITIATIVE BE USED TO ABROGATE, INVALIDATE, IMPAIR, OR INTERFERE WITH PRIOR, VESTED WATER RIGHTS?**

Yes.

***** COULD THE PROPOSED INITIATIVE BE USED TO ALTER THE TIMING OR DECREASE THE AMOUNT OF DIVERSIONS OF PRIOR, VESTED WATER RIGHTS?**

Yes.

7. WHO IS AUTHORIZED TO MANAGE THE USE OF WATER ~~RIGHTS~~ TO PROTECT THE NATURAL ENVIRONMENT AND THE PUBLIC'S USE AND ENJOYMENT OF THE STATE'S WATERS?

Any state or local agency, any court of competent jurisdiction, or any newly identified entity as determined by the Legislature could be assigned the management of water.

***** WHAT TYPE OF MANAGEMENT IS CONTEMPLATED BY THIS AUTHORITY?**

The "single subject" rule for proposed Initiatives precludes the sponsors from proposing contemplated management entities or management protocols – the Colorado legislature is empowered to create management agencies to engage Colorado water issues.

***** WOULD THE MANAGING ENTITY HAVE THE AUTHORITY TO PROMULGATE RULES?**

Yes.

8. IF A WATER RIGHT OWNER ENTERS INTO A CONTRACT REGARDING THE WATER RIGHT OR IF THE MANAGING ENTITY PROMULGATES RULES, DOES PARAGRAPH (1) (C) MAKE THAT CONTRACT OR THOSE RULES UNENFORCEABLE IN SOME CIRCUMSTANCES?

Sponsor's Note: Question is unintelligible; therefore, unanswerable.

***** IF SO, WHAT ARE THOSE CIRCUMSTANCES?**

Sponsor's Note: Question is unintelligible; therefore, unanswerable.

9. ~~SUBSECTION (3) (D) OF~~ THIS MEASURE STATES THAT "A USUFRUCT WATER PROPERTY RIGHT SHALL REQUIRE THE WATER USE APPROPRIATOR TO RETURN WATER UNIMPAIRED TO THE PUBLIC AFTER USE." THE PROVISION RAISES THE FOLLOWING QUESTIONS:

A. HOW CAN AN APPROPRIATOR IMPAIR WATER AND WHAT TYPES OF ACTIVITIES ARE LIMITED BY THIS PROVISION?

The "single subject" rule for proposed Initiatives precludes the sponsors from proposing a redefinition "impairment" – a common term used in Colorado water deliberations.

***** FOR EXAMPLE, DOES THIS MEASURE PROHIBIT AN APPROPRIATOR FROM AFFECTING WATER QUALITY OR TEMPERATURE?**

Ibid.

***** WOULD THE PROPONENTS CONSIDER ADDING A DEFINITION OF "UNIMPAIRED"?**

No.

B. MOST WATER USES, SUCH AS IRRIGATION, CONSUME PART OF THE WATER THAT IS DIVERTED. FOR EXAMPLE, MORE THAN 40 PERCENT OF THE WATER THAT IS DIVERTED TO FLOOD-IRRIGATE ALFALFA

MAY BE LOST TO A STREAM THROUGH EVAPORATION AND PLANT UPTAKE. DOES ~~SUBSECTION (3) (D) OF~~ THIS MEASURE (have the potential) **TO PROHIBIT OR OTHERWISE LIMIT CONSUMPTIVE USES?**

Yes.

***** WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE TO CLARIFY WHAT, IF ANY, LIMIT IS PLACED ON CONSUMPTIVE USES?**

No.

C. UNDER CURRENT LAW, PERSONS WHO DIVERT WATER FROM ONE BASIN TO ANOTHER BASIN, IN WHAT ARE CALLED "TRANS-BASIN DIVERSIONS," ARE NOT REQUIRED TO RETURN THE UNCONSUMED WATER TO THE BASIN OF ORIGIN. INSTEAD, THE OWNERS OF SUCH WATER RIGHTS MAY USE THIS WATER, ALSO CALLED "FOREIGN WATER," TO EXTINCTION OR ALLOW THE REMAINING WATER TO RETURN TO THE BASIN OF INTRODUCTION. WHAT IS THE EFFECT OF SUBSECTION (3) (D) ON TRANS-BASIN DIVERSIONS?

The "single subject" rule for proposed Initiatives precludes the sponsors from proposing actions and determinations regarding trans-basin transfers.

***** DOES IT REQUIRE PERSONS WHO DIVERT WATER FROM ONE BASIN TO ANOTHER TO RETURN THE REMAINING WATER TO THE BASIN OF ORIGIN?**

Ibid.

***** FOR EXAMPLE, WOULD DENVER BE REQUIRED TO RETURN PART OF THE WATER FROM ITS WATER TREATMENT PLANT TO THE COLORADO RIVER BASIN?**

Ibid.

***** COULD WATER FROM ANOTHER SOURCE BE SUBSTITUTED?**

Ibid.

***** WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE TO EXPLAIN HOW THIS PROVISION AFFECTS TRANS-BASIN DIVERSIONS?**

No.

10. WHAT IS THE PUBLIC'S "WATER ESTATE"?

A public "water estate" is an element of *jus publicum* (public law, or the law relating to the constitution and functions of government and its officers… public ownership, or the paramount or sovereign territorial right or title of the state or government.). "Public Waters" – such as are adopted for the purposes of navigation, or those to which the general public have a right of access, as distinguished from artificial lakes, ponds, or other bodies of water privately-owned. see *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139,18 L.R.S. 670, 38 Am.St.Rep. 541; *State v. Theriault*, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am.St.Rep. 648. (Black's Law Dictionary, Revised Fourth Edition). "Estate" is the interest which any one has in lands, or any other subject of property. see 1 Prest.Est. 20. In this sense, "estate" is constantly used in connection with the words "right," "title." and "interest," and is, in a great degree, synonymous with all of them. see Co.Litt. 345. (Black's Law Dictionary, Fourth Revised Edition).

11. WHAT RIGHTS OF PUBLIC ACCESS DOES ~~SUBSECTION (5)~~ the measure **GRANT THE PUBLIC? ACCESS ACROSS PRIVATE PROPERTY TO ANY STREAM? THE RIGHT TO FLOAT ON STREAMS? TO FISH?**

This Colorado Public Trust Doctrine proposes to acknowledge the right of the public in the enjoyment of their water estate. The ability to float upon, or fish within, their "property" is not a grant to the public but rather exists as condition of ownership. Access across - trespass - any private property is an element of *jus privatum*, laws concerning the rights in private property, and, as such, the issue is not contained within this measure.

12. HOW IS THE "HIGH WATER MARK" DETERMINED? IS THIS THE HIGHEST RECORDED FLOOD? OR THE AVERAGE HEIGHT OF A STREAM?

The high-water mark of a river, not subject to tide, is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation, and to destroy its value for agriculture. see *Raide v. Dollar*, 34 Idaho 682, 203 P. 469, 471; *Union Sand and Gravel v. Northcott* , 102 W.Va. 519, 135 S.E. 589, 592.

13. HOW DOES THE "HIGH WATER MARK" DIFFER FROM THE "WETTED PERIMETER LANDS" INCIDENT TO THE WATERS AND STREAMBED OF A NATURAL STREAM?

Ibid.

***** HOW DOES THE "STREAM COURSE" DIFFER FROM THE "STREAMBED" AND ITS INCIDENT WETTED PERIMETER LANDS?**

"Water Course" - A running stream of water; a natural stream fed from permanent or natural sources, including rivers, creeks, runs, and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry.

It must flow in a definite channel, having a bed or banks, and usually it discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes. see *Leader v. Mathews*, 192 Ark. 1049, 95 S.W.2d. 1138, 1139; *Los Angeles v. Pomerory*, 124 Cal. 597, 57 P. 587.

Water flowing underground in a known and well-defined channel is not "percolating water", but constitutes a "water course", and is governed by law applicable to "surface streams" rather than by law applicable to percolating waters. see *Bull v. Siegrist*, 169 Or. 180, 126 P.2d. 832, 834.

14. SUBSECTION (5) (C) SPECIFIES THAT PUBLIC USES OF WATER (in the natural watercourse of the stream) **ARE NOT SUBJECT TO (**the rules of) **APPROPRIATION, BUT SUBSECTION (1) STATES THAT THE PROPERTY OF THE PUBLIC IN THE WATER OF NATURAL STREAMS IS SUBJECT TO APPROPRIATION. CAN THE PROPONENTS CLARIFY THIS CONFLICT?**

No conflict exists. Waters in streams (see *Hartman v. Tresise* – J. Bailey's dissent) is within the public domain. When water is transferred from the stream as an act of appropriation it then is in the domain of the appropriator - and then is subject to the water usufruct conditions of the appropriator's usufruct property rights as established under provisions of section 16, art. 5.

15. WHO IS A "PERSON OF THE STATE"? A COLORADO RESIDENT? ANYONE WHO HAPPENS TO BE IN COLORADO? HOW WOULD A PERSON OF THE STATE "ENABLE" THE PROPOSED INITIATIVE, PARTICULARLY GIVEN THAT SUBSECTION (7) SPECIFIES THAT THE PROPOSED INITIATIVE IS SELF-ENACTING AND SELF-EXECUTING?

Persons are the subject of rights and duties; and, as a subject of a right, the person is the object of correlative duty, and conversely. Every full citizen is a person; other human beings, namely, subjects who are not citizens, may be persons. But not every human being is necessarily a person; for a person is capable of rights and duties, and there may well be human beings having no legal rights. A person is such because rights and duties are ascribed to him. The person is the legal subject of which rights and duties are attributes. An individual human being considered as having such attributes is called a natural person. see Pollock, FIRST BOOK OF JURISPR. 110. Gray, NATURE AND SOURCES OF LAW. The word in its natural and usual signification includes women as well as men. see *Commonwealth v. Welosky*, 276 Mass. 398, 177 N.E. 656. The term may include artificial beings, as corporations. see 1. Bla.Com. 123; 4 Binge 669. But a corporation of another state is not a "person" within the jurisdiction of the state until it has complied with the conditions of admission to do business in the state. see *Fire Ass'n of Phila. v. New York*, 7 S.Ct. 108, 119 U. S. 110, 30 l. Ed. 342. It may include partnerships. see *In Re Julian, D.C.Pa*., 22 F. Supp. 97, 99. A county is a person in a legal sense, see *Lancaster County v. Trimble*, 34 Neb. 752, 52 N.W, 711; but a sovereign is not: see *In Re Fox*, 52 N.Y. 535, 11 Am.Rep. 751*; U.S. v. Fox*, 94 U. S. 315, 24 L. Ed. 192.

(n. b. THE PRIOR C. R. S. 1-40 "SPONSOR RESPONSE" OF MAY 1, 2002 IS PRESENTED HERE AND IS REQUESTED TO BE INCORPORATED INTO THE APRIL 12, 2010 SPONSOR'S "ANSWERS" TO THE CURRENT C. R. S. 1-40 "REVIEW AND COMMENT" QUESTIONS PREPARED BY THE STAFF OF THE OFFICE OF THE COLORADO LEGISLATIVE COUNSEL AND THE STAFF OF THE COLORADO OFFICE OF LEGISLATIVE LEGAL SERVICES REGARDING THE COLORADO INITIATIVE # 2, 2011-2012 – "*INITIATIVE TO ADOPT THE COLORADO PUBLIC TRUST DOCTRINE*".

Find here the formal record of testimony of the sponsors of the Colorado Initiative 2002-135 – "Public Ownership and Use of Water", proposing to require that Colorado *"ENFORCE AND DEFEND A PUBLIC TRUST DOCTRINE THAT PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATERS, AND PROTECTS THE NATURAL ENVIRONMENT."* The hearing for that Colorado Initiative was held Wednesday, May 1, 2002, at 11:00 a.m., in HCR 0111 (State Capitol Building).

INITIATIVE TO ADOPT THE PUBLIC TRUST DOCTRINE
IN COLORADO FOR THE PEOPLE'S WATER

ANSWERS TO THE QUESTIONS AND COMMENTS
FROM THE LEGISLATIVE COUNSEL
AND THE OFFICE OF LEGISLATIVE LEGAL SERVICES

"Be it Enacted by the People of the State of Colorado:

"**SECTION 1**. Sections 5 and 6 of Article XVI of the Constitution of the state of Colorado are amended to read:

"**ARTICLE XVI SECTION 5 Waters of streams public property**

(1) 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.
(2) THE STATE OF COLORADO SHALL ENFORCE AND DEFEND A PUBLIC TRUST DOCTRINE THAT PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATERS, AND PROTECTS THE NATURAL ENVIRONMENT.
(3) THE PROPERTY RIGHT GRANTED BY THE PUBLIC TO THE WATER USE APPROPRIATOR IS A USUFRUCT ESTATE SUBSERVIENT TO THE PUBLIC ESTATE. ANY WATER USE RIGHT MAY BE CONVEYED TO PUBLIC OWNERSHIP OR USE. WATER USE RIGHTS SHALL NOT CONFER OWNERSHIP

OF WATER OTHER THAN USE RIGHTS TO THE APPROPRIATOR.
(4) THE PROVISIONS OF THIS SECTION ARE SELF ENACTING AND ARE SELF-EXECUTING.

ARTICLE XVI, SECTION 6 Diverting unappropriated water – limitations – priority preferred uses

(1) The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied, BUT MAY BE LIMITED SO AS TO PROTECT PUBLIC USE OF WATER, AND TO PROTECT THE NATURAL ENVIRONMENT. THE PROPERTY RIGHT ACCRUED TO WATER DIVERTED IS A WATER USE USUFRUCT RIGHT REQUIRING THE USER TO RETURN WATER UNIMPAIRED TO THE PUBLIC AFTER USE. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using water for domestic purposes shall have preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.
(2) THE COLORADO DOCTRINE OF APPROPRIATION RECOGNIZES THAT THE PUBLIC CONFERS THE PRIVILEGE OF USE OF WATER AND THE DIVERSION OF WATER TO APPROPRIATORS FOR THE COMMON GOOD.
(3) THE PROVISIONS OF THIS SECTION ARE SELF ENACTING AND ARE SELF-EXECUTING.

Section 1-40-101(1), C. R. S., requires the Directors of the Colorado Legislative Counsel and the Office of Legislative Legal Services to "review and comment" on initiated petitions for proposed amendments to the Colorado Constitution. The first objective of the hearing is to permit the staffs of both offices to ask questions concerning the intent and objective regarding the proposed amendments. The Hearing is a legal proceeding to establish the sponsor's Constitutional intent regarding the proposed Constitutional modification.

The answers provided here to the "review and comment" inquiries are to be considered the formal record of testimony of the sponsors of the Colorado Initiative 2002-135 – "Public Ownership and Use of Water", requiring that Colorado *"ENFORCE AND DEFEND A PUBLIC TRUST DOCTRINE THAT PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATERS, AND PROTECTS THE NATURAL ENVIRONMENT."* The Hearing has been scheduled for Wednesday, May 1, 2002 at 11:00 a.m. in HCR 0111 (State Capitol Building – Ground Floor, House Hearing Room).

The convention used in the following document shall be as follows:

• **Questions and comments from the staffs of the Legislative Council and legislative Legal Services shall be presented in BOLD FACE TYPE AND UPPER CASE LETTERING.**

• Responses to the questions by the sponsors shall appear in lower case lettering using normal appearing typeface.

_____

THE MAJOR PURPOSES OF THE AMENDMENT APPEAR TO BE:

1. TO REQUIRE THE STATE TO ENFORCE AND DEFEND A PUBLIC TRUST DOCTRINE THAT PROTECTS THE PUBLIC'S OWNERSHIP AND USES OF WATER AND THE NATURAL ENVIRONMENT.

Yes.

2. TO PROVIDE THAT APPROPRIATOR'S RIGHTS ARE A USUFRUCT ESTATE THAT IS SUBSERVIENT TO AND (may be**) LIMITED BY THE PUBLIC ESTATE, AND THAT SUCH RIGHTS MAY BE CONVEYED TO PUBLIC OWNERSHIP OR USE.**

Yes. The phrase "*AND LIMITED BY THE PUBLIC ESTATE***"** should be conditional. Not at all times would public ownership limit appropriator's (use) rights. The public has made grants of the use of water to the users so that common good within Colorado can occur. The Constitutional re-statement of public ownership, and that public ownership is older, and preceded appropriation use rights, is not intended to change or effect an individual water use right within the appropriation system unless that use right impinges upon, or damages, or causes injury, or impairs the public ownership of water and the uses and the values the people retain in their water.

3. TO REQUIRE APPROPRIATORS TO RETURN WATER UNIMPAIRED TO THE PUBLIC AFTER USE:

Yes.

4. TO PROVIDE THAT THE APPROPRIATION DOCTRINE RECOGNIZES THAT IT IS THE PUBLIC THAT CONFERS THE RIGHT TO USE WATER FOR THE PUBLIC GOOD;

No. The measure intends to provide that the Colorado Doctrine of Prior Appropriation be acknowledged as a grant to the use of water to the users from the public, and that those grants to the use of water were given by the public to the user so that Colorado might become fruitful by the allocation of its scarce water resources. (see Yunker v. Nichols, Colorado Territorial, Vol. 1, 70, 552, 555 February 1872, Hallett, C. J.) (see also Hartman v. Tresise, 84 Pacific Reporter, 685, 694, Supreme Court of Colorado, June 5, 1905, N.B. *dissenting, Bailey, J. Steele, J. concurs).*

5. TO PROVIDE THAT THE PROPOSED AMENDMENT IS SELF-ENACTING AND SELF-EXECUTING.

Yes.

SUBSTANTIVE QUESTIONS:

1. SUBSECTION 5 (2) : IT IS UNCLEAR WHAT IS MEANT BY THE "PUBLIC TRUST DOCTRINE"

A. CONTENT : HOW DO THE PROPONENTS CHARACTERIZE THIS DOCTRINE? WHAT DO THE PROPONENTS WANT THE DOCTRINE TO CONSIST OF AND DO THEY WANT IT PATTERNED AFTER THE PUBLIC TRUST DOCTRINE OF ANY OTHER STATE? WOULD COMPARING OR CONTRASTING THIS PROPOSAL WITH REGARD TO PREVIOUS COLORADO PUBLIC TRUST DOCTRINE INITIATIVES BE HELPFUL?

> *"By the law of nature these things are common to man – the air, running water, the sea, and consequently the shores of the sea."* - (Institutes of Justinian 2.1.1.)

In a series of cases, the United States Supreme Court has found that, "... the shores, and rivers, and bays and arms of the sea, and the land under them, ... held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fisheries." (see Martin v. Waddell, 10 L. Ed. 997 (1842)).

Martin v. Waddell was the first time that the U. S., Supreme Court had opined regarding the "public trust" – or JUS PUBLICUM (public rights conferred under the Law of Nations as the foundation of all social rights in civil law). The Court, further discussing the historic implications of JUS PUBLICUM, noted that tracing the title from the English Crown to the patent under discussion in the case, had observed that." ... the lands and territories of the new continent were not claimed by the right of conquest, but were claimed by the right of discovery. Absolute rights and dominions were held to belong to the European nations."

The Court further discussed therein that the "King holds nothing as private property, but everything as JUS CORONAE. By the Chapters 16 and 23 of the Statute of Magna Carta, the power of the King to grant the soil of navigable rivers, ports, and havens was restrained and the exercise of it as to new grants entirely prohibited."

Justice Tanney, in Martin v. Waddell, stated:

> "... when the Revolution took place, the people of each State became themselves sovereign, and in that character hold absolute right to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered by the Constitution to the General Government."

In Pollard v. Hagan, 44 U.S. (3 How) 212,230, 11 L. Ed. 565 (1845), the court opined that:

> "... the common law duties and limitations of Alabama over the navigable waters were the same as those original Colonies..."

The theory thereafter was declared as the "Equal Footing" doctrine which suggested that when new territories were accepted as states, they follow the common laws and dictates as applied to the original states, and that issues such as the public trust doctrine were not to be obviated merely by the will of the State.

The United States Supreme Court decision that is most instructional to understanding the concepts contained within the Public Trust Doctrine, and the case most cited as having been the "landmark" decision in moving the Public Trust Doctrine from the national level to the level of the states, is the 1892 U. S. Supreme Court decision Illinois Central R. Co. v. State of Illinois, 146 U.S. 387 (1892), 13 S. Ct. 110 (December 5, 1892). The Illinois Legislature in 1869 had passed legislation that had provided much of the waterfront of Lake Michigan in Chicago to the Illinois Central Railroad as a fee simple absolute ownership. When a newly-elected Legislature passed legislation to overturn the grant from the 1869 Legislature, subsequent legal actions passed through the courts until the 1892 United States Supreme Court decision. In his majority opinion, Justice Field, commenting on the "common law doctrine" being discussed opined in the following manner:

> "... this doctrine has been often announced by this court, and is not questioned by counsel of the parties."
> "The Doctrine is founded upon the necessity of preserving for the public the use... of waters from private interruption and encroachment.... We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of ... waters are subject to the same trusts and limitations."
> "The question, therefore, to be considered, is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and the consequent control of it waters... "
> "The state holds the title to the lands by common law, which we have already shown."
> "It is a title different in character from that which the state holds lands intended for sale. It is different from the title which the United States hold in the public lands which are open for preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry over commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties."
> "... the exercise of that trust requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of property. The control of the state for purposes of the trust can never be lost ...".

In Illinois Central R. Co. v. State of Illinois the United State Supreme Court had announced that the rights and ownership of waters and certain lands associated with water could never be held outside the public ownership is the doctrine known as the Public Trust Doctrine.

The United State Supreme Court further discussed the states "as quasi-sovereigns" in the case Georgia v. Tennessee Copper, 206 U.S. 230, 27 S. Ct. 618 (1907), when Justice Holmes, in the majority opinion, stated:

> "In that capacity the state has an interest independent of, and behind, the title of its citizens, in all the earth and air within its domain.... the state, by its entering the Union, did not sink to the position of private owners, subject to the system of private law... "

The extent and the range of the Public Trust Doctrine that the sponsors of the Colorado Constitutional Amendment here proposed underscore has been manifested in Marks v. Whitney, 6 Cal. 3d. 251, and is the following:

> "(p)ublic easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes ... " "(t)he traditional triad of uses – navigation, commerce and fisheries – does not limit the public interest in the trust reservation..." "(t)he public uses to which lands and waters are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of lands and waters is the preservation of those lands and waters in their natural state so that they may serve as ecological units... as open space, and as environments which provide food and habitat for birds and (wildlife), and which favorably affect the scenery and climate of the area."

Therefore, it may be concluded that the extent and range of the Public Trust Doctrine extends to may public "uses" and values, including, but not limited to, the protection of the natural environment, recreational uses of the elements of the public reservation, and the preservation of the public natural resources for the enjoyment and benefit of wild places and of wildlife.

> "The objective and function of the (Public Trust) Doctrine insofar as the state is concerned relates to the authority and obligations of the state as administrator of the public trust with the dominant theme being the states sovereign power and duty to continued supervision over the trust... One consequence... is that the parties acquiring rights in the trust property (or granted uses of trust elements), generally hold those rights subject to the trust, and can assert no vested right to use those (trust elements) in a manner harmful to the trust." National Audubon Society v. Superior Court of Albany County, 21 ERC 1490, February 17, 1983

And, to the question as to the potential for the adoption of a Public Trust Doctrine to create not only policy re-directions in the care and use and applications of state waters but also to establish a new direction for the support, control and regulation for elements of the trust on Federal lands within the state domain, an answer might be found in the United States Supreme Court decision California Coastal Zone Commission, et. al. v. Granite Rock Company, 107 S. Ct. 1419 (March 24, 1987) in which the U. S. Court found:

> "(t)he Property Clause of the constitution, which gives Congress plenary power to legislate use of federal lands, does not itself automatically conflict with all state regulation of federal lands. "Even within the sphere of the Property Clause, which gives Congress plenary power to legislate use of federal lands, state law is preempted only when it conflicts with the operation or objectives of federal law, or when congress evidences intent to occupy a given field (U.S.C.A. Const. Art. 4, (3 cl.2)."
>
> "In summary, ... (these) cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously grants rights or the enforcement of the trust against lands and waters long thought to be free of the trust ... Except for those rare instances in which a grantee may (have) acquired a right to use former trust property free of trust restrictions, the grantee holds (an interest) subject to the trust, And while he may assert a vested right to the servient estate and to any improvement he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes." see National Audubon Society v. Superior Court of Albany County, 21 ERC 1490, February 17, 1983.

In In-stream Flows and the Public Trust, Professor Harrison C. Dunning make the following statements, adopted by the sponsors of the proposed Colorado constitutional amendment:

> "The doctrine takes on the dimensions of implied constitutional limitation upon legislative power...."
> "... (Public Trust doctrine) imposed a duty on the state to act in a way protective of *in situ* public trust uses of waters.
> "... that the ancient Public Trust doctrine may in proper circumstances serve to limit how much water may be diverted pursuant to an appropriative right.
> "... (Public Trust Doctrine) judicially fashions a public right to deal with inadequate legislation for the protection of important public values, including, but not limited to, federal land reservations, national recreational areas, wildlife preserves, forests and parks."
> "Alongside the diversion of water, there are important values represented by non-diversion of the "free" flow of water."
> "An advantage to the Public Trust Doctrine is its association with state law ... with regard to water law in the West, federal law plays a secondary role . The U.S. Supreme Court has emphasized that the paramount federal policy on Western waters is deference to state law,"
> "the Public Trust doctrine – to the extent it is understood as a public property right – dates from "time immemorial", and as the common heritage of the people has its greatest potentials as a tool for restoration."

DO THEY WANT IT PATTERNED AFTER THE PUBLIC TRUST DOCTRINE OF ANY OTHER STATE?

No.

WOULD COMPARING OR CONTRASTING THIS PROPOSAL WITH REGARD TO PREVIOUS COLORADO PUBLIC TRUST DOCTRINE INITIATIVES BE HELPFUL?

Yes. Find here, attached as further intent and reference supporting the adoption of a Public Trust Doctrine for Colorado's waters and environments, answers provided to the February 12, 1996 "review and comment" Hearing regarding "Proposed Constitutional Amendment – 1996-6: Water – Public Trust Doctrine"

B. PUBLIC USES:

I. DEFINITION : WHAT ARE PUBLIC USES OF WATER ? IS WATER USED FOR RECREATION AND AESTHETIC PURPOSES A PUBLIC USE OF WATER? WOULD THE ADOPTION OF A TRUST DOCTRINE PROVIDE THE PUBLIC WITH FISHING, HUNTING OR ACCESS RIGHTS ON COLORADO'S STREAMS. IS THE COLORADO WATER CONSERVATION BOARD'S IN-STREAM FLOW PROGRAM A PUBLIC USE? IS THE EXISTING STATUTE GIVING THE COLORADO WATER CONSERVATION BOARD THE EXCLUSIVE AUTHORITY TO HOLD IN-STREAM FLOWS INCONSISTENT WITH THE PROPOSAL? WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT FURTHER DEFINES "PUBLIC USES" OF WATER?

WHAT ARE PUBLIC USES OF WATER?

See above. In particular see the discussion within Marks v. Whitney, 6 Cal. 3d. 251, manifested the following:

> "(p)ublic easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes ... " "(t)he traditional triad of uses – navigation, commerce and fisheries – does not limit the public interest in the trust reservation..." "(t)he public uses to which lands and waters are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of lands and waters is the preservation of those lands and waters in their natural state so that they may serve as ecological units... as open space, and as environments which provide food and habitat for birds and (wildlife), and which favorably affect the scenery and climate of the area."

The question of public "uses" of waters does not seek a classification of "uses", but rather incorporates public desires associated with its ownership of waters. The issue within a Public Trust Doctrine is that the people of the state of Colorado own the water in Colorado and, as such, may seek water – related activities as owners of their estate compliant with the rights and responsibilities of the state as administrator to enforce regulation. Various public uses, including the navigation servitude, need not be determined solely on the basis of the amount of water

flowing, but may be impressed by the public ownership of water and the public desire to use the water for public purpose (s).

Emphatically – the Public Trust Doctrine is not a "use" doctrine; it is a statement and a re-emphasis of ownership of water by the people as was originally stipulated in Article XVI, Section 5 of the Colorado Constitution.

IS WATER USED FOR RECREATION AND AESTHETIC PURPOSES A "PUBLIC USE" OF WATER?

Yes.

WOULD THE ADOPTION OF A TRUST DOCTRINE PROVIDE THE PUBLIC WITH FISHING, HUNTING OR ACCESS RIGHTS ON COLORADO'S STREAMS.

To the extent that the surface of streams and rivers to the high-water boundary, and the beds of streams and rivers thereof, are owned by the people of the state of Colorado, the people may use their property as a public highway.

IS THE COLORADO WATER CONSERVATION BOARD'S IN-STREAM FLOW PROGRAM A PUBLIC USE ?

No. The in-stream flow water use right program is a state water use allocation within the Appropriations Doctrine. To the extent that the Colorado Water Conservation Board'' In-stream Flow Program is protective of the state's interest in its water use right(s), and to the extent that the Colorado Water Conservation Board seeks to keep riparian and lotic environments from absolute diversion and no water within a stream or river corridor, it can be seen as a public interest, but not a public "use", within the context here evolved regarding the Public Trust Doctrine and the people's ownership of waters and associated lands.

IS THE EXISTING STATUTE GIVING THE COLORADO WATER CONSERVATION BOARD THE EXCLUSIVE AUTHORITY TO HOLD IN-STREAM FLOWS INCONSISTENT WITH THE PROPOSAL?

The two issues are not contained within a single context. The Public Trust Doctrine identifies public values and uses as ownership prerogatives. The Colorado Water Conservation Board'' In-stream Flow Program seeks to "quantify" water use rights within the Doctrine of Appropriation, and, thereby, subject those uses to priorities and preferences within a "use", or appropriations, concept. To the extent that the Colorado Water Conservation Board'' In-stream Flow Program seeks to "quantify" water use rights within the Appropriations, or "use" Doctrine, it is therefore, by definition, a subservient estate to the public's dominant ownership estate.

II. IMPLEMENTATION: WHO DECIDES HOW MUCH WATER IS NEEDED TO PROTECT PUBLIC USES? IS THERE A STATE ENTITY THAT IS CHARGED WITH DETERMINING WHETHER A USE PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATER? IS THIS DETERMINATION BEST MADE BY THE COURTS OR A STATE AGENCY, SUCH AS THE COLORADO WATER CONSERVATION BOARD OR THE STATE ENGINEER? WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT SPECIFIES THE MOST APPROPRIATE

FORUM FOR DETERMINING WHETHER A USE PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATERS?

WHO DECIDES HOW MUCH WATER IS NEEDED TO PROTECT PUBLIC USES?

The state, and its agencies and departments, as quasi-sovereign, is mandated to act to protect the people's ownership, and is charged with being the steward of the people's estate.

IS THERE A STATE ENTITY THAT IS CHARGED WITH DETERMINING WHETHER A USE PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATER?

The state, as quasi-sovereign, mandated to act to protect the people's ownership, is charged with being the steward of the people's estate.

IS THIS DETERMINATION BEST MADE BY THE COURTS OR A STATE AGENCY, SUCH AS THE COLORADO WATER CONSERVATION BOARD OR THE STATE ENGINEER?

The "power" to enforce a Public Trust Doctrine element necessarily resides within each and every state citizen, and resides at many state agencies and departments. Any person has standing in a court of competent jurisdiction within the context of the Public Trust Doctrine to ask and seek the state to enforce and defend trust elements. State agencies, responsible for wildlife concerns, water quality matters, agriculture, mining and natural resources, and air quality, as it associates with trust elements, are charged within the proposal *to PROTECT THE PUBLIC OWNERSHIP AND USE OF WATERS, AND PROTECTS THE NATURAL ENVIRONMENT.*

WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT SPECIFIES THE MOST APPROPRIATE FORUM FOR DETERMINING WHETHER A USE PROTECTS THE PUBLIC OWNERSHIP AND USE OF WATERS?

No.

C. <u>NATURAL ENVIRONMENT</u> :

I. <u>HISTORIC CHANGES</u>: DAMS AND WATER USE PRACTICES HAVE ALTERED THE TIMING AND VOLUME OF FLOWS IN COLORADO'S RIVERS. FOR EXAMPLE, IMPOUNDMENTS, TRANS-MOUNTAIN DIVERSIONS, AND IRRIGATION RETURN FLOWS HAVE CREATED YEAR ROUND FLOWS IN EASTERN STRETCHES OF THE SOUTH PLATTE RIVER WHERE HISTORICALLY THE RIVER FLOWED ONLY DURING THE SPRING RUNOFF AND AFTER LARGE THUNDERSTORMS. AS A RESULT, BIOTIC COMMUNITIES HAVE DEVELOPED WHERE NONE EXISTED BEFORE. ARE THESE NEW BIOTIC COMMUNITIES PART OF THE "NATURAL ENVIRONMENT", AND IS THE STATE OBLIGATED TO ENSURE THE CONTINUATION OF THE PRACTICES THAT CREATED THE FLOWS UPON WHICH THESE COMMUNITIES DEPEND?

For instruction into the question postulated here, a further examination of Justice Bailey's opinion, at 690, in Hartman v. Tresise, 84 P. 685 (1905) serves.

> "SECTION 5, ARTICLE 16... makes the water of every natural stream public. They are dedicated to the use of the people, to be used by them is such manner as they see fit, subject only to one condition: that of the right of appropriation for beneficial purposes. Until the waters are appropriated and diverted from the stream, they belong to the public. No stronger words could have been used by the people than are used in this declaration. It is idle to say that the waters of streams are dedicated to the public for the purpose of appropriations, because those words are not the words of the Constitution. It is a grant made subject to that right. The moment the water is appropriated, it ceases to belong to the public, but it becomes the property of the appropriator. The individual who makes the diversion, and the appropriation, has the exclusive right to its use, and the public is barred from interfering with it. The contention that the water of a stream is dedicated to the people for the purpose of appropriation must fall of its own weight, because, immediately upon its being appropriated, it no longer belongs to the people. ... The dedication does not go into effect until the appropriation is made, and the moment that it is made, the water ceases to belong to the people, but become the property of the appropriator. ...
>
> "In 1897, the (Colorado) Legislature passed an Act which permitted any person or company to divert water from any public stream and turn it into another public stream and take out the same amount of water again, making provisions for loss by seepage or evaporation."

The waters "turned into other public steams" by any person, or any company, by the Act of 1897 used other public streams for conveyance of waters to faraway lands – all of which was consistent with the protocols established in Yunker v. Nichols – that we make this a fortunate land by granting the right of use of waters to dry places for commerce and agriculture. The subsequent emergence of new biomes and biotic communities due to the import of waters came from the grant of the use of waters permitted in the 1897 Act. So long as the waters transported and appropriated contribute to biotic communities after the water has been appropriated, then that biome is a community associated with use, not with the public ownership.

And the converse is true – should there be damages due to the diversion of waters from the public to "users", and that damage can be reasonable determined to be the result of too much appropriation of the people's property to the detriment of public values, then that use, as a grant, can be rescinded.

ARE THESE NEW BIOTIC COMMUNITIES PART OF THE "NATURAL ENVIRONMENT", AND IS THE STATE OBLIGATED TO ENSURE THE CONTINUATION OF THE PRACTICES THAT CREATED THE FLOWS UPON WHICH THESE COMMUNITIES DEPEND?

No.

II. <u>DOMESTIC USE</u>: OCCASIONAL, COLORADO EXPERIENCES SEVERE DROUGHTS THAT MAY NOT PROVIDE SUFFICIENT WATER FOR BOTH ENVIRONMENTAL PROTECTION AND DOMESTIC PURPOSES. HOW SHOULD COLORADO ALLOCATE SUCH A LIMITED SUPPLY? IS THERE A PRIORITY BETWEEN PROTECTING THE NATURAL ENVIRONMENT AND SUPPLYING DOMESTIC NEEDS? IF SO, WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT SPECIFIES THE PRIORITY BETWEEN THESE POTENTIALLY COMPETING USES?

ARTICLE XVI, Section 6 provides: "... but when waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using water for domestic purposes shall have preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Waters diverted to cities and communities for "domestic purposes" are diversion – in the form of appropriation. ARTICLE XVI, Section 6 is clear and explicit that when water diverted from natural streams is not sufficient for the service of all those desiring the use of the stream, then those using water for domestic purpose have a priority.

IF SO, WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT SPECIFIES THE PRIORITY BETWEEN THESE POTENTIALLY COMPETING USES?

No.

D. <u>GROUNDWATER</u> : THE COLORADO SUPREME COURT HAS DETERMINED THAT THE DOCTRINE OF PRIOR APPROPRIATION DOES NOT APPLY TO WATER IN NON-TRIBUTARY AQUIFERS AND DESIGNATED GROUNDWATER BASINS BECAUSE SUCH WATERS ARE NOT PART OF THE "WATER OF EVERY NATURAL STREAM" AS THE TERM IS USED IN PROPOSED SUBSECTION (1). SUBSECTION (2), IN CONTRAST, REFERS SIMPLY TO WATERS. DOES THE PUBLIC TRUST DOCTRINE EXTEND TO THESE WATERS IN NON-TRIBUTARY AQUIFERS AND DESIGNATED GROUNDWATER BASINS? WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT DEFINES THE APPLICABILITY OF THE PUBLIC TRUST DOCTRINE TO NON-TRIBUTARY GROUNDWATERS AND DESIGNATED GROUNDWATER BASINS?

DOES THE PUBLIC TRUST DOCTRINE EXTEND TO THESE WATERS IN NON-TRIBUTARY AQUIFERS AND DESIGNATED GROUNDWATER BASINS?

The Initiative, as proposed and presented, does not speak to waters in non-tributary aquifers.

WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT DEFINES THE APPLICABILITY OF THE PUBLIC TRUST DOCTRINE TO NON-TRIBUTARY GROUNDWATERS AND DESIGNATED GROUNDWATER BASINS?

No.

E. COMPACTS: EVERY ONE OF COLORADO'S MAJOR RIVERS IS SUBJECT TO AN INTERSTATE COMPACT PURSUANT TO WHICH COLORADO IS OBLIGATED TO DELIVER WATER TO DOWNSTREAM STATES. WHAT EFFECT, IF ANY DO THE PROPONENTS INTEND FOR THE PROPOSAL TO HAVE ON COLORADO'S OBLIGATIONS UNDER THESE COMPACTS? SHOULD AN EXEMPTION BE MADE FOR OUT-OF-STATE DIVERSIONS THAT ARE MADE FOR THE PURPOSE OF COMPLYING FOR SUCH COMPACTS?

WHAT EFFECT, IF ANY DO THE PROPONENTS INTEND FOR THE PROPOSAL TO HAVE ON COLORADO'S OBLIGATIONS UNDER THESE COMPACTS ?

The proposal as submitted does not related to Interstate Compacts which call for the delivery of water at state boundaries. The Public Trust Doctrine is meant as an application of state law within the state domain.

SHOULD AN EXEMPTION BE MADE FOR OUT-OF-STATE DIVERSIONS THAT ARE MADE FOR THE PURPOSE OF COMPLYING FOR SUCH COMPACTS?

No.

2. SUBSECTION 5 (3)

A. USUFRUCT: BY SPECIFYING THAT APPROPRIATIVE RIGHTS ARE A "USUFRUCT ESTATE" AND THAT WATER USE RIGHTS "SHALL NOT CONFER OWNERSHIP OF WATER OTHER THAN USE RIGHTS TO THE APPROPRIATOR", DO THE PROPONENTS INTEND ANY CHANGE TO EXISTING PRIOR APPROPRIATION LAW ? IF SO, WHAT ?

The inclusion of *"USUFRUCT ESTATE" AND THAT WATER USE RIGHTS "SHALL NOT CONFER OWNERSHIP OF WATER OTHER THAN USE RIGHTS TO THE APPROPRIATOR"* is meant to defeat any implication in Archuleta V. Boulder & Weld County Ditch Co., 118 Colo. 43, 192 P.2d. 891 (1948), and to hold null and void legislation enacted pursuant thereto. The case herein cited vested rights in waters in natural streams, and is, by definition, a use doctrine assignment that does violence to the public estate.

B. SUBSERVIENT TO THE PUBLIC ESTATE: IT IS NOT CLEAR WHAT THIS PROVISION MEANS.

The intent of the language is to assure, that should a conflict arise between public trust elements and actions of the Appropriations Doctrine, that a prior assertion exists that the Public Trust Doctrine is, and has been, a Doctrine that is older, has been in effect longer, represents the interests of the people more than a use doctrine does, and is the foundation of the people's rights and interests in their water.

I. PROSPECTIVE APPLICATION : WOULD THIS PROVISION (OR THE SIMILAR PROVISION IN SUBSECTION 6 (1) PURSUANT TO WHICH THE RIGHT TO DIVERT MAY BE LIMITED TO PROTECT PUBLIC USES AND THE NATURAL ENVIRONMENT) REQUIRE WATER JUDGES TO IMPOSE USE, LOCATION, RATE,

VOLUMETRIC, OR TIMING LIMITATIONS IN NEW WATER RIGHTS DECREES ? IF SO, HOW WOULD SUCH LIMITS BE DETERMINED AND ENFORCED.

The state, and its agencies and departments, as quasi-sovereign, is mandated to act to protect the people's ownership, and is charged with being the steward of the people's estate. The role of the state as administrator is not detailed within the Public Trust Doctrine Initiative. To do so might jeopardize the initiative "single subject" rule.

II. RETROACTIVITY: DO THE PROPONENTS INTEND THE PUBLIC TRUST DOCTRINE TO APPLY RETROACTIVELY TO EXISTING WATER RIGHTS ? IF SO, HOW WOULD THE EFFECTS OF SUCH APPLICATION, INCLUDING NECESSARY LIMITS, BE DETERMINED AND ENFORCED? WOULD DOING SO CONSTITUTE A TAKINGS THAT WOULD REQUIRE COMPENSATION PURSUANT TO THE FEDERAL CONSTITUTION'S FIFTH AMENDMENT OR ARTICLE ii, SECTION 15 OF COLORADO'S CONSTITUTION?

DO THE PROPONENTS INTEND THE PUBLIC TRUST DOCTRINE TO APPLY RETROACTIVELY TO EXISTING WATER RIGHTS ?

The question contains an ambiguity. Since the Public Trust Doctrine is older and precedes the Appropriation Doctrine, and since any "use" that is granted to the water user comes with the condition that the people's ownership and values are to be protected, and that the Appropriations Doctrine is a subservient estate to the people's public trust estate, any action to protect the public interest and ownership cannot be classified as retroactive – just normative and corrective.

III. IF SO, HOW WOULD THE EFFECTS OF SUCH APPLICATION, INCLUDING NECESSARY LIMITS, BE DETERMINED AND ENFORCED?

The state, and its agencies and departments, as quasi-sovereign, is mandated to act to protect the people's ownership, and is charged with being the steward of the people's estate.

IV. WOULD DOING SO CONSTITUTE A TAKINGS THAT WOULD REQUIRE COMPENSATION PURSUANT TO THE FEDERAL CONSTITUTION'S FIFTH AMENDMENT OR ARTICLE ii, SECTION 15 OF COLORADO'S CONSTITUTION ?

No.

The public ownership of water predated the grant of use of the public water for uses. The question contemplates the issue of what are the rights of parties who have acquired interests in a public trust element if the elements of the trust start being applied?

No "takings" of private property can occur since all privately-held water use rights, granted to the private users, were grants subject to the trust provisions. The application of the Public Trust Doctrine here is not the application of a new tenet of public law, but the re-statement of the United States Constitution and provisions of U. S. Supreme Court decisions

prior to Colorado being a territory or a state. The "Equal Footings" opinions in Pollard v. Hagan, 44 U.S. (3 How) 212, 230, 11 L. Ed. 565 (1845), where the court opined that:

> "... the common law duties and limitations of Alabama over the navigable waters were the same as those original Colonies..."

is the controlling precept. The theory thereafter was declared as the "Equal Footing" doctrine which suggested that when new territories were accepted as states, they follow the common laws and dictates as applied to the original states, and that issues such as the public trust doctrine were not to be obviated merely by the will of the State.

For one treatment of the question regarding the potential for a "takings" of property that originally had been within the public ownership, the California Supreme Court provided guidance in People v. California Fish Co., 166 Cal. 576, 597 (Calif. 1913) to wit:

> "(S)tatutes purporting to authorize an abandonment of ... public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed. And if the interpretation if statute is reasonably possible which would not involve a destruction of public use or an intention to terminate in violation of the trust, the courts will give the statute such interpretation."

Would then such administration and control of public uses and the public trust to enter upon and possess another party's interest for the preservation and advancement of public uses, and to make such improvements and changes as may be deemed advisory for those purposes, be a "taking", and subject to claims for compensation ? Again seeking answers in People v. California Fish Co., 166 Cal. 576, 597 (Calif. 1913), the California Court rejected the claims for "takings" compensations, noting that :

> "they had not lost title to their interests, but retained title s subject to the public trust."

and,

> "We do not divest anyone of title to property; the consequence of our decision will be only that some predecessors in interest acquired property .... and hold it subject to the public trust." Berkeley v. Superior Court, 26 Cal. 3 d. 515, 532.

C. PUBLIC OWNERSHIP: MAY ONLY ABSOLUTE WATER RIGHTS BE CONVEYED TO PUBLIC OWNERSHIP, OR CAN CONDITIONAL RIGHTS ALSO BE TRANSFERRED? WOULD THE CONVEYANCE BE PURSUANT TO A DONATION, OR COULD COMPENSATION BE REQUIRED TO BE PAID TO A WATER RIGHTS OWNER (sic) FOR SUCH A TRANSFER? IF SO, WHAT AGENCY OF GOVERNMENT WOULD PAY ?

MAY ONLY ABSOLUTE WATER RIGHTS BE CONVEYED TO PUBLIC OWNERSHIP, OR CAN CONDITIONAL RIGHTS ALSO BE TRANSFERRED ?

"ANY WATER USE RIGHT MAY BE CONVEYED TO PUBLIC OWNERSHIP OR USE." – see proposed Initiative 2002-135.

WOULD THE CONVEYANCE BE PURSUANT TO A DONATION, OR COULD COMPENSATION BE REQUIRED TO BE PAID TO A WATER RIGHTS OWNER (sic) FOR SUCH A TRANSFER?

The intention is that the public not be required to buy back any of the property that the public granted to the user. If a car were to be borrowed and use permitted, would the owner, upon demand that the property be returned, be required to offer compensation? No.

The voluntary alienation or surrender of the use right, could, should the Legislature so choose, be considered a donation to public purpose and have special tax treatment, but that decision is not contained within the current proposal, and is outside the condition of the constitutional modification language offered.

3. SUBSECTIONS 5 (4) AND 6 (3): WHAT DOES THE REFERENCE TO "SELF-ENACTING" MEAN? DOES THE REFERENCE TO "SELF-EXECUTING" MEAN THAT LEGISLATION IS NOT REQUIRED, THAT IT IS PROHIBITED, OR COULD IMPLEMENTATION BE ACCOMPLISHED BY A STATEMENT OF POLICY BY EXECUTIVE BRANCH OFFICIALS?

WHAT DOES THE REFERENCE TO "SELF-ENACTING" MEAN?

The Term "self-enacting" means that upon approval by the electorate of the question "Be it enacted...", the measure becomes a constitutional provision without wait or without a formal declaration of any agency or department of government.

DOES THE REFERENCE TO "SELF-EXECUTING" MEAN THAT LEGISLATION IS NOT REQUIRED, THAT IT IS PROHIBITED, OR COULD IMPLEMENTATION BE ACCOMPLISHED BY A STATEMENT OF POLICY BY EXECUTIVE BRANCH OFFICIALS?

The reference to "self-executing" indicates that no action by the Legislature, or by the State Executive officer, is necessary for the elements of the Public Trust Doctrine to become law and be installed in the Colorado State Constitution. The terms does not mean that the Legislature cannot enact provisions that will assist with implementations of the provisions of the Public Trust Doctrine, but it does constrain the Legislature from attacking, or modifying the trust elements, contained herein.

4. SUBSECTION 6 (1)

A. <u>UNIMPAIRED</u> : WHAT DOES THE REQUIREMENT THAT WATER USERS "RETURN WATER UNIMPAIRED TO THE PUBLIC AFTER USE" MEAN ?

"IMPAIR" - to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner. - Black's Law Dictionary – Revised Fourth Edition.

I. QUANTITY: ARE ALL CONSUMPTIVE USES PROHIBITED? IF NOT, MAY EXCESSIVE CONSUMPTION ALONE BE IMPAIRMENT? HOW MUCH CONSUMPTION IS ACCEPTABLE BEFORE IMPAIRMENT OCCURS? FOR INSTANCE, TRANS-BASIN DIVERSIONS REMOVE WATER FROM ONE BASIN, SUCH AS THE COLORADO RIVER BASIN AND TRANSFER IT TO ANOTHER BASIN, SUCH AS THE SOUTH PLATTE RIVER BASIN. CONSEQUENTLY, NO WATER RETURNS TO THE ORIGINAL BASIN AFTER IT HAS BEEN TRANSFERRED AND USED. WILL TRANS-BASIN DIVERSIONS CONTINUE TO BE ALLOWED ? WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT DEFINES THE PERMISSIBILITY OF TRANS-BASIN DIVERSIONS ?

ARE ALL CONSUMPTIVE USES PROHIBITED?

No.

IF NOT, MAY EXCESSIVE CONSUMPTION ALONE BE IMPAIRMENT?

Yes.

HOW MUCH CONSUMPTION IS ACCEPTABLE BEFORE IMPAIRMENT OCCURS?

When damage or injury is done to elements of the Public Trust, or to the public ownership and values and uses, impairment has occurred.

WILL TRANS-BASIN DIVERSIONS CONTINUE TO BE ALLOWED?

Yes.

WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE THAT DEFINES THE PERMISSIBILITY OF TRANS-BASIN DIVERSIONS?

No.

II. QUALITY : DOES THE "UNIMPAIRED" REQUIREMENT CONTAIN A WATER QUALITY ELEMENT ? IF SO, HOW IS THIS REQUIRED TO BE EVALUATED AND ENFORCED? IS THE WATER QUALITY CONTROL COMMISSION'S EXISTING JURISDICTION OVER WATER QUALITY AFFECTED? HOW ABOUT THE STATE ENGINEER'S AND WATER JUDGE'S WATER QUALITY AUTHORITY REGARDING SUBSTITUTE SUPPLY PLANS?

DOES THE "UNIMPAIRED" REQUIREMENT CONTAIN A WATER QUALITY ELEMENT?

Yes. Since the condition precedent is that the public owns the waters that contain values and uses the people wish to retain unimpaired, contamination or pollution of the waters that limit such public enjoyment of their resource would be objectionable to the public as they encounter their resource.

IS THE WATER QUALITY CONTROL COMMISSION'S EXISTING JURISDICTION OVER WATER QUALITY AFFECTED?

Yes. No deliberation of "economic reasonableness" permitting the contamination or pollution of the waters that could limit public enjoyment of their resource would be permitted. The actions and deliberations of the Water Quality Control Commission or of the Department of Health and Environment would be tolerated that would impair, injure, damage, contaminate or pollute the public's resource. No governmental action that adversely effected the natural environment or effected the people's aesthetic enjoyment of their resources would be without error.

HOW ABOUT THE STATE ENGINEER'S AND WATER JUDGE'S WATER QUALITY AUTHORITY REGARDING SUBSTITUTE SUPPLY PLANS?

The measure here under review and comment does not speak directly to any specific administration or judicial action. The requirements that the people's ownership and uses of their resources be unimpaired by uses is the condition addressed in the measure.

5. SUBSECTION 6 (2):

A. <u>APPROPRIATION DOCTRINE</u>: THE SYSTEM OR DOCTRINE CREATED BY THE CURRENT CONSTITUTIONAL LANGUAGE IS TYPICALLY REFERRED TO AS THE "PRIOR" APPROPRIATION DOCTRINE. DO THE PROPONENTS INTEND A SUBSTANTIVE CHANGE BY REFERRING TO IT AS THE "COLORADO APPROPRIATION DOCTRINE"? IF NOT, WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE ADDING THE WORD "PRIOR"?

DO THE PROPONENTS INTEND A SUBSTANTIVE CHANGE BY REFERRING TO IT AS THE "COLORADO APPROPRIATION DOCTRINE"?

No.

IF NOT, WOULD THE PROPONENTS CONSIDER ADDING LANGUAGE ADDING THE WORD "PRIOR"?

No.

B. <u>COMMON GOOD</u> : THIS SECTION, PROVIDING THAT THE DOCTRINE OF APPROPRIATION RECOGNIZES THAT THE PUBLIC CONFERS USE RIGHTS FOR THE COMMON GOOD IS PHRASED TO IMPLY THAT IT IS INTENDED SOLELY TO BE A RESTATEMENT OF EXISTING LAW. DOES THAT ACCURATELY REFLECT THE PROPONENT'S INTENT? WHAT ELEMENTS OF PRIOR APPROPRIATION DOCTRINE RECOGNIZE THIS PRINCIPLE? THE DEFINITION OF "BENEFICIAL USE"? IS THIS PRINCIPLE INCONSISTENT WITH CASE LAW THAT PROMOTES THE "MAXIMUM UTILIZATION OF THE WATERS OF THE STATE"? <u>FELLHAUER</u> <u>V.</u> <u>PEOPLE</u>, 447 P.2D. 986 (COLO. 1968).

DOES THAT ACCURATELY REFLECT THE PROPONENT'S INTENT ?

Yes.

WHAT ELEMENTS OF PRIOR APPROPRIATION DOCTRINE RECOGNIZE THIS PRINCIPLE ?

The reason that the measure is being forwarded through the initiative process is so that the people might legislate regarding their resource is that the Colorado appropriation doctrine does not recognize the peoples' interests in waters.

The Colorado Supreme Court opined in People v. Emmert, 198 Colo. 137, 597 P.2d. 1025 (Colo. 1979) :

> "... the section of the state constitution providing that the waters of every natural stream not heretofore appropriated is the property of the public and is dedicated to the use of the people of the state was primarily intended to preserve the historical appropriations system of water rights upon which the irrigation economy in Colorado was founded, rather than assure public access to waters for purposes other than appropriation."

The assertion by the Colorado Supreme Court in People v. Emmert that "the section of the state constitution providing that the waters of every natural stream not heretofore appropriated is the property of the public and is dedicated to the use of the people of the state was primarily intended to preserve the historical appropriations system of water rights upon which the irrigation economy in Colorado was founded" took the people's ownership of water from the people and gave "ownership" of the water to the users / appropriators.

People v. Emmert, and the equally damaging and misdirected decision in Hartman v. Tresise, 84 P. 685 (1905), are specifically meant to be overturned by this proposal that seeks to re-assert and re-claim and return the people's water to their ownership as was the intent of the original language in the Colorado Constitution (see Bailey, J. dissent, as instructional as to the original meaning of Article XVI, Section 5 and 6, Colorado Constitution).

IS THIS PRINCIPLE INCONSISTENT WITH CASE LAW THAT PROMOTES THE "MAXIMUM UTILIZATION OF THE WATERS OF THE STATE"? FELLHAUER V. PEOPLE, 447 P.2D. 986 (COLO. 1968).

Yes. If the Doctrine of Appropriation seeks to maximize use of waters over the public's intentions for their enjoyment and use of their resource; and if the Doctrine of Appropriation seeks to maximize use of water without regard to the people's values and the needs of the natural environment to the detriment of the people's values; and if the Doctrine of Appropriation seeks to maximize use of waters, including but not limited to, the ability of users to pollute or contaminate the people's waters after use without regard to the people's values and interests, then the Colorado Doctrine of Maximum Utilization is in conflict with the superior, older, and more exigent Public Trust Doctrine that seeks to protect the people's ownership and values in their resource.