



Public Trust Doctrine: The Real Story

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LEGAL FOUNDATIONS OF
COLORADO WATER
RIGHTS

VS.

THE PUBLIC TRUST
DOCTRINE

The Colorado Constitution: Foundation For Water Rights

Article 16, Section 5 of the Colo. Constitution provides:

The unappropriated “water of every natural stream...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.”

The Colorado Constitution: Foundation For Water Rights

And Section 6 states:

“The **right to divert** the unappropriated waters of any natural stream to beneficial uses **shall never be denied**. **Priority of appropriation** shall give the better right as between those using the water for the same purpose. . . .”

*These provisions, unchanged since statehood, ensure **security, stability and predictability** of water rights.*

Roots of the Public Trust Doctrine

Traditional Doctrine

Common law restraint on government preventing the sovereign from defeating public **access** to **navigable** waters and lands beneath them.

Illinois Cent. Railroad Co. v. Illinois, 146 U.S. 387 (1892)

Illinois holds title to lands submerged under **navigable** waters **in trust** for the people of the state, and **may convey title** to lands beneath navigable waters, but **must retain sufficient control to assure the public trust is not impaired**. In effect, the state holds an inalienable power to **revoke** its conveyance for trust purposes.

State law is the source of any public trust doctrine.

Roots of the Public Trust Doctrine

PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012)

Upon statehood, state gains title to beds of **navigable** waters within its borders and may allocate them according to state law.

U.S. retains title to lands where not navigable at time of statehood

Clarification of “Navigability in Fact” Test: navigability in fact at the time of statehood; portages and other interruptions defeat navigability

- “Navigation” = Commercial use of river

Public Trust Doctrine remains a matter of state law, which each state may determine for water within its borders

Colorado's Rejection of the Public Trust Doctrine

People v. Emmert, 597 P.2d 1025 (Colo. 1979)

Colorado Supreme Court interpreted Art. XVI, §§ 5 and 6, holding the unappropriated water in the State is for “use of the people” by appropriation, not by navigation (i.e. right to float)

The only State protection of public water is for use by appropriation, not protection *from* use or for preservation. There is no constitutional right to float in Colorado, only a right to appropriate

Emmert recognizes that the drafters of the state constitution knew natural streams within CO were non-navigable, so **streambeds were not property of the state**

California's Public Trust Doctrine and Water Rights

Marks v. Whitney, 491 P.2d 374 (Cal. 1971)

Upheld a claimed **implied public trust easement** over certain tidelands for which California had issued a patent. Public trust easement is not limited in scope to the traditional uses of "navigation, commerce, and fisheries" – **public trust is a public right changing to accommodate whatever use/non-use a reviewing court finds appropriate**

City of Berkeley v. Super. Ct. of Alameda, 606 P.2d 362 (1980)

State conveyed fee simple title to lands under waters navigable at high tide; lands were filled and developed; **State subsequently asserted public trust against private owners**

- Held: Parcels not filled in **remained burdened by the public trust** – meaning lands were never really conveyed. **Exercising trust could not constitute a "taking"** because the government cannot "take" what it has always had

California's Public Trust Doctrine and Water Rights

National Audubon Society v. Superior Court (Mono Lake Case), 658 P.2d 709 (Cal. 1983)

City of Los Angeles obtained permit in 1940 for water rights to streams feeding Mono Lake; built two aqueducts and began diverting nearly 100,000 acre-feet per year

California Supreme Court held **City's permit must be reconsidered** in light of **effects of diversions on "ecosystem,"** scenic and recreational values of Mono Lake – because **tributaries from which City diverted fed a lake that was navigable for fishing purposes**

First application of Public Trust Doctrine to reconsider appropriative water rights

California's Public Trust Doctrine and Water Rights

California Water Rights After *Mono Lake*

Public Trust Doctrine may restrict new water rights or even modify existing rights in non-navigable waters that “affect” a navigable waterway, to protect public trust values “whenever feasible”

California citizens may sue to enforce the public trust in water for the protection of ecological resources

California's public trust doctrine does not extend to groundwater, absent some impact on the public use of navigable waters

State Water Resources Control Board has broad authority to supervise appropriators, and to reconsider past appropriations if inconsistent with current needs

Other Western State Trends

Hawaii: Hawaii Constitution Article 11, Section 1:

For the benefit of present and future generations, the State. . . shall **conserve and protect Hawaii's** natural beauty and all **natural resources**, including land, **water**, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation. . . **All public natural resources are held in trust by the State for the benefit of the people**

Extends the Public Trust Doctrine to both surface water and groundwater

State Health Department must consider the public trust when issuing Clean Water Act permits

For more information on this topic and related Public Trust Doctrine issues, please see the following recent article:

Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Comes From, And Why Colorado Does Not (And Should Not) Have One*, 16. U. DENV. WATER L. REV. 47 (2012).

Colorado's Statewide Initiative Process

Colorado's Initiative Process

Phase One – Drafting and Agency Review

Phase Two – Title Setting: Single Subject?

Phase Three – Petitions to Get on the Ballot

Phase Four – Campaign and Election

Recent Water Initiatives and CWC Involvement

History of Colorado Public Trust and Related Initiatives

Year	Initiative Number	Initiative Short Title	Brief Description of Subject Matter	Proponents	Outcome
2013	46	Stewardship of Public Properties*	Rights of citizens to clean air, clean water, and the preservation of nature; includes citizen enforcement	Philip Doe; Richard Hamilton	Withdrawn prior to Review and Comment ("R&C") hearing
2012	45	Limits on Water Diversion*	Appropriation expanded to all water, but subordinated to public estate; return water unimpaired	Philip Doe; Richard Hamilton	Title set and affirmed by Colo. Supreme Court; Petitions approved, but proponents failed to collect sufficient signatures
2012	3	Use of Colorado Water Streams*	Public trust in water and access on streams	Richard Hamilton; Philip Doe	Title set and affirmed by Colo. Supreme Court; Petitions approved, but proponents failed to collect sufficient signatures
2012	2	Use of Colorado Water Streams*	Public trust in water and access on streams	Richard Hamilton; Philip Doe	Withdrawn prior to R&C hearing; Re-submitted as #3
2007	37	Repeal of Colorado Water Resources and Power Development Authority	Dissolution of the Colorado Water Resources and Power Development Authority; delegation of its duties to other state agencies	Richard Hamilton; Philip Doe	Title set; signatures not collected
2007	34	Repeal of Colorado Water Resources and Power Development Authority	Dissolution of the Colorado Water Resources and Power Development Authority; delegation of its duties to other state agencies	Richard Hamilton; Philip Doe	R&C Hearing held; resubmitted as #37
2007	8	Concerning New State Department and Elected Board for Environmental Conservation*	Creation of Colorado Dept. of Environmental Conservation, with public trust standard for stewardship of water and other resources	Richard Hamilton; Philip Doe	Title set; reversed by Colo. Supreme Court as containing multiple subjects
2002	135	Public Ownership and Use of Water*	Public trust in water of natural streams; subordination of private and public water rights to public use rights; assignment of water use rights to public use; return water unimpaired	Richard Hamilton; Jeanne Englert	Title set; signatures not collected

History of Colorado Public Trust and Related Initiatives

Year	Initiative Number	Initiative Short Title	Brief Description of Subject Matter	Proponents	Outcome
1996	6	1996-6*	Public trust in water; assignments of water use rights to public and to a watercourse	Richard Hamilton; Philip Hufford	Title set; affirmed by Colo. Supreme Court; did not appear on ballot
1995	Unknown	Public Rights in Waters II*	"Strong" Public Trust Doctrine in water; voters in water conservancy or conservation district must approve any changes to district boundaries and elect district directors; decrees of water to the public	Richard Hamilton; Jeanne Englert	Title set; reversed by Colo. Supreme Court on grounds that it did not constitute a single subject
1994	Unknown	Public Rights in Waters*	"Strong" Public Trust Doctrine in water; voters in water conservancy or conservation district must approve any changes to district boundaries and elect district directors; decrees of water to the public	Richard Hamilton; Jerry Swingle	Title set; affirmed by Colo. Supreme Court; signatures collected, but did not appear on the ballot
1992	Unknown	Willingness and Appropriateness in Transfers and Exports of Rivers (W.A.T.E.R.)*	Voters in water conservancy or conservation district must approve any transfer of water outside of district or between basins, and any changes to district boundaries	Richard Hamilton; Robert L. Pastore	Title set; affirmed by Colo. Supreme Court; signatures collected, but did not appear on the ballot

*Indicates initiatives that proposed constitutional amendments rather than statutory amendments

Initiative 3 (Hamilton / Doe 2012)

Initiative 3 would have. . .

- **Expanded Section 5** declaration that unappropriated water is “property of the public”
- Added constitutional provisions to adopt a “**Colorado Public Trust Doctrine**”
- Given public’s estate in water “legal authority **superior to rules and terms of contracts or property law**”
- **Overtaken *People v. Emmert*** to grant right to float on any stream without liability for trespass

Outcome: A split Supreme Court *upheld* the title as satisfying single subject requirement, but supporters were unable to garner sufficient signatures

Justice Hobbs Dissent: 3 separate subjects; like dropping a “nuclear bomb” on Colorado water and land rights

Initiative 45 (Hamilton / Doe 2012)

Initiative 45 would have. . .

- **Extended Section 6** right of diversion of unappropriated waters of “natural streams” to “any water within the state”
- Provided for limitation/curtailment of diversions to “protect natural elements of the **public’s dominant water estate**”
- Regarding water diversion rights, “require the appropriator to **return water unimpaired to the public** after use” to protect the environment and public’s use and enjoyment of waters

Outcome: A split Supreme Court *upheld* the title as satisfying single subject requirement, but supporters were unable to collect sufficient signatures

Justice Hobbs Dissent: Beyond imposing public trust, the initiative would **subject Colorado to Riparian Law** by requiring that appropriators return water to the stream unimpaired

Initiatives 3 & 45 (Hamilton / Doe 2012)

Implications of Initiatives 3 & 45

- **Radical extension of Public Trust Doctrine** (beyond California's doctrine), **severing doctrine from "navigability" requirement**
- **Dramatic increase in litigation and grant of near-unrestricted power to judiciary** to re-determine vested property rights over Colorado water rights because both initiatives would have forced reconsideration and subordination of previously-decreed rights
- Would have opened the door to numerous takings claims because initiatives **enabled state-required transfers of private rights to public use, without owner's consent and without compensation** to owner
- Would have **created enormous costs** for property owners and state - to the tune of **billions of dollars**

2014 Proposed Ballot Initiatives of Interest

Status of 2014 Proposed Ballot Initiatives of Interest(As of April 1)

#	Initiative Title	Proponents	Const or Stat?	R&C Hearing	Title Board	Petitions Due	Comments
TITLE SET - MAY SUBMIT PETITION FORMAT FOR APPROVAL							
75	Right to Local Self-Government	Clifton Willmeng; Lotus (no last name)	Const	3/5/2014	Title Set on 3/19/2014; Rehearing 4/2/2014		Resubmittal of #72; may submit petition format for SOS approval
76	Recall of State and Local Officers	Natalie Menten; Mike Spalding	Const	3/6/2014	Title Set on 3/19/2014 Rehearing 4/2/2014		Resubmittal of #71; may submit petition format for SOS approval
PENDING TITLE SETTING/MAY FILE FOR TITLE SETTING							
82	Local Control of Oil and Gas Development	Laura Fronckiewicz; Kelly Giddens	Const	3/7/2014	On Title Board Agenda for 4/2/2014 meeting		Pending Title Setting
89	Local Government Regulation of Environment	Caitlin Leahy; Gregory Diamond	Const	3/17/2014	On Title Board Agenda for 4/2/2014 meeting		Pending Title Setting
63	Right to Local Self-Government	Clifton Willmeng; Lotus (no last name)	Const	2/4/2014			May file for Title Setting (see #75 also)
71	Recall of State and Local Officers	Natalie Menten; Mike Spalding	Const	2/19/2014			Resubmittal of #69; may file for Title Setting (see #76 also)
103	Public Trust Resources	Philip Doe; Barbara Mills-Bria	Const	3/11/2014	On Title Board Agenda for 4/16/2014 meeting		Resubmittal of #83; Letter Issued; Pending Title Setting
90	Local Government Control of Oil and Gas Operations	Caitlin Leahy; Gregory Diamond	Const	3/17/2014	On Title Board Agenda for 4/2/2014 meeting		Pending Title Setting

Continued . . .

Status of 2014 Proposed Ballot Initiatives of Interest (continued)

PENDING R&C HEARING						
121	<u>Distribution of Oil and Gas Revenue</u>	Jerry Sonnenberg; Frank McNulty	Stat	4/3/2014		Pending R&C Hearing
WITHDRAWN, DENIED, OR EXPIRED						
73	<u>Public Trust Resources</u>	Philip Doe; Barbara Mills-Bria	Const	2/21/2014		Withdrawn Prior to R&C Hearing (see #103)
72	<u>Right to Local Self-Government</u>	Clifton Willmeng; Lotus (no last name)	Const	2/4/2014		Withdrawn Prior to Title Setting (see #75)
70	<u>Right to Local Self-Government</u>	Clifton Willmeng; Lotus (no last name)	Const	2/18/2014		Withdrawn Prior to R&C Hearing
69	<u>Recall of State and Local Officers</u>	Natalie Menten; Mike Spalding	Const	2/14/2014		Withdrawn Prior to R&C Hearing
46	<u>Stewardship of Public Properties</u>	Richard Hamilton; Phillip Doe	Const	8/26/2013		Withdrawn Prior to R&C Hearing

2014 Initiative 75: Local Control

Ballot Title as set by the Title Board on Rehearing, April 2, 2014:

An amendment to the Colorado constitution concerning a right to local self-government, and, in connection therewith, declaring that the people have an inherent right to local self-government in counties and municipalities, including the power to enact laws to establish and protect fundamental rights of individuals, communities, and nature and the power to define or eliminate the rights and powers of corporations or business entities to prevent them from interfering with those fundamental rights; declaring that such local laws are not subject to preemption by any federal, state, or international laws.

2014 Initiative 89: Public Trust + Local Control

Initiative 89 would amend the Colorado Constitution by adding a new Article, declaring and providing as follows:

- Declares that Colorado's environment is "the common property of all Coloradans";
- Declares that conservation of Colorado's environment (including clean air, pure water, natural, and scenic values) is "fundamental";
- Declares that Colorado's environment should be "protected and preserved" for all Coloradans, including future generations;
- States that the people of Colorado, including future generations, have a "right to Colorado's environment" (including clean air, pure water, natural, and scenic values);
- Designates the state and local governments as trustees of "this resource" (referring to Colorado's environment), requiring them to conserve Colorado's environment (including clean air, pure water, natural, and scenic values) "for the benefit of all the people";

Continued

2014 Initiative 89: Public Trust + Local Control (continued)

The proposed Initiative 89:

- Applies its local control and public trust provisions to the state, as well as to every city, town, county, and city and county, notwithstanding the provisions of the constitution that provide for Home Rule cities and towns and for Home Rule counties;
- Provides that its provisions are self-executing and severable;
- Provides that local governments shall have the power to enact laws, regulations, ordinances, and charter provisions that are “more restrictive and protective” of the environment than those enacted or adopted by state government; and
- Provides that if a locally-enacted law or regulation adopted pursuant to the new Article conflicts with a state-enacted law or regulation, the “more restrictive and protective law or regulation shall govern.”

2014 Initiative 103: Public Trust

Initiative 103 would amend the Colorado Constitution by adding a new section to Article XVI, the provisions of the constitution that govern mining and water rights.

This amendment would:

- Establish an “inalienable right” of the people of Colorado to clean air, clean water (including groundwater), and the preservation of the environment and natural resources (called “Public Trust Resources”), as common property of all people including future generations;
- Require the state, as trustee of Public Trust Resources, to conserve and maintain them for the benefit of all the people;
- Require state government and its agents, as trustees, to protect Public Trust Resources from substantial impairment including pollution, applying a “precautionary principle” that any action or policy with a suspected risk, absent a scientific consensus of harm, places the burden of proving no harm on the proponents;

Continued . . .

2014 Initiative 103: Public Trust (continued)

This amendment would:

- Obligate the state to seek natural resource damages from entities causing substantial impairment to Public Trust Resources, and to use such funds to remediate the harm;
- Authorize all Colorado citizens (as beneficiaries) to sue to preserve Public Trust Resources against substantial impairment and to enforce the State's obligations as trustee, to obtain legal and equitable remedies, and to recover attorney fees and costs when a court finds the state has not met its duties as trustee;
- Require the state as trustee to use best available science in any process or proceeding that may affect Public Trust Resources, and to refer for criminal prosecution anyone manipulating data or scientific information in an attempt to use Public Trust Resources for private profit; and
- Apply to all public actions or commercial transactions that would violate these provisions, "regardless of the date of any applicable local, state or federal permits."

Next Steps for Proposed Initiatives of Interest

- **Initiative 75: Local Control**
 - Title was set on March 19; Modified at rehearing on April 2
 - Appeal to the Supreme Court due April 9
 - Once Secretary of State approves petition format, proponents may collect signatures (86,105 valid signatures required)

- **Initiative 89: Public Trust + Local Control**
 - **Title Board set title on April 3, 2014**; Motion for Rehearing due April 10
 - Appeal to the Supreme Court due one week after rehearing
 - After title is set, proponents may apply to Secretary of State for petition format approval

Next Steps for Proposed Initiatives of Interest (continued)

- **Initiative 103: Public Trust**
 - On Title Board Agenda for April 16 hearing
 - Motion for Rehearing due April 23
 - After title is set and any appeals are addressed, proponents may apply to Secretary of State for petition format approval

Next Steps for 2014 Cycle

- **April 4:** Last day to file for Title Setting for 2014 ballot
- **April 9-10:** Motions for Rehearing due for 13 initiatives heard on April 2-3, 2014
- **April 16:** Final Title Board Hearing for 2014 ballot
- **April 23:** Final Motions for Rehearing due
- **April 24-25:** Final Rehearings to be held
- **May 1-2:** Final appeals to the Supreme Court due
- **August 4:** Deadline to file initiatives with Secretary of State with **86,105 valid signatures**

Legal Limits on Public Advocacy:

The Fair Campaign Practices Act

Legal Limits on Public Advocacy: The Fair Campaign Practices Act

When Does the FCPA Apply?

Section 117 of the FCPA is triggered when a ballot issue

- has been submitted for the purpose of having a title designated fixed, or
- has had a title designated or fixed.

What Are The Implications For Public Entities?

Prohibited:

- **Urging the electorate to vote** in a particular manner through (1) spending, (2) donating, or (3) contributing public entity's funds

Allowed:

- **Taking a position and communicating it** through normal channels
- Providing a **balanced factual summary** of an issue of official concern

Note - Courts review specific facts of case to determine if there is a FCPA violation

Any Questions?