

ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2005)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE, AND SUMMARY
FOR 2005-2006, #125

Petitioners:

KENNETH A. WONSTOLEN; HOWARD STANLEY
DEMPSEY, JR.; CHRISTOPHER P. ELLIOTT; and
STUART A. SANDERSON, Objectors,

V.

Respondents:

JOHN GORMAN and JACK REAL, Proponents,

and

Title Board:

WILLIAM A. HOBBS, DANIEL DOMINICO, and
SHARON EUBANKS.

2006

For Petitioner, Kenneth A. Wonstolen:

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[illegible]

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, Colorado 80203</p>	<div data-bbox="933 254 1339 510" data-label="Image"> </div> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2005) Appeal from the Ballot Title Setting Board</p> <p>Petitioners: KENNETH A. WONSTOLEN, HOWARD STANLEY DEMPSEY, JR., CHRISTOPHER P. ELLIOTT, and STUART A. SANDERSON, Objectors, v. Respondents: JOHN GORMAN and JACK REAL, Proponents, and Title Board: WILLIAM A. HOBBS, DANIEL DOMINICO, and SHARON EUBANKS</p>	
<p><u>Attorneys for Petitioners:</u> Sean R. Gallagher, #16863 Jacqueline S. Cooper, #35066 Hogan & Hartson LLP 1200 17th Street, Suite 1500 Denver, Colorado 80202 Phone No.: 303/899-7300; Fax No.: 303/899-7333 E-mail: sergallagher@hhlaw.com Attorneys for Kenneth A. Wonstolen</p> <p>Scott E. Gessler, # 28944 Hackstaff Gessler LLC 1601 Blake Street, Suite 310 Denver, Colorado 80202 Phone No.: 303/534-4317; Fax No.: 303/534-4309 E-mail: sgessler@hackstaffgessler.com Attorneys for Howard Stanley Dempsey, Jr. and Christopher P. Elliott</p> <p>Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone No.: 303/256-3978; Fax No.: 303/292-3152 E-mail: eramey@ir-law.com Attorneys for Stuart A. Sanderson</p>	<p>Case No.</p> <p style="font-size: 24pt; font-weight: bold;">06SA1679</p>
<p style="text-align: center;">PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #125 ("DAMAGES FOR MINERAL EXTRACTION")</p>	

Kenneth A. Wonstolen, Howard Stanley Dempsey, Jr., Christopher P. Elliott, and Stuart A. Sanderson ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to § 1-40-107(2), C.R.S. (2005), to review the actions of the Ballot Title Setting Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2005-2006 #125 ("Damages for Mineral Extraction").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set titles for proposed Initiative for 2005-2006 #125 on May 17, 2006. Each of the Petitioners filed a Motion for Rehearing pursuant to § 1-40-107(1), C.R.S. (2005), on May 24, 2006. The Motions for Rehearing were heard at the next meeting of the Title Board on May 25, 2006. At the rehearing, the Board granted in part and denied in part Petitioners' Motions. Petitioners hereby jointly seek review of the final action of the Title Board with regard to proposed Initiative for 2005-2006 #125 pursuant to § 1-40-107(2), C.R.S. (2005).

II. Issues Presented

1. Is the initiative so vague and ambiguous that its intent and effect cannot reasonably be ascertained by the Title Board so as to enable the Board to set

a title that correctly and fairly expresses the true meaning and intent of the initiative and sufficiently informs the voters of the consequences of a yes or no vote?

2. Is the title unfair and misleading in that it fails to inform the voters of the measure's intent by failing to sufficiently inform them of the meaning of such terms as "mineral extractor," "damages," "development," "pursuit," "extraction," or "mineral" and that it is unclear whether the proposal would make procedural and substantive changes to existing Colorado law?

3. Does the title contain an impermissible catch phrase by use of the term "fair value?"

III. Supporting Documentation

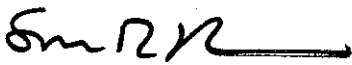
As required by § 1-40-107(2), C.R.S. (2005), a certified copy of the Petition, with the titles and submission clause of the proposed constitutional amendment, together with a certified copy of the Motions for Rehearing and the rulings thereon, are submitted herewith.

IV. Relief Requested

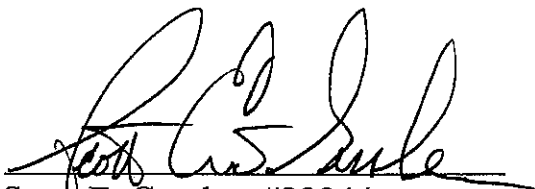
Petitioners respectfully request this Court to reverse the actions of the Title Board with directions to decline to set a title and to return the proposed Initiative to the proponents.

Respectfully submitted this 30th day of May, 2006.


HOGAN & HARTSON LLP

By: 
Sean R. Gallagher, #16863

HACKSTAFF GESSLER LLC

By: 
Scott E. Gessler, #28944

ISAACSON ROSENBAUM P.C.

By: 
Edward T. Ramey, #6748

ATTORNEYS FOR PETITIONERS

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Denver, CO 80204

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Golden, CO 80401

Christopher P. Elliott
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Greenwood Village, CO 80111

Stuart A. Sanderson
9234 Ptarmigan Trail
Lone Tree, CO 80214

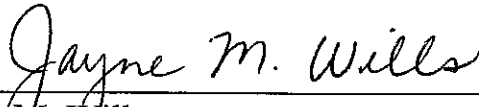
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2006, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #125 ("DAMAGES FOR MINERAL EXTRACTION")** was placed in the United States mail, postage prepaid, to the following:

John Gorman
Post Office Box 3361
Glenwood Springs, CO 81602

Jack Real
55 Hideaway Lane
Glenwood Springs, CO 81601

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203



Jayne M. Wills



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **GINETTE DENNIS**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motions for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2005-2006 #125"...

.....

IN TESTIMONY WHEREOF I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 26th day of May, 2006.

Ginette Dennis

SECRETARY OF STATE

STATE OF COLORADO
Department of State
1700 Broadway
Suite 270
Denver, CO 80290



Ginette Dennis
Secretary of State

J. Wayne Munster
Acting Director, Elections Division

May 23, 2006

NOTICE OF REHEARING MEETING

You are hereby notified that the Secretary of State,
Attorney General, and the Director of the Office of Legislative

Legal Services will meet to consider all
Motions for Rehearing filed by the deadline of
Wednesday, May 24, 2006 at 5:00 p.m.

Meeting will take place on

Thursday, May 25, 2006 at 9:00 a.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

GINETTE DENNIS
Secretary of State

**AUDIO BROADCASTS NOW AVAILABLE. PLEASE VISIT WWW.SOS.STATE.CO.US AND CLICK
ON THE "INFORMATION CENTER".**

RECEIVED

MAY 24 2006

ELECTIONS / LICENSING
SECRETARY OF STATE

Colorado Land Owners For Fairness

May 23, 2006

John Gorman
Colorado Land Owners for Fairness
P.O. Box 3361
Glenwood Springs, Colorado 81602

Donald Kaufman
926 Bennett Avenue
Glenwood Springs, Colorado 81601

Ginette Davis
Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 90290

Dear Madam Secretary,

RE: Request for rehearing of title.

We (John Gorman, a proponent and Donald Kaufman, a registered elector) request a rehearing by the Title Board for consideration of the title for ballot Issue #125.

"A MINERAL EXTRACTOR SHALL PAY THE FAIR VALUE OF DAMAGES BROUGHT ABOUT IN THE DEVELOPMENT, PURSUIT, OR EXTRACTION OF A MINERAL, INCLUDING OIL AND GAS."

Thank You,

John Gorman

Donald Kaufman

RECEIVED

MAY 24 2006

BALLOT TITLE BOARD
STATE OF COLORADO

ELECTIONS / LICENSING
SECRETARY OF STATE

~~2:26pm~~

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE 2005-2006 #125

L. Roger Hutson and Ken Wonstolen ("Petitioners"), who are registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Motion for Rehearing, pursuant to C.R.S. § 1-40-107(1). Petitioners move for a rehearing of the title, ballot title, and summary for regarding Proposed Initiative 2005-2006 #125, which were set by the Title Board ("Board") on May 17, 2006, and state as follows:

1. The initiative is so vague and ambiguous that the Board cannot ascertain its intent. Therefore, the title does not sufficiently inform the voters of the effect of a yes or no vote. *See* C.R.S. § 1-40-106.

2. The title fails to inform voters of the measure's intent because the title does not sufficiently inform voters of the meaning of "mineral extractor," "damages," "development," "pursuit," "extraction" or "mineral." *Cf. In re Proposed Initiatives 2001-2002 # 221 and # 22*, 44 P.3d 213, 220-21 (Colo. 2002). Moreover, the title does not state that the proposal would make procedural and substantive changes to existing Colorado law.

3. The title contains an impermissible catch phrase by use of the term "fair value." *See In re Title, Ballot, and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246 (Colo. 2000).

Respectfully submitted this 24th day of May, 2006.

HOGAN & HARTSON LLP



Sean R. Gallagher, #16863
Jacqueline S. Cooper, #35066
1200 Seventeenth St., Suite 1500
Denver, Colorado 80202
Telephone: 303-899-7300
Facsimile: 303-899-7333

ATTORNEYS FOR PETITIONERS

Petitioners' Addresses:

L. Roger Hutson
5320 S. Geneva St.
Englewood, CO 80111

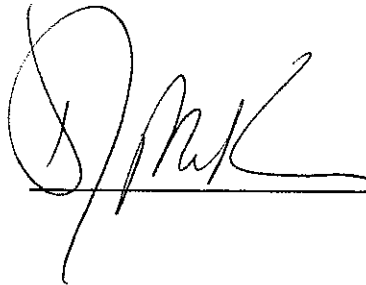
Kenneth A. Wonstolen
601 West 11th Ave. #1109
Denver, CO 80204

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2006, a true and correct copy of the foregoing Motion For Rehearing was placed in the United States mail, postage prepaid, to the following:

John Gorman
P.O. Box 3361
Glenwood Springs, Colorado 81602

Jack Real
55 Hideaway Lane
Glenwood Springs, Colorado 81601



RECEIVED
MAY 24 2006 3:15 PM
ELECTIONS / LICENSING
SECRETARY OF STATE

BALLOT TITLE BOARD

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE 2005-2006 #125 ("DAMAGES FOR MINERAL
EXTRACTION")

Stuart A. Sanderson and James T. Cooper ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully submit the following Motion for Rehearing, pursuant to C.R.S. § I-40-107(1), concerning the actions of the Title Board at the hearing on May 17, 2006 regarding Proposed Initiative 2005-2006 #125 ("Damages for Mineral Extraction"). Petitioners submit that the title does not fairly express the true meaning and intent of the initiative in the following respects:

1. The title is misleading in that it does not clearly disclose what the effect of a "yes" or "no" vote will be notwithstanding its repetition of the language contained in the text of the measure. Aisenberg v. Campbell, 987 P.2d 249, 259-60 (Colo. 1999).
2. The title is misleading in that it does not clearly reflect the specific inclusion of oil and gas as specified in the text of the measure.
3. The title incorporates an improper catch phrase by use of the term "fair value."

Respectfully submitted this 24th day of May, 2006.

ISAACSON ROSENBAUM P.C.

By: 

Edward T. Ramey, #6748
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Telephone: (303) 292-5656
Facsimile: (303) 292-3152

ATTORNEYS FOR PETITIONERS

Petitioners' Addresses:

Stuart A. Sanderson
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Lone Tree, CO 80214

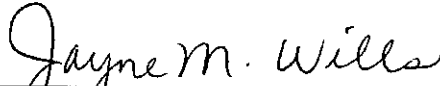
James T. Cooper
305 Grand Street
Paonia, CO 81428

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

John Gorman
Post Office Box 3361
Glenwood Springs, CO 81602

Jack Real
55 Hideaway Lane
Glenwood Springs, CO 81601



Jayne M. Wills

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MAY 24 2006

3:08 P.M.

COLORADO TITLE SETTING BOARD

ELECTIONS/LICENSING
SECRETARY OF STATE

In re Title and Ballot Title and Submission Clause for Initiative 2005-2006 #125

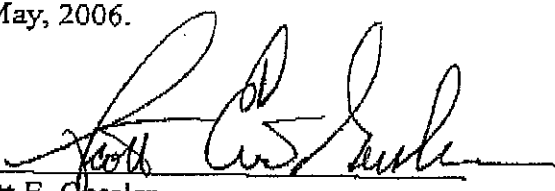
MOTION FOR REHEARING

On behalf of Howard Stanley Dempsey, Jr. a registered elector of the State of Colorado, the undersigned hereby moves for a rehearing of the title, ballot title, and submission clause for Initiative 2005-2006 #125, set by the title Board on May 17, 2006, and states as follows:

1. The Petitioner claims that the Title Board is without jurisdiction to set a title because it cannot ascertain the true intent and meaning of the initiative, and therefore it cannot set a title that correctly and fairly expresses the true intent and meaning of the initiative. Merely repeating the language of the initiative does not ensure that voters will be appraised of the true intent and meaning of the initiative.

2. The title and submission clause contain an impermissible catch phrase in the use of the term "fair value."

Respectfully submitted this 24th day of May, 2006.

By: 
Scott E. Gessler
Reg. No. 28944
Hackstaff Gessler LLC
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Denver, Colorado 80202
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sgessler@hackstaffgessler.com

Attorney for Howard Stanley Dempsey, Jr.

Address of Petitioner:
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Golden, Colorado 80401

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

John Gorman
Colorado Land Owners for Fairness
P.O. Box 3361
Glenwood Springs, Colorado 81602

John Real
55 Hideaway Lane
Glenwood Springs, Colorado 81601

RECEIVED

MAY 03 2006

HAVA Division
Secretary of State

6/3/06
Jun

FINAL LANGUAGE OF PROPOSAL

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

Article XVIII of the constitution of the State of Colorado is amended BY THE
ADDITION OF A NEW SETION to read:

Section 13. Paying Fair Value. A MINERAL EXTRACTOR SHALL PAY THE FAIR VALUE
OF DAMAGES BROUGHT ABOUT IN THE DEVELOPMENT, PURSUIT, OR EXTRACTION OF A
MINERAL, INCLUDING OIL AND GAS.

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Ballot Title Setting Board

Proposed Initiative 2005-2006 #125¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas?

Hearing May 17, 2006:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 8:20 p.m.

Hearing May 25, 2006:

Motions for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 10:22 a.m.

¹ Unofficially captioned "Damages for Mineral Extraction" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, Colorado 80203</p> <p>ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) Appeal from the Ballot Title Setting Board</p>	<div data-bbox="1013 300 1424 562" data-label="Image"> </div>
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #125</p> <p>Petitioners: KENNETH A. WONSTOLEN, HOWARD STANLEY DEMPSEY, JR., CHRISTOPHER P. ELLIOTT, and STUART A. SANDERSON, Objectors, v. Respondents: JOHN GORMAN and JACK REAL, Proponents, and Title Board: WILLIAM A. HOBBS, DANIEL DOMINICO, and SHARON EUBANKS</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioners: Sean R. Gallagher, #16863 Jacqueline S. Cooper, #35066 Hogan & Hartson LLP 1200 17th Street, Suite 1500 Denver, Colorado 80202 Phone No.: 303/899-7300; Fax No.: 303/899-7333 E-mail: srgallagher@hhlaw.com Attorneys for Kenneth A. Wonstolen</p> <p>Scott E. Gessler, # 28944 Hackstaff Gessler LLC 1601 Blake Street, Suite 310 Denver, Colorado 80202 Phone No.: 303/534-4317; Fax No.: 303/534-4309 E-mail: sgessler@hackstaffgessler.com Attorneys for Howard Stanley Dempsey, Jr. and Christopher P. Elliott</p> <p>Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone No.: 303/256-3978; Fax No.: 303/292-3152 E-mail: eramey@ir-law.com Attorneys for Stuart A. Sanderson</p>	<p>Case No. 06SA167</p>
<p>OPENING BRIEF OF PETITIONERS</p>	

Kenneth A. Wonstolen, Howard Stanley Dempsey, Jr., Christopher P. Elliott, and Stuart A. Sanderson ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, submit the foregoing Opening Brief, pursuant to C.R.S. § 1-40-107(2), to review the actions of the Ballot Title Setting Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2005-2006 #125 ("Damages for Mineral Extraction").

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the initiative so vague and ambiguous that its intent and effect cannot reasonably be ascertained by the Ballot Title Setting Board ("Board") so as to enable the Board to set a title that correctly and fairly expresses the true meaning and intent of the initiative and sufficiently informs the voters of the consequences of a yes or no vote?

2. Is the title unfair and misleading in that it fails to inform the voters of the measure's intent by failing to sufficiently inform them of the meaning of such terms as "mineral extractor," "damages," "development," "pursuit," "extraction," or "mineral," and that it is unclear whether the proposal would make procedural and substantive changes to existing Colorado law?

3. Does the title contain an impermissible catch phrase by use of the term "fair value?"

STATEMENT OF THE CASE

This is a challenge to the actions of the Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2005-2006 #125 ("Damages for Mineral Extraction").

The Board conducted its initial public meeting and set titles for proposed Initiative for 2005-2006 #125 on May 17, 2006. Each of the Petitioners filed a

Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on May 24, 2006. The Motions for Rehearing were heard at the next meeting of the Board on May 25, 2006. At the rehearing, the Board granted in part and denied in part Petitioners' Motions. Petitioners hereby jointly seek review of the final action of the Board with regard to proposed Initiative for 2005-2006 #125 pursuant to C.R.S. § 1-40-107(2).

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas?

SUMMARY OF ARGUMENT

1. The language of Initiative 2005-2006 #125 is so vague and ambiguous that its intent and probable effects could not be reasonably ascertained by Board, and thus the Board did not have the authority to set a title under Colorado law. In setting a title, the Board is required to consider the public confusion that might be

caused by misleading titles, and to correctly and fairly express the true intent and meaning of the proposed law. This is necessary to allow the voter to determine intelligently whether to support or oppose the proposal. Here, the proponents gave conflicting testimony to the Board as to the intent of the initiative. Whether the initiative will disturb or change relative rights of surface and mineral owners is not clear from the title set by the Board. Without more guidance, the Board cannot set a title that satisfies the mandates of Colorado law.

2. The title contains an impermissible "catch phrase" by use of the term "fair value." By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase. Here, the title contains the statement that mineral extractors shall pay "fair value" of damages brought about in the development, pursuit or extraction of a mineral. The term "fair value" is a quintessential catch phrase. It does nothing to convey to the reader what damages must be paid. Moreover, the term "fair value" also forms the basis for a political slogan, already in use by the proponents in their advertising, that encourages prejudice in favor of the issue and thereby distracts voters from consideration of the proposal's merits. Indeed, that proponents are already using

the moniker "Colorado Land Owners for Fairness" is *prima facie* evidence that the phrase "fair value" is an impermissible slogan and catch phrase.

ARGUMENT

I. The Language Of Initiative #125 Is So Vague And Ambiguous That Its Intent And Probable Effects Could Not Be Reasonably Ascertained By Title Board, And Thus The Board Did Not Have The Authority To Set A Title Under Colorado Law.¹

In reviewing the actions of the Board, the Court grants "great deference to the Board's broad discretion in the exercise of its drafting authority." *In re Proposed Initiative Concerning 'State Personnel Sys.'*, 691 P.2d 1121, 1125 (Colo.1984)." *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1131 (Colo.1996). The Court may not rewrite the title to achieve the best possible

¹ In their Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2005-2006 #125 ("Damages for Mineral Extraction"), Petitioners identified, *inter alia*, the following issues for review:

1. Is the initiative so vague and ambiguous that its intent and effect cannot reasonably be ascertained by the Title Board so as to enable the Board to set a title that correctly and fairly expresses the true meaning and intent of the initiative and sufficiently informs the voters of the consequences of a yes or no vote?
2. Is the title unfair and misleading in that it fails to inform the voters of the measure's intent by failing to sufficiently inform them of the meaning of such terms as "mineral extractor," "damages," "development," "pursuit," "extraction," or "mineral" and that it is unclear whether the proposal would make procedural and substantive changes to existing Colorado law?

Because these issues are so closely related, Petitioners address both of these issues in this section.

statement of the measure's intent. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 # 256*, 12 P.3d 246, 255 (Colo. 2000). However, the Court analyzes the title in light of the Board's statutory responsibilities. "The language employed by the Board will be rejected where such language is misleading, inaccurate, or fails to reflect the central features of the proposed initiative." *Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Section 2 to Article VII (Petitions)*, 907 P.3d 586, 590 (Colo. 1995) (emphasis added) (citation omitted).

The Board's duties regarding setting a title are set forth in C.R.S. § 1-40-106(3), which provides:

(b) In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. *The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof*, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board.... Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and *which shall unambiguously state the principle of the provision sought to be added, amended, or repealed*.

(Emphasis added.) Courts applying this provision recognize that it requires the Board to set a title that expresses the true intent of the measure and enables the

electorate to "determine intelligently whether to support or oppose such a proposal." *Proposed Initiative on Parental Notification*, 794 P.2d 238, 242 (Colo. 1990).

In *In re Proposed Initiative on "Obscenity"*, 877 P.2d 848 (Colo. 1994) (hereinafter "*Obscenity*"), this Court held that a title was misleading, even though it tracked virtually word for word the language submitted by the proponents, because it failed to express the true intent of the measure. In that case, the acknowledged intent of the measure was to prevent Colorado courts from interpreting the right to free expression more broadly under the state constitution than under the United States Constitution. The Board, however, did not include a clear statement of that intent in the title, and instead set a title indicating that state and local authorities were permitted to "control the promotion of obscenity to the full extent permitted by the First Amendment to the U.S. Constitution." *Obscenity*, 877 P.2d at 850. The Court explained that this language was ambiguous because it failed adequately to inform the electorate of the consequences of a yes or no vote:

[I]t is dubious whether a significant portion of the electorate, be they familiar with the subject matter of the Initiative, would ascertain that in permitting the promotion of obscenity to the full extent allowed by the First Amendment, the initiative is intended to foreclose the Colorado courts from permitting any broader protection of obscenity under the Colorado Constitution. . . . As such, the title and

submission clause do not 'fairly and accurately represent' the intent and purpose of the initiative.

Id.

In this case, as in *Obscenity*, the "true intent and meaning" of the initiative cannot be ascertained from the title, and, thus, the potential for voter confusion is high. Indeed, the deficiency in the title in this case is more egregious than in *Obscenity* because the actual intent of the measure cannot be discerned, which suggests that the Board could not satisfy its statutory mandate to set a title that expresses the true intent of the measure and enables the electorate to "determine intelligently whether to support or oppose such a proposal."

The proponents did not explain the intention of the initiative until the arguments on the motions for rehearing on May 25, 2006. See transcript of Initiative Title Setting Review Board Hearing, May 25, 2005 ("Rehearing"), p. 3, lines 8 -22 (attached hereto as Exhibit A). There, Mr. Gorman explained that his intention for the measure is not to spur enabling legislation but rather to "set a principle and change the atmosphere in negotiations between surface owners and mineral extractors." Rehearing, p. 4, lines 8 – 10. By contrast, the second proponent, Mr. Kauffman, stated that the intent of the measure is to "overturn the common law" governing the relationship between surface and mineral owners. Rehearing, p. 41, lines 3 – 6. The confusion over whether the initiative in fact

effects a change in Colorado law is not clarified by the language set by the Board, which indicates only that a mineral extractor shall be required to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral.

Colorado law recognizes the right of a fee owner to sever the mineral estate from the surface, and a large body of case law has emerged to define the relationship between the two estate owners. For example, absent an express agreement specifying the relative rights of the surface and mineral owners, the mineral owner enjoys an implied right to access and use the surface as reasonably necessary to develop the minerals. *Rocky Mountain Fuel Co. v. Heflin*, 148 Colo 415, 366 P.2d 577, 589 (1961) (“The owner of a mineral estate has rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of his interest.”); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997) (Because “severed minerals lack value unless they can be developed . . . the owner of a severed mineral estate or lessee is privileged to access the surface and ‘use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest.’”). The Colorado Supreme Court has recognized that the surface owner “continues to enjoy the right to use the entire surface of the land as long as such use does not preclude exercise of the [oil and gas] lessee’s privilege.” *Id.* at 927. However, the mineral owner must have

“due regard” for the rights of a surface owner in the way he conducts his mineral operations. *Id.*

If a mineral owner’s use exceeds what is “reasonably necessary to develop the minerals, the mineral owners must compensate the surface owner for unreasonable or excessive use of the surface. *See id.*; *Frankfort Oil Co. V Abrams*, 413 P.2d 190, 194-95) (Colo. 1966) (the owner of the mineral estate has the right to make reasonable use of the surface, and no payment is due the surface owner for damage resulting from exploration or drilling absent unreasonable use or negligence). Currently, damages are to be based on land actually used, not on the purported impact to other land owned by the surface owner. *Frankfort Oil Co.*, 413 P.2d at 195.

Similarly, the conduct of oil and gas operations in Colorado is regulated by the Colorado Oil and Gas Conservation Commission (“COGCC”) under the Oil and Gas Conservation Act. C.R.S. § 34-60-102 et seq. The Act states that it is in the public interest to foster, encourage, and promote the development, production, and utilization of oil and gas in Colorado in a manner consistent with protection of the public health, safety and welfare, and to prohibit waste. *Id.* C.R.S. § 34-60-102(1). In the exercise of its regulatory mandate to protect the public health, safety and welfare, and in recognition of the increasing land use conflict between oil and

gas developers and surface owners, the COGCC has promulgated far-reaching rules to protect the interests of surface owners and other affected parties. In particular, the COGCC has acted to protect surface land owners from unreasonable damage cause by oil and gas development.

The Office of Legislative Council raised concerns as to whether the language of Initiative 2005-2006 #125 would affect the longstanding role of the COGCC to address. Memorandum dated March 9, 2006, p. 3.² Those concerns were also raised by the Petitioners in the May 25, 2006 rehearing before the Title Board, but the Title Board failed to address those issues in setting the title, ballot title and submission clause for the initiative.

In addition, the initiative does not limit recovery of "fair value of damages" to surface estate owners. Instead, it imposes a strict liability regime for any stakeholder injured as a result of the extraction of a mineral. Thus, a shareholder in a company who believes he has been injured as a result of a decision to extract minerals or a motorist injured by a vehicle engaged in the extraction of a mineral may have claims for "fair value of damages", notwithstanding other conflicting

² This memorandum can be found at <http://www.leg.state.co.us/lcs/0506initrefr.nsf/dac421ef79ad243487256def0067c1de/b41c5d940bc4549687257157006ddcb9?OpenDocument>.

provisions of statutory and common law. None of these possibilities is disclosed to the voter by the title, ballot title, and submission clause.

Further complicating the matter are the modifications enacted by statute governing the mining of coal. Congress enacted the Surface Mining Control & Reclamation Act of 1977, 30 USC 1201 et seq., which Colorado has incorporated through the Colorado Surface Coal Mining Reclamation Act. C.R.S. § 33-33-101 et seq. CSMCRA and its federal counterpart require operators of coal mines to include within any permit application a list of all documents upon which the applicant bases its legal right to enter and conduct surface or underground coal mining operations. C.R.S. § 34-33-110(2)(j). These instruments will define the relationship between the surface owner and the mineral extractor. Moreover, CSMCRA also requires coal operators to repair damage to lands caused by subsidence from underground mining and to compensate surface owners for damage to dwellings and other surface features. It is unclear whether the initiative intends to change the rights guaranteed under state and federal law in favor of some more general remedy.

Whether the initiative will disturb or change the relative rights of surface and mineral owners is not at all clear from the title set by the Board, nor is it clear from the statements of intent offered by the initiative's two proponents before the

Board. This ambiguity of purpose can lead to serious confusion on the part of the electorate. As in *Obscenity*, a voter considering this initiative could conclude that the measure simply states a general principle of law reinforcing the current regime and preventing the legislature from, for example, enacting legislation preventing the payment of any damages whatsoever by a mineral owner. A voter could also conclude, however, that the measure will fundamentally alter Colorado property law and regulations concerning mineral extraction. Indeed, even the proponents of this measure cannot agree on a single interpretation.

Without more guidance, the Board simply cannot set a title that satisfies the mandates of section 1-40-106(3). Put simply, the title set in this case does not fairly reflect the true intent of the measure and does not adequately inform the voters of the consequences of a yes or no vote. As such, the title set by the Board cannot stand, and the Petitioners respectfully request that this Court reverse the action of the Board.

II. The Title Contains An Impermissible "Catch Phrase" By Use Of The Term "Fair Value."

This Court has repeatedly cautioned against the use of catch phrases in the title of ballot initiatives. Catch phrases are "words that work to a proposal's favor without contributing to voter understanding." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 256*, 12 P.3d 246, 257 (Colo.

2000). The Court has cautioned that the use of catch phrases "should be carefully avoided" and that "the particular words chosen by the Ballot Title Setting Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #258(A), 4 P.3d 1094, 1100 (Colo.2000) (hereinafter "*English Education*"); *Say v. Baker*, 137 Colo. 155, 160., 322 P.2d 317, 320 (1958). This is because "[b]y drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *Id.*

The title language in *English Education* that was found to be a catch phrase was the recitation, lifted directly from the text of the initiative, that the initiative required all children in Colorado public schools to be taught English "as rapidly and effectively as possible." *Id.* The Court explained,

[t]hese words operate as both a catch phrase and a slogan. They mask the policy question regarding whether the most rapid and effective way to teach English to non-English speaking children is through an English immersion program. This question is a subject of great public debate.

Id.

In the present case, the title contains the phrase, again lifted from the text, that mineral extractors shall pay "fair value" of damages brought about in the development, pursuit or extraction of a mineral. This is a quintessential catch phrase. It does nothing to convey to the reader what damages must be paid as a result of development, pursuit or extraction. Rather, as in *English Education*, the use of this catch phrase injects a value laden term solely for the purpose of tipping the debate. No one opposes "fairness", and it is fundamentally unfair to allow one side of a debate to co-opt that conclusion through the official designation of the titles and summary.

Equally pernicious are catch phrases that also "form the basis for slogans for use by those who expect to carry out a campaign for or against an initiated constitutional amendment." *Id.*, at 1099. These slogans are catch phrases "tailored for political campaigns – brief striking phrases for use in advertising and promotion" that "encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposal's merits." *Id.*

Here, the use of the term "fair value" also forms the basis for a slogan for use in a political campaign. Indeed, the proponents have already incorporated that concept into their campaign. Proponent John Gorman introduced himself at the hearing on the petition for rehearing as a member of the organization "Colorado

Land Owners for Fairness.” Rehearing, p. 2, lines 18-20.³ In addition, Petitioner’s motion for rehearing was on the letterhead of “Colorado Land Owners for Fairness.” Petitioners use of the loaded term “fair” for purposes of promoting the initiative is *prima facie* evidence that the term “fair value” is a catch phrase. The term is clearly calculated to “trigger a favorable response” by generating support “that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase.”⁴ See *id.*, at 1099. Because the inclusion of such a phrase in the ballot title and submission clause is impermissible, this Court should reverse the action of the Board.

CONCLUSION

For the reasons set forth above, this Court should reverse the determinations of the Ballot Title Setting Board, and remand with instructions.

³ A copy of the letterhead of “Colorado Land Owners for Fairness” is part of the record of the May 25, 2006 hearing, and is available at <http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/Final%20Text%20125.pdf>.


⁴ It should be no defense that the phrase “fair value” is itself part of the content of the proposal. If that were the rule, every initiative proponent could simply embed a catch phrase into an initiative and circumvent forty-eight years of Colorado case law concerning catch phrases.

CERTIFICATE OF COMPLIANCE WITH C.A.R. 32(a)(3)

This brief contains 3,859 words.

Respectfully submitted this 9th day of June, 2006.

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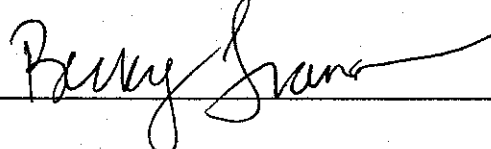
CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2006, a true and correct copy of the foregoing **OPENING BRIEF OF PETITIONERS** was served by Federal Express, priority overnight service, to the following:

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ORIGINAL

INITIATIVE TITLE SETTING REVIEW BOARD

THURSDAY, MAY 25, 2006, 9:15 A.M.

SECRETARY OF STATE'S BLUE SPRUCE CONFERENCE ROOM

1700 BROADWAY, SUITE 270

DENVER, COLORADO

The following proceedings were taken on
Thursday, May 25, 2006, commencing at 9:15 a.m., before
Deborah D. Mead, Certified Shorthand Reporter and Notary
Public within and for the State of Colorado.

THE BOARD:

William Hobbs, Chairman
Dan Domenico
Sharon L. Eubanks

PROPOSED INITIATIVE 2005-2006 #125



P R O C E E D I N G S

THE CHAIRMAN: Then let's turn to the first agenda item, which is 2005-2006 No. 125, Damages for Mineral Extraction. I actually have four different motions for rehearing; one filed by one of the Proponents and then three others. And I'd pretty much like to take them as a group, maybe starting with the one filed by a Proponent, but go ahead and hear from each of the Petitioners on these motions for rehearing. And then we may act separately on them or together. I don't know.

But let's start with the one submitted by John Gorman, since I think he is one of the Proponents.

Mr. Gorman, are you present?

MR. GORMAN: I am.

THE CHAIRMAN: If you could come forward and identify yourself for the record and who you represent.

MR. GORMAN: My name is John Gorman. I am a Proponent of Ballot Initiative No. 125. Our organization is Colorado Land Owners for Fairness. And I'd like to ask the Title Board to include a complete iteration of the initiative in the title there. I think the initiative is clear and it is broad, but vague it is not.

The words used are commonly-understood words whose meanings are univocal and unequivocal. So I'd just like to ask you to append, including "oil and gas" at the

1 end of the wording of the title.

2 One of the objections is that simply stating
3 the language of the initiative does not necessarily make
4 it clear, and that is true unless the statement of the
5 initiative from the beginning was clear and simple, and I
6 submit that this one is.

7 THE CHAIRMAN: Mr. Gorman, you know, when the
8 measure came up last time, the Board was at a
9 disadvantage because there were no representatives from
10 the Proponents. And one of the obligations of the Board
11 is to make sure that they do understand the measure.

12 Typically that's how we start with a new
13 proposal is we -- I give the Board an opportunity to ask
14 questions, and there were a great many questions about
15 the measure. And I think to some degree those questions
16 are now reflected in motions for rehearing.

17 But again, we didn't have the opportunity of
18 seeking any clarification from the Proponents last time.
19 It may be that either now or after we hear from
20 petitioners on the other motions for rehearing that there
21 will be some questions.

22 MR. GORMAN: Either I or Mr. Kaufman would be
23 happy to answer any of your questions now or after some
24 of the other petitioners have been heard.

25 THE CHAIRMAN: Well, one question that I have

1 is that, and this is a constitutional proposal -- there
2 were a lot of questions having to do with the meanings of
3 various terms. Is it your intention that the details
4 such as definition would be fleshed out in the
5 implementing legislation?

6 MR. GORMAN: We hope not. What we hope to do
7 with this is to set a principle and change the atmosphere
8 in negotiations between surface owners and mineral
9 extractors. And we think that this is a strong enough
10 proposal that, indeed, if passed, it will change that
11 atmosphere. If it does not, then there will be
12 litigation and perhaps legislation that present a more
13 detailed relationship between varying interests.

14 But it was not our intention to stimulate
15 legislation, although we saw that as a definite
16 possibility. We also see litigation as a possibility.
17 But we hope that people of the State of Colorado will
18 avoid both.

19 THE CHAIRMAN: Would -- the legislature would
20 not be prohibited from proposing and enacting legislation
21 I take it. I mean that's not your --

22 MR. GORMAN: Absolutely not. Neither is it
23 now. And in fact, it has made several attempts.

24 THE CHAIRMAN: Are there any questions from
25 the Board members about the proposal itself or about

1 Mr. Gorman's motion for rehearing?

2 MR. DOMENICO: What specifically --
3 specifically what do you think adding the -- I take it
4 your motion is to just add the words "including oil and
5 gas" to the title?

6 MR. GORMAN: Correct.

7 MR. DOMENICO: What do you think that adds to
8 the title that "mineral" doesn't, just leaving it at
9 "mineral"?

10 MR. GORMAN: Well, a mineral, as a term
11 understood in the industry, includes, of course, oil and
12 gas. But the common understanding of minerals among the
13 people of the state of Colorado do not or does not
14 include oil and gas. So this is just to emphatically
15 state that -- what we're talking about because -- and I
16 invite you to go down on the street here, ask ten people,
17 and then you will agree with me, because I've already
18 done it.

19 THE CHAIRMAN: Thank you.

20 MR. GORMAN: Thank you.

21 THE CHAIRMAN: We may have questions later.
22 But let's turn to the next motion for rehearing, and I
23 will -- I guess the next one I'll take up is Sean
24 Gallagher for L. Roger Hutson and Ken Wonstolen.

25 Mr. Gallagher.

1 MR. GALLAGHER: Thank you, Mr. Chairman.

2 Good morning, Mr. Chairman and members of the
3 Board. I don't intend to replot ground that was plowed a
4 week ago by Mr. Wonstolen. He made, I think, a very
5 detailed and very eloquent explanation a week ago about a
6 number of the concerns that we have. And I would just
7 not restate those for the record, but since the record
8 already contains them, I would ask that you review your
9 notes from last week as well.

10 As the Supreme Court has told us, titles must
11 properly advise voters of the operation of the measure.
12 In short, this board has an obligation to call out a wolf
13 in sheep's clothing when it sees one.

14 The Supreme Court has told us that the ballot
15 title and the submission clause is inadequate where the
16 definition -- where an important definition of an
17 important term is not included in the title or the
18 submission clause.

19 The first question which this board needs to
20 address is whether this initiative creates a new legal
21 standard which is new and likely to be controversial.
22 And the answer to that is clearly yes. The rights of
23 several mineral owners to certain access has been the
24 cornerstone of property law for 400 years, and Colorado
25 has long recognized that right of access.

1 In a long line of cases, Colorado courts have
2 recognized the right of the surface owner to be
3 compensated for unreasonable or excessive use at the
4 surface. The conduct of oil and gas operations in
5 Colorado is also regulated by the Colorado Oil and Gas
6 Conservation Commission under the Oil and Gas
7 Conservation Act.

8 And pursuant to its implementing legislation,
9 the Commission has, through its spacing decisions,
10 actually limited the number of wells that can be drilled
11 on any given section of land and has promulgated detailed
12 and far-reaching rules designed to protect surface owners
13 as well as to protect the public's health and safety.

14 This initiative would fundamentally alter the
15 basic and long-settled principles regarding ownership of
16 property in Colorado.

17 The next question then which the Board must
18 address is whether this new legal standard is likely to
19 be controversial so as to require it -- so as to require
20 reference to that fact in the document prepared by this
21 board.

22 Courts have told us that things like a square
23 footage in a casino are not controversial for purposes of
24 ballot initiative, but abortion restrictions are probably
25 probably are the quintessential definition of something

1 that's probably controversial.

2 Here the issue between surface right owners
3 and mineral extractors has been the subject of long
4 dialogue most recently in the legislature surrounding
5 House Bill 85. It's been the subject of much newspaper
6 coverage, at least the subject of hearings, and much
7 debate within the general assembly.

8 So we think it's clear that this board should
9 conclude that this would be a controversial subject as
10 well. And therefore, the Board has an obligation to
11 prepare a summary which eliminates this measure, not
12 necessarily restates it.

13 Now, we're aware and mindful of the decisions
14 of the Supreme Court that prohibit this board from
15 interpreting particular measures that are in front of it,
16 and we are also mindful of the decision of the Supreme
17 Court that cautioned that this board is not to be
18 concerned with legal issues.

19 We're not asking this board to interpret the
20 measure nor are we asking the Board to render legal
21 opinions. What we're asking the Board to do is convey
22 the primary purpose of this measure, which is namely to
23 create new standards in Colorado for mineral extraction.

24 Mr. Wonstolen also discussed in his testimony
25 a week ago the fact that the title contains impermissible

1 catch phrases; namely, the use of the term "fair value."
2 Again, I don't intend to replot that ground, but it is
3 one of the bases that we have moved for reconsideration.

4 So for those reasons we ask the Board to
5 reconsider its conclusions of last week and act in such a
6 way that the new title and submission clause would fairly
7 inform the public that this is a controversial issue and
8 that enactment of this initiative would fundamentally
9 alter Colorado law on mineral extraction, that it would
10 alter the obligations and authority of the Colorado Oil
11 and Gas Conservation Commission, and that it would
12 require substantial legislation to interpret and
13 implement the initiative.

14 If there are those questions ...

15 THE CHAIRMAN: One question that I have --
16 well, help me understand just a little bit better how the
17 Board in your opinion should modify the titles to reflect
18 this principle that you think the measure creates a new
19 legal standard and so forth. Can you just help me a
20 little more practically?

21 MR. GALLAGHER: I think it should be modified
22 to include a statement that this initiative would change
23 established law on general extraction, would alter the
24 responsibilities and authority of the Colorado Oil and
25 Gas Conservation Commission, and would require

1 substantial legislation to interpret and implement the
2 initiative.

3 THE CHAIRMAN: Thank you. And then one other
4 quick question. Would it be sufficient -- with respect
5 to the catch phrase already mentioned, would it be
6 sufficient just to remove the word "fair" from the title
7 set by the Board, or is something more required, or do
8 you have another suggestion?

9 MR. GALLAGHER: Well, I think clearly the
10 phrase "fair value" is a catch phrase. I think the
11 problem is when you remove the word "fair" then you run
12 into a vagueness issues.

13 I understand vagueness is not necessarily an
14 issue that the Board needs to consider in the context of
15 the enforceability, the constitutional enforceability of
16 the initiative, but it renders, I think, the entire
17 meaning of the initiative that much more amorphous and
18 unclear to members of the public.

19 THE CHAIRMAN: Okay. Ms. Eubanks.

20 MR. GALLAGHER: Thank you.

21 THE CHAIRMAN: I think Ms. Eubanks may have a
22 couple.

23 MS. EUBANKS: I have a couple questions.

24 MR. GALLAGHER: Okay.

25 MS. EUBANKS: In terms of the catch phrase

1 argument, other than asserting that it is a catch phrase,
2 could you elaborate any further in terms of why you think
3 that's a catch phrase in terms of the analysis that the
4 court has used as to what constitutes a catch phrase?

5 MR. GALLAGHER: Yeah. I'd be happy to do
6 that.

7 The court has, in the past five or six years,
8 really sort of bounced around on the issue of catch
9 phrases. In some opinions they have found words to be
10 catch phrases, in others, they haven't.

11 The court has told us that its task is to
12 recognize terms that provoke political emotion and impede
13 voter understanding as opposed to those which are merely
14 just descriptive of the proposal.

15 So if we look at that standard, the phrase
16 "fair value" is in no way descriptive of the proposal.
17 And in fact, it is so ambiguous that it actually creates
18 more issues than it solves.

19 In fact, the Proponents have told us a few
20 minutes ago that they believe that litigation and
21 legislation is a possibility. And I would suggest it's
22 more than a possibility, it's a likelihood. And it's a
23 likelihood because those phrases are not descriptive of
24 the proposal. In fact, they create uncertainty.

25 The other issue the court has tasked this

1 board with evaluating is whether these statements provoke
2 political emotion or impede voter understanding.

3 Now, I don't know that the phrase "fair value"
4 necessarily is the kind of phrase akin to a fighting word
5 that incites, you know, people on the street to lose
6 their tempers. But certainly in the context of the
7 debate that went on within the legislature over House
8 Bill 1185, the concept of "fair value" is an issue that
9 many of Colorado's industries differ on the
10 interpretation of.

11 So certainly within the group of citizens that
12 would be affected by the enactment of this legislation,
13 those terms might very well provoke political emotion.

14 But moreover, and I think more importantly,
15 they would also impede voter understanding. I think a
16 voter looking at this would look at that phrase and say,
17 Well, I mean it seems fair to me. It's kind of like
18 saying are you against apple pie and motherhood. You
19 know, there are very few people who are going to come out
20 and say I'm against fairness.

21 So it is the kind of phrase that, I think, has
22 an effect on the voter and impedes the voter's actual
23 understanding of what the measure is intended to
24 accomplish.

25 MS. EUBANKS: In terms of the argument

1 relating to the title should somehow explain that the
2 measure is creating this new legal standard, wouldn't you
3 say that usually when there is an amendment to the
4 Constitution or an amendment to the Colorado Revised
5 Statutes that that represents some change in existing
6 law?

7 MR. GALLAGHER: Well, I mean, by definition
8 anytime you amend the Colorado statutes, you've changed
9 existing law. But that's not the standard that the
10 Supreme Court applies. The standard isn't whether there
11 is some change. The standard is whether there is a
12 establishment of a new right or whether there is some
13 material change in the law.

14 So yeah, I would ask this board not to focus
15 on the fact that, by definition, enactment of a new
16 provision of the Colorado Revised Statutes changes the
17 law. I think really the question is does this go beyond
18 just a mere minor change and does it constitute the
19 creation of new, either constitutional or statutory
20 rights, and clearly it does.

21 MS. EUBANKS: Would you think that the court's
22 decision on the waters rights initiative, which was back
23 in 1994, where that proposal asserted to create a new and
24 controversial legal standard, that the court did not find
25 that that title needed to say that that was a new legal

1 standard, it didn't need to be defined, it didn't need to
2 be explained, just setting forth the new standard of
3 whatever was being created in that initiative in terms of
4 that being analogous to this situation, where you don't
5 really -- other than having the standard as set forth in
6 the title, there is no obligation to go any further than
7 that?

8 MR. GALLAGHER: I think there is an analogous
9 situation from 1994 from the Supreme Court, but it's not
10 the water initiative, it's the obscenity initiative.
11 It's found at 877 P.2d 848.

12 And in that case the court held that even
13 though the language of the title set by the board was
14 nearly identical to that of the proposed initiative, the
15 titles still did not fairly reflect the contents of the
16 measure. The court held that the titles failed to
17 sufficiently inform voters that the measure was intended
18 to prevent the state from adopting a definition of
19 obscenity that was broader than that of the First
20 Amendment.

21 So I think that is -- at least the 1994
22 Colorado Supreme Court case, that is more on point with
23 this situation.

24 MS. EUBANKS: Okay. Thank you.

25 THE CHAIRMAN: Any other questions for

1 Mr. Gallagher? Thank you.

2 MR. GALLAGHER: Thank you.

3 THE CHAIRMAN: Next I'd like to hear from Ed
4 Ramey on behalf of Stuart Sanderson and James T. Cooper.

5 MR. RAMEY: Good morning Mr. Hobbs. Ed Ramey
6 representing Stuart Sanderson. And do we need to go
7 through the disclaimers again?

8 THE CHAIRMAN: I think they're on the record.

9 MR. RAMEY: They're on the record. Good.
10 Okay. That tends to consume time.

11 I think to some degree our arguments are very
12 similar, our submissions are very similar to the ones
13 that Mr. Gallagher just presented, with one exception.
14 We have three items, and let me, I guess, take them out
15 of order.

16 No. 2, I think the Proponents, if I heard them
17 correctly, addressed this morning. We believe that the
18 specific inclusion of "oil and gas," which for whatever
19 reason, is specifically included and referenced in the
20 text, should be referenced in title. I think I heard
21 that echoed by the Proponents. That is sort of what it
22 is.

23 With regard to No. 3, the catch phrase, we
24 agree. And as I read the objections coming next,
25 Mr. Gessler has an issue there as well. I would agree

1 with Mr. Gallagher's statements with regard to the catch
2 phrase, and I think he put it very well when he said that
3 when -- the term "fair value" is, as far as -- at least
4 as far as I know and most of the voters would view it as
5 not a term of art that has sort of an encapsulated
6 meaning, but it's a phrase that incorporates a sense of
7 fairness, and everybody wants to be fair. And that
8 carries sort of that loaded concept.

9 The closest analogy that I can think of from
10 my own memory, and I'm remembering all the cases I've
11 either won or lost, usually lost at Mr. Knaizer's hands
12 over the years of the court, was the 2002 -- one of the
13 2002 English immersion initiatives where there was a
14 phrase "rapidly and effectively as possible," which is
15 about as close an analogy as I could think.

16 And the Supreme Court stated that that was
17 indeed a catch phrase, I think in their first opinion on
18 those issues that year, because, I think, everybody would
19 like children to learn English as rapidly and effectively
20 as possible, of course. And "fair value" is something
21 like that.

22 If there is damage, people would like to see
23 the -- whoever suffers that damage to be compensated in a
24 fair fashion.

25 Your question, whether you can just extract

1 the word "fair," do you have to take the whole phrase
2 "fair value" out, poses exactly the problem that
3 Mr. Gallagher stated. You leave "value" in, what the
4 heck does that mean?

5 So there is a bit of a quandary there. And
6 frankly, Mr. Hobbs, I don't have the answer to that.

7 Which, I guess, leads to my third point, and
8 that is the -- just the general confusion that -- and
9 lack of clarity in the text of the measure itself, which
10 presents, I think, the Title Board, with some
11 difficulty.

12 I couldn't even begin to present the concerns,
13 I won't even try again, as well as Mr. Gallagher
14 suggested as Mr. Wonstolen did at the meeting at some
15 length a week ago. And I think those are precisely the
16 concerns.

17 My question to the Board goes a little further
18 than Mr. Gallagher's, and I don't know if the Board can
19 set a title short of simply doing what the Proponents
20 abdicated this morning, and that's just quote the
21 measure. And then -- the text of the measure. And then
22 the question is, minus the catch phrase, does that
23 adequately inform the voters of what they're voting for?

24 One other case Mr. Gallagher cited, the
25 obscenity case. Another case that the Supreme Court

1 dealt with an issue in response to a question Ms. Eubanks
2 asked a few moments ago about changes in the law, that,
3 of course, a constitutional amendment is changing the
4 law, but in 1990 or 1992 or thereabouts the parental
5 notification for abortion issue that was on the ballot at
6 the time incorporated within it a change in the
7 definition of when life begins.

8 And the courts -- Supreme Court's guidance at
9 that time, if I recall the opinion correctly, was not
10 that you couldn't do it, but that if you're going to
11 change a concept as important and as controversial as
12 that sort of concept, when life is deemed to begin under
13 Colorado law, that has to be clearly disclosed in the
14 title. So I think that's another example of a case where
15 the court has given guidance like that.

16 On my first point, which echoes
17 Mr. Wonstolen's argument last week, I'm a little more
18 frustrated than even, I think, Mr. Gallagher is, because
19 I don't know how you do set a title. And I defer to the
20 expertise of the Board. But I would suggest that one
21 consideration is that this measure doesn't lend itself to
22 a title, because you can't set a title. And in fact,
23 you've been told this morning that whatever it means will
24 have to get sorted out someday downstream primarily
25 through litigation, if not legislation.

1 I'm just not sure it's -- if this is not one
2 of those cases where the Board can't perform its -- its
3 statutory duty.

4 THE CHAIRMAN: Questions? Mr. Domenico.

5 MR. DOMENICO: If I take it correctly, the
6 argument that we can't set a title is that the measure
7 itself turns essentially on a catch phrase, so that we
8 can't set a title without using a catch phrase; and in
9 addition, the catch phrase and the things surrounding it
10 are so undefined and -- that we can't accurately set a
11 title without getting into defining terms
12 inappropriately, which we're not permitted to do, or
13 analyzing it, which we're not permitted to do it; is that
14 the argument?

15 MR. RAMEY: I think so. And I was beginning
16 to just object to the first part of your statement,
17 Mr. Domenico, in that I don't think that just turns on
18 the catch phrase. I think that's part of the problem.
19 But I refer back to Mr. Wonstolen's presentation of last
20 week. I think it's much broader than that.

21 And the Board's charge, as I understand it --
22 with deference to Mr. Knaizer, who may gave advice on
23 this in a moment, but I think the Board's charge is to
24 set a fair and clear title. And if the Board cannot set
25 a fair and clear title -- and there was a case out there,

1 and I apologize that I cannot remember the case that I'm
2 quoting. Everybody on the Board probably knows exactly
3 what case I'm quoting.

4 But there was a case one time where the Board
5 said -- Supreme Court made the comment that they
6 understood the quandary of the Board confronted with the
7 initiative it was confronted with and the Board
8 apparently, in the court's view, did not understand the
9 title and, frankly, couldn't have understood the title
10 given the way it was drafted, and therefore, couldn't
11 perform its statutory charge.

12 So the question is what do you do in that
13 situation? Set a title anyway?

14 MR. DOMENICO: Right. Well, I mean, I agree
15 that it's a bit of a quandary. My question, though, is
16 is the problem that there are all these terms that are
17 going to be fought out later and aren't defined in the
18 measure, does that fact in itself sort of make it
19 impossible in your understanding?

20 MR. RAMEY: No. Not that fact in itself. The
21 fact the terms would have to be fleshed out later. But
22 it has to be clear enough, I would suggest, that the
23 voters will have some idea what they're voting for. I
24 mean, not necessarily in excruciating detail and not that
25 there won't be litigation in implementing legislation,

1 perhaps.

2 But the voters have to have some idea what the
3 meaning of a yes or no vote is. And I think one of the
4 things that we've heard primarily, not from me, but from
5 others, is that it's very difficult, even for the Board,
6 to determine what a yes or no vote on this means.

7 MR. DOMENICO: I share -- I appreciate the
8 logic of that, and the problem I have with it is I wonder
9 what we would then do if we were brought a measure that
10 said something along the lines of the state shall make no
11 law abridging the right of free speech. That seems to be
12 a catch phrase, at least as much as fair value is. It's
13 undefined, it's been fought out in litigation for
14 hundreds of years and will continue to be.

15 And so my question is maybe -- it seems to me
16 that perhaps what the title does is inform people that
17 they're voting on something that includes vague terms,
18 and that's our role; not to try to explain to them what
19 those vague terms may mean, because you're right, we
20 don't know.

21 And so I -- I wonder, the logic of your
22 argument is appealing, but it suggests to me we'd have
23 trouble with something like the First Amendment.

24 MR. RAMEY: You know, I think Mr. Domenico,
25 you've very eloquently identified a distinction that I'm

1 not very eloquently making. I mean, I think there is a
2 difference between breadth and scope, and the Proponents
3 even referred to that this morning.

4 The First Amendment certainly is broad in
5 scope. The old parental rights initiative, which was
6 something to the effect the government shall not
7 interfere with the parents' rights to control the
8 upbringing, education, discipline of their children.
9 Clearly broad in scope and intended to be.

10 That's a little different from some of the
11 questions that I heard coming from the Board last week
12 and that Mr. Wonstolen was suggesting that aren't really
13 questions of scope. It's really a question of lack of
14 clarity of intent.

15 And what I heard this morning from the
16 Proponents is the intent, at least in part, is to change
17 the tenor of the discussions, if you will, in the future,
18 perhaps without necessarily providing that clarity. So
19 that may be something of -- that may be somewhat
20 intentional.

21 But I think there's a difference between
22 intended broad scope and using terms that scoop in a lot,
23 as the First Amendment parental rights initiative did
24 do.

25 But as compared with the text of a measure

1 where you, as a board, look at it and you say, I don't
2 know -- if I'm voting yes on this, I don't know what I'm
3 doing, I don't know what I'm voting for, which is
4 exacerbated, of course, by a crucial catch phrase that I
5 think would have to come out and makes it worse.

6 So I'm merely taking, I guess, Mr. Gallagher's
7 statement -- Mr. Gallagher would like you to fix it and
8 sort of challenge the Board to fix it and make it more
9 clear. If the Board feels they can do it, more power to
10 you. If the Board feels, you can't do it, and I defer to
11 the three of you on that -- if you feel you can't do it,
12 I think the court has given you an out, and saying if you
13 can't do it -- if you can't write a clear title where the
14 import of a yes or no vote can be understood by the
15 voters, then you violate your statutory mandate to set a
16 title notwithstanding that.

17 I'm sort of tossing -- I'm taking your
18 question and spinning it around and tossing it back to
19 you. I don't know the answer. If you feel you can set a
20 clear and understandable title, by all means. I think
21 that's your statutory charge no matter what I'm saying.

22 But if you can't, I think the court is
23 suggesting, don't.

24 MR. DOMENICO: Thank you.

25 THE CHAIRMAN: Thanks. Any other questions?

1 Thank you.

2 Next I'd like to hear from Scott Gessler on
3 behalf of Howard Stanley Dempsey, I guess it is.

4 Mr. Gessler.

5 MR. GESSLER: Well, thank you, Mr. Hobbs.

6 I would also like to enter an appearance on
7 behalf of Mr. Chris Elliot as well. So I'll be
8 representing both Mr. Dempsey and Mr. Chris Elliot in my
9 comments -- Christopher Elliot.

10 Obviously, I'm, based on my motion for
11 rehearing, echo many of the comments made by
12 Mr. Gallagher and Mr. Ramey. I'll try and just point out
13 my differences, proving the point you get three lawyers
14 on the same issue, you'll get three different arguments.

15 I'd like to talk first about the issue of fair
16 value. That suffers, I would argue, from two
17 infirmities. One is that it's vague, and the Board can't
18 set a title for that. And I'll talk about that in a
19 moment.

20 But the one I'd like to focus on is the use of
21 the catch phrase. I certainly would agree with
22 everything Mr. Gallagher and Mr. Ramey have said. I
23 would add one other point. Another standard for a catch
24 phrase is does it form the basis for a political
25 campaign? That's in the Supreme Court case law.

1 And if you look, in fact, at the Proponents'
2 motion for rehearing, they fashion themselves as the
3 Colorado Land Owners for Fairness. So in other words,
4 they are taking that use of the word fair, they're taking
5 the theme fair, and they're turning it into the basis of
6 their political campaign seeking mere fairness.

7 And that's the essence of a catch phrase, and
8 that's why we don't want to have catch phrases in the
9 title, because they form the basis of political campaigns
10 in a very emotionally-laden way. It brings an emotional
11 content, emotional component into this, and as Mr. Ramey
12 said, who can being against fairness. Everyone wants
13 fairness because it's just right.

14 So we have to remove the term "fair."

15 That brings us to the second point, and that
16 has to do with the ambiguities and the inability to
17 understand this title itself. I respectfully submit that
18 the Title Board committed two analytical errors when it
19 reviewed this issue before.

20 The first error that I believe is that -- and
21 again, I hate telling the tribunal that it goofed, but I
22 guess I'm here to do that.

23 The first point is that the ambiguity and
24 vagueness of a statute or proposed initiative, that
25 analysis is separate from a single subject analysis.

1 Okay? They're related, but they're two different steps.
2 And I'd argue what this board needs to do first, the very
3 first thing the Board needs to do, is understand what the
4 initiative does. I mean, that's the very first thing it
5 has to do in order to set a title that accurately
6 reflects what it does; it has to understand what it
7 does.

8 So yes, there is a necessity for this board to
9 interpret the law, to interpret the proposed law and
10 interpret what it means. And the Board, obviously,
11 relies on the normal canons of statutory interpretation.
12 First canon is to look at the plain language; the second
13 is to obtain some sense of intent, provided that is
14 consistent with the plain language. And that's why the
15 Board always asks Proponents what their intent is. And
16 so that's why it's relevant and important.

17 But this board has to, as the very first step,
18 understand what the heck this thing means.

19 The second step is to determine whether or not
20 it meets the single subject requirement, based on its
21 initial determination, and of course, that there is to
22 set a title.

23 And here we seem to skip directly to the
24 single subject. I mean, people couldn't quite understand
25 what it meant. And I think the re- -- part of the

1 evidence of that is, you know, comments by the Board:
2 Well, whatever we do, we're just going to have to include
3 the ti- -- the actual language as part of the title,
4 because that's the only way we're going to capture this
5 thing.

6 And I would argue that the reason you came up
7 with that conclusion is a valid one: You can't put it in
8 other words, because we don't know how to put it in other
9 words -- other words that capture what this means.

10 So the Board sort of said, Well, we have a
11 sense that it means single subject. I mean, that's
12 probably correct. I mean, it has to do with obligations
13 of mineral extractors. I mean, that, in and of itself,
14 is an adequate single subject. But you still have to get
15 over the vagueness hurdle.

16 And I'd like to talk just a few details, a few
17 more details about why this so vague and why it's
18 impossible to truly understand what it means.

19 First of all, let's looking at the term
20 value. The mineral extractor has to pay value. I think
21 a mineral extractor, we can probably figure out, shall
22 pay the fair value of damages.

23 Well, there are sort of two conflicting and
24 diametrically-opposed ways of interpreting this. One is
25 when a mineral extractor purchases mineral rights on the

1 fair market value, that fair market value, that has
2 already incorporated from an economic standpoint the
3 damage -- both the costs and benefits associated with
4 that mineral right.

5 For example, the fair market value will assume
6 that minerals cost so much, that it costs so much to
7 remove them, and one of the cost components of removing
8 them is paying for damages that are caused to the surface
9 owner under Colorado law.

10 So in other words, whenever a mineral
11 extractor simply buys mineral rights, that automatically
12 incorporates -- that fair market value in an economic
13 sense, automatically incorporates the value of damages.
14 So this doesn't change the law at all under that
15 interpretation.

16 Under a different interpretation, and this is
17 the diametrically-opposed interpretation, that that
18 value, okay, the value paid by the surface owner and the
19 value paid by the mineral extractor, don't include, don't
20 incorporate in any manner whatsoever the damages that can
21 be caused to a surface owner. Okay?

22 So what that means is the diametrically
23 opposite interpretation, that every burden, every
24 economic burden a surface owner obtains has to be paid.

25 So I think just the use of the term "value,"

1 okay, and, in fact, combined with sort of this unusual
2 verbiage, brought about in the development pursuit or
3 extraction, creates two absolutely opposing
4 interpretations, both supported by the plain language of
5 the statute or the proposed initiative itself.

6 Two other problems. The term development and
7 the term pursuit. These are non-idiomatic usages of
8 these words. How do you develop a mineral? Okay.
9 Normally we don't speak of developing a mineral. We
10 speak of extracting a mineral. We speak of selling a
11 mineral. You may develop, for example, a coal mine, a
12 physical structure that is built. That's normally what
13 development means.

14 But to use the term as developing a mineral,
15 it's a non-idiomatic usage, it's very unusual. What does
16 it mean? We don't use that in our normal language.

17 Under the second word, pursuit, what does that
18 mean? Do you pursue a mineral? Minerals don't run away,
19 obviously. Well, perhaps they seep away. But usually
20 what pursuit -- means pursuing an opportunity, pursuing a
21 business deal, pursuing something that's mobile. But how
22 do you pursue a mineral? We don't speak in those terms.
23 We don't speak in terms of pursuing a mineral.

24 Another ambiguity is the term "brought
25 about." Does that imply some form of causality or not?

1 It's a term that people rarely use in this context.

2 Finally, I've talked about the term "surface
3 owner." Well, if you look at this initiative, it does
4 not limit itself to surface owners. Okay. For example,
5 let's say a stockholder owns stock in a mineral
6 extractor, coal company, a mining company, an oil and gas
7 company. Okay? And what that, let's say, mining company
8 does, is it pursues a mineral, pursues a mineral
9 opportunity -- let's sort of take this broad approach --
10 and digs a mine or digs a well, it comes up dry, and that
11 stockholder loses money because the company made a bad --
12 bad mistake pursuing a mineral. That's -- they're
13 damaged.

14 This initiative covers that. It is
15 breathtakingly broad. It is basically a full, strict
16 liability statute for all mineral extractors in what
17 could conceivably be considered every activity that they
18 undertake. Because if you take sort of the strange usage
19 of development or pursuit, anything a mineral extractor
20 does is part of developing a mineral or pursuing a
21 mineral or extracting a mineral. Okay?

22 And I could provide other arguments as to how
23 this sort of works downstream in the production stream.
24 I mean, if you're a seller of a mineral, simply a broker,
25 are you pursuing that mineral? Well, you probably are.

1 You're pursuing it from the person who extracted it.

2 Okay? And you're selling it.

3 So I think that the way the verbs -- or I
4 shouldn't call them -- in this instance they're
5 nominalizations and nouns, development and pursuit are
6 not idiomatic usage. It's not clear at all what they
7 mean, as well as the term value brought about. Nor does
8 this limit it, or we talk about, nowhere in the language
9 does it limit it to surface owners. This essentially
10 creates a new cause of action, a strict liability cause
11 of action not based on reasonableness, simply for any
12 damages caused by a mineral extractor.

13 I've given you one interpretation, which I
14 think is a very -- well, I came up with it, so I think
15 it's a very compelling interpretation. I'm sure you
16 could hear plenty of other compelling interpretations
17 that mean radically different things.

18 And this language gives the Title Board no
19 ability whatsoever to choose between these radically
20 different interpretations. I'd argue that's the essence
21 of vagueness and ambiguity, because how does the Board
22 interpret what this means in order to set a title? It
23 can't.

24 So we would argue, and I guess along those
25 lines, we follow Mr. Ramey's argument that this entire

1 thing has to fail.

2 I point out one other point, and this is going
3 back to the -- I mentioned two analytical errors. This
4 is the second analytical error. The vagueness and
5 ambiguity standard does not rely on the complexity of
6 language. There is not a limitation that only complex
7 language invokes the vagueness and ambiguity standard,
8 but rather any language can invoke that standard, if it's
9 vague and ambiguous, and the Title Board cannot
10 understand what it means, it cannot set a title,
11 regardless of whether one characterizes the language as
12 simple or complex.

13 And of course, the terms simple and complex
14 themselves, I would argue, even if this court uses -- or
15 if this board uses the complex standard, this is very
16 complex language. It's short, but complexity is not
17 necessarily a function of the number of words.

18 So for those reasons, as an initial matter, we
19 think that it's impossible to interpret this in a
20 straightforward, consistent manner, and therefore, there
21 should not be a title set. It doesn't require complex
22 language, and it's the very first step this board has to
23 do.

24 And I think what happened last week is the
25 Board, and I understand exactly where you're coming from,

1 said sort of, oh, this is too much of a problem to figure
2 out what the heck it means, let's just put the language
3 right in the title and that will solve our problem.

4 As Mr. Gallagher pointed out, that doesn't
5 solve the problems. There is a case directly on point
6 that says merely including the language of the title does
7 not necessarily resolve the ambiguity problem. The Board
8 still has to do its duty and explain what it means. And
9 it can't -- it is not sufficient simply to include the
10 exact language of the measure.

11 So those are my points, and I'm happy to
12 answer any questions.

13 THE CHAIRMAN: Questions for Mr. Gessler?

14 MR. DOMENICO: I'd like to ask the same
15 question I asked Mr. Ramey about. Could we not set a
16 title for the First Amendment of the U.S. Constitution?
17 I don't see how those terms are any different than the
18 terms you complain about here.

19 MR. GESSLER: Well, I would argue that, no,
20 you couldn't set a title for the First Amendment. Okay.
21 Just as you cannot set a title for TABOR.

22 MR. DOMENICO: Could we set a title to part of
23 the -- to the first clause of the First Amendment if we
24 separated out each part, the free speech, the freedom of
25 religion? Could one of those be done?

1 MR. GESSLER: If you can give me some exact
2 language, I'd be happy to answer that.

3 MR. DOMENICO: Well, how about this: Could we
4 set a title to a measure that said the people of Colorado
5 should treat each other fairly?

6 MR. GESSLER: Well, I would argue absolutely
7 no. But that's a different basis. It sort of has the
8 pieces possible. I mean, my interpretation is it
9 requires some legislative mandate, and that's not a
10 legislative mandate.

11 But perhaps to try and get to the essence of
12 your question, I mean, the Title Board is not the
13 constitutional convention, and obviously terms like
14 freedom of speech, okay, have acquired, I would argue,
15 over the 200 plus years of our country's history, have
16 acquired an aura of perfectibility or an aura of the
17 absolute fundamental standards of what we believe in.

18 So whenever anyone says freedom of speech,
19 that is almost -- it's almost become -- it has become an
20 expressive, emotionally-laden term that everyone agreed
21 to is a good thing.

22 So to take that example, yes, I -- well, or I
23 should say no, I do not think that the Board would have a
24 -- would be able to include a phrase, you know, freedom
25 of speech or shall guarantee freedom of speech. Again,

1 I'd have to look at the exact context.

2 But there is a high risk that that is a catch
3 phrase, and I can certainly see a group out there called
4 Citizens for Free Speech, which forms -- which takes the
5 content of the initiative, takes the content of the
6 title, turns it into a political campaign.

7 THE CHAIRMAN: I might just go ahead and say
8 that, for the benefit of Mr. Gessler, if you want to
9 comment or anybody else, is Mr. Domenico's comments
10 reflect exactly where I am at this point on the motions
11 for rehearing. You know, I think this measure is a
12 little unusual in that it is so short. But it does
13 simply state a legal principle.

14 And, you know, I was looking through the
15 Consti- -- looking through Article 2 of the State
16 Constitution, the Bill of Rights section, and section
17 after section is three and four lines long, stating
18 simple, simple statements of general legal principles, a
19 lot like this.

20 I mean, I was looking -- I was trying to find
21 the best analogy, and I think actually Mr. Domenico had a
22 better one because of the catch phrase aspect as well.
23 But I was looking at Section 10, freedom of speech and
24 press; Section 13, right to bear arms; Section 14, taking
25 private property for private use; Section 5, freedom of

1 elections, which speaking personally from my present
2 job. I read -- that's barely over two lines. I've got a
3 lot of questions about what that means.

4 And you know, each of these sections has pages
5 and pages of annotations, you know, where those questions
6 have been raised. And you know, going back to the right
7 to bear arms, we know that there are radically different
8 interpretations of what that might mean, I think, at
9 least interpretations under the federal equivalent.

10 So, you know, if we apply scrutiny that the
11 Board is being asked to apply to this measure, could we
12 also apply it to those kinds of measures if they were to
13 be -- if those kinds of things were to be proposed by
14 citizens today, the implication would be the citizens
15 can't do that through the initiative process, that they
16 can't submit general legal principles that might require
17 interpretations. And that does trouble me to come to
18 that conclusion.

19 MR. GESSLER: I guess I would argue this
20 differs. Obviously, I have to argue that this differs,
21 in that, you know, I think that what I have proposed are
22 sort of two, for example, diametrically-opposed
23 interpretations, I mean absolutely opposite
24 interpretations, both of which are supported by the
25 legislation.

1 You know, for example, in Article 2, Section
2 10, no law shall be passed impairing the freedom of
3 speech. We can argue about exactly what freedom of
4 speech is. And I'd argue, for example, in here, you
5 know, I'm not focussed on the issue of a mineral
6 extractor. We can argue about what a mineral extractor
7 is, because there is sort of a core definition or sense
8 of what that means and maybe at some point a fuzzy line
9 as to what a mineral extractor is or not. Same with
10 freedom of speech.

11 But with respect to the issue, shall paying
12 the fair value brought about, I mean there can be
13 radically different interpretations as to exactly what
14 that means. There is no sort of core number. I mean
15 there's sort of different cores out there, depending on
16 which one you happen to choose on that particular day.

17 So that's how I would argue this differs.

18 THE CHAIRMAN: There is -- and one other thing
19 I'll just comment on, again, this is probably not a
20 question. But I know sometimes it looks like the Board
21 uses the language of the measure because -- because of
22 difficulties of understanding the measure any better.

23 You know, in this particular case I -- I don't
24 think this is a case where the Board is using the
25 language of the measure because it's throwing up its

1 hands, you know, unable to do any better because it
2 doesn't understand it.

3 I think the Board is using the language of the
4 measure because altering that would likely mislead
5 people. We would likely, because this is a general
6 statement of principle, if we used -- or to the degree we
7 used different language, I suspect we would likely
8 mislead voters about the true meaning and intent. I
9 think that risk would be very real.

10 So here I feel like I kind of understand, I
11 believe, the general measure this measure states. I
12 share lots of questions that you've raised and actually
13 that Mr. Wonstolen did very well last time as well. Lots
14 of questions. But it does seem like it's
15 understandable.

16 Again, I don't think we're just totally at a
17 loss of just trying to understand what this is about.
18 It's not that kind of situation. But anyway, that's kind
19 of where I am right now.

20 MR. GESSLER: I understand. Thank you for
21 your patience.

22 THE CHAIRMAN: Thank you for your comments.

23 Mr. Wonstolen, I don't have you signed up, but
24 if you will sign up at some point ...

25 MR. WONSTOLEN: Yes.

1 THE CHAIRMAN: Why don't you go ahead and come
2 forward.

3 MR. WONSTOLEN: I appreciate the Board's
4 indulgence. Ken Wonstolen, appearing pro se.

5 Mr. Chairman, I heard you say that you
6 understand this measure to state a general principle. I
7 think that's where I would challenge your analysis.

8 What is the general principal? There is a
9 body of law today that describes damages for which
10 mineral extractors of some sort are liable, and those are
11 damages which result from the unreasonable use or
12 exercise of the mineral right, in a negligent fashion,
13 exceeding the scope of the mineral right and constituting
14 trespass, fair to accommodate, impeding surface uses.

15 I don't know that this measure changes that at
16 all. I could -- some of my members argued this measure
17 simply restates existing law, common law, puts it into
18 the Constitution.

19 On the other hand, it seems to be the intent
20 of the Proponents to overthrow the common law and erect
21 some new strict liability broad standard. But you have
22 no way of knowing from the words of this measure itself
23 whether you are voting to restate the common law in
24 constitutional terms or whether you are voting it
25 overthrows the common law.

1 I have simply no way of knowing that, and I
2 don't think you can set a title that explains to the
3 voters, What are they doing? Are they restating common
4 law or are they overthrowing common law? I think that's
5 the fundamental dilemma.

6 THE CHAIRMAN: Thank you. If I could also get
7 you to sign up.

8 MR. WONSTOLEN: Sure.

9 THE CHAIRMAN: I think Mr. Kaufman was also
10 signed up. Do you have need to testify, or do you want
11 to testify?

12 MR. KAUFMAN: Just very briefly.

13 THE CHAIRMAN: Sure. If you will identify
14 yourself for the record, please.

15 MR. KAUFMAN: Don Kaufman on behalf of the
16 Proponents, one of the Proponents.

17 The initiative is just one sentence long.
18 When you approved the title, you excluded including "oil
19 and gas." The miners, one of their objections, is that
20 they want that term included in its entirety. We think
21 that by doing that, you would make the initiative
22 abundantly clear.

23 It is broad and it's not vague. And by
24 striking terms, all you would do is potentially increase
25 the vagueness.

1 That's all we ask, is the entire sentence be
2 included in the title.

3 THE CHAIRMAN: Mr. Domenico.

4 MR. DOMENICO: Nothing.

5 THE CHAIRMAN: I'm sorry. I don't know
6 whether you want to make a comment about Mr. Wonstolen's
7 comment, but you know, this is -- anything, you know, you
8 say on the record here is a reflection of legislative
9 intent.

10 MR. KAUFMAN: Sure.

11 THE CHAIRMAN: And I am kind of curious, your
12 response to Mr. Wonstolen's comments, that one of the
13 problems is, in his view, that it's unclear whether the
14 measure is restating common law or is it overturning the
15 existing law.

16 MR. KAUFMAN: It would be overturning existing
17 law, which was attempted in the state legislature. That
18 measure did fail. And now it's an attempt to allow the
19 voters to make that decision, to overturn common law.

20 THE CHAIRMAN: Thank you.

21 Having heard from each of the petitioners on
22 the motions -- behind the motions for rehearing, if
23 anybody else wants to comment on what they've heard.
24 Before I turn to Board discussion, I want to give you an
25 opportunity. Mr. Gorman, do you have any further

1 comments?

2 MR. GORMAN: No, thank you.

3 THE CHAIRMAN: Thank you. Anyone else?

4 Then I'll turn to Board discussion on the
5 motions for rehearing.

6 Cesi, maybe if you would also project the
7 title on the screen so we can be looking at it as well.
8 Thank you.

9 Ms. Eubanks.

10 MS. EUBANKS: I've got several issues here
11 that have been raised in the motions for rehearing, and
12 hopefully I will touch upon all of them. Tell me if I
13 miss one as we're going along.

14 In terms of the argument that the measure is
15 so ambiguous that we can't -- and vague that we can't set
16 a title, I don't believe that's true.

17 I'm like where you are, Mr. Hobbs. I think
18 that we can ascertain what this measure does. In terms
19 of how it's implemented and who all it impacts, I'm not
20 sure we're in a position to say. But I do know that the
21 case law has clearly said that even if the terms of a
22 proposal are vague and undefined, a title which tracts
23 the language of a proposal accurately reflects the
24 intents and simple features of the proposal, although it
25 may be similarly vague and undefined.

1 I also recognize there is case law that goes
2 forward that says that even if you track the language,
3 that may not be sufficient if voters can't tell whether
4 they're voting yes or no, if they don't know what they're
5 voting on.

6 I don't think we're there on this measure. I
7 don't know -- just from my expertise, I don't know
8 whether this is a new standard of damages that have to be
9 paid. I don't know if it's just putting in a
10 constitution an existing standard. I don't know that it
11 matters.

12 Because I think what it does, it's setting a
13 standard. Whether that's the same standard or a new
14 standard, it's setting the standard. It's telling the
15 voters that if you vote for this, you're requiring
16 extractors to pay damages for certain activities relating
17 to mineral extraction.

18 I think you can say yes or no, whether they
19 want to require that payment of damages.

20 So I think I'm at the point right now that I
21 think that we can set a title and that the grounds raised
22 in the motions for rehearing on this basis should be
23 denied.

24 In terms of the catch phrase argument about
25 "fair value," I think that this is a hard one. I think

1 that it's -- in some respects, I can see where the use of
2 the term "fair" may be looked upon as being in some way
3 intended to be influential, that, you know, fair damages
4 versus unfair damages.

5 I do think that it may be possible, because I
6 think the term "fair value" goes to the amount of damages
7 that is being required to be paid, if this measure were
8 to be approved, that perhaps we could remove that from
9 the title, avoid the catch phrase potential problem,
10 because you're saying, you know, that you're requiring
11 certain damages to be paid in relation to mineral
12 extraction.

13 And so I think that there may be some ways to
14 address that concern, although I don't know that I'm
15 entirely convinced that it is a catch phrase, I think we
16 may be able to avoid the problem.

17 I think -- I don't know if there is anything
18 else. I think I've touched upon yes or no.

19 Oh. In terms of oil -- the oil and gas,
20 again, I think we probably just used the term mineral
21 because we thought that was all-inclusive. I think the
22 language in the measure is there is just further
23 elaboration of what is included in that term, but it's
24 not exclusive to oil and gas, but I don't know that I
25 have any problem adding that if it helps in terms of the

1 clarity of the title.

2 So I think that's where I am on the various
3 issues.

4 THE CHAIRMAN: Mr. Domenico.

5 MR. DOMENICO: I think I'm about in the same
6 place. I should say I appreciate Mr. Gessler's
7 explanation of the framework of analysis. I think he's
8 correct, and late at night last week we probably got a
9 little bit jumbled in our analysis.

10 But I do appreciate that the question of
11 whether we can ascertain the meaning of the measure is
12 the first question and is separate from whether it's a
13 single subject. And so I wanted to just state that I
14 think that that's really the question we're having.

15 That said, I think, as has been pointed out by
16 everyone, there is essentially some -- the case law is
17 difficult to ascertain a single definition or even
18 perfectly consistent within the Supreme Court's
19 jurisprudence in this area. It's a little bit difficult
20 to come up with a single principle that helps us define
21 -- decide what's too vague and what's not.

22 But to the extent I've been able to see
23 something in there, on both vagueness questions and catch
24 phrase questions, the real basis for the court
25 overturning a title on that basis is if it -- if use of

1 vague terms is somehow misleading or use of a catch
2 phrase misleads voters into voting for something when
3 they don't under -- when they -- for voting for something
4 because it's a catch phrase when the actual effect would
5 be something different from their understanding. And I
6 don't think that's a problem on either count in this
7 case.

8 I think to the extent "fair value" is a catch
9 phrase, I don't think it's a misleading one. It's in the
10 measure itself. And while people may have some
11 differences of opinion about what exactly "fair value"
12 is, I don't think it's misleading to use it, and I don't
13 think it's the kind of emotional thing where people will
14 think they're voting for one thing but getting something
15 else.

16 And for the reasons I expressed before, I
17 think we can understand what's going on here is the
18 people would be voting on whether to put into the
19 Constitution a number of undefined terms that would have
20 to be fleshed out in the future.

21 And I think, while we may question some of
22 those terms and how they may come out in the end, I think
23 we can ascertain that as the intent and immediate, direct
24 effect of the measure.

25 And so I think we can set a title. And I

1 think we should go ahead and add the "oil and gas" just
2 to make it more complete and a little bit clearer. But I
3 do think we're able to set a title.

4 THE CHAIRMAN: And I agree with Ms. Eubanks
5 and Mr. Domenico, and I don't want to restate what I've
6 already said before, but I think too that the Board
7 should proceed, and I think the titles that we've set are
8 satisfactory with the exception of that I agree that we
9 should add "oil and gas" at the end. I think -- although
10 Mr. Gorman indicated that the term mineral includes oil
11 and gas, and I think that's what we were thinking when
12 the Board met before.

13 When I actually look up the term "mineral" in
14 the dictionary, it implies to me that it does not include
15 oil and gas, that the dictionary definition seemed to say
16 a solid, you know, inorganic solid and things that to me
17 suggest that it's not necessarily oil and gas.

18 So I feel like the titles are a little
19 misleading right now by not reflecting the fact that the
20 measure also applies to oil and gas extraction.

21 So I guess I would, just for the sake of
22 discussion, make a motion that at the end where Ms. Gomez
23 has the cursor that we insert a comma and add "including
24 oil and gas."

25 MS. EUBANKS: I would second the motion.

1 THE CHAIRMAN: That's been moved and
2 seconded. Any further discussion?

3 If not, all those in favor say aye.

4 THE BOARD: Aye.

5 THE CHAIRMAN: All those opposed, no.

6 That motion carries three to zero.

7 I have struggled a little bit about the catch
8 phrase argument too, but I think I'm again where
9 Ms. Eubanks and Mr. Domenico are. And I think that the
10 titles are okay by referencing their value at this
11 point.

12 Are there any other changes to the titles as
13 set by the Board? If not, I would entertain a motion to
14 deny the various motions for rehearing except to the
15 extent that the Board has amended the titles.

16 Ms. Eubanks.

17 MS. EUBANKS: I would move that the Title
18 Board deny the motions for rehearing in terms of all the
19 grounds raised except for the grounds raised in terms of
20 the inclusion of the term "including oil and gas" at the
21 end of the title.

22 THE CHAIRMAN: I'll second the motion. That's
23 been moved and seconded. Any further discussion?

24 If not, all those in favor say aye.

25 THE BOARD: Aye.

1 THE CHAIRMAN: All opposed, no.

2 That motion carries three to zero.

3 That concludes action on No. 125. The time is

4 10:22 a.m.

5 (The hearing concluded at 10:22 a.m.,

6 May 25, 2006.)


C E R T I F I C A T E

I, Deborah D. Mead, Certified Shorthand Reporter and Notary Public, do hereby certify that the said proceedings were taken in shorthand by me at the time and place aforesaid and were thereafter transcribed by me; that the same is a full, true, and correct transcription of my shorthand notes then and there taken.

I further certify that I am not attorney, nor counsel, nor in any way connected with any attorney or counsel for any of the parties of said action, nor otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 8th day of June 2006.

My commission expires June 18, 2009.


Deborah D. Mead
Certified Shorthand Reporter

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), 1 C.R.S. (2005)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE, AND SUMMARY FOR
2005-2006, #125
KENNETH A. WONSTOLEN; HOWARD STANLEY
DEMPSEY, JR; CHRISTOPHER P. ELLIOTT; AND
STUART A. SANDERSON, OBJECTORS,

Petitioner

v.

JOHN GORMAN AND JACK REAL, PROPONENTS,

Respondents,
and

WILLIAM A. HOBBS, DANIEL DOMINICO, AND
SHARON EUBANKS,

Title Board

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FILED IN THE
SUPREME COURT

JUN 09 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

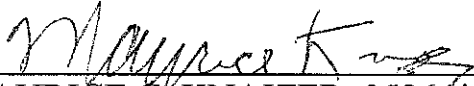
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Case No.: 06SA167

NOTICE OF TITLE BOARD

The Title Board hereby notifies the Court that it will not be filing a brief in this case. Due to several pending election matters, undersigned counsel is unable to file the brief by the deadline set by the Court. The Board does not wish to prejudice or impair the rights of the proponents by seeking an enlargement of time at this stage of the petition cycle.

JOHN W. SUTHERS
Attorney General



MAURICE G. KNAIZER, 05264*
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within NOTICE OF TITLE BOARD upon all parties herein by depositing copies of same in the United States mail, Express Mail, postage prepaid, at Denver, Colorado, this 9th day of June 2006 addressed as follows:


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SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
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ORIGINAL PROCEEDING PURSUANT TO 1-40-107 (2)
1 C.R.S. (2005)

Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE AND
SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006

Petitioners:

KENNETH A. WONSTOLEN; HOWARD STANLEY
DEMPSEY, JR.; CHRISTOPHER P. ELLIOT; and STUART A.
SANDERSON, Objectors,

v.

Respondents:

JOHN GORMAN AND JACK REAL, Proponents,
and

Title Board:

WILLIAM A. HOBBS, DANIEL DOMINICO, and SHARON
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FILED IN THE
SUPREME COURT

JUN 09 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

Case No 06SA167

**PROPOSERS' BRIEF IN OPPOSITION TO PETITION FOR REVIEW OF
FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING
PROPOSED INITIATIVE 2005-2006 #125
("DAMAGES FOR MINERAL EXTRACTION")**

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II. Statement of the Case

A. Procedural Posture

This appeal involves an action by the State of Colorado Ballot Title Setting Board (“Title Board”). On May 17, 2006, the Title Board considered proposed initiative 2005-2006 #125, which concerns compensation for damages to be paid by mineral extractors. Informally, this proposed initiative is known as the Initiative for Surface Owner Rights, or “ISOR.” At the hearing, the Title Board concluded that ISOR’s proposed constitutional text met the constitutionally required single subject requirement. This finding is not contested by Petitioners in this case. Further, the Title Board also designated and fixed the ballot title and submission clause for ISOR as follows:

Shall there be an amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral?

In the week following the May 17 decision, four requests for rehearing were filed with the Title Board related to ISOR. Three challenges were filed by representatives of mineral, oil and gas industry groups (Roger Hutson & Ken Wonstolen, Stuart Sanderson & James Cooper, and Howard Stanley Dempsey, Jr.).¹ These industry Motions for Rehearing raised alleged infirmities with the initiative’s language and the text of the ballot title drafted by the Title Board. The proponents of ISOR also requested a rehearing in order to amend the text of the constitutional language to include the phrase “including oil and gas” as a description of the word mineral.²

At a hearing on May 25, 2006, the Title Board granted the ISOR proponents’ request for

¹ Exhibit to Petitioners’ Petition for Review of Final Action.

rehearing and modified the proposed constitutional text as requested, by adding an additional phrase at the end of the text.³ The Title Board went on to deny “in all other respects” the objections made by ISOR’s opponents - the Petitioners in this case. The ballot title and submission clause now reads:

Shall there be an amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas?⁴

Having been unsuccessful in their attempts to block setting of the ballot title and submission clause at the Title Board, petitioners now seek to use this proceeding to halt this proposed initiative. On May 31, 2006 this Court ordered the parties file simultaneous briefs on or before June 9, 2006. In this Brief in Opposition, respondents Gorman and Real respond to the May 30, 2006 Petition for Review, and respectfully request that this Court dismiss the Petition for Review and allow the matter to proceed to the public, including the filing of petitions for a ballot issue with the Secretary of State under CRS § 1-40-108.

B. Intent and Purpose of the Initiative

According to proponents who testified at the Title Board Reconsideration Hearing, the proponents seek voter approval of a change in Colorado law regarding the standard for damages in claims brought by surface rights owners against mineral rights owners. The language of the ballot initiative is plain and simple. It is brief, constituting one sentence only. The language

² Id.

³ Id. The proposed constitutional text, as amended, reads “A mineral extractor shall pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas.”

⁴ Exhibit to Petitioners’ Petition for Review of Final Action.

uses simple terms easily understood by voters. There are no vague or misleading terms, but rather only common terms generally understood by laypersons.

III. Argument

A. This Court Must Grant Great Deference to the Title Board's Discretion.

The standard by which this Court shall review a challenge to a Title Board decision is very circumscribed. While not exactly the standard used in a review of agency action under C.R.C.P. 106, this court has often stated that it owes the Title Board a great degree of deference.

In reviewing the actions of the Title Board, this Court “grants ‘great deference to the board's broad discretion in the exercise of its drafting authority.’” Garcia v. Montero, 44 P.3d 213, 219 (Colo. 2002). The Court has explained that it has only a limited role in ballot-title proceedings. “It is not this Court’s function to write the best possible titles.” In re: Ballot Title 1999-2000 No. 256, 12 P.3d 246, 256 (Colo. 2000). Only if the Board's chosen language is clearly inaccurate or misleading will the Court reverse it. Id. “We construe constitutional and statutory provisions governing the initiative process in a manner that facilitates the right of initiative instead of hampering it with technical statutory provisions or constructions.” Id. at 255. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal, but need not include every detail. Garcia, 44 P.3d at 222. Ultimately, this Court must uphold a ballot title and submission that “allow[s] the voter to understand the effect of a yes or no vote on the measure.” Finally, this Court will not interpret or construe the future legal effects of a proposed initiative as a means of defeating an otherwise valid title. In re Ballot Title 1999-2000 #200A, 992 P.2d 27, 30 (Colo. 2000).

Upon review, the Supreme Court treats actions of board as presumptively valid. The Supreme Court will not address the merits of a proposed initiative, interpret its language, or predict its application. In re Ballot Title 1999-2000 Nos. 245(b), 245(c), 245(d), and 245(e), 1 P.3d 720 (Colo. 2000). The court will reverse the board's action in preparing the title or submission clause only if the title and submission clause contain a material omission, misstatement, or misrepresentation. In re Ballot Title 1990-2000 No. 29, 972 P.2d 257 (Colo. 1999).

B. The Substance of the Initiative Itself Is Beyond the Scope of this Court's Review.

The right to initiate constitutional amendments is reserved to the registered electors of the state of Colorado by Article V, Section 1 of the Colorado Constitution. The Constitution reads, "The first power hereby reserved by the people is the initiative."

The General Assembly has declared that there shall be an initiative process, unlimited and unabridged. The legislative declaration preceding the statutes which create the Title Board states:

It is not the intention of this article to limit or abridge in any manner the powers reserved to the people in the initiative and referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government. CRS § 1-40-101.

Here, citizen proponents Gorman and Real have made known their intention to ask the voters of the State of Colorado to enact a law. The law sought to be enacted, if approved, would change existing law.⁵ The statutes which safeguard and protect the powers reserved to the people for

⁵ Testimony of proponent witness Donald Kaufman before the Title Board's Reconsideration Hearing, May 25, 2006 (59:40). A full audio transcript of the Title Board hearing is available on the Secretary of State website.

initiative and referendum do not allow the Title Board nor this Court to rewrite the substance of the proposed initiative, nor to strike the substance of the proposed initiative because it is a change in the law. To the contrary, it may be assumed that the initiative process does involve a change in the law.

In their first “Issue Presented” by Petition for Review of May 30, 2006, the Petitioners essentially ask this Court to strike the substance of the proposed initiative by framing the issue in terms of whether the Title Board is able to set a title, given the subject matter. Mr. Gorman and Mr. Real submit that this is a transparent attempt to avoid the very limited review accorded the Title Board and this Court because of the unpopularity of the proposed language with the Petitioners. The intent and effect of the initiative is fairly set forth in the plain language of the proposed ballot initiative. In framing the first issue, the Petitioners attempt to insinuate that the voters are unable, from reading the measure, to understand the consequences of a “yes or no” vote.

The standard for clarity is set forth by the Legislative Assembly:

To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters. The draft shall not present the issue to be decided in such manner that a vote for the measure would be a vote against the proposition or viewpoint that the voter believes that he or she is casting a vote for or, conversely, that a vote against the measure would be a vote for a proposition or viewpoint that the voter is against. CRS § 8-40-105(3).

The text of the ballot initiative easily passes this test, and the Title Board unanimously entered

Q: (By Commissioner Hobbs) One of the problems in (petitioner’s) view is that it’s unclear whether the measure is restating common law or is it overturning the existing law.

A: (By proponent Kaufman) It would be overturning existing law which was attempted in the State Legislature. That measure did fail. And now it’s an attempt to allow the voters to make that decision; to overturn common law.

this conclusion in its May 17, 2006 and May 25, 2006 Orders.

The review of the Title Board is limited to:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment . . . shall correctly and fairly express the true intent and meaning thereof. Ballot titles shall be brief . . . (and) shall unambiguously state the principle of the provision sought to be added, amended, or repealed. CRS § 1-40-106(3)(b).

The Title Board did not find the text of the proposed initiative so vague and ambiguous that it could not be titled. To the contrary, each Commissioner made concluding comments to the effect that the meaning of the citizens' language was ascertainable. As such, it is improper for this Court to review the substance of the initiative or to substitute the Court's interpretation for that of the Title Board.

C. The Title Fairly Informs the Voters of the Measure's Intent.

In its second "Issue Presented" by Petition of May 30, 2006, the petitioners argue that the title is unfair and misleading because the title does not "sufficiently inform" the voters of the meaning of each of the terms in the title. After argument from three petitioners, the Title Board voted 3-0 to grant the Motion of the proponents to reiterate the text of the initiative in the title. The Board indicated it found the title was a simple statement of a legal principle.⁶

In the past, this Court has not required the Title Board to define terms in the title. In fact, to the contrary, CRS § 1-40-106(3)(b) requires ballot titles to "be brief". The Board's job is

⁶ Comments of Commissioner Hobbs at the Title Board's Reconsideration Hearing, May 25, 2006, please see *infra*, n. 14 at 12; Comments of Commissioner Eubanks, (1:01:30) "I think we can ascertain what this measure does in terms of how it's implemented and who all it impacts."

to set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation. However, the titles need not spell out every detail of a proposal. In re Ballot Title 1999-2000 No. 256, 12 P.3d at 256. The titles are not required to include definitions of terms unless the terms "adopt a new or controversial legal standard which would be of significance to all concerned" with the initiative. In re Proposed Election Reform Amendment, 852 P.2d 28, 34 (Colo. 1993). The titles and summary are intended to alert the electorate to the salient characteristics of the proposed measure. They are not intended to address every conceivable hypothetical effect the Initiative may have if adopted by the electorate. In re Ballot Title 1999-2000 No. 255, 4 P.3d 485, 497 (Colo. 2000).

A voter passed initiative may lead to enacting legislation and litigation. This Court has recognized that the General Assembly and courts may be poised to interpret the meaning of the initiative after its passage. This Court recognized that reality in its opinion on the proposed initiative on water rights, 877 P.2d 321, 327 (Colo. 1994) stating, "because the proposed amendment contains no definition of "strong public trust doctrine," such a definition must await future judicial construction and cannot appropriately be included in the title or submission clause". Likewise, in Ballot Title 1999-2000 No. 256, this Court specifically commented on the omission of defined terms in the title, indicating it was aware that litigation might ensue.⁷

There is nothing new and controversial about a legal standard which requires a party to pay "the fair value of damages". While it may be a change in the standard for damages from

⁷ In Re Ballot Title 1999-2000 No. 256, 12 P.3d 246, 256 (Colo. 2000). "Should the Initiative pass, the interplay between the existence of permanent, primary structures on the land and the requirement for water and sewer service *may possibly be the subject of future judicial interpretation*. The omission of the definition of "committed area" from the titles does not render them misleading or inaccurate." (emphasis added)

existing common law, it is not “new and controversial”. The standard for damages with respect to claims for remedies in dissenting shareholder actions is already “the fair value” of the matter in question.⁸ This is not a new or controversial remedy, and, at least in shareholder contexts, is already well defined in Colorado law. According to one of the petitioners, his members argue the proposed measure simply restates existing common law and is not a change in the law at all.⁹ Given this admission, it is hard to understand how petitioners can credibly argue that the title misleads the voters about the intent of the measure.

D. The Title Clearly Conveys the Intent of the Initiative and Does Not Contain an Impermissible “Catch Phrase”

Petitioners also seek to deny the voters their opportunity to decide on the language of the proposed amendment by asserting that a commonly used term in the title, as fixed by the Title Board, is a “catch phrase”. Petitioners argue that “fair value” are words that work to the proposal's favor without contributing to voter understanding, which is this Court’s test for an impermissible catch phrase. Petitioners ignore the many definitions, each in context, of the adjective “fair”. In the context of damages, the definer “fair” only connotes the objective price or value of the thing in question. It is a common business term not geared to elicit an emotional

⁸ For instance, in Pueblo Bancorp v. Lindoe, 63 P.3d 353, 361 (Colo. 2003) this Supreme Court distinguished “fair value” from “fair market value” and gave instructions on the elements of the determination of “fair value” given the context, instructed the trial court to balance the quantitative and qualitative facts in evidence, and set forth a deferential standard of review. The Court clarified “fair value” in the dissenters’ rights statute from other state statutes which use the same term. Id. at 363. Courts may find some of these concepts useful in application to the present context.

⁹ Testimony of petitioner Ken Wonstolen before the Title Board’s Reconsideration Hearing, May 25, 2006 (57:28). “I don’t know that this measure changes (existing damages law) at all. I could - some of my members argue this measure simply restates existing law - common law - puts it in the Constitution.”

response. “Fair” is commonly utilized to describe the actual or replacement value of a thing for sale, as in the term “fair market value”. A shopper dispassionately pays the “fair market value” of a can of peaches at the supermarket.

“Fair value” is a legal term distinguishable from “fair market value”¹⁰ more applicable in a case where the value of an asset is diminished or has become less liquid by an outside action.¹¹ In the context of a lawsuit for diminished value brought about by the extraction of minerals including oil and gas, “fair value” is a particularly relevant question for the finder of fact.

The words “fair value” contribute to voter understanding of the intent of the measure. “Fair value” implies that the measure of damages is subject to deliberation and thought based upon the best evidence available on the question. “Fair value” is a commonly used term in accounting which is easily definable by qualified experts called to testify on the matter. The word “value” standing alone in the text of the proposed amendment differs little from “damages” and appears redundant. The term “fair market value” is inappropriate because it implies there could be no damages where there remains no market due to the extent of the damages. Also, some intangibles are not susceptible to the concept of “fair market value”. Only “fair value” adequately expresses the objective test sought by the drafters to convey the measure of damages they seek to infuse into Colorado law. It is a neutral phrase descriptive of the proposal.

This Court is careful to recognize, but not create catch phrases. Matter of Title, 3 p.3d 1, 7 (Colo. 2000). Petitioners must offer evidence that the summary contains an impermissible

¹⁰ N. 8, *infra*.

¹¹ Pueblo Bancorp. v. Lindoe, 63 P.3d 353, 370 (Colo. 2003)(Kourlis, J., dissenting) “Because the (*Cheesman Realty*) court found that fair value was not susceptible to a precise mathematical formula, the court found that trial courts would have to determine the value to place on each factor on a case-by-case basis”.

catch slogan beyond the bare assertion that political disagreement currently exists over the challenged phrase.¹² “Fair value” is a term of art, easily understandable to the public, which the Title Board properly found should be included in the title of the proposed amendment.¹³ The fact that “fair value” may require legislative or judicial interpretation and refinement in the future did not invalidate the title, nor the validity of the measure before the Title Board.¹⁴

IV. Conclusion

The citizens of Colorado have enjoyed the right to initiate and pass constitutional amendments and laws since 1910. In Re Title, Ballot Title 1999-2000 #25, 974 P.2d 458, 462 (Colo. 1999). Article V, Section 1 of the Colorado Constitution reads “The first power hereby reserved by the people is the initiative.”

The statute authorizing this Court’s review of the title of a proposed initiative states that:

It is not the intention of this article to limit or abridge in any manner the powers reserved to the people in the initiative and

¹² “To preserve . . . the social institution of marriage” is not a prohibited catch phrase. Matter of Title, 3 P.3d at 7.

¹³ Comments of Commissioner Dominico at the Title Board’s Reconsideration Hearing, May 25, 2006 (32:30). “Free speech seems to be a catch phrase at least as much as “fair value” is. It’s been fought out in litigation for hundreds of years and will continue to be.” (1:07:20) “To the extent ‘fair value’ is a catch phrase, I don’t think it’s a misleading one.”

¹⁴ Comments of Commissioner Hobbs at the Title Board’s Reconsideration Hearing, May 25, 2006 (51:36). “I think this measure is a little unusual in that it’s so short. But it does simply state a legal principle. I was looking through Article II of the State Constitution, the Bill of Rights section. And section after section is three or four lines long stating simple statements of general legal principle a lot like this . . . section 10, “Freedom of Speech and Press”, section 13, “Right to Bear Arms”, section 14, “Taking Private Property for Private Use”, section 5, “Freedom of Elections” . . . barely over two lines . . . and each of these sections has pages and pages of annotations. . . . If we apply the scrutiny that the Board is being asked to apply (by petitioners) to this measure . . . if those kind of things were to be proposed by citizens today, the implication would be that citizens . . . can’t submit general legal principles that require interpretation.”

referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government. CRS § 1-40-101.

Consistent with that charge, this Court's review is very limited, consistent with its own pronouncement that it gives "great deference" to the Title Board's broad discretion.¹⁵

The proposed amendment is written in plain terms, easily understandable to a voter of reasonable intelligence. There is no effort to mislead the voters. The three member Board which reviewed the language heard those identical issues framed in the petitioners' May 30, 2006 Petition for Review. In very thoughtful deliberations, the Board voted unanimously that the petitioners' Motions for Rehearing would be denied. Each of the issues brought to this Court was reviewed in detail after arguments from three industry counsel and testimony. The legal standard articulated by the Board members was well researched and clearly stated.¹⁶

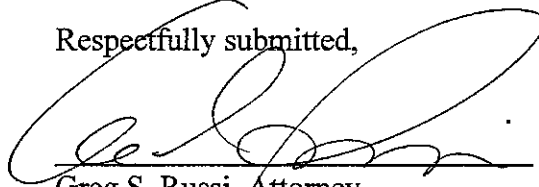
This Court is always mindful of its standard of review, particularly when the appropriate process is subject to being impermissibly broadened. This is not a substantive review of the content of the measure. The people have reserved the right to initiate laws as a "modern instrumentality of democratic government". The target of this initiative is the mineral extraction industry, including oil and gas interests, with whom the language of this ballot initiative is unpopular. The Petition to Review appears to attempt to attack the substance of the ballot initiative rather than the procedure observed at the Title Board.

¹⁵ Garcia v. Montero, 44 P.3d 213, 219 (Colo. 2002).

¹⁶ E.g., Comments of Commissioner Dominico at the Title Board's Reconsideration Hearing, May 25, 2006, (1:06:45) "The real basis for the Court overturning a title . . . is if use of vague terms is somehow misleading or use of a 'catch phrase' misleads voters into voting for something because it's a 'catch phrase' when the actual effect would be something different from their understanding, and I don't think that's a problem in either count in this case.

Colorado electors Mr. Gorman and Mr. Real would very kindly ask that this Court defer to the Title Board in upholding its determinations which allowed the amendment of title by the proponents, and denied in all other respects those objections of the petitioners.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Greg S. Russi', written over a horizontal line.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF was placed in overnight mail to the following petitioners' representatives, and first class mail, postage prepaid, to other addressees, this Ninth day of June, 2006 and addressed as follows:

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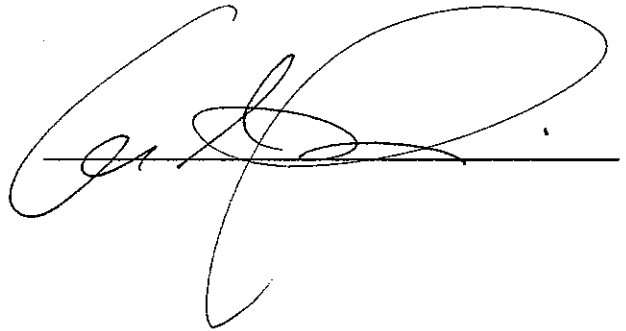
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Case No.06SA167

ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2),
C.R.S. (2005)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND
SUMMARY FOR 2005-2006, #125

Petitioners:

KENNETH A. WONSTOLEN; HOWARD STANLEY DEMPSEY, JR; CHRISTOPHER P.
ELLIOTT; and STUART A. SANDERSON, Objectors,

v.

Respondents:

JOHN GORMAN and JACK REAL, Proponents,
and

Title Board:

WILLIAM A. HOBBS, DANIEL DOMINICO, and SHARON EUBANKS.

ORDER OF COURT

Upon consideration of the Petition for Review, together
with briefs filed herein, and now being sufficiently advised in
the premises,

IT IS ORDERED that the actions of the Title Board are
AFFIRMED.

BY THE COURT, EN BANC, JUNE 16, 2006.



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