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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT JUL 16 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK **COURT USE ONLY**
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from Ballot Title Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008 #17 DOUGLAS KEMPER AND STUART SANDERSON, REGISTERED ELECTORS OF THE STATE OF COLORADO, OBJECTORS Petitioners, v. RICHARD HAMILTON AND PHIL DOE, PROPONENTS. AND WILLIAM A. HOBBS, DANIEL CARTIN, AND DANIEL DOMENICO, TITLE BOARD, Respondents.	Case No.: 07SA201
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 5th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record	

OPENING BRIEF OF TITLE BOARD

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STATUTES

William A. Hobbs, Daniel Cartin and Daniel Domenico, as members of the Title Board (hereinafter "Board"), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

The Board adopts the statement of issues as set forth in the Petition for Review.

STATEMENT OF THE CASE

On April 23, 2007, Richard Hamilton and Phil Doe, the proponents ("Proponents) submitted Initiative 2007-2008 #17 (#17) to the Board. On June 6, 2007, the Board determined that the content of #17 constituted a single subject and proceeded to set a title. On June 13, 2007, Douglas Kemper and Stuart A. Sanderson, the objectors ("Objectors"), filed a motion for rehearing. They contended that the measure contained more than one subject, that the titles did not clearly set forth the true meaning of the proposal and that the titles contained a catch phrase. On June 20, 2007 the Board denied the motion for rehearing. Objectors filed a timely appeal with this Court. A certified copy of the entire administrative record has been filed.

STATEMENT OF THE FACTS

The measure amends the Colorado Constitution by adding article XXX. It creates a new department of environmental conservation. (Section 1) The policy of the new department will be set by an elected board of commissioners. (Section 4) The commissioners appoint an executive director who is responsible for the "procedural management" of the new department. (Section 5) #17 transfers to the new department existing divisions within state agencies or the Governor's office that presently have authority over various environmental matters. (Section 3) It assigns numerous powers and duties to the new department. (Section 7) The measure exempts the new department from revenue and spending limits established by Colo. Const. article X, § 20. (Section 8)

SUMMARY OF THE ARGUMENT

The measure contains only one subject: the establishment of a new Department of Environmental Conservation. The titles are fair, clear and accurate. The titles do not include a catch phrase.

ARGUMENT

I. The measure contains only one subject: The establishment of the Department of Environmental Conservation.

Objectors contend that the Board should not have set titles because #17 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other. *In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006)(*#55*); *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 215 (Colo. 2002) (*#21*). A proposed initiative that "tends to effect or to carry out one general objective or purpose presents only one subject." *In re Ballot Title 1999-2000 #25,* 974 P.2d 458, 463 (Colo. 1999). The single

subject rule both prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) (*#43*).

The Court will not address the merits of a proposed initiative, interpret it or construe its future legal effects. *#21*, 44 P.3d at 215-16, *#43*, 46 P.3d at 443. The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *#55*, 138 P.3d at 278. The single subject requirement must be liberally construed to avoid the imposition of undue restrictions on initiative proponents. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74*, 962 P. 2d 927, 929 (Colo. 1998).

The purpose of #17 is to consolidate into one new agency designated existing departments and agencies that have responsibility for activities that have an impact on the environment. Objectors contend that the measure has three other subjects: (1) the initiative exempts all funds allocated to or generated by the new department from restrictions imposed by Colo. Const. art. X, § 20; (2) the measure creates a public trust in private property rights in water and land; and (3) the

initiative modifies the method of appointing certain governmental officers. For the following reasons, the Court must reject Objectors' arguments.

Objectors correctly observe that Colo. Const. art. X, § 20 contains multiple subjects. This Court on numerous occasions has reversed settings of titles by the Board which have attempted to amend multiple sections of art. X, § 20. #17 does not attempt to amend this constitutional provision. Rather, it seeks to exempt the new department from constitutionally mandated spending and revenue limits for the purpose of implementing the powers and duties of the proposed department.

This Court has already permitted governments to exempt themselves from both spending and revenue limits in one referred measure. *Havens v. Board of County Commissioners of the County of Archuleta*, 924 P.2d 517 (Colo. 1996). There, a voter challenged the authority of Archuleta County to authorize the retention and expenditure of excess revenues without a reduction in future compensatory revenues. The additional funding was to be used for roadway improvements. The Court rejected the voter's argument. "Such a view would prohibit voters from authorizing the accomplishment of objectives they deem justified which would not be achieved in the absence of supplementary revenues to a governmental entity." *Id.* at p. 522.

In the case at bar, the exemption from the restriction in art. X, § 20 is limited to the newly-established department. As in *Havens*, the additional funding is directed to one particular purpose: to ensure that the department has sufficient funding to function. Therefore, the exemption is directly related to the establishment of the department.

Objectors also maintain that the alteration of the appointment of certain governmental officers constitutes a separate subject. In particular they contend that the shift from appointments by the Governor and confirmation by the Senate of members of various board members to the board of the new department constitutes a separate subject. This claim is without merit.

As this Court has noted, the fact that the amendment changes the law is not necessarily determinative of whether the measure contains a single subject. "All proposed constitutional and statutory amendments or laws would have the effect of changing the status quo in some respect if adopted by the voters." *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #258(A),* 4 P.3d 1094, 1098 (Colo. 2000). The issue is whether or not the changes are adequately connected to the subject of the measure.

An analysis in *Board of Education of the State of Colorado v. Spurlin*, 141 Colo. 508, 349 P.2d 357 (Colo. 1960) offers some guidance. In 1948, Colorado

voters amended Colo. Const. art. IX, § 1. Prior to the amendment, the State Board of Education was appointed and the Superintendent of Public Education was elected. The amendment provided for the election of Board members and the appointment of a Commissioner of Education. 1949 Colo. Sess. Laws, chap. 152, p. 359. In discussing this change in the method of selection, the Court noted:

> The object of Article IX, section 1 upon which defendants rely was to substitute the appointive office of Commissioner of Education for the *elective* office of Superintendent of Public Instruction. It was thus necessary to redefine his status.

Spurlin, 141 Colo. at 520, 349 P.2d at 363. A redefinition of the restructuring of an office, or the creation of a new office, entails the definition of the powers and duties of the office, including methods of appointment.

In the case at bar, the measure seeks to establish a new elective office: commissioner of the department of environmental conservation. The measure defines the powers of the new office. One of those powers is the appointment of members of boards and commissions that it supervises. The power to appoint members of subordinate agencies is integrally connected to the powers of the new agency.

Finally, Objectors contend that the measure changes substantive law by establishing a public trust doctrine in private water and land. In the course of determining the meaning and scope of a measure, the Board must consider the testimony of the proponent because "[t]he proponent of the measure best understands the reasons for initiating the change or addition to the constitution or statutes." *In re Proposed Initiated Constitutional Amendment Concerning Unsafe Workplace Environment*, 830 P.2d 1031, 1034 (Colo. 1992).

In this instance, the testimony of the proponents at the rehearing regarding the "public trust doctrine" was unequivocal. The proponents submitted a written statement[1], which provided, in pertinent part:

> The contention by petitioners to Rehear that suggest that the measure is an attempt, in a surreptitious manner, to install a public trust doctrine into the Colorado Constitution, is in direct conflict with testimony provided at the Title Hearing, June 6th., (sic) where testimony specifically stated that there was, in no manner, any attempt to promote a public trust doctrine....The sponsors of the initiative definitely and succinctly stated that there has been no attempt in the ARTICLE XXX proposal to install a public trust doctrine.

[1] The written statement is a part of the administrative record and is attached to this brief as Exhibit A.

In this instance, the language of the measure does not contradict this statement. Objectors have attempted to string disparate words, phrases, and sections of the measure in order to support their contention. Contrary to Objectors contention, nothing in the language of the measure comes close to establishing "a public trust doctrine."

For these reasons, the Court must conclude that #17 contains a single subject.

II. The phrase "conflicts between economic interests and conservation stewardship will be resolved in favor of public ownership and public values" is not a catch phrase.

A catch phrase consists of "words that work to a proposal's favor without contributing to voter understanding. 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." *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). Catch phrases "form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment that prejudices the voter understanding of the issues presented to the voters." *In re Title, Ballot Title and Submission Clause*

and Summary for 1999-2000 #227 and #228, 3 P.3d 1, 6-7 (Colo. 2000). Whether words constitute a catch phrase must be determined in the context of contemporary political debate. The "task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal." *Id.* Objectors must offer some evidence that the wording constitutes a catch phrase. *Id.* at p. 7. The court will recognize but not create catch phrases.

Objectors contend that the phrase "conflicts between economic interests and conservation stewardship will be resolved in the favor of public ownership and public values." The phrase merely establishes the legal standard by which the department would judge whether and what type of action to take. It does not make an ephemeral promise to signers and voters. Compare, *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1110 (Colo. 2000)(categorizing phrase "as rapidly and effectively as possible" as a catch phrase because it "masked 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.") The phrase at issue here does not hide anything. It merely describes the legal standard that the new department must use when making

decisions. Objectors did not present any evidence that this phrase will generate support for the measure in a manner independent of the content of the proposal.

THE TITLES ARE FAIR, CLEAR AND ACCURATE.

Section 1-40-106(3), C.R.S. (2006) establishes the standard for setting titles. It provides:

> 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 effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state 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 amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 No. 256, 12 P.3d 246, 256 (Colo.2000)(#256).*

However, the Board is not required to set out every detail. *#21*, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure's efficacy, or its practical or legal effects. *#256*, 12 P.3d at 257; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e)*, 8 P.3d 11944, 1197 (Colo. 2000). The Court does not demand that the Board draft the best possible title. *#256*, at p. 256. The Court grants great deference in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).

Objectors contend that the titles do not fully describe to the voters (1) the manner in which the measure limits the appointment power of the governor and the confirmation power of the Senate, and (2) the manner in which the Initiative controls over any conflicting previously enacted measure. Objectors do not contend that the terminology in the titles does not convey the general understanding of the effect of a "yes" or "no" vote. See, *In re Title, Ballot Title and Submission Clause and Summary on "Obscenity"*, 877 P.2d 848, 850 (Colo. 1994). Rather, they allege that the titles do not discuss the change from existing law. The Board is not required to discuss how the proposed initiative would change existing

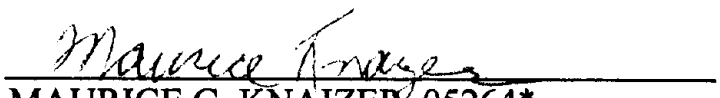
law. *#246(e)*, 8 P.3d at 1197; *In re Title, Ballot Title and Submission Clause, And Summary Concerning "Fair Fishing"*, 877 P.2d 1355, 1362 (Colo. 1994) ("Board is not required to state the effect that the measure will have on other constitutional or statutory provisions.")

The titles are not flawed because they fail to mention that the measure would control over any conflicting previously enacted measure. This provision is not an important feature of the measure. It does nothing more than state a well-known tenet of statutory and constitutional construction. Moreover, the Board was not presented with any evidence showing that the measure conflicts with other provisions in the Constitution. Therefore, the Board acted within its discretion when it did not mention this provision in the titles.

CONCLUSION

For the reasons stated herein, the Court must approve the action of the Title Board.

JOHN W. SUTHERS
Attorney General



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same in the United States mail, Express Mail, at Denver, Colorado, this 16th day of July 2007 addressed as follows:

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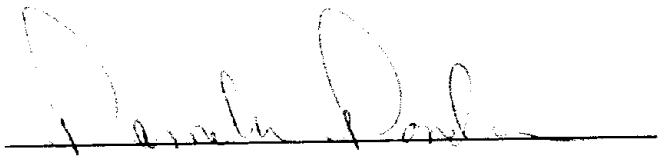

RESPONSE TO MOTION TO REHEAR THE TITLE SET BY THE TITLE SETTING BOARD FOR THE INITIATIVE TO ADD ARTICLE XXX - ESTABLISHMENT OF COLORADO DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Wednesday, June 20, 2007

Richard G. Hamilton
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One sponsor of the Initiative responds to the contentions of the petitioners Motion for Rehearing on the Article XXX initiated proposal.

The petitioners to rehear the title set June 6, 2007 by the Title Setting Board for the Initiative 2007 - 2008 # 17 cited three (3) issues of error by the Title Setting Board in setting the title for the initiative that include the contention that the title contains more than a single subject:

1.) TABOR - Article X. Section 20 of the Colorado Constitution.

2.) Section 7 of the measure doesn't protect "private property rights".

3.) Measure makes substantive changes in law.

TABOR: The initiated measure does not change TABOR - Article X, section 20 - of the Colorado Constitution. The measure does propose that no manner of fiscal management contained within TABOR is to constrain the new Department of Environmental Conservation (D.E.C.) in funding or operation. The reason for the TABOR section in the initiative - as was stated at the Title Board June 6th. - is that the proposed D.E.C. is to be an agency where departmental funding is largely dependent upon revenues from "discretionary", non-steady, sole sources. Departmental funding will not be derived, in whole, from the Colorado General Fund, or from "secure" finance program areas, or directly from ad valorem taxing authorities. The funding of the department is more "ad hoc" than say the Department of Revenue where economic conditions and "steady-stream" revenues can be predicted. The measure also states that the Legislature may fund activities of the Department of Environmental Conservation. The petitioners for a Motion to Rehear assert that TABOR is being modified. TABOR is not being modified. The inclusion of the TABOR section in the initiative has to do with departmental funding, the potentials of wide cash-funded vacillations in revenues disrupting stability in the proposed department's funding, and does not effect substantive changes in TABOR.

The initiated measure's Section 7 "stewardship" provisions, and the initiative's Section 2 provisions, those constitutional provisions relating to "prior constitutional provisions - if conflict shall arise", are included in the measure to detail, and define, the stewardship responsibilities of the Department (not now in statute), as well as to attempt to protect the new ARTICLE XXX by stating that, if adopted, ARTICLE XXX shall have been adopted by the public in a public vote to be an new constitutional article ratifying the public's intent - see Colorado Constitution Article 5, Section 1 - the people's right to legislate.

A

The contention by the petitioners to Rehear that suggests that the measure is an attempt, in a surreptitious manner, to install a public trust doctrine into the Colorado Constitution, is in direct conflict with testimony provided at the Title Hearing, June 6th., where testimony specifically stated that there was, in no manner, any attempt to promote a public trust doctrine. The badinage and persiflage espoused by the petitioners of the Motion to Rehear that the sponsors have an public trust "agenda" is a specious contention meant to smear and mischaracterize the motivations of the sponsors. The petitioners for the Motion to Rehear contention is without merit. The sponsors of the initiative definitely and succinctly stated that there has been no attempt in the ARTICLE XXX proposal to install a public trust doctrine.

The reason that Section 7 was proposed in its present form is demonstrated by the following: The recent Colorado Court of Appeals case - (see Board of County Commissioners of Gunnison County v. BDS and the Colorado Oil and Gas Conservation Commission (COGCC) - Court of Appeals No.: 04CA1679, Gunnison County District Court No. 03CV76) December 16, 2006, wherein the Court of Appeals decided (and thereafter the Colorado Supreme Court Petition for Writ of Certiorari was DENIED. EN BANC - June 10, 2007) that counties can review and permit "matters of state interest" and "activities of state concerns" on environmental grounds on federally-managed lands (thereby upholding Gunnison County's "1041" regulations as being exigent - see state authority acknowledged in the U. S. Supreme Court decision, see CALIFORNIA COASTAL COMM'N v. GRANITE ROCK CO., 480 U.S. 572 (1987), March 24, 1987, 107 S. Ct. 1419 (1987), Steve Aquafresca, a former Colorado legislator and now Mesa County commissioner - upon being informed that counties have authority to promulgate hearings and issue environmental compliance permits on resource developments on federally-managed lands, stated: "Now we are going to have to go through numerous court decisions to see what those county powers and environmental authorities are." That contention - that court cases are to determine environmental compliance areas of authority that counties retain - is precisely the reason that Section 7 was included, in detail, in the ARTICLE XXX initiative. The sponsor's of the initiative propose the public to legislate authorities to protect and steward their natural resources, and are loath to permit courts to determine, piecemeal, public resource conservation policy generated as judicial dicta.

The ARTICLE XXX initiative is an effort to stipulate, via publicly approved and enacted language, what protections are to be included within state and local environmental stewardship regulations as those stewardship stipulations direct a new state department to ensure and enable conservation protection guarantees. The initiative proposal for the establishment of ARTICLE XXX is an effort to present to the public a well-enunciated series of environmental protection proposals so that the public might be able to see a clear and extensive "check-list" of stewardship protections proposals presented for their consideration and for their vote. Section 7 forwards to the public, in a forthright manner, proposed authorities that stipulate comprehensive responsibilities for a new state department to protect the public's interests in public resources as those responsibilities would be constitutionally mandated in Colorado law.

In the section of the Motion for Rehearing captioned "The Initiative Modifies the Method of Appointing Certain Governmental Officers", the response is "obviously". If the initiative for constitutional modification did not modify certain governmental authorities - then why present it? The rehearing proponents are not supposing the measure was introduced in order to establish a new department - they are intent upon presupposing that the measure seeks to

[illegible] the CRS 1-40-1 "Advice and Comment Hearing") - is that the mandates and the enabling language of the proposed new ARTICLE XXX department should specify the department's duties and powers insofar as stewardship of the public's natural resource are concerned. The measure has not been introduced to destroy or impede the authority of the governor, nor to constrain the legislature from an ability to act in any specific manner. These questions are rightly within the province of the public's right to legislate, and to vote to confirm, via an initiated measure.

The title set and the summary clause designated for the Proposed Initiative 2007 - 2008 # 17 by the Title Setting Board fairly and clearly sets a ballot initiative title and summary clause: "that expresses the subject of the bill in the title to make ... the public aware of the contents of the proposed legislation" - see Legislative Research Memorandum No. 2, December 1971 - Bills to Contain Single Subject And "... the generality of a title is oftener to be commended than criticized. the constitution being sufficiently complied with so long as the matters contained within a bill are directly germane to the subject expressed in the title." (see Catron v. Co. Commissioners, 18 Colo.553, at 558, 33 P. 513, at 514 (1893).