

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

Petitioner:

Howard Stanley Dempsey, Jr., Objector,
v.

Respondents:

Joe Neuhof and Gary L. Nakarado, Proponents,

and

Title Board:

William A. Hobbs, Sharon Eubanks, and Daniel
Dominico

Attorneys for Petitioner:

Scott E. Gessler, #28944

Mario D. Nicolais, II #38589

Hackstaff Gessler LLC

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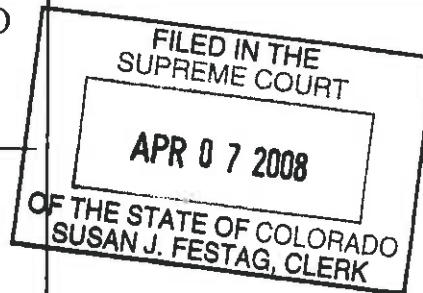
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▲ COURT USE ONLY ▲

Case Number:

08SA117

**PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE
SETTING BOARD CONCERNING
PROPOSED INITIATIVE 2007-2008 #71 ("Severance Taxes")**

Howard Stanley Dempsey, Jr., a registered elector of Colorado, by and through undersigned counsel, respectfully petitions this Court under C.R.S. § 1-40-107(2), to review the title, ballot title, and submission clause set by the Ballot Title Setting Board for Proposed Initiative 2007-2008 #71 ("Severance Taxes").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set the title and submission clause for Proposed Initiative 2007-2008 #71 on March 19, 2008. On March 26, 2008, Dempsey filed a Motion for Rehearing under C.R.S. § 1-40-170(1), and the Title Board considered the Motion for Rehearing at its next meeting on April 2, 2008. The Board denied in part the Motion. The Petitioner now seeks review of the Title Board's decision under C.R.S. § 1-40-107(2).

II. Issue Presented

A. Does the initiative violate the single subject requirement by creating an increase in the severance tax on oil and gas production in Colorado, while also: (1) creating spending mandates that are not dependent upon or necessarily connected with the tax increase or with or one another, and (2) expanding that authority of the State Board of the Great Outdoors Colorado Trust Fund by removing current limitations and restrictions on State Board?

B. Is the ballot title and submission clause incomplete, because it fails to identify the percentage of the tax revenues devoted to each new purpose, thereby omitting critical information necessary to allow voters to make an informed choice?

C. Does the ballot title and submission improperly employ the catch phrase "preservation of land and water resources?"

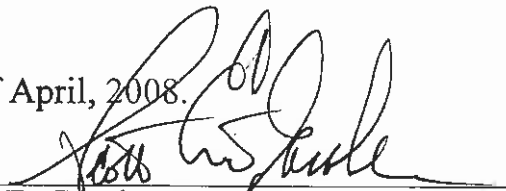
III. Supporting Documentation

As required by C.R.S. § 1-40-107(2), attached is a certified copy of the Petition with the titles and submission clause of the proposed constitutional amendment, a certified copy of the Motion for Rehearing, and final action by the Title Board (**collectively Exhibit 1**). The Petitioner has also attached a copy of the transcript of the Motion for Rehearing (**Exhibit 2**).

IV. Relief Requested

The Petitioner respectfully requests this Court to reverse the actions of the Title Board with directions to decline to set a title and return the Proposed Initiative to the Proponents. Alternatively, the Petitioner requests this Court to remand the matter to the Title Board and instruct it to set a complete and accurate Ballot Title and Submission Clause.

Respectfully submitted this 7th day of April, 2008.

By: 
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Mario D. Nicolais, II., Reg. No. 38589
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Attorneys for Howard Stanley Dempsey, Jr.

Address of Petitioner:
3110 Alkire St.
Golden, Colorado 80401

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2008, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #71 (“Severance Taxes”)** was placed in the United States mail, postage prepaid, to the following:

Ed Ramey, Esq.
Kara Veitch, Esq.
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, Colorado 80202

Joe Neuhof
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Gary L. Nakarado
24657 Foothills Drive North
Golden, Colorado 80401




EXHIBIT
1



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **MIKE COFFMAN**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2007-2008 #71".....

.....

..... **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 7th day of April, 2008.

SECRETARY OF STATE

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Proposed Initiative
2007-2008

#71

(corrected)
(3/13/08 C.G.)

~~#68~~

Final
Text

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

SECTION 1. 39-29-101 (3), Colorado Revised Statutes, is amended to read:

39-29-101. Legislative declaration. (3) It additionally is the intent of the general assembly that a portion of the revenues derived from such a severance tax be used by the state for public purposes, that a portion be held by the state in a perpetual trust fund, and that a portion be made available to local governments to offset the impact created by nonrenewable resource development, THAT A PORTION BE MADE AVAILABLE TO PROMOTE THE DEVELOPMENT OF RENEWABLE ENERGY SOURCES AND ENERGY CONSERVATION PROGRAMS, AND THAT A PORTION BE MADE AVAILABLE TO PROMOTE THE ACQUISITION AND PRESERVATION OF LAND AND WATER RESOURCES TO PROTECT WILDLIFE HABITAT AND FOR OTHER PUBLIC PURPOSES.

SECTION 2. 39-29-105, Colorado Revised Statutes, is amended to read:

39-29-105. Tax on severance of oil and gas. (1) (c) IN ADDITION TO THE TAX PROVIDED IN PARAGRAPH (b) OF THIS SUBSECTION (1), AND IN ADDITION TO ANY OTHER TAX, THERE SHALL BE LEVIED, COLLECTED, AND PAID FOR EACH TAXABLE YEAR COMMENCING ON OR AFTER JANUARY 1, 2009, A FURTHER TAX UPON THE GROSS INCOME ATTRIBUTABLE TO THE SALE OF OIL AND GAS SEVERED FROM THE EARTH IN THIS STATE. NOTHING IN THIS PARAGRAPH (c) SHALL EXEMPT A PRODUCER OF OIL AND GAS FROM SUBMITTING A PRODUCTION EMPLOYEE REPORT AS REQUIRED BY SECTION 39-39-110(1)(d)(I). THE TAX FOR OIL AND GAS PROVIDED FOR IN THIS PARAGRAPH SHALL BE AT THE FOLLOWING RATE OF GROSS INCOME:

\$300,000 AND OVER

3 1/2%

(3) THE PROCEEDS OF THE TAX AND INVESTMENT INCOME RECEIVED IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH (c) OF SUBSECTION (1) OF THIS SECTION THEREON SHALL BE COLLECTED AND SPENT BY THE STATE AS A VOTER-APPROVED REVENUE CHANGE WITHOUT REGARD TO ANY SPENDING LIMITATION CONTAINED WITHIN SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION, OR ANY OTHER LAW, AND WITHOUT LIMITING IN ANY YEAR THE AMOUNT OF OTHER REVENUE THAT MAY BE COLLECTED AND SPENT BY THE STATE OR ANY DISTRICT.

SECTION 3. 39-29-108 (2), Colorado Revised Statutes, is amended to read:

39-29-108. Allocation of severance tax revenues – definitions – repeal. (2) (a) Of the total gross receipts realized from the severance taxes imposed on minerals and mineral fuels under the provisions of this article after June 30, 1981, EXCEPTING THOSE REVENUES LEVIED, COLLECTED, AND PAID BY OPERATION OF SECTION 39-29-105 (1) (c), fifty percent shall be credited to the state severance tax trust fund created by section 39-29-109, and fifty percent shall be credited to the local government severance tax fund created by section 39-29-110.

(b) OF THE REVENUES RECEIVED BY OPERATION OF SECTION 39-29-105 (1) (c):

(I) FORTY PERCENT OF SUCH REVENUES SHALL BE CREDITED TO THE CLEAN ENERGY FUND PURSUANT TO SECTION 24-75-1201, C.R.S.;

(II) FORTY PERCENT OF SUCH REVENUES SHALL BE CREDITED TO THE LAND CONSERVATION FUND ESTABLISHED IN SECTION 39-29-108.7 FOR THE PURPOSES SET FORTH THEREIN; AND

(III) TWENTY PERCENT OF SUCH REVENUES SHALL BE CREDITED TO THE LOCAL GOVERNMENT SEVERANCE TAX FUND FOR THE PURPOSES SET FORTH IN SECTION 39-29-110 (1) (b) (I).

SECTION 4. 39-29-110(1)(c.5), Colorado Revised Statutes, is amended, and the said 39-29-110 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

39-29-110. Local government severance tax fund – creation – administration – energy impact assistance advisory committee created – definitions – repeal. (1) (c.5) EXCEPT AS SPECIFIED IN SUBSECTION (5) OF THIS SECTION, for any state fiscal year commencing on or after July 1, 2007, state severance tax receipts credited to the local government severance tax fund shall be distributed as follows:

(I) Seventy percent of the receipts and income shall be distributed to political subdivisions in the manner specified in paragraph (b) of this subsection (1); and

(II) Thirty percent of the receipts and income shall be distributed or loaned to counties or municipalities in the manner specified in paragraph (c) of this subsection (1).

(5) ONE HUNDRED PERCENT OF THE REVENUES RECEIVED AND CREDITED TO THE LOCAL GOVERNMENT SEVERANCE TAX FUND BY OPERATION OF SECTION 39-29-108 (2) (b)

(III) SHALL BE DISTRIBUTED TO POLITICAL SUBDIVISIONS AS PROVIDED IN THAT SUBPARAGRAPH.

SECTION 5. Article 29 of title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

39-29-108.7. Land Conservation Fund. (1) THERE IS HEREBY CREATED THE LAND CONSERVATION FUND, TO BE ADMINISTERED AND OVERSEEN BY THE STATE BOARD OF THE GREAT OUTDOORS COLORADO TRUST FUND CREATED BY SECTION 6 OF ARTICLE XXVII OF THE STATE CONSTITUTION. REVENUES CREDITED TO THE LAND CONSERVATION FUND SHALL BE USED FOR THE EXCLUSIVE PURPOSE OF MAKING COMPETITIVE GRANTS TO COUNTIES, MUNICIPALITIES, OTHER POLITICAL SUBDIVISIONS OF THE STATE, THE COLORADO DIVISION OF WILDLIFE, THE COLORADO DIVISION OF PARKS AND OUTDOOR RECREATION, AND NONPROFIT LAND CONSERVATION ORGANIZATIONS FOR ACQUISITION OF LAND OR INTERESTS IN LAND AND, TO THE EXTENT ACQUIRED WITH SUCH FUNDS TO ASSIST WITH STEWARDSHIP OF LAND OR INTERESTS IN LAND, THAT WILL PRESERVE NATIVE WILDLIFE HABITAT, RIVER CORRIDORS, WORKING FARMS OR RANCHES, URBAN PARKS AND OPEN LANDS, AND OPEN SPACE AND NATURAL AREAS OF STATEWIDE SIGNIFICANCE.

(2) THE LAND CONSERVATION FUND SHALL NOT BE SUBJECT TO THE LIMITATIONS AND RESTRICTIONS MADE APPLICABLE TO THE GREAT OUTDOORS COLORADO TRUST FUND

BY ARTICLE XXVII OF THE STATE CONSTITUTION. FURTHER, IN ADMINISTERING AND OVERSEEING THE LAND CONSERVATION FUND, THE STATE BOARD OF THE GREAT OUTDOORS COLORADO TRUST FUND SHALL HAVE THE DISCRETION TO DIRECT THAT ANY PORTION OF AVAILABLE REVENUES BE REINVESTED IN THE LAND CONSERVATION FUND AND NOT EXPENDED IN ANY PARTICULAR YEAR.

SECTION 6. 33-60-107, Colorado Revised Statutes, is amended to read:

33-60-107. State board of the great outdoors Colorado trust fund. (4) THE STATE BOARD OF THE GREAT OUTDOORS COLORADO TRUST FUND SHALL HAVE THE FURTHER POWERS TO ADMINISTER AND OVERSEE THE LAND CONSERVATION FUND ESTABLISHED BY SECTION 39-29-108.7, C.R.S.

Proponents:

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Counsel:

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H. J. P. M.
C. H.

In re Title and Ballot Title and Submission Clause for Initiative 2007-2008 #71

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 2007-2008 #71, set by the Title Board on March 19, 2008.

The Petitioner claims that the proposed initiative violates Colorado's single subject requirement contained in C.R.S. § 1-40-106.5 because it contains the following separate subjects:

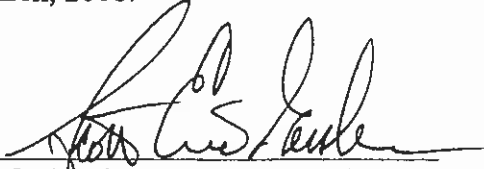
1. An increase in the severance tax on oil and gas production in Colorado;
2. Spending mandates that are not dependent upon or necessarily connected with the severance tax increase, or one another; and
3. A mandate to create a new state fund, the Land Conservation Fund, as well as new standards and mandates for the dispersal of state funds. The new fund and spending mandates are not dependent upon or necessarily connected with the severance tax increase or other spending mandates.
4. The removal of limitations and restrictions on the State Board of the Great Outdoors Colorado Trust Fund. This expansion in the State Board's discretion and authority is not dependent upon or necessarily connected with the severance tax increase.

The Petitioners also allege that the title set by the Board is misleading, inaccurate, and incomplete for the following reasons:

1. The title is misleading because it substantially understates the size of the tax increase in the first year that the initiative goes into effect; and
2. The title fails to identify the percentage of the tax revenues devoted to each new purpose, thereby omitting critical information necessary to allow voters to make an informed choice.
3. The title uses the phrase "preservation of land and water resources," which is an improper catch phrase that works to the proposals favor without contributing to

voter understanding.

Respectfully submitted this 26th day of March, 2008.

By: 

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Attorney for Howard Stanley Dempsey, Jr.

Address of Petitioner:
3110 Alkire St.
Golden, Colorado 80401

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

Ed Ramey, Esq.
Kara Veitch, Esq.
Isaacson Rosenbaum P.C.
633 17th Street
Suite 2200
Denver, Colorado 80202



Ballot Title Setting Board

Proposed Initiative 2007-2008 #71¹

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

State taxes shall be increased \$299.1 million annually by an amendment to the Colorado Revised Statutes concerning the severance tax on oil and gas extracted in the state, and, in connection therewith, for taxable years commencing on or after January 1, 2009, imposing an additional severance tax on oil and gas for taxpayers with three hundred thousand dollars or more of gross income; exempting revenues from the additional tax from state and local government spending limits; and requiring specified percentages of the revenues from the additional tax to be credited to (1) the clean energy fund, (2) the local government severance tax fund, and (3) the land conservation fund that the measure creates to be used for awarding grants for the acquisition of land or interests in land for preservation of land and water resources.

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

Shall state taxes be increased \$299.1 million annually by an amendment to the Colorado Revised Statutes concerning the severance tax on oil and gas extracted in the state, and, in connection therewith, for taxable years commencing on or after January 1, 2009, imposing an additional severance tax on oil and gas for taxpayers with three hundred thousand dollars or more of gross income; exempting revenues from the additional tax from state and local government spending limits; and requiring specified percentages of the revenues from the additional tax to be credited to (1) the clean energy fund, (2) the local government severance tax fund, and (3) the land conservation fund that the measure creates to be used for awarding grants for the acquisition of land or interests in land for preservation of land and water resources?

Hearing March 19, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 11:03 a.m.

Hearing April 2, 2008:

Motion for Rehearing denied.

Hearing adjourned 12:25 p.m.

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

EXHIBIT

2

COPY

STATE OF COLORADO TITLE SETTING BOARD

April 2, 2008

Rehearing For the Title, Ballot Title, and
Submission Clause For Initiative 2007-2008 No. 71

The rehearing for the Title, Ballot
Title, and Submission Clause For Initiative 2007-2008
No. 71 commenced on April 2, 2008, at 11:49 a.m., at
1700 Broadway, Suite 270, Blue Spruce Conference Room,
Denver, Colorado 80290, before the State of Colorado
Title Setting Board: Daniel D. Domenico, Solicitor
General; Sharon L. Eubanks, Office of Legislative
Legal Services; William A. Hobbs, Deputy Secretary of
State; and Maurice G. Knaizer, Assistant Attorney
General.

The speakers were Scott E. Gessler,
Esq., Hackstaff Gessler LLC, and Kara D. Veitch, Esq.,
Isaacson Rosenbaum P.C.

Reported by: Tracy C. Masuga, RPR, CRR.

The logo consists of the letters 'H+G' in a bold, white, sans-serif font, centered within a solid black square.

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1 WHEREUPON, the following proceedings
2 were taken.

3 * * * * *

4 MR. HOBBS: Moving on then to agenda
5 item No. 5, that is 2007-2008 No. 71, severance
6 taxes -- severance tax. This is a rehearing on motion
7 submitted by Mr. Gessler on behalf of Howard Stanley
8 Dempsey.

9 Perhaps, Mr. Gessler, if we could hear
10 from you on your motion. Thank you.

11 MR. GESSLER: Certainly. Thank you very
12 much. My name again is Scott Gessler. I represent
13 Mr. Howard Stanley Dempsey, Jr., in this matter, and
14 this is the motion for rehearing on ballot -- proposed
15 Ballot Initiative No. 71.

16 As an initial matter, I would like to
17 withdraw a portion of our request for motion for
18 rehearing, and that's item No. 1 with respect to the
19 misleading, inaccurate, and incomplete title,
20 specifically the amount involving the size of the tax.
21 So we are withdrawing that objection.

22 MR. HOBBS: Thank you.

23 MR. GESSLER: So I will just sort of go
24 through the motion in sequence. As we've identified
25 here, we think that this has four separate subjects,

1 Colorado Supreme Court, summary affirmance. Under the
 2 Colorado Supreme Court's guidance, that does not serve
 3 as precedence. In fact, they specifically said that
 4 approximately two years ago in the English-only case.
 5 That was proposed Ballot Initiative No. 55, 2005 to
 6 2006.

7 That was a case in which, the prior
 8 cycle, a nearly identical ballot title had been -- a
 9 nearly identical ballot proposal and title had been
 10 submitted before the Court had summarily affirmed it.
 11 It said that because that was not a reported decision,
 12 it cannot serve as precedential value. And, in fact,
 13 that Court went on to talk about how it could not even
 14 serve as claim or issue preclusion, and the reason why
 15 is because the fundamental purposes of this proceeding
 16 versus a court proceeding were different in that this
 17 proceeding always allowed for specific types of
 18 objections based on the specific instances of title,
 19 and it didn't cut that off.

20 So for these same reasons, I would say
 21 No. 14 is not precedential value. Now, I'll
 22 nonetheless address some of the merits of that.

23 In that particular instance, the funds
 24 went to general -- general funds, I would argue, as
 25 well as educational costs, and what the board did in

1 that instance, and there -- you know, I've sort of
2 gone through the briefs, and in their opening brief
3 the board itself specifically said that there was a --
4 that there was a strong link between the imposition of
5 the tax and the appropriation and distribution of the
6 revenues for school construction and for counties and
7 municipalities, and that was based upon the impact
8 that it had on local communities. So the Court in
9 its -- I'm sorry, the Title Board in its arguments
10 before the Court based its arguments specifically on
11 the impact to the community and that being the link
12 preserving the single subject matter.

13 And I would -- you know, to the extent
14 the -- I'm sure the board doesn't have that particular
15 briefing in front of them, but it was on page 6 of the
16 opening brief. And it also later -- the Title Board
17 in their response brief said the revenues were
18 relevant to the impact of extraction in oil and gas.

19 Here we have a different situation. In
20 this particular situation, we have the Land
21 Conservation Fund as well as the Clean Energy state
22 fund, and the Clean Energy state fund and the Land
23 Conservation Fund themselves are two separate subject
24 matters and -- and cannot be linked by a generalized
25 impact upon local communities.

1 Certainly, the Clean Energy Fund, which
2 goes to state coffers for projects that may or may not
3 be involved based on the im- -- may or may not fund
4 projects based on the impact to a local community, and
5 don't really have that requirement that they be
6 focused on the impact to a local community at all,
7 that is different and it is substantially different
8 than the -- than the funding for the Land Conservation
9 Fund.

10 So those two purposes, in and of
11 themselves, are -- are separate, as well as being
12 slightly different from the -- from the severance tax,
13 as well. So in this instance, we don't have a
14 situation where the tax and then we have a generalized
15 and a specific fund linked by a specific impact, but
16 we have a tax, generalized fund, a Clean Energy Fund,
17 and a Land Conservation Fund.

18 So even if one argues that the Land
19 Conservation Fund is specifically focused and
20 connected to the severance tax due to the impact on
21 communities, that argument does not fly with respect
22 to the Clean Energy Fund; and secondarily, the Clean
23 Energy Fund and the Land Conservation Fund are
24 different entities with different purposes that are
25 not connected by a single subject.

1 And that brings me back to my earlier
2 argument that I had made the other week, which was
3 that it's usually -- one should not -- one cannot
4 simply take a tax and then distribute it to a variety
5 of funds or a variety of purposes and simply say,
6 because you received tax, and now you're spending it,
7 that they're all automatically connected by the same
8 subject.

9 So this is a particular instance where
10 they are not connected by the same subject, and we
11 argue that they are two separate subjects.

12 And then also, you know, going back to
13 the purposes of the single-subject requirement is to
14 prevent log rolling. I mean, here what you have when
15 you divert funds or allocate funds to separate and
16 distinct subject matters is -- what you're doing is
17 you're actually obtaining -- you're obtaining support
18 from different constituencies that may or may not --
19 that are not related to one another. They're not
20 necessarily related to one another.

21 So people may believe in this thing
22 called the Clean Energy Fund but not really be worried
23 so much about Land Conservation, and they'll support
24 the measure -- support the measure. Whereas people
25 who support -- are more focused on the Land

1 Conservation Fund, and that's their interest, will
2 support the measure, as well, even though the funds
3 are going for disparate purposes, disparate impacts,
4 and have different subjects along those lines.

5 So for that reason, items 2 and 3 are --
6 show that there are separate subjects here.

7 With respect to item No. 4, this is a
8 little bit different. Towards the very end of the
9 measure, it basically says that the new Land
10 Conservation Fund will be housed at essentially GOCO,
11 and that the normal prohibitions and restrictions on
12 GOCO do not apply to their administration of this
13 particular fund.

14 That is a different subject, because
15 what it's now doing is rejiggering what GOCO can and
16 can't do. Granted, it may be for these limited
17 purposes, but it is still changing the fund --
18 changing the nature of GOCO, changing their authority,
19 changing the limitations upon GOCO. So as a result,
20 that certainly is another subject that's hidden within
21 the folds of this -- of this particular measure.

22 I did not bring this issue to the
23 board's attention last week, but I'm doing it on
24 behalf of Mr. Stempsey -- Mr. Dempsey today.

25 So those are the four -- well, four

1 separate subjects we have, and they're arguments that
2 I have, that they -- that this does not meet the
3 single-subject requirement, and that, in fact, there
4 are different subjects based on the disparate and
5 different spending priorities, as well as the fact
6 that the GOCO provision, this essentially changes in a
7 very obtuse and almost hidden way what GOCO may and
8 may not do as far as its overall powers, and that
9 certainly, itself, is a change in the -- is a change
10 in the GOCO's powers that is -- that is not dependent
11 upon this, and is -- upon the severance tax, and is
12 a -- is a separate subject.

13 I'm happy to address any questions, or
14 if the board would prefer, I can move on to the issues
15 with respect to the title.

16 MR. HOBBS: Let me just try to digest
17 your last point just a little better and then compare
18 it to the text. So let me see how close I am to
19 understanding.

20 We've got Section 5 of the measure
21 creating the Land Conservation Fund. Subsection (2)
22 of that says -- of the new section says it's not
23 subject to the limitations and restrictions of the
24 GOCO Trust Fund. Is that what you're referring to?

25 MR. GESSLER: Yes, I am. And then --

1 and then there's a conforming measure under 33-60-107,
2 and I think, if I'm correct, and I'm certainly willing
3 to be disabused if I'm incorrect, that that change was
4 based on a response to a question by Legislative Legal
5 Services, because Legislative Legal Services flagged
6 the fact that this was something new and different;
7 that it changed the existing laws for GOCO; and
8 accordingly, suggested that the proponents create a
9 conforming measure to clarify that it's changing
10 GOCO's powers.

11 So that was actually in response to
12 something that Legislative Legal Services identified,
13 and -- and that's why that conforming amendment was
14 added in the final -- in the final draft.

15 MR. HOBBS: So -- okay. So the new fund
16 is not subject to the limitations and restrictions
17 applicable to the trust fund, but it's -- the new fund
18 is still administered by the -- the Great Outdoors --
19 by the state board.

20 I'm just trying to absorb, you know,
21 how -- how much of a change is this really? How
22 significant is this? And I'm -- and it strikes me as
23 fairly minor, but maybe I'm not fully appreciating --
24 I mean, in creating a new fund, what's it taking away
25 from what -- what the board does now. Is that the

1 thrust of your argument, that this is a surprise, the
2 impact to the trust fund and the board, the GOCO
3 board? Is there something surreptitious or --

4 MR. GESSLER: Well, I am arguing that
5 the existing limitations on the trust fund, and which
6 are outlined in the constitution, don't apply to this
7 particular -- or to the board, don't apply to this new
8 fund that exists, and -- and I have not reviewed all
9 the case law outlining those parameters, but this was
10 certainly included for a purpose, and that -- and that
11 purpose was to change what GOCO can do at the -- at
12 the moment, and I would argue whether one believes
13 it's a minor change or a major change, it's
14 nonetheless a change that, in fact, is a different
15 subject, and -- and I would argue that the -- the
16 definition of single subject really doesn't have a --
17 the standard for single subject doesn't have sort of a
18 de minimis standard: That if it's only a minor second
19 subject it's not that big of a deal as opposed to a
20 major second subject. And I would argue here that
21 it's, on its face, a separate subject that -- that
22 discusses GOCO, and clearly, the proponents put it in
23 here because they thought it was relevant and
24 important enough to make those changes to -- to GOCO.
25 So I'm relying actually on the proponents' desire to

1 make that change.

2 MR. HOBBS: Mr. Domenico?

3 MR. DOMENICO: Well, the measure, as I
4 read it, doesn't change GOCO's responsibilities or the
5 limitations on what it can do with respect to anything
6 current. It's only if this measure passes, they get
7 this new fund, and when they're administering the new
8 fund, they can do it without those limits, right? Is
9 that right?

10 MR. GESSLER: I believe that's correct,
11 yes.

12 MR. DOMENICO: So I would certainly
13 agree with you, if this measure contains something
14 that -- that said -- in addition to what it does,
15 eliminated GOCO's limits for everything it does, but
16 it seems to me that this measure could have just
17 created a new body to administer this fund, right, and
18 not subjected it to the GOCO limits, and that wouldn't
19 really, to me, be a single-subject violation just
20 because they had to house this fund. Some entity had
21 to have the authority to run it.

22 And so to me, the fact that they've
23 basically just attached it to an existing body, but
24 not, at the same time, extended that existing body's
25 limitations on other things to this, that's the only

1 difference from that situation, and I don't see that
2 really as a single-subject violation. I mean, it
3 doesn't change what GOCO can do with respect to
4 anything it currently can do. It just gives it a new
5 responsibility, and that new responsibility, it's got
6 different limitations. Am I wrong about that?

7 MR. GESSLER: Well, we would disagree
8 with your characterization that it's not -- that it
9 doesn't violate the single subject.

10 MR. DOMENICO: Right.

11 MR. GESSLER: But, you know, as I said
12 earlier, it does seem to -- to change it with the
13 future revenue stream.

14 The argument, I think, still remains
15 that it's a change in GOCO's responsibilities and what
16 they can and can't do, and that is a -- that is a
17 separate subject.

18 MR. DOMENICO: Say the measure was
19 silent about who's in charge of this fund. Someone
20 would have to run it, right?

21 MR. GESSLER: That's correct.

22 MR. DOMENICO: And that someone would
23 not be subject to GOCO's limitation, right?

24 MR. GESSLER: Not necessarily.

25 MR. DOMENICO: Yeah.

1 MR. GESSLER: I mean, in that instance,
2 I think there would have to be enabling legislation.

3 MR. DOMENICO: Yeah. Somebody would
4 have to figure it out, right?

5 MR. GESSLER: Which would be a second --
6 you know, a new bill, or I guess it could be a new
7 initiative, but a new bill that would have -- would
8 have that subject, as well, and that it would have its
9 own specific subject.

10 MR. DOMENICO: But if in this they had
11 said, "It will be administered by the newly created
12 trust fund board, and it shall not be subject to the
13 GOCO limits," I don't -- that -- that doesn't
14 change -- that's not a new subject, is it?

15 It's just -- there's some -- there's
16 something about your argument that I agree with, which
17 is that if it really did change GOCO's
18 responsibilities at -- current responsibilities, then
19 that would be one thing. It doesn't do that. It adds
20 a new revenue stream, as you say, that they can
21 administer in a different way, but that's pretty
22 clearly tied to the creation of the new revenue
23 stream, and if you don't want these certain revenues
24 to be subject to those limits, I don't see how that's
25 a second subject. But I -- I mean, I understand your

1 argument, I think. I'm just not quite there.

2 MR. HOBBS: Ms. Eubanks?

3 MS. EUBANKS: If I could continue along
4 this line a little bit with just a little bit
5 different tack. Is your argument because it's
6 involving GOCO and it's a constitutionally created
7 entity and it has constitutionally created
8 restrictions on the -- what it can do with the trust
9 fund versus -- the GOCO Trust Fund versus this trust
10 fund, or would you have -- make your same argument
11 contrary to how Mr. Domenico suggested in terms of the
12 measure creating a new entity. What if it took -- I
13 don't know, had it -- this fund created by, I don't
14 know, the executive director of one of the principal
15 departments, an existing. I mean, would you still
16 make the argument that having the executive director
17 of a department administer this fund constitutes a
18 second subject because it's changing the
19 responsibilities of that executive director? Or is
20 this because it's GOCO and it's constitutional?

21 MR. GESSLER: Let me try and answer
22 that. Obviously, it would depend on the language
23 before us in the sort of hypothetical case before I
24 would firmly commit one way or the other.

25 But I would argue that if this simply

1 said, okay, this new revenue stream, and assuming
2 other single subject matters are adequately addressed,
3 that -- that it shall be -- that it shall be
4 administered by a particular agency, and it doesn't
5 describe the agency's inherent powers, inherent
6 limitations, procedures, or anything like that.
7 It's -- the agency is either free to determine that
8 according to its normal grant of authority, or that
9 it's free to do that based on legislative guidance. I
10 don't think that would create the same problems that
11 we have here.

12 But I think it is -- it is analogous to
13 perhaps your initial thought that, you know, GOCO does
14 have sort of constitutionally mandated restrictions on
15 what and how they can do things, and by changing those
16 restrictions, even if it's for what I'm sure the
17 proponents would characterize as a limited purpose,
18 but changing those restrictions does change GOCO
19 itself, and -- and because it's such a broad -- broad
20 change on any limitation with respect to these funds,
21 you know, that can conceivably include not just what
22 they spend it on, which is inherent in here, but how
23 they spent it, as well, and what their normal
24 procedures are, and so that's the -- that's the
25 difference in the subject. That's the difference, and

1 that creates the separate subject. So the fact that
2 GOCO is constitutionally mandated, I think reinforces
3 our argument, but it doesn't necessarily depend upon
4 that.

5 MS. EUBANKS: Thank you.

6 MR. GESSLER: Did I achieve clarity in
7 my response there? I'm hoping I did.

8 MS. EUBANKS: You did.

9 MR. GESSLER: Thank you.

10 MR. HOBBS: Do you want to go on then to
11 the other issues?

12 MR. GESSLER: Certainly. As I said, we
13 dropped the very first issue, so I won't address that.

14 The -- the other two issues, with
15 respect to No. 2, it fails to identify the percentages
16 of the tax revenues devoted to each new purpose. We
17 obviously had this discussion last week, as well, and
18 I am conscious of the fact that I was on the short end
19 of a three-to-zero vote, but nonetheless, I would like
20 to make my argument here and reinforce it.

21 (At this time Mr. Knaizer left the
22 room.)

23 MR. GESSLER: I think a good -- a good
24 lens through which to view this is perhaps No. 68,
25 which we just saw, and this particular issue, No. 71.

1 And the -- and the percentages are different in how
2 they are allocated, and the difference is -- it's a
3 big difference. Obviously, it's expressed in
4 percentages here. Those percentages have meanings.
5 40 percent of over 200 -- of almost \$300 million, I
6 would argue, is a lot of money, especially when it's
7 from year to year, and that's critical to
8 understanding how this operates, the impact that it
9 has.

10 Now, the Colorado constitution,
11 obviously the TABOR amendment, requires a specific
12 number as far as how much revenue is raised. And I
13 think that goes to the fact that the -- or that shows
14 the fact that the voters, in looking at -- in -- in
15 looking at tax measures, you know, also indicated that
16 it's important to understand the magnitude of tax
17 increases; that the magnitude is a very critical and
18 important piece of information, as is the -- how this
19 works or the subject matter that it works on, but the
20 magnitude is.

21 And TABOR requires that the magnitude be
22 expressed in a dollar term. Obviously, I think a
23 dollar term would be appropriate here, as well, but I
24 think a percentage term is also appropriate on how
25 money is spent.

1 Spending is the flip side of the coin of
2 the tax. I mean, most tax, some would argue that even
3 more than most taxes, are spent by governments. And
4 so the amount that's spent or how money is spent, that
5 magnitude or measure of that magnitude is critical
6 information to enable voters to make a meaningful
7 choice.

8 And for that reason, I'll continue the
9 argument that failing to include some indication of
10 the magnitude, which is appropriately expressed in
11 percentages here, renders this ballot title
12 incomplete.

13 And -- and just to, again, compare it to
14 No. 68, let us assume that one or the other is on the
15 ballot, unlikely as I understand it that both would
16 be, but some voters may -- may find it a real distinct
17 difference between the fact -- and I would argue that
18 many would -- that 40 percent is allocated to one
19 thing versus 20 percent or 10 percent. And the reason
20 why is because over several years, that -- or perhaps
21 even in one year, I mean, it's hundreds of millions of
22 dollars, and that's a big difference, and so I would
23 again urge the board here to add the 40 percent -- or
24 add the percentages.

25 Obviously, the board has to weigh

1 against that creating a succinct title. Adding
2 percentages here does not create an unduly cumbersome
3 title here, and it would be appropriate to explain the
4 percentages as to how these -- how this money is being
5 spent.

6 Now, obviously, I -- I think the -- I
7 shouldn't say "obviously," but I sense that the board
8 thought the other week that my argument would have
9 been stronger if it were, say, 5 percent, 5 percent,
10 90 percent; that that characterization had -- or
11 created more -- lent more weight to the argument
12 that -- that the percentages should be included. But
13 I don't think the board should stop at that point,
14 because accuracy is a critical item, and although the
15 board's opinion may be that it's -- that it only rises
16 to that level when you have some large imbalance here,
17 I think it's important to let the voters make that
18 decision for themselves and to have that in the ballot
19 title as to what the appropriate percentages are.

20 So, again, I would urge the board to add
21 those percentages.

22 Finally, with respect to the phrase
23 "preservation of land and water resources," I know
24 there was some discussion. I did not bring this up
25 before. I'm bringing it up for the first time here.

1 I would argue that that's a -- that that's a catch
2 phrase. It does work to the proposal's favor without
3 really contributing to an understanding of what this
4 does.

5 I guess the voter -- I mean,
6 preservation of land and water resources, land and
7 water resources is pretty much everything. Well,
8 maybe it's not air resources, so if it were to include
9 land, water, and air resources, that would be
10 everything in human existence, but land and water
11 resources is hugely broad. A resource can mean a lot
12 of things to a lot of people. In fact, I would argue
13 it means anything to anyone. Everyone views
14 everything on land or everything in water to be a
15 resource. A resource is something at their disposal.

16 And when you preserve resources, you
17 keep resources. In other words, you're keeping
18 everything. So it's -- it's difficult to see how this
19 could be anything but -- but, you know, using the
20 phrase -- to use synonyms, you know, using the phrase
21 "preservation of land and water resources" would be,
22 you know, preserving everything that we use almost,
23 unless, of course it's an air resource, so I guess my
24 argument isn't entirely complete along those lines,
25 but the point is that this can easily form the slogan,

1 you know, "Increase taxes to preserve our resources."
2 And preserving resources in that manner, I think, is
3 an improper catch phrase that can be used as a slogan.
4 It truly doesn't -- it doesn't add to a lot of voter
5 understanding, again because resources can be
6 anything. And preservation, maintaining things, seems
7 to be a very positive connotation here. And I
8 understand the argument before we earlier had about
9 that, that it's not dispositive, but it's certainly an
10 element that this board should weigh.

11 So based on that, our argument, as well,
12 is that "the preservation of land and water resources"
13 is an improper catch phrase.

14 MR. HOBBS: Thank you. Are there
15 questions for Mr. Gessler?

16 (No response.)

17 MR. HOBBS: Thank you.

18 MR. GESSLER: Okay. Thank you very
19 much.

20 MR. HOBBS: Ms. Veitch, would you like
21 to respond, or anyone else?

22 MS. VEITCH: If necessary. If you have
23 questions for me, I'm happy to respond; otherwise, let
24 you guys move on with things.

25 MR. HOBBS: I am wondering about -- and

1 we probably did cover this, but with respect to the --
2 this -- the request from Mr. Gessler to include the
3 specific percentages, what is -- what are the
4 proponents feeling about that?

5 MS. VEITCH: I think it's typically not
6 done. For example, in 13, the percentages were 75 and
7 25. That wasn't done there. And I think that's where
8 we headed off our -- or concluded at the last meeting
9 was that 40-40-20 is not so disparate that the
10 citizens needed kind of a red flag for that. So
11 that's our --

12 MR. HOBBS: I mean, and I -- I don't
13 have strong feelings about it one way or the other,
14 but I'm inclined to leave it the way it is, unless the
15 proponents concur that we should change it, and I'm
16 not hearing that, so --

17 MS. VEITCH: That's correct.

18 MR. HOBBS: Any questions for
19 Ms. Veitch?

20 (No response.)

21 MR. HOBBS: Thank you.

22 Is there anybody else who wishes to
23 comment on the motion for rehearing? Seeing none,
24 discussion by the board?

25 MR. DOMENICO: Well, I've got -- I have

1 to say, I tend to agree with some of what Mr. Gessler
2 said; that the idea that you can simply raise a tax or
3 impose a fee and then use it for any number of
4 purposes, no matter what they are, is pushing it.

5 These, I think, are -- are fairly
6 related to one another and to the -- to the severance
7 tax, even if it's a little bit tenuous in some ways.
8 So given our -- our command to be liberal about our
9 interpretation of the single subject, I'm willing to
10 go along, although I -- I do think that some of these
11 are borderline.

12 As to the title, as I think I said last
13 time, I definitely prefer if we put the percentages in
14 here. I think it's a much better title, and it
15 doesn't -- and I don't see any downside to it.

16 That said, there are lots of ways to
17 write a complete and accurate title, and this is not
18 inaccurate.

19 You know, if, in fact, the percentages
20 are all that important to voters, as Mr. Gessler's
21 argued, they can look at the measure itself and get
22 those percentages.

23 So while I -- while I would prefer
24 putting the percentages in, I've -- I've voted in
25 favor of the titles this way, because I -- I don't

1 think it's -- makes them inaccurate. I do think they
2 would be better.

3 And then as to the issue of the
4 language, "for preservation of land and water
5 resources," I know we really struggled with that last
6 time, and I'm not -- I don't know that I think it's
7 really a catch phrase. I -- I could be talked into
8 just maybe deleting "resources" at the end, because
9 that seemed to be part of the main concern, but I
10 don't know that that fixes anything that Mr. Gessler
11 really was complaining about, and I don't know that it
12 makes it any better, so unless someone else is
13 interested in pursuing that, I'm not going to make a
14 motion on that or on the percentages, although as I
15 say, I think we should -- I would put them in there if
16 it were just me. I would put them in all of them, not
17 just this one, but since we're not doing it, I haven't
18 pushed it.

19 MR. HOBBS: You know, and I basically
20 agree with your comments, Mr. Domenico. I mean, I --
21 I think the different recipients of the funds, there
22 is -- there is a connection. It's not like we're
23 raising taxes and putting a part for the Clean Water
24 Fund and then another part for transportation or
25 something else. Well, even that, I guess, I might be

1 able to argue, but at least they're not -- they're not
2 totally different items, and there is a relationship,
3 as you said, in the severance tax, and -- you know,
4 and I -- and I think I -- although we pretty much
5 discussed this and, Mr. Domenico, I think you
6 convinced me.

7 I just want to note that I do think that
8 with respect to the -- the issue about the -- the
9 limitation on the GOCO board, I -- I think, as you
10 identified, I think that's not a separate subject. I
11 think the proponents chose to delegate administrative
12 oversight to an existing board, and they simply, I
13 think, just wanted to answer that question, what about
14 the existing constitutional provisions that govern the
15 trust fund, and just to avoid some issue about it, I
16 think they said those don't apply. And so I think
17 that's not a separate subject.

18 And -- and I agree with you,
19 Mr. Domenico. I don't see that "preservation of land
20 and water resources" is a catch phrase, so I don't
21 know that's -- at this point I'm not convinced to
22 change what the board did before.

23 Do you have any comments, Ms. Eubanks?

24 MS. EUBANKS: I think in general, I'm in
25 agreement with both of you. I -- I still believe that

1 the measure constitutes a single subject.

2 I -- in terms of the administration of
3 the fund, I think that's well within the purview of
4 the measure to be able to specify those details. The
5 fact that it's the GOCO board versus somebody else,
6 I -- I don't think that makes a difference to me.

7 In terms of the -- the spending mandates
8 and the various purposes for which the revenues are to
9 be used, you know, if you buy that argument, then --
10 and, you know, severance taxes is really sort of a
11 form of income tax, I mean, it's based on income
12 received from the sale of oil and gas severed, and so,
13 you know, you just equate it to income tax in general.
14 You could never have an income tax rate increase
15 because you use it for different purpose? I -- I
16 don't know that -- how you sort of equate this, you've
17 got to do it for a related purpose for -- you know, in
18 terms of what the tax is imposed on versus what you
19 use it, and the fact that you have some -- some
20 differences in terms of the various purposes for which
21 it's used. I don't know how you make sense of that
22 and apply it in various situations, and so at this
23 point, I still believe that the measure constitutes a
24 single subject.

25 In terms of the percentages, I agree

1 that we could include the percentages. I don't know
2 that not including the percentages is a fatal flaw in
3 the title. I believe it still gives sufficient notice
4 of the purposes for which it's to be spent. I mean,
5 for example, even if you put it in percentages, folks
6 may not know what the Clean Energy Fund is used for or
7 may not know what the local government severance tax
8 fund is used for, and so they would have to be
9 looking -- I mean, you might guess. I mean, for us it
10 may be easier to surmise the purposes of those funds,
11 because we're more familiar with them, but they may
12 have to be looking more specifically to figure out the
13 various purposes, and I don't know that adding
14 percentages really helps them know if they agree with
15 those priorities or not in terms of how the funds are
16 spent on various purposes.

17 And in terms of the catch phrase, I
18 think we worked very hard to come up with the
19 terminology that is currently in the title to avoid a
20 catch phrase. I don't know that we could describe it
21 any other way, and -- and so I would deny the motion
22 for rehearing on all the various counts.

23 MR. HOBBS: Is there any further
24 discussion? Is there a motion? Ms. Eubanks?

25 MS. EUBANKS: I would move to deny the

1 motion for rehearing.

2 MR. HOBBS: I'll second that.

3 If there's no other discussion, all
4 those in favor say "Aye."

5 THE BOARD: Aye.

6 MR. HOBBS: All those opposed, "No."

7 (No response.)

8 MR. HOBBS: That motion carries three to
9 zero. That concludes action on No. 71. The time is
10 12:25 p.m. That concludes our morning agenda, and we
11 will reconvene at 1:30. Thank you.

12 WHEREUPON, the within proceedings were
13 concluded at the approximate hour of 12:25 p.m. on the
14 2nd day of April, 2008.

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24 Title and Ballot Title and Submission Clause For

25 Initiative 2007-2008 No. 71 4/2/08 (tcm)

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, TRACY C. MASUGA, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 4th day of April, 2008.

My commission expires April 24, 2008.

- Reading and Signing was requested.
- Reading and Signing was waived.
- Reading and Signing is not required.

TRACY C. MASUGA
NOTARY PUBLIC
STATE OF COLORADO


Tracy C. Masuga
Registered Professional Reporter