

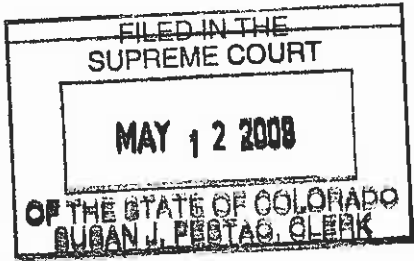
<p>SUPREME COURT, STATE OF COLORADO</p> <p>Court Address: Two East 14th Avenue Denver, Colorado 80203</p> <p>Phone Number: 303.861.1111</p>			
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. 2007 Appeal from the Ballot Title Setting Board</p>			
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #83 ("Fees on Energy Emissions").</p> <p>Petitioner: TERRANCE G. ROSS, OBJECTOR</p> <p>v.</p> <p>Respondents: J. THOMAS MCKINNON AND SAMUEL P. WEAVER, PROPONENTS</p> <p>and</p> <p>Title Board: WILLIAM A HOBBS, SHARON EUBANKS, and DANIEL D. DOMENICO</p>	<p>▲ COURT USE ONLY ▲</p>		
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<p>OPENING BRIEF OF PROPONENTS</p>			

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Proponents J. Thomas McKinnon and Samuel P. Weaver, Pro Se, respectfully present this Opening Brief in support of the actions of the Ballot Title Setting Board (“Title Board”) with respect to the setting of the title, ballot title and submission clause for Proposed Initiative 2007-2008 #83 (“Fees on Energy Emissions”¹).

STATEMENT OF THE ISSUES

1. Whether the Title Board erred in finding that the Proposed Initiative which creates a fee on carbon dioxide emissions based on the end-use consumption of natural gas and electricity comprises a single subject.”
2. Whether the Title Board failed to set a title that is fair and that fairly expresses the true meaning and intent of the Initiative.”

STATEMENT OF THE CASE

J. Thomas McKinnon and Samuel P. Weaver (hereafter “Proponents”) proposed an initiative to create a fee on carbon dioxide emissions based on the

¹ While the title “Fees on Energy Emissions” is unofficial and for tracking purposes, its use of the phrase “Energy Emissions” is incorrect. The Initiative creates fees on carbon dioxide emissions, which is quite different from energy emissions. A correct title would be “Fees on Carbon Dioxide Emissions,” or “Fees on CO2 Emissions,” or “Fees on Greenhouse Gas Emissions,” or “Fees on GHG Emissions,” or “Fees on Global Warming Pollution,” or “Fees on Pollution.”

end-use consumption of natural gas and electricity, and which allocates a percentage of the revenues resulting from these fees to various programs designed to reduce global warming pollution and to advance Colorado's New Energy Economy. This proposal was denominated as Initiatives 2007-2008 #83 (hereafter the "Initiative").

The Petitioner has variously and unsuccessfully argued before the Title Board that the Initiative violates the single-subject rule. Petitioner claims that the fee amounts to new, prohibited regulatory schemes for carbon dioxide for geological carbon sequestration, and, based on these and other assertions, that the language of the title is unfair and does not express the true intention of the initiative.

The Proponents successfully refuted the Petitioner's claims before the Title Board by showing the direct connection between the programs funded by the fee and the fee itself. The Petitioner attempts to expand the scope of this ballot initiative in order to argue a violation of the single-subject rule based upon its own expanded scope of this ballot initiative.

It is the duty of this Court to protect the right of individual voters to propose ballot initiatives by liberally construing the single-subject rule. Only if it is clear that the Title Board made a mistake that allows a concealed topic to be included in

a ballot initiative should this Court intervene. The Proponents assert that the Title Board correctly found the Initiative to address a single subject and fairly set the title, ballot title and submission clause and urge this Court to affirm the final action of the Title Board.

STATEMENT OF THE FACTS

The Title Board conducted its initial public hearing and set title for the Initiative on April 2, 2008, and determined that the Initiative is limited to a single subject. Petitioner filed a Motion for Rehearing on April 9, 2008, alleging that the Title Board erred in its determination that the Initiative is limited to a single subject and that the title did not fairly convey the intent of the Initiative.

The Title Board heard the Motion for Rehearing at its meeting on April 16, 2008. After several hours of discussion and careful consideration at the rehearing, the Title Board amended the title, but otherwise denied the Petitioner's Motion in all respects.

The Title Board set the following title for this Initiative:

State taxes shall be increased \$209 million annually by an amendment to the Colorado Revised Statutes concerning a fee imposed on the consumption of electricity or natural gas to be used to reduce certain forms of pollution, and, in connection therewith, imposing the fee at a rate of three dollars per metric ton of carbon dioxide or carbon dioxide equivalent emitted to the atmosphere from electricity generation and natural gas combustion;

collecting the fee from consumers; specifying that the fee is in addition to certain existing programs; exempting revenues generated from the fee from applicable constitutional spending limits; specifying minimum percentages of the revenues that are to be spent on the following purposes: (1) energy efficiency, (2) renewable energy, (3) carbon sequestration, (4) pollution reduction, (5) workforce training, (6) technology commercialization, (7) public education, and (8) curricula development; establishing and funding a clean energy progress task force to develop strategies for a clean energy portfolio; and funding a senior advisor to the governor on climate change.

Petitioner now asks this Court's review to reverse the final action of the Title Board, claiming that the provisions that implement the single purpose of the Initiative are separate and unrelated to the single purpose, and claiming that the title and the use of certain phrases are misleading.

Proponents now file this Opening Brief in Support of the final action of the Title Board, and ask this Court procedurally to employ the proper standard of review of the Title Board's decision as well as to uphold the Title Board's final action on its merits.

SUMMARY OF THE ARGUMENT

The Initiative sets forth the single purpose of creating a fee on carbon dioxide emissions from end-use consumption of electricity and natural gas, the revenues of which are allocated to specific programs to advance Colorado's New Energy Economy and to reduce global warming pollution. The Initiative includes

provisions to promote energy efficiency, renewable energy, carbon sequestration, pollution reduction and other measures. While the Petitioner sets out complex arguments that these measures violate the single-subject rule, the Title Board found these measures to be directly connected to the single purpose of the Initiative.

LEGAL ARGUMENT

I. THE INITIATIVE CONTAINS A SINGLE SUBJECT.

A. Legal standards

When reviewing the actions of the Title Board in finding that the Initiative is limited to a single subject, this Court should liberally construe the single-subject and title requirements to ensure that the rights of Proponents are not unduly restricted. *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1131 (Colo. 1996)

The single subject requirement is not violated if the “matters encompassed are necessarily or properly connected to each other rather than disconnected or incongruous.” *In re Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995); *People v. Sours*, 31 Colo. 369, 405, 74 P. 167, 178 (1903).

The court may not construe the future legal effects of an initiative. *In re Title, Ballot Title and Submission Clauses for Proposed Initiatives 2001-2002 Nos.21 & 22*, 44 P.3d 213, 215-16 (Colo. 2002)

B. The single subject of the Initiative is to create a fee on carbon dioxide emissions to reduce global warming pollution by advancing the New Energy Economy

The Initiative sets forth the single purpose of creating a fee on carbon dioxide [hereafter CO₂] emissions to reduce global warming pollution by advancing the New Energy Economy. The Initiative includes provisions to promote energy efficiency, renewable energy, carbon sequestration, pollution reduction and other measures to reduce global warming pollution by advancing the New Energy Economy. While the Petitioner sets out complex arguments that these measures violate the single-subject rule, the Title Board found these measures to be directly connected to the single purpose of the Initiative.

Further, global warming is inherently a complex issue whose complexity is not the Proponents' fabrication; it is merely the reality of the issue, which the Proponents attempt to address in a fair and forthright manner with this Initiative. Therefore, it is to be expected and indeed is only proper that a measure addressing global warming should embody multiple provisions. Any attempt to limit Proponents to a piecemeal approach to address global warming would be to unduly restrict the Proponents' rights to craft the best policy possible.

C. Mistaken conjecture about CO2 regulation does not create an additional subject

The Petitioner's assertions of multiple objectives is the result of Petitioner working backwards from the merits of the Initiative and attempting to construe and interpret the language of the Initiative in a manner that produces the result being asserted. For example, the Petitioner conclusively asserts that the Initiative results in the regulation of CO2 as a pollutant under the law in Colorado and under the federal Clean Air Act, which is not the case, and which the Title Board agreed is not the case.

D. Mistaken conjecture about implementing carbon sequestration does not constitute an additional subject

Next, Petitioner objects to the allocation of revenues from the fee toward geologic carbon sequestration efforts in Colorado. Petitioner makes an argument based on what is essentially a "claim within a claim." The first claim is that the mere act of specifying a percentage revenue allocation to implement carbon sequestration (which could be in soils or in geologic formations) amounts to a mandate to create a geologic carbon sequestration program. This is explicitly not the case [see section 6 (c) of the Initiative]. The second claim contained within the first is that if a geologic carbon sequestration program is being mandated--which again, is not specified by the Initiative--then what amounts to a reassignment of

responsibilities will occur from an unspecified commission to the Department of Agriculture, the Department of Natural Resources, and the Governor's Energy Office.

Under the Initiative, the earliest apportioning of funds by the General Assembly would be in 2010, and it is unlikely that new programs would be ready for implementation for some time later. It seems quite likely that CO₂ will be a federally regulated pollutant and that there will be a federal infrastructure for regulating geologic carbon sequestration by then. This Initiative positions Colorado to be ready to act if and when geologic carbon sequestration becomes technically and economically feasible and the administrative and regulatory infrastructure is in place.

E. Mistaken conjecture about prohibiting future General Assemblies from changing this statute does not create an additional subject

The Petitioner mistakenly asserts that the Initiative has the effect of prohibiting future General Assemblies from repealing or reducing funding to certain programs. The clear language of the Initiative requires that revenues resulting from the Initiative be additional funding to, and not substitute funding for, certain existing programs. The ballot initiative contains a requirement that the revenues resulting from the fees imposed by the Initiative be directed towards certain programs in certain percentages, and not be available for other uses in the

State's general fund. If the Initiative did not express the intention that the General Assembly not repeal existing programs or reduce funding to those programs, then the revenues attributable to the Initiative would not be additive, but would simply replace the funding of existing programs, thus undermining the will of the voters. The Initiative recognizes that in order to reduce the impact of global warming in Colorado, additional revenues must be brought to new programs designed to accomplish those objectives. Importantly, because this is a proposed statute, the legislature retains the authority to change or repeal it, subject to the legislature's accountability to the voters.

II. THE TITLE IS CLEAR AND ACCURATE

A. Legal Standards

When reviewing the Petitioner's attempt to exclude reasonable words and phrases from use to describe this Initiative, the Court must protect the right of initiative and referendum. The single subject requirement is not violated if the "matters encompassed are necessarily or properly connected to each other rather than disconnected or incongruous." *In re Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995)

The summary is not intended to educate people on all aspects of the proposed law and is not required to set out in detail every aspect of the initiative.

In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Tax Reform, 797 P.2d 1283, 1288-89 (Colo. 1990))

B. The Title, Ballot Title and Submission Clause fairly express the true meaning and intent of the Initiative

The language chosen by the Title Board fairly summarizes the intent and meaning of the Initiative. The title makes it abundantly clear that additional revenues will be collected, as fees on CO2 emissions from the end-use of electricity and natural gas, and the use of phrases and words in the Initiative, such as “climate change” and “pollution,” are necessary and appropriate to properly describe the Initiative.

C. The fee on CO2 emissions is a fee, not a tax

As the Petition for Rehearing itself cites [pp. 12-13] "A fee is a charge imposed on persons or property to defray costs of a particular government service. A tax is a means of distributing the general burden of the cost of government, rather than an assessment of benefits." *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. 2005), citing *E-470 Pub. Highway Auth.*, 3 P.3d 18 (Colo. 2000), and *Thorpe v. State*, 107 P.3d 1064 (Colo.App.2004)."

The Initiative creates a fee on global warming pollution “to defray costs of a particular government service”--specifically, the government service of reducing global warming pollution (enumerated in Section 6 of the Initiative), thereby also

reducing the need for future government expenditures to address the consequences of global warming. Quite simply, the fee is on pollution and the fee is used to reduce pollution, and also to reduce future government expenditures to address the consequences of that pollution. There is no purer use of a fee, and no purer example of a fee.

Additionally, revenues from the fee do not go to the General Fund and do not fund government services not related to the “assessment of benefits” of reducing global warming pollution. Clearly, the fee is a fee, and not a tax.

It is for voter clarity that the title does begin with the words “State taxes...” and the ballot title does begin with the words “Shall state taxes...” “Tax” is used here at Proponents’ expense of voter prejudice against the Initiative, but in the service of quashing any ambiguity whatsoever that there is a cost to consumers, in direct proportion to the CO2 emissions associated with their electricity and natural gas end-use. Further, though the fee will cost consumers up front, the voluntary programs it funds are projected on average to save participating consumers substantially more than they pay in fees, thus reducing their global warming pollution. These are advantages to consumers--and to the planet--that go unstated in the title, further diminishing Petitioner’s claim of unfairness (calculations @ www.CleanEnergyProgress.org and based on the proven experience from

programs in another state). And that is the whole point of the Initiative: to reduce global warming pollution by advancing the New Energy Economy. Unfortunately, the Office of State Planning and Budgeting is not required to do a full cost accounting in which case the title might read “Shall taxes be raised \$209 million to save Coloradoans over \$500 million...” which we believe would be a more accurate title.

The Petitioner has further mischaracterized the Initiative as a “consumption fee” (Motion for Rehearing, p. 6) whereas it is truly a pollution fee--analogous to a dumping fee paid to use a dump. At the dump, the dumping fee creates funds to manage the facility and to reduce or mitigate its pollution, just as the carbon fee creates funds for government services directed at reducing the global warming pollution of dumping CO₂ into the atmosphere. To test this, note that the fee is not charged for wind-generated electricity (such as Wind Source) that has no CO₂ emissions associated with it [see Section 7 of the Initiative]; the fee is only charged on CO₂ emissions, and therefore is clearly not a “consumption fee” but rather a pollution fee.

D. The Initiative does not regulate CO2 as a pollutant and does not create a new CO2 regulatory scheme

Because the Initiative does not regulate CO2 as a pollutant and does not create a substantially new regulatory scheme, the only way to accurately describe these effects to the voters is not to describe them at all!

E. The title does not use “catch phrases”

The phraseology employed throughout the Initiative is firmly grounded in words that are in common use among academic, scientific, political, media, business, and economic sectors. We note the phrases “climate change” and “global warming” are in common usage not just in the scientific literature but also in such popular media as NATIONAL GEOGRAPHIC and READER'S DIGEST! (With boldface added, here is a sample title from NATIONAL GEOGRAPHIC, October 2007:

“Carbon’s New Math: to deal with **global warming**, the first step is to do the numbers” [pp. 33-37] and a sample quote from READER’S DIGEST, May 2008:

“There’s another climate player: **global warming**. Growing scientific evidence warns that **climate change** could render the Southwest’s growth and development trends untenable.”) Even the Petitioner’s Petition for Rehearing “Exhibit A” letter from EPA Administrator Stephen Johnson uses the term “**climate change**” [pp. 1 & 2, boldface added].

In fact, during the title hearing Petitioner challenged the phrase “global warming pollution” which was subsequently reduced to “pollution” in the approved title. While some may have felt this was more neutral language, it came at the expense of substantial loss of precision thus creating its own impediment to fair voter understanding of the issue. Proponents chose not to appeal this issue, but note that with Petitioner’s Appeal, Petitioner now wants “pollution” to be excised, leaving Proponents with no suitable vocabulary whatsoever!

While we make no claims of Petitioner’s involvement in the following nefariousness, we note that to the extent there is controversy around the language of “climate change” and “global warming,” it has been manufactured through a concerted campaign of disinformation financed by carbon-intensive industries (“Was Confusion Over Global Warming a Con Job? Some Claim Disinformation Campaign Attempted to Create the Impression Scientists Were Broadly Divided” [ABC News with Charlie Gibson, March 26, 2006]). If Petitioner is to succeed at turning all legitimate vocabulary necessary to discuss an Initiative into a “catch phrase,” and thus impermissible, then Petitioner has done nothing less than usurp the citizen’s right to petition!

CONCLUSION

The Petitioner's arguments against the single-subject determination by the Title Board are misplaced and inaccurate. The Petitioner's assertions that the title, ballot title and submission clause are unfair are likewise misplaced and inaccurate.

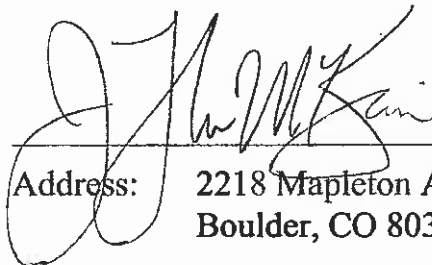
The Title Board carefully and competently exercised its jurisdiction to insure that the Initiative contains a single subject and that only those matters that are connected with and dependent upon the single subject are included in the Initiative.

At the same time, the Title Board approved the language of the title, ballot title and submission clause in full compliance with applicable law.

Therefore, this Court should afford great weight and deference to the final action of the Title Board, properly limit the scope of its review, and affirm the final action of the Title Board in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF PROPONENTS** upon all parties herein by hand delivery, this 12 day of May, 2008, addressed as follows:

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