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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT MAY 12 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2007) Appeals from the Ballot Title Board	▲ **COURT USE ONLY** ▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE AND SUMMARY FOR 2007-2008, #83 ("FEES ON ENERGY EMISSIONS") TERRANCE G. ROSS, OBJECTOR, Petitioner, v. J. THOMAS MCKINNON AND SAMUEL P. WEAVER, PROPONENTS; AND WILLIAM A. HOBBS, SHARON EUBANKS AND DANIEL DOMENICO, TITLE BOARD , Respondents.	Case No.: 08SA138
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OPENING BRIEF OF TITLE BOARD

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

STATEMENT OF THE ISSUES

The Board adopts the statement of issues set forth in the Objector's Petition for Review.

STATEMENT OF THE CASE

On March 20, 2008 J. Thomas McKinnon and Samuel P. Weaver, the proponents, filed Proposed Initiative #83 (#83) with the Secretary of State. The Board held a hearing to set the titles on April 2, 2008. The Board concluded that #83 had a single subject and set titles.

On April 9, 2008, Terrance G. Ross, the Objector, filed a motion for rehearing. He alleged that #83 contained multiple subjects and the titles were unclear, incomplete and inaccurate. On April 16, 2008, the Board granted the motion for rehearing in part and approved the titles as amended. The Objector filed this appeal.

STATEMENT OF THE FACTS

#83, if enacted, would amend article 75 of title 24 by adding part 13, entitled "Clean Energy Progress Fund". The measure establishes the Clean Energy Progress Fund in the Governor's Energy Office. The Fund will consist primarily of taxes imposed upon "the production of global warming pollution from natural gas consumption and electricity production", or upon the electricity generated and not the natural gas when natural gas combustion generates electricity. The entity providing the energy to the end user is responsible for collecting the revenues from the end user of energy and remitting them to the Public Utilities Commission. The Commission then remits the revenues quarterly to the state treasurer, who credits the revenues to the Clean Energy Progress Fund.

#83 allocates the funds for several purposes, including a minimum of five percent of revenues to be used to implement carbon sequestration. End users of energy who enter into voluntary contracts to purchase a portion of the energy from sources that do not create global warming pollution are exempt from paying the fee on that portion of their energy consumption.

SUMMARY OF THE ARGUMENT

#83 contains only one subject: creating a new tax, the revenues of which will be placed in the Clean Energy Progress Fund.

The titles set by the Board are fair, clear and accurate. Although the titles do not describe all of the details of the proposed measure, they do state its central features.

The terms "pollution" and "climate change" are not a catch phrases.

ARGUMENT

I. The Measure Includes Only One Subject: An Increase In State Taxes On The Consumption Of Electricity Or Natural Gas To Be Used To Reduce Certain Forms Of Pollution.

Objector contends that the Board should not have set titles because #83 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 "relate[s] 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 Proposed Initiatives 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2002)(Colo. 2006) (*#55*) 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. *#55*, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002)(*#43*).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. *#43*, 46 P.3d at 443. However, 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. *In re Title, Ballot Title and Submission Clause for 2001-2002 #21 and #22*, 44 P.3d 213, 216 Colo. 2002). The single subject rule must be liberally construed to avoid

unduly restricting the right of initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74*, 962 P.2d 927, 929 (Colo. 1998).

Objector asserts that the measure contains four subjects: (1) a tax on carbon emissions resulting from the consumption of electricity and natural gas; (2) regulation of carbon dioxide as a pollutant; (3) authorization for the Departments of Revenue and Natural Resources and the Governor's Energy Office to implement a carbon sequestration program; and (4) prohibiting future legislatures from repealing or reducing funding to programs. For the following reasons, the Court must reject this argument.

The measure imposes a tax on the consumption of the production of global warming pollution from natural gas consumption and electricity production, places the revenues in the Clean Energy Progress Fund and then grants a continuing appropriation of Clean Energy Progress Fund to the Governor's Energy Office.[1] The Office is authorized to spend the money "on programs targeted to reduce energy bills within Colorado and to reduce global warming pollution within

[1] On July 21, 1999, Gov. Owens recreated the Office of Energy Conservation as the Office of Energy Management and Conservation. Executive Order D 007 99. On April 16, 2007 Governor Ritter issued Executive Order D 100 10 07, which changed the name to the Governor's Energy Office. The Office will lead Colorado to a new energy economy, including renewable energy and clean energy resources.

Colorado." Section 6(c) of the measure allocates five percent of the revenues to implement carbon sequestration in Colorado. The Energy Office must consult with the Departments of Agriculture and Natural Resources before expending funds to implement carbon sequestration.

Objector argues that the proposal seeks "to implement a carbon sequestration program" which would require the regulation of carbon by the Departments of Agriculture and Natural Resources. This contention is without merit. The measure does not authorize the regulation of carbon or the implementation of a carbon sequestration program. The measure does not grant additional regulatory authority to any entity. #83 only creates a mechanism by which the Energy Office can "spend the revenues on programs targeted to reduce energy bills in Colorado and …reduce global warming within Colorado." It does not create programs or authorize a regulatory regime; instead, it funds existing programs or potential programs that may be created in the future. In essence, the Energy Office is a bank with a fund that can be used to offer grants.

The structure established in the measure is comparable to the Clean Energy Fund created in § 24-75-1201, C.R.S. (2007). The moneys in the Clean Energy Fund are appropriated to the Governor's energy office. Section 24-75-1201(2), C.R.S. (2007). The law's purpose "is the advancement of energy efficiency

through the efficient and effective use of moneys in the clean energy fund as permitted in section 24-75-1201(2), Colorado Revised Statutes." 2007 Colo. Sess. Laws, ch. 321, § 1, S.B. 07-246. The principal of the fund consists of moneys transferred from the limited gaming fund and from moneys that may be transferred from the severance tax fund. Section 24-75-1201(1), C.R.S. (2007). The money may be expended for various purposes, including "assist[ing] in the implementation of energy efficiency projects throughout the state" and "aid[ing] governmental agencies in energy efficiency government initiatives." Section 24-75-1201(2)(d), (e), C.R.S. (2007).

Objector's argument presumes that a carbon sequestration or a reduction in carbon must be accomplished by regulation. This assumption is incorrect. Colorado already recognizes that carbon sequestration and reduction of carbon can be accomplished without regulation. For example, the Public Utilities Commission can consider proposals by electric utilities to demonstrate the feasibility of carbon dioxide capture and sequestration. Section 40-2-123(2), C.R.S. (2007). The law allows the Commission to "prime the pump" without requiring or authorizing a new regulatory structure.

Objector also asserts that the measure violates the single subject because it purports to prohibit future legislatures from repealing or reducing funding to

certain existing programs. #83, section 4. According to Objector this limitation is not directly connected to the imposition of a tax to reduce certain forms of pollution. This Court rejected a similar challenge in *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #265*, 3 P.3d 1210 (Colo. 2000). There, the proponents proposed a statute that would regulate genetically modified foods. The proposed statute included a provision stating, "The voters of Colorado authorize the general assembly to make changes consistent with the intent of this law so long as the changes further the purposes of this part." The opponents argued that the proposed statute created a second subject by inhibiting the power of the General Assembly to make laws. The Court, noting that it was impossible for a statute to override constitutional provisions, refused to interpret the proposal in a manner that would lead to a legal impossibility. *Id.* at 1213; *see also, Sovereign Camp of the Woodmen of the World v. Woodmen of the World*, 73 Colo. 57, 64, 213 P. 579, 582 (1923) (statute providing that "no law hereafter enacted shall apply to them, unless they are expressly designated therein" cannot bind future legislatures, but does indicate intent.)

As in *#265*, the Court must interpret the language of section 4 as precatory; therefore, it does not create a second subject.

II. The Titles Are Fair, Clear And Accurate.

Section 1-40-106(3), C.R.S. (2007) 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 added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000). 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 1194, 1197

(Colo. 2000). The Court does not demand that the Board draft the best possible title. *#256*, at p. 219. The Court grants great deference to the Board 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).

Objector asserts that the title is defective in two ways. First, he contends that the use of both terms is confusing to the voters. The Court must reject this argument.

Section 3 of the measure imposes a "clean energy progress fee". Upon examination of the measure, the Board concluded that the fee imposed by the measure was actually a tax. *Cf. Bloom v. City of Fort Collins,* 784 P.2d 304, 307 (Colo. 1989). As such, the election provisions of Colo. Const. art. X, § 20(3)(c) are triggered. Under this provision, ballot titles for a statewide measure must begin with the phrase "shall state taxes be increased". At the same time, the Board sought to incorporate the operative language of the measure to the extent feasible. Therefore, it used the term "fee" in the titles.

The use of the words "fees" and "taxes" is not inherently confusing. The plain reading of the titles indicates that the fees are indeed taxes. The first clause

states that the measure increases taxes by $209 million annually. The second clause states that the increase in taxes occurs through the fee increase. The next clause provides the details of the increase. The titles successfully synthesize the measure and the requirements of article X, § 20.

The key concern of voters is not the designation as a "fee" or a "tax". Rather, the important factor is the identity of the people who pay the money. The titles clearly state that it is the consumer pays the money. The description of the payment as a "fee" or a "tax" is not significant.

The Court rejected an argument similar to that presented by Objector. *In re Title, Ballot Title and Submission Clause and Summary Concerning "Automobile Insurance Coverage"*, 877 P.2d 853 (1994). The proposal would have required the General Assembly to establish a system of automobile insurance requiring to purchase private insurance or to participate in an insurance pool of drivers with no insurance. The system would have been financed by premiums imposed on fuel, license plates, drivers' licenses and traffic offense convictions. The objectors contended that the titles were misleading because they referred to "premiums" rather than "taxes". The objectors argued that the Board erred by failing to begin the ballot titles with the language prescribed in article X, § 20.

The Court rejected the argument. It concluded that the Board and the Court could not "choose between varying interpretations of the status of revenues ultimately collected." *Id.* at 856. To do so at this stage of the process would require the Board and the Court to interpret a measure, something that is inappropriate prior to the time a measure is passed. *Id.*

The use of word "taxes" to include "fees" is not unusual. Although this specific issue was not raised, *In re Title, Ballot Title and Submission Clause and Summary Pertaining to Proposed Initiative "1997-98 #10"*, 943 P.2d 897 (Colo. 1997) is helpful. The measure sought to increase both fees and taxes in order to finance long-term transportation needs. The ballot title and submission clause commenced with the phrase, "Shall state taxes be increased $172.8 million annually". The titles also mentioned that the measure would increase vehicle registration fees. There is no evidence that the use of the words "taxes" and "fees" created any confusion or uncertainty.

Objector also asserts that the titles do not disclose that the measure proposes to make carbon dioxide a regulated pollutant and that a substantial regulatory scheme will be imposed. As noted above, neither result will occur under the terms of the measure. Therefore, this argument must be rejected.

III. The Terms "Pollution" And "Climate Change" Are Not Catch Phrases.

Objector contends that the term "pollution" and "climate change" are catch phrases. The Court must reject this argument.

"'Catch phrases are 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 Ballot Title 1999-2000 No. 258(A),* 4 P.3d 1094, 1100 (Colo. 2000). The test has two parts: (1) phrases work in favor of the proposal, and (2) phrases do not enhance voter understanding in a manner that does not hinge on the content of the measure. *Id.* The existence of a catch phrase is determined in the context of contemporary political debate. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000). The person asserting the existence of a catch phrase must offer convincing evidence. *Id.*

In this case, neither term is a catch phrase. The term "pollution" has been described as a "standard". *Fry Roofing Co. v. Department of Health*, 179 Colo. 223, 230, 499 P.2d 1176, 1180 (1972). The short title for Colorado's air quality

control program is the "Colorado Air Pollution Prevention and Control Act." Section 25-7-101, C.R.S. (2007).

Likewise, "climate change" is not a catch phrase. To the contrary, the federal government has described it as a "science":

> "The science of climate change is extraordinarily complex and still evolving. Although there have been substantial advances in climate change science, there continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed. As the NRC explained, predicting future climate change necessarily involves a complex web of economic and physical factors...."

Massachusetts v. Environmental Protection Agency, ---U.S.---, 127 S.Ct 1438, 1474 (2007) (quoting Environmental Protection Agency, 68 Fed.Reg. 52930). The Colorado General Assembly has established the "Climate Change Markets Grant Program" in part to conduct research based on climate change.

Both of these terms describe scientific standards. #83 does not use these terms for the purpose of creating a bias for the measure. Instead, these commonly-used terms constitute operative words within the measure that enhance voter understanding.

CONCLUSION

For the above-stated reasons, the Court must affirm the action of the Board in setting the titles.

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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, overnight by DHL at Denver, Colorado, this 12th day of May 2008 addressed as follows:

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