

SUPREME COURT
STATE OF COLORADO

101 West Colfax Avenue, Suite 800
Denver, CO 80202

Original Proceeding Pursuant to Colo. Rev. Stat.
§ 1-40-107(2)
Appeal from the Ballot Title Board.

IN RE TITLE, BALLOT TITLE AND
SUBMISSION CLAUSE FOR PROPOSED
INITIATIVE 2011-12, #45

DOUGLAS KEMPER, as Registered Elector of the
State of Colorado
Petitioners,

v.

RICHARD G. HAMILTON AND PHILLIP DOE,
Proponents
and
WILLIAM A. HOBBS; DANIEL DOMENICO; and
JASON GELENDER
Title Board

Respondents.

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Case No. 12SA22

ANSWER BRIEF OF TITLE BOARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 1515 words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

Maurice Kne

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William A. Hobbs, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Board (hereinafter “Board”), hereby submit their Answer Brief.

STATEMENT OF THE ISSUES

The Board adopts the Statement of the Issues as set forth in the Petition for Review.

STATEMENT OF THE CASE

The Board adopts the Statement of the Case as set forth in the Petition for Review.

SUMMARY OF THE ARGUMENT

Petitioners’ arguments focus on the potential legal effects of the measure. These legal effects are immaterial to the question of whether the measure contains a single subject.

#45 is similar to the measure that this Court approved in *Macravey v. Hufford*, 917 P.2d 1277 (Colo. 1996).

Petitioners’ arguments with respect to the clarity of the titles are equally unavailing. Their arguments ignore the entirety of the titles

and instead focus on the introductory phrase. The titles, when read as a whole, clearly convey the content of the measure.

ARGUMENT

I. The measure contains a single subject

A. Standard of Review

The standard of review was set forth in the Board's Opening Brief.

B. The Single Subject is "Public Control of Water."

According to Petitioners, the measure has three distinct purposes: (1) "to subordinate water rights to a public estate in water" (Petitioners' Opening Brief, p. 9); (2) to remove limits on the right to appropriate water (Petitioners' Opening Brief, p. 11); and (3) to require appropriators to return water to the stream unimpaired (Petitioners' brief, p. 16).

Petitioners improperly conflate the purpose of the measure with their interpretation of the potential effects of the measure on existing law. The purpose of the initiative process is to change the law. The fact

that the measure changes existing law is not necessarily relevant to the question of whether the changes are connected and are a single subject.

The sections of the measure are closely connected. It establishes the “use of water as a usufruct property right, granted by the public to water users.” (#45, Article XVI, § 6(2)) In other words, it consolidates control and authority over waters in the public but allows the public to grant to individuals the right to enjoy and use this property subject to any strictures placed by the public on its use. The statement of the single subject accurately provides that the measure concerns “the public’s control of water” in this state. Although the subject covers all waters, it is still a single subject.

Petitioners’ arguments about the legal effects of the measure actually support the conclusion that the measure contains but one subject. They state that section 1 of the measure “subordinates existing and future appropriative water rights to the interests of the public.” (Petitioners’ Opening Brief, p. 10). They conclude that the measure would shift control in nontributary waters from the general assembly and the private owners to the public. (Petitioners’ Opening Brief, pp. 14-

15) Finally, they argue that the measure would require appropriators to return water unimpaired after use. (Petitioners' Opening Brief, p. 16)

The core of each of the arguments is that the measure changes existing law by shifting control of waters to the public. All of these arguments relate to the single subject: the public's control over waters.

This Court approved a measure similar in scope and content in *Macravey v. Hufford*, 917 P.2d 1277 (Colo. 1996). The measure in that case proposed to add the following paragraphs to article XVI, § 5:

(2) On and after January 1, 1997, the State of Colorado shall adopt and defend a public trust doctrine to protect the public's rights and ownership in and of the waters in Colorado and to protect the natural environment.

(3) Present or future water use rights may be granted or assigned to the public and to any watercourse, without hindrance from a governmental or quasi-governmental entity. The State of Colorado shall defend all public ownership's [sic] from transfer from the public ownership, and from transfer from the watercourse to which that right was pledged.

The Court concluded that the single subject, "the public's interest in state waters," was "sufficiently narrow and sufficiently connected with

both a ‘public trust doctrine’ and the assignment of water use rights to the public or a watercourse, to satisfy the single subject requirement.” *Id.* at 1281.

The essence of #45 is no different from that of the measure in *Macravey*. Although the terminology is somewhat different, the scope and effect of both measures are the same. #45 declares that the “use of water is a usufruct right.” The user must “return the water unimpaired to the public.” The measure declares that the “Colorado doctrine of appropriation acknowledges that the public confers the privilege, by grant, for the use of its water, and the diversion of the same, to any appropriator for the common good.” The measure defines the public’s control over the rights in waters in Colorado, the scope of those rights and the extent of the control. All of these factors relate to the public’s control.

Moreover, Petitioners’ argument would require this Court to interpret the initiative and to speculate about the legal effect this measure may have on other constitutional provisions or statutes. In particular, much of their argument speculates on the long-term

implications that the measure will have on Colorado water law. This Court has reiterated that it will not engage in legal speculation or interpretation of the measure beyond what is permitted in the context of a review of the adequacy of the titles. *Macravey*, 917 P.2d at 1281.

For these reasons, the Court must conclude that the #45 contains a single subject.

II. The titles are clear, fair and accurate.

A. Standard of Review

The standard of review was set forth in the Board's Opening Brief.

B. The titles are not misleading

Petitioners assert that the phrase "public control of water" is vague and misleading because it: (1) does not specify that the measure "would subordinate existing and future appropriative water rights"; (2) "does not encompass the expanded scope of appropriation to include previously appropriated water and nontributary groundwater"; and (3) "implies that public communities would have increased control over

water,” when the control of “public entities” would in fact be diminished. (Petitioners’ Opening Brief, p. 21).

The Court must reject Petitioners’ arguments. Petitioners’ contentions would require the Court to engage in interpretations of the legal effect of the measure, an activity that is beyond the scope of the Court’s authority at this stage of the process. *Id.*

The Court must reject the third contention for another reason. The term “public” used in the titles is the same term used in the measure and in Colo. const. art. XVI, § 6. The Court has long recognized that the term “public” in this context does not include public communities, entities or instrumentalities. *Central Colorado Water Conservation District v. Colorado River Water Conservation District*, 186 Colo. 193, 196, 526 P.2d 302, 304 (1974) (“The rights of appropriation contained in the constitution of Colorado are reserved to the people. An instrumentality of the state has only such rights as the statute gives to it.”) Given the accepted meaning of the word “public” in the context of water rights, Petitioners cannot reasonably contend that


the term "public," which reflects the language of both the constitution and the measure, includes communities, entities or instrumentalities.

The titles, when read as a whole, closely track the content of the measure. The titles adequately and fairly summarize each section of the measure.

CONCLUSION

For the reasons stated in the Board's briefs, the Court must approve the Board's action in setting the titles.

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