

<p>SUPREME COURT STATE OF COLORADO</p> <p>101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	<p>FILED IN THE SUPREME COURT</p> <p>FEB 13 2012</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board.</p>	<p>OF THE STATE OF COLORADO Christopher T. Ryan, Clerk</p>
<p>IN RE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2011-12, #45</p> <p>DOUGLAS KEMPER, as Registered Elector of the State of Colorado Petitioners,</p> <p>v.</p> <p>RICHARD G. HAMILTON AND PHILLIP DOE, Proponents and WILLIAM A. HOBBS; DANIEL DOMENICO; and JASON GELENDER Title Board</p> <p>Respondents.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>OPENING BRIEF OF TITLE BOARD</p>	

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 2019 words.

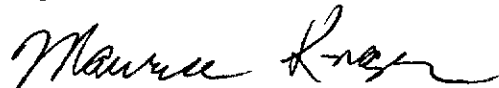
It does not exceed 30 pages.

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.

JOHN W. SUTHERS
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William A. Hobbs, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Board (hereinafter "Board"), hereby submit their Opening Brief. The proposed initiative, 2011-2012 #45 (#45) is attached as exhibit A. The titles are attached as exhibit B.

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

#45 contains a single subject. It amends Colo. Const. art. XVI, § 6 by expanding public control over the waters of the state.

The titles are clear. The titles accurately summarize the content of the measure. The titles, when read as a whole, clearly convey the single subject. The phrase "public control of waters" fairly and clearly expresses the single subject, and the remainder of the titles clarifies any purported ambiguity.

ARGUMENT

I. THE SINGLE SUBJECT CHALLENGE

A. Standard of Review

The Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010) (#91). Only in a clear case should the court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982)

B. The measure contains a single subject

Objectors contend that the Board should not have set titles for 2011-2012 #45 because it 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.

The Colorado General Assembly enacted legislation to implement the constitutional amendment. § 1-40-106.5, C.R.S. (2011). The General Assembly's stated intent is to forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure" and "[t]o prevent surreptitious measures and to apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced on the voters." Section 1-40-106.5(1)(e)(I) and (II), C.R.S. (2011)

An initiative, consistent with the single subject requirement, may contain several purposes that are interrelated. #91, 235 P.3d at 1076. Conversely, "[a] proposed initiative that has two or more distinct and separate purposes which are not dependent or connected with each other violates" the single subject rule. *Id.* The mere assertion of a

general theme will not save the initiative if it contains multiple subjects. *Id.* A comprehensive proposal in an initiative “contains a single subject if all of its provisions relate directly to its single subject.”

Id.

The Court will not address the merits of a proposed initiative, interpret it or construe its future legal effects. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) 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 and Summary for 2009-2010, #24*, 218 P.3d 350, 353 (Colo. 2009).

#45 seeks to amend Colo. Const. art. XVI, § 6 regarding diversion of unappropriated water of any natural stream. The measure alters the existing constitutional provision by deleting references to “unappropriated waters of any natural stream” and allowing diversion of waters within the state of Colorado. It then states that such diversion

rights may be limited or curtailed “to protect natural elements of the public’s dominant water estate by holding unlawful any usufruct use of water causing irreparable harm to the public’s estate.” Section 2 of the measure defines “usufruct property right.” Section 3 of the measure defines the “doctrine of appropriation.” Section 4 delegates administrative enforcement to the executive, legislative and judicial branches. Section 5 authorizes private actions by citizens.

The integral relationship between interests in unappropriated and appropriated waters has long been recognized. *Wyatt v. Larimer & Weld Irrigation Co.*, 1 Colo. App. 480, 494, 29 P. 906, 910 (1892), *rev’d on other grounds*, 18 Colo. 298, 33 P. 144 (1893). Under the present version of the constitution, unappropriated waters belong to the public. A person seeking to divert unappropriated water for a beneficial use may do so. Title to the water remains in the public domain until a person diverts it, segregates it and applies it to a beneficial use. Once properly diverted, the appropriator becomes the owner. Thus, the constitutional provision, as it presently exists, defines who controls and owns appropriated and unappropriated waters.

#45 does not alter the subject contained within Colo. Const. art. XVI, § 6. It only modifies the existing rights and interests in water between private individuals and the public. It subordinates appropriated ownership interests when such interests would harm the public's interests in water. It expands the right to appropriate water for beneficial use to all water within Colorado, subject to the public's ownership interests. #45 requires water users to return water unimpaired after use to the public. All sections of the measure relate to ownership interests and rights in water. Although #45 alters the details, it does not alter the long-recognized scope of the subject.

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

II. THE TITLES ARE CLEAR, FAIR AND ACCURATE.

A. Standard of Review

The Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions." #91, 235 P.3d at 1076. Only in a clear case will the Court reverse a decision of the Title Board. *In re Title,*

Ballot Title and Submission Clause and Summary Pertaining to Casino Gambling Initiative, 649 P.2d at 306.

B. The titles fairly and accurately clearly express the single subject.

Section § 1-40-106(3)(b), C.R.S. (2011) establishes the standard for setting titles. It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title*, *Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58

(Colo. 2008). However, the Board is not required to set out every detail. *In re Title, Ballot Title and Submission Clause for 2001-2002 #21 and #22*, 44 P.3d 213, 222 (2002). In setting titles, the Board may not ascertain the measure's efficacy, construction or future application. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645, 649 (Colo 2010). The Court does not demand that the Board draft the best possible title. *Id.* at 648. The Court will read the titles as a whole. If the titles, read as a whole, fairly and accurately summarize the measure, the Court will affirm the titles. *Id.* at 649.

The phrase "public control of water" is fair and accurate. #45 extends the public's powers over waters in the state. The measure acknowledges the right to divert water but then states that the right "may be limited, or curtailed, so as to protect natural elements of the public's dominant water estate by holding unlawful any usufruct use of water causing harm to the public's estate." It also provides that the "[t]he 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

does exactly what the statement of the single subject provides. It makes private interests in water subservient to the public's interest and authorizes both government officials and members of the public to take action necessary to enforce the public's interest in water.

Any ambiguity in the statement of the single subject is clarified in the remainder of the titles. The titles, when read as a whole, provide the details of the remainder of the measure. Any doubt about the meaning of the statement of the single subject is removed when the titles are read in their entirety.

CONCLUSION

For the reasons stated in this brief, the Court must approve the action of the Title Board.

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/s/Maurice G. Knaizer

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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 by overnight Express Mail, postage prepaid, at Denver, Colorado, this 13th day of February, 2012 addressed as follows:

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A handwritten signature in cursive script, appearing to read "Daniel D. Dande", is written over a horizontal line.

MS SWARD

FINAL VERSION

Initiative to Amend ARTICLE XVI, Section 6, of the Colorado Constitution

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

In the constitution of the state of Colorado, amend section 6 of article XVI as follows:

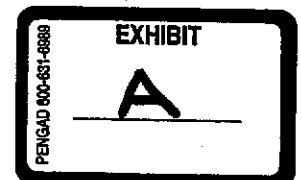
Section 6. Diverting ~~unappropriated water - priority-preferred-uses~~ LIMITATIONS. (1) The right to divert ~~the unappropriated waters of any natural stream~~ WATER WITHIN THE STATE OF COLORADO to beneficial ~~uses~~ shall never be denied, BUT MAY BE LIMITED, OR CURTAILED, SO AS TO PROTECT NATURAL ELEMENTS OF THE PUBLIC'S DOMINANT WATER ESTATE BY HOLDING UNLAWFUL ANY USUFRUCT USE OF WATER CAUSING IRREPARABLE HARM TO THE PUBLIC'S ESTATE. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the ~~waters of any natural stream~~ are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

(2) THE USE OF WATER IS A USUFRUCT PROPERTY RIGHT, GRANTED BY THE PUBLIC TO WATER USERS, THAT SHALL REQUIRE THE WATER USE APPROPRIATOR TO RETURN WATER UNIMPAIRED TO THE PUBLIC, AFTER USE, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND THE PUBLIC'S USE AND ENJOYMENT OF WATERS.

(3) 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.

(4) ENFORCEMENT AND IMPLEMENTATION OF THIS SECTION THAT CONFERS, BY GRANT, THE USE OF THE PUBLIC'S WATER TO USERS AND THAT STIPULATES THAT USES OF WATER SHALL BE PROTECTIVE OF THE PUBLIC'S RIGHTS AND INTERESTS, ARE MANDATED TO THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF COLORADO STATE GOVERNMENT TO ACT, AS STEWARDS, TO PROTECT AND ENFORCE THE PUBLIC'S INTERESTS IN ITS WATER ESTATE.

(5) ANY CITIZEN OF THE STATE OF COLORADO SHALL HAVE STANDING IN JUDICIAL ACTIONS SEEKING TO COMPEL THE STATE OF COLORADO TO ENFORCE THE PROVISIONS OF THIS SECTION.



(6) PROVISIONS OF THIS SECTION ARE SELF-ENACTING AND SELF-EXECUTING, BUT LAWS MAY BE ENACTED, SUPPLEMENTARY TO, AND IN PURSUANCE OF, BUT NOT CONTRARY TO, PROVISIONS OF THIS SECTION.

Ballot Title Setting Board

Proposed Initiative 2011-2012 #45¹

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

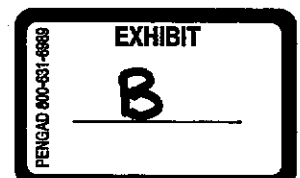
An amendment to the Colorado constitution concerning public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding the right to appropriate water for beneficial use to all water within Colorado, including nontributary groundwater and not limited to unappropriated water, subject to the public ownership interest; requiring water users to return water unimpaired after use to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; and allowing any Colorado citizen to sue to enforce the amendment.

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

Shall there be an amendment to the Colorado constitution concerning public control of water, and, in connection therewith, allowing appropriated water rights to be limited or curtailed by prohibiting any use of water that would irreparably harm the public ownership interest in water; expanding the right to appropriate water for beneficial use to all water within Colorado, including nontributary groundwater and not limited to unappropriated water, subject to the public ownership interest; requiring water users to return water unimpaired after use to the public so as to protect the natural environment and the use and enjoyment of water by the public; requiring state government to act as steward of and to protect, enforce, and implement the public ownership interest; and allowing any Colorado citizen to sue to enforce the amendment?

*Hearing December 21, 2011:
Withdrawn by proponents.
Hearing adjourned 3:10 p.m.*

¹ Unofficially captioned "Limits on Water Diversion" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.



*Hearing January 4, 2012:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 5:02 p.m.*

*Hearing January 18, 2012:
Motion for Rehearing denied.
Hearing adjourned 2:20 p.m.*