SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING PURSUANT TO 1-40-107 (2) 1 C.R.S. (2005) Appeal from the Ballot Title Setting Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006 **Petitioners:** KENNETH A. WONSTOLEN; HOWARD STANLEY DEMPSEY, JR; CHRISTOPHER P. ELLIOT; and STUART A. SANDERSON, Objectors, v. **Respondents:** JOHN GORMAN AND JACK REAL, Proponents, and **Title Board:** WILLIAM A. HOBBS, DANIEL DOMINICO, and SHARON EUBANKS Attorney for Respondent Proponents: Greg S. Russi, Atty. 110 E. Third Street #202 PO Box 1999 Rifle, CO 81650 (970) 625-9876 (970) 625-0970 Fax	Case No 06SA167

PROPONENTS' BRIEF IN OPPOSITION TO PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #125 ("DAMAGES FOR MINERAL EXTRACTION")

I. Table of Contents and Table of Cases

II. Statement of the Case

A. Procedural Posture

This appeal involves an action by the State of Colorado Ballot Title Setting Board ("Title Board"). On May 17, 2006, the Title Board considered proposed initiative 2005-2006 #125, which concerns compensation for damages to be paid by mineral extractors. Informally, this proposed initiative is known as the Initiative for Surface Owner Rights, or "ISOR." At the hearing, the Title Board concluded that ISOR's proposed constitutional text met the constitutionally required single subject requirement. This finding is not contested by Petitioners in this case. Further, the Title Board also designated and fixed the ballot title and submission clause for ISOR as follows:

> Shall there be an amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral?

In the week following the May 17 decision, four requests for rehearing were filed with the Title Board related to ISOR. Three challenges were filed by representatives of mineral, oil and gas industry groups (Roger Hutson & Ken Wonstolen, Stuart Sanderson & James Cooper, and Howard Stanley Dempsey, Jr.).[1] These industry Motions for Rehearing raised alleged infirmities with the initiative's language and the text of the ballot title drafted by the Title Board. The proponents of ISOR also requested a rehearing in order to amend the text of the constitutional language to include the phrase "including oil and gas" as a description of the word mineral.[2]

At a hearing on May 25, 2006, the Title Board granted the ISOR proponents' request for

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[1] Exhibit to Petitioners' Petition for Review of Final Action.

rehearing and modified the proposed constitutional text as requested, by adding an additional phrase at the end of the text.[3] The Title Board went on to deny "in all other respects" the objections made by ISOR's opponents - the Petitioners in this case. The ballot title and submission clause now reads:

> Shall there be an amendment to the Colorado constitution requiring a mineral extractor to pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas?[4]

Having been unsuccessful in their attempts to block setting of the ballot title and submission clause at the Title Board, petitioners now seek to use this proceeding to halt this proposed initiative. On May 31, 2006 this Court ordered the parties file simultaneous briefs on or before June 9, 2006. In this Brief in Opposition, respondents Gorman and Real respond to the May 30, 2006 Petition for Review, and respectfully request that this Court dismiss the Petition for Review and allow the matter to proceed to the public, including the filing of petitions for a ballot issue with the Secretary of State under CRS § 1-40-108.

B. Intent and Purpose of the Initiative

According to proponents who testified at the Title Board Reconsideration Hearing, the proponents seek voter approval of a change in Colorado law regarding the standard for damages in claims brought by surface rights owners against mineral rights owners. The language of the ballot initiative is plain and simple. It is brief, constituting one sentence only. The language

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[2] Id.

[3] Id. The proposed constitutional text, as amended, reads "A mineral extractor shall pay the fair value of damages brought about in the development, pursuit, or extraction of a mineral, including oil and gas."

[4] Exhibit to Petitioners' Petition for Review of Final Action.

uses simple terms easily understood by voters. There are no vague or misleading terms, but rather only common terms generally understood by laypersons.

III. Argument

A. This Court Must Grant Great Deference to the Title Board's Discretion.

The standard by which this Court shall review a challenge to a Title Board decision is very circumscribed. While not exactly the standard used in a review of agency action under C.R.C.P. 106, this court has often stated that it owes the Title Board a great degree of deference.

In reviewing the actions of the Title Board, this Court "grants 'great deference to the board's broad discretion in the exercise of its drafting authority.'" Garcia v. Montero, 44 P.3d 213, 219 (Colo. 2002). The Court has explained that it has only a limited role in ballot-title proceedings. "It is not this Court's function to write the best possible titles." In re: Ballot Title 1999-2000 No. 256, 12 P.3d 246, 256 (Colo. 2000). Only if the Board's chosen language is clearly inaccurate or misleading will the Court reverse it. Id. "We construe constitutional and statutory provisions governing the initiative process in a manner that facilitates the right of initiative instead of hampering it with technical statutory provisions or constructions." Id. at 255. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal, but need not include every detail. Garcia, 44 P.3d at 222. Ultimately, this Court must uphold a ballot title and submission that "allow[s] the voter to understand the effect of a yes or no vote on the measure." Finally, this Court will not interpret or construe the future legal effects of a proposed initiative as a means of defeating an otherwise valid title. In re Ballot Title 1999-2000 #200A, 992 P.2d 27, 30 (Colo. 2000).

Upon review, the Supreme Court treats actions of board as presumptively valid. The Supreme Court will not address the merits of a proposed initiative, interpret its language, or predict its application. In re Ballot Title 1999-2000 Nos. 245(b), 245(c), 245(d), and 245(e), 1 P.3d 720 (Colo. 2000). The court will reverse the board's action in preparing the title or submission clause only if the title and submission clause contain a material omission, misstatement, or misrepresentation. In re Ballot Title 1990-2000 No. 29, 972 P.2d 257 (Colo. 1999).

B. The Substance of the Initiative Itself Is Beyond the Scope of this Court's Review.

The right to initiate constitutional amendments is reserved to the registered electors of the state of Colorado by Article V, Section 1 of the Colorado Constitution. The Constitution reads, "The first power hereby reserved by the people is the initiative."

The General Assembly has declared that there shall be an initiative process, unlimited and unabridged. The legislative declaration preceding the statutes which create the Title Board states:

> It is not the intention of this article to limit or abridge in any manner the powers reserved to the people in the initiative and referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government. CRS § 1-40-101.

Here, citizen proponents Gorman and Real have made known their intention to ask the voters of the State of Colorado to enact a law. The law sought to be enacted, if approved, would change existing law.[5] The statutes which safeguard and protect the powers reserved to the people for

[5] Testimony of proponent witness Donald Kaufman before the Title Board's Reconsideration Hearing, May 25, 2006 (59:40). A full audio transcript of the Title Board hearing is available on the Secretary of State website.

initiative and referendum do not allow the Title Board nor this Court to rewrite the substance of the proposed initiative, nor to strike the substance of the proposed initiative because it is a change in the law. To the contrary, it may be assumed that the initiative process does involve a change in the law.

In their first "Issue Presented" by Petition for Review of May 30, 2006, the Petitioners essentially ask this Court to strike the substance of the proposed initiative by framing the issue in terms of whether the Title Board is able to set a title, given the subject matter. Mr. Gorman and Mr. Real submit that this is a transparent attempt to avoid the very limited review accorded the Title Board and this Court because of the unpopularity of the proposed language with the Petitioners. The intent and effect of the initiative is fairly set forth in the plain language of the proposed ballot initiative. In framing the first issue, the Petitioners attempt to insinuate that the voters are unable, from reading the measure, to understand the consequences of a "yes or no" vote.

The standard for clarity is set forth by the Legislative Assembly:

> To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters. The draft shall not present the issue to be decided in such manner that a vote for the measure would be a vote against the proposition or viewpoint that the voter believes that he or she is casting a vote for or, conversely, that a vote against the measure would be a vote for a proposition or viewpoint that the voter is against. CRS § 8-40-105(3).

The text of the ballot initiative easily passes this test, and the Title Board unanimously entered

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Q: (By Commissioner Hobbs) One of the problems in (petitioner's) view is that it's unclear whether the measure is restating common law or is it overturning the existing law.

A: (By proponent Kaufman) It would be overturning existing law which was attempted in the State Legislature. That measure did fail. And now it's an attempt to allow the voters to make that decision; to overturn common law.

this conclusion in its May 17, 2006 and May 25, 2006 Orders.

The review of the Title Board is limited to:

> 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 understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment . . . shall correctly and fairly express the true intent and meaning thereof. Ballot titles shall be brief . . . (and) shall unambiguously state the principle of the provision sought to be added, amended, or repealed. CRS § 1-40-106(3)(b).

The Title Board did not find the text of the proposed initiative so vague and ambiguous that it could not be titled. To the contrary, each Commissioner made concluding comments to the effect that the meaning of the citizens' language was ascertainable. As such, it is improper for this Court to review the substance of the initiative or to substitute the Court's interpretation for that of the Title Board.

C. The Title Fairly Informs the Voters of the Measure's Intent.

In its second "Issue Presented" by Petition of May 30, 2006, the petitioners argue that the title is unfair and misleading because the title does not "sufficiently inform" the voters of the meaning of each of the terms in the title. After argument from three petitioners, the Title Board voted 3-0 to grant the Motion of the proponents to reiterate the text of the initiative in the title. The Board indicated it found the title was a simple statement of a legal principle.[6]

In the past, this Court has not required the Title Board to define terms in the title. In fact, to the contrary, CRS § 1-40-106(3)(b) requires ballot titles to "be brief". The Board's job is

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[6] Comments of Commissioner Hobbs at the Title Board's Reconsideration Hearing, May 25, 2006, please see *infra*, n. 14 at 12; Comments of Commissioner Eubanks, (1:01:30) "I think we can ascertain what this measure does in terms of how it's implemented and who all it impacts."

to set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation. However, the titles need not spell out every detail of a proposal. In re Ballot Title 1999-2000 No. 256, 12 P.3d at 256. The titles are not required to include definitions of terms unless the terms "adopt a new or controversial legal standard which would be of significance to all concerned" with the initiative. In re Proposed Election Reform Amendment, 852 P.2d 28, 34 (Colo. 1993). The titles and summary are intended to alert the electorate to the salient characteristics of the proposed measure. They are not intended to address every conceivable hypothetical effect the Initiative may have if adopted by the electorate. In re Ballot Title 1999-2000 No. 255, 4 P.3d 485, 497 (Colo. 2000).

A voter passed initiative may lead to enacting legislation and litigation. This Court has recognized that the General Assembly and courts may be poised to interpret the meaning of the initiative after its passage. This Court recognized that reality in its opinion on the proposed initiative on water rights, 877 P.2d 321, 327 (Colo. 1994) stating, "because the proposed amendment contains no definition of "strong public trust doctrine," such a definition must await future judicial construction and cannot appropriately be included in the title or submission clause". Likewise, in Ballot Title 1999-2000 No. 256, this Court specifically commented on the omission of defined terms in the title, indicating it was aware that litigation might ensue.[7]

There is nothing new and controversial about a legal standard which requires a party to pay "the fair value of damages". While it may be a change in the standard for damages from

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[7] In Re Ballot Title 1999-2000 No. 256, 12 P.3d 246, 256 (Colo. 2000). "Should the Initiative pass, the interplay between the existence of permanent, primary structures on the land and the requirement for water and sewer service *may possibly be the subject of future judicial interpretation.* The omission of the definition of "committed area" from the titles does not render them misleading or inaccurate." (emphasis added)

existing common law, it is not "new and controversial". The standard for damages with respect to claims for remedies in dissenting shareholder actions is already "the fair value" of the matter in question.[8] This is not a new or controversial remedy, and, at least in shareholder contexts, is already well defined in Colorado law. According to one of the petitioners, his members argue the proposed measure simply restates existing common law and is not a change in the law at all.[9] Given this admission, it is hard to understand how petitioners can credibly argue that the title misleads the voters about the intent of the measure.

D. The Title Clearly Conveys the Intent of the Initiative and Does Not Contain an Impermissible "Catch Phrase"

Petitioners also seek to deny the voters their opportunity to decide on the language of the proposed amendment by asserting that a commonly used term in the title, as fixed by the Title Board, is a "catch phrase". Petitioners argue that "fair value" are words that work to the proposal's favor without contributing to voter understanding, which is this Court's test for an impermissible catch phrase. Petitioners ignore the many definitions, each in context, of the adjective "fair". In the context of damages, the definer "fair" only connotes the objective price or value of the thing in question. It is a common business term not geared to elicit an emotional

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[8] For instance, in Pueblo Bancorp v. Lindoe, 63 P.3d 353, 361 (Colo. 2003) this Supreme Court distinguished "fair value" from "fair market value" and gave instructions on the elements of the determination of "fair value" given the context, instructed the trial court to balance the quantitative and qualitative facts in evidence, and set forth a deferential standard of review. The Court clarified "fair value" in the dissenters' rights statute from other state statutes which use the same term. Id. at 363. Courts may find some of these concepts useful in application to the present context.

[9] Testimony of petitioner Ken Wonstolen before the Title Board's Reconsideration Hearing, May 25, 2006 (57:28). "I don't know that this measure changes (existing damages law) at all. I could - some of my members argue this measure simply restates existing law - common law - puts it in the Constitution."

response. "Fair" is commonly utilized to describe the actual or replacement value of a thing for sale, as in the term "fair market value". A shopper dispassionately pays the "fair market value" of a can of peaches at the supermarket.

"Fair value" is a legal term distinguishable from "fair market value"[10] more applicable in a case where the value of an asset is diminished or has become less liquid by an outside action.[11] In the context of a lawsuit for diminished value brought about by the extraction of minerals including oil and gas, "fair value" is a particularly relevant question for the finder of fact.

The words "fair value" contribute to voter understanding of the intent of the measure. "Fair value" implies that the measure of damages is subject to deliberation and thought based upon the best evidence available on the question. "Fair value" is a commonly used term in accounting which is easily definable by qualified experts called to testify on the matter. The word "value" standing alone in the text of the proposed amendment differs little from "damages" and appears redundant. The term "fair market value" is inappropriate because it implies there could be no damages where there remains no market due to the extent of the damages. Also, some intangibles are not susceptible to the concept of "fair market value". Only "fair value" adequately expresses the objective test sought by the drafters to convey the measure of damages they seek to infuse into Colorado law. It is a neutral phrase descriptive of the proposal.

This Court is careful to recognize, but not create catch phrases. Matter of Title, 3 p.3d 1, 7 (Colo. 2000). Petitioners must offer evidence that the summary contains an impermissible

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[10] N. 8, *infra.*

[11] Pueblo Bancorp. v. Lindoe, 63 P.3d 353, 370 (Colo. 2003)(Kourlis, J., dissenting) "Because the (*Cheesman Realty*) court found that fair value was not susceptible to a precise mathematical formula, the court found that trial courts would have to determine the value to place on each factor on a case-by-case basis".

catch slogan beyond the bare assertion that political disagreement currently exists over the challenged phrase.[12] "Fair value" is a term of art, easily understandable to the public, which the Title Board properly found should be included in the title of the proposed amendment.[13] The fact that "fair value" may require legislative or judicial interpretation and refinement in the future did not invalidate the title, nor the validity of the measure before the Title Board.[14]

IV. Conclusion

The citizens of Colorado have enjoyed the right to initiate and pass constitutional amendments and laws since 1910. In Re Title, Ballot Title 1999-2000 #25, 974 P.2d 458, 462 (Colo. 1999). Article V, Section 1 of the Colorado Constitution reads "The first power hereby reserved by the people is the initiative."

The statute authorizing this Court's review of the title of a proposed initiative states that:

> It is not the intention of this article to limit or abridge in any manner the powers reserved to the people in the initiative and

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[12] "To preserve . . . the social institution of marriage" is not a prohibited catch phrase. Matter of Title, 3 P.3d at 7.

[13] Comments of Commissioner Dominico at the Title Board's Reconsideration Hearing, May 25, 2006 (32:30). "Free speech seems to be a catch phrase at least as much as "fair value" is. It's been fought out in litigation for hundreds of years and will continue to be." (1:07:20) "To the extent 'fair value' is a catch phrase, I don't think it's a misleading one."

[14] Comments of Commissioner Hobbs at the Title Board's Reconsideration Hearing, May 25, 2006 (51:36). "I think this measure is a little unusual in that it's so short. But it does simply state a legal principle. I was looking through Article II of the State Constitution, the Bill of Rights section. And section after section is three or four lines long stating simple statements of general legal principle a lot like this . . . section 10, "Freedom of Speech and Press", section 13, "Right to Bear Arms", section 14, "Taking Private Property for Private Use", section 5, "Freedom of Elections" . . . barely over two lines . . . and each of these sections has pages and pages of annotations. . . . If we apply the scrutiny that the Board is being asked to apply (by petitioners) to this measure . . . if those kind of things were to be proposed by citizens today, the implication would be that citizens . . . can't submit general legal principles that require interpretation."

> referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government. CRS § 1-40-101.

Consistent with that charge, this Court's review is very limited, consistent with its own pronouncement that it gives "great deference" to the Title Board's broad discretion.[15]

The proposed amendment is written in plain terms, easily understandable to a voter of reasonable intelligence. There is no effort to mislead the voters. The three member Board which reviewed the language heard those identical issues framed in the petitioners' May 30, 2006 Petition for Review. In very thoughtful deliberations, the Board voted unanimously that the petitioners' Motions for Rehearing would be denied. Each of the issues brought to this Court was reviewed in detail after arguments from three industry counsel and testimony. The legal standard articulated by the Board members was well researched and clearly stated.[16]

This Court is always mindful of its standard of review, particularly when the appropriate process is subject to being impermissibly broadened. This is not a substantive review of the content of the measure. The people have reserved the right to initiate laws as a "modern instrumentality of democratic government". The target of this initiative is the mineral extraction industry, including oil and gas interests, with whom the language of this ballot initiative is unpopular. The Petition to Review appears to attempt to attack the substance of the ballot initiative rather than the procedure observed at the Title Board.

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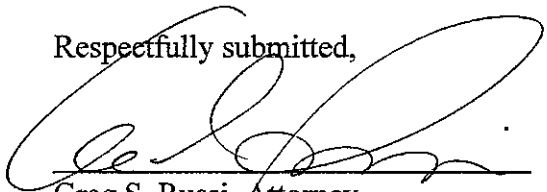
[15] Garcia v. Montero, 44 P.3d 213, 219 (Colo. 2002).

[16] E.g., Comments of Commissioner Dominico at the Title Board's Reconsideration Hearing, May 25, 2006, (1:06:45) "The real basis for the Court overturning a title . . . is if use of vague terms is somehow misleading or use of a 'catch phrase' misleads voters into voting for something because it's a 'catch phrase' when the actual effect would be something different from their understanding, and I don't think that's a problem in either count in this case.

Colorado electors Mr. Gorman and Mr. Real would very kindly ask that this Court defer to the Title Board in upholding its determinations which allowed the amendment of title by the proponents, and denied in all other respects those objections of the petitioners.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF was placed in overnight mail to the following petitioners' representatives, and first class mail, postage prepaid, to other addressees, this Ninth day of June, 2006 and addressed as follows:

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