

SUPREME COURT OF COLORADO

101 West Colfax Avenue, Suite 800
Denver, CO 80202

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2009)
Appeal from the Ballot Title Board

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE FOR 2009-
2010 #87

Petitioner:

JOHN GREGORY LEEDE, Objector and
DOUGLAS KEMPER, a registered elector of the
State of Colorado

vs.

Respondents:

ROBERT HAMEL and JAY P.K. KENNEY,
Proponents

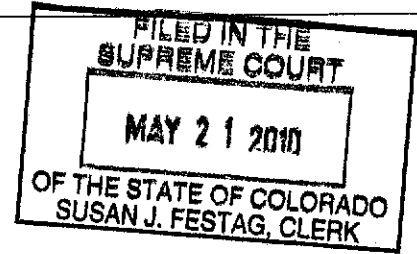
and

Title Board:

WILLIAM A. HOBBS, DANIEL L. CARTIN, and
DANIEL DOMENICO

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Case Number: 2010SA130

**PETITIONER LEEDE'S OPENING BRIEF
(PROPOSED INITIATIVE 2009-2010 #87)**

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). It contains 5,411 words. Further, the undersigned certifies that the brief complies with C.A.R. 28(k). 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, not to an entire document, where the issue was raised and ruled on.



Douglas J. Friednash

Petitioner John Gregory Leede (the "Petitioner"), a registered elector of the State of Colorado, through his counsel, Greenberg Traurig, LLP, respectfully submits his Opening Brief, pursuant to Colo. Rev. Stat. §1-40-107(1), and seeks review of the Title Setting Board (the "Title Board") action in setting a title, ballot title, and submission clause for Proposed Initiative 2009-2010 #87 (the "Initiative"). The Initiative concerns the public's ability to use the water of every natural stream within the state without the consent of the owner of the private property.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the title informs voters of the Initiative's true meaning and intent, because it fails to inform voters of its central element of the Initiative: that the measure grants the public the right to use the water of every natural stream *without the consent of the owner of the private property*. In addition, despite fundamental differences between this Initiative and Proposed Initiative 2009-2010 #88, the titles set for both initiatives are identical.

2. Whether the Initiative violates the single subject requirement of the Colo. Const. art. V, § 1(5.5) and the Colo. Rev. Stat. § 1-40-106.5.

STATEMENT OF THE CASE

I. Nature Of The Case, Course Of Proceedings, And Disposition

Robert Hamel and Jay P.K. Kenney (the “Proponents”) proposed the Initiative. On April 6, 2010, the directors of the Colorado Legislative Council and the Office of Legislative Legal Services submitted a Memorandum to the Proponents in compliance with Colo. Rev. Stat. § 1-40-105(1). On April 9, 2010, a review and comment hearing on the Initiative was held before designated representatives of the Offices of Legislative Council and Legislative Legal Services to address technical and substantive comments, as well as the representatives’ questions concerning the Initiative.

On April 9, 2010, the Proponents submitted a final version of the Initiative to the Secretary of State.

On April 21, 2010, the Title Board held a public hearing in order to establish the Initiative’s single subject and to set the Initiative’s title and submission clause.

On April 28, 2010, Petitioner filed a Motion for Rehearing alleging that: (1) the Initiative violated the single subject requirement of Colo. Const. art. V, § 1(5.5) and the Colo. Rev. Stat. § 1-40-106.5; (2) the title set for the Initiative failed to express the Initiative’s true intent and meaning; and (3) the title set for the Initiative contained an impermissible catch-phrase.

The Motion for Rehearing was heard at the next meeting of the Title Board on April 30, 2010. In response to the Motion for Rehearing and oral argument, the Title Board made certain revisions to the Initiative's ballot title and submission clause. The Motion for Rehearing was otherwise denied by a vote of two to one.

This appeal timely followed.

II. Statement Of Facts

The Initiative seeks to add a new section 9 to Article XVI of the Colorado Constitution, a copy of which is attached as Appendix A. The Initiative, in pertinent part, states:

The right to use the water of every natural stream within the state of Colorado historically included and shall continue to include: (a) the right to float any craft upon any natural stream that is capable of such use; (b) the right, as a necessary incident to that use, to make such contact with the bed or banks of the natural stream below the high water mark that is the minimum possible for the full and safe enjoyment of the public's easement to float; and (c) the right to fish while floating.

See Appendix A.

The title of the Initiative, which is attached as Appendix B, states:

An amendment to the Colorado constitution concerning public use of the water of every natural stream within the state, and, in connection therewith, declaring that the public may float any craft upon any natural stream that is capable of such use, make contact with the bed or banks of the natural stream below the high water mark, and fish while floating, and stating that the measure shall not be construed to allow access to a natural stream by crossing private land without permission, allow the dropping or dragging of an anchor or the intentional broaching of a craft, create a water right, affect any

existing water right, or impair the right to appropriate water, or affect title to the bed or banks of any natural stream.

The ballot title and submission clause of the Initiative are identical to the ballot title and submission clause of Proposed Initiative 2009-2010 #88, but these initiatives are substantively different. A copy of the Proposed Initiative 2009-2010 #88 and its ballot title are attached as Appendix C.

SUMMARY OF ARGUMENT

The title, ballot title, and submission clause mislead voters as to the Initiative's true intent and meaning. The true intent of this Initiative is to give the public the right to use waters of every natural stream overlying private property without the consent of the owner. This title is misleading because: (1) it does not notify voters that the measure grants the public the ability to access or use the water of every natural stream within the state without the consent of the private property owner; (2) it does not inform the voter that this Initiative retroactively seeks to change existing Colorado law; and (3) despite fundamental differences between initiatives, this title is identical to the ballot title and submission clause set for Proposed Initiative 2009-2010 #88.

The Initiative also violates the single subject requirement. The Initiative contains multiple subjects. The first subject seeks to prospectively change Colorado law to allow the public the right to use the water of every natural stream within the state of Colorado. The second separate subject seeks to retroactively

reverse longstanding Colorado law and declare that the public has historically had the right to use the water of every natural stream within Colorado. In addition, the Initiative contains multiple substantive subjects: (1) the right to use the water of every natural stream by floating any craft; (2) the right to trespass onto private property by making contact with the bed and banks of every natural stream; and (3) the right to fish while floating.

ARGUMENT

I. The Initiative's Title Does Not Correctly And Fairly Express The True Intent And Meaning Of The Measure

The importance of setting a clear and accurate ballot title cannot be overstated. The titles drafted by the Title Board appear on the petitions circulated to collect signatures and on the election day ballot when voters consider a particular measure. The stakes are even higher when a constitutional proposal is presented.

A. Standard of Review

The Title Board is statutorily required to set a title that "shall correctly and fairly express the true intent and meaning" of the initiative. Colo. Rev. Stat. § 1-40-106(3)(b). In addition, 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." *Id.*

In order to fulfill this duty, the Title Board must unambiguously state the principle or provision sought to be added, amended, or repealed by the proposed measure. It is well established that the Title Board must act with the utmost dedication to the goal of drafting the title, ballot title, and submission clause in a manner that enables voters, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990); *In re Proposed Initiative Concerning "State Personnel System,"* 691 P.2d 1121, 1123 (Colo. 1984). This Court's duty is to ensure that the title, ballot title, and submission clause fairly reflect the proposed initiative so that the petition signers and voters will not be misled into supporting or opposing a proposition by reason of the words employed by the Title Board. *In re Proposed Election Reform Act*, 852 P.2d 28, 32 (Colo. 1993). This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant, provision that was obfuscated by other elements of the proposal. *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 446-47 (Colo. 2002).

While the ballot title should also be concise, this may not come at the cost of voter confusion or a misleading ballot title. "If a choice is made between brevity and a fair description of the essential features of a proposal, the decision must be

made in favor of full disclosure to the registered electors.” *In re Proposed Election Reform Act*, 852 P.2d at 32.

Finally, while the Title Board is not required to describe every feature of the proposed measure, eliminating a key feature of an initiative from the title is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; see also *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998* #62, 961 P.2d 1077, 1083 (Colo. 1998); *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000* #37, 977 P.2d 845, 846 (Colo. 1999).

B. The Ballot Title and Submission Clause is Misleading

1. *The ballot title and submission clause fail to inform the voters of the true intent and meaning of the Initiative*

Under Colorado law, the public already has certain rights to use the water of every natural stream overlying public land within the state. See Colo. Const. art. XVI, § 5. In *People v. Emmert*, 597 P.2d 1025, 1030 (Colo. 1979), this Court held that “the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner.” Therefore, as Colorado law exists today, the public has certain rights to use waters overlying public lands, but does not have the right to use waters overlying private lands without the consent of the landowner.

The true intent and consequence of this Initiative is to grant the public a new right: the right to use water of every natural stream overlying private land without the consent of the landowner. However, the subject clause of the ballot title merely states, "An amendment to the Colorado constitution concerning the public use of the water of every natural stream within the state . . ." See Appendix B. The subject clause of this Initiative's title not only fails to inform the voter of this proposed material change in Colorado law, which is the purpose of the Initiative, but its additional language, describing one of the measures other provisions, confuses the voter as to its true meaning and effect.

The history of the proceedings before the Title Board provides a useful starting point for this Court's analysis of whether the title, ballot title, and submission clause fairly reflect the content of the proposed initiative. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d at 241. During the Rehearing, Solicitor General Domenico sought to add such language to the ballot title over the objection of counsel for the Proponents of the measure. The following exchange took place between Solicitor General Domenico and counsel for the Proponents, whom conceded that this was one of the material reasons for the Initiative:

Mr. Domenico: Well, I'm not sure why you would need an amendment to the Constitution stating that people can use other people's land with consent. **I mean, the point of this is to**

make clear that you don't need consent to do this. That's the material reason for adopting this, I would think.

Mr. Grueskin: **It is one of the material reasons . . .**

Title Board Rehearing Proposed Initiative 2009-2010 #87 (“Rehearing Transcript”) 46:7-15, April 30, 2010 (emphasis added). A copy of the transcript is attached as Appendix D.

The omission of language from the ballot title’s subject clause, that fairly and accurately expresses the true intent of this Initiative, is a fatal defect. *In re Proposed Initiative 2001-02 #43*, 46 P.3d at 442; *see also In re Ballot Title 1997-98 #62*, 961 P.2d at 1082. In order to accurately reflect the true meaning and intent of this Initiative, the subject clause of the ballot title must include language that informs the voter that this Initiative grants the public the right to use the waters of every natural stream within the state without consent of the owner or without regard to existing private property rights. Without this language, or something similar, the ballot title is impermissibly misleading.

At the Rehearing, Proponents alluded to additional language in the ballot title and submission clause that already addresses this issue. *See* Rehearing Transcript 46:23-47:4. Specifically, the ballot title and submission clause include language from the Initiative text that, “the measure shall not be construed to allow access to a natural stream by crossing private land without permission.”

However, as Solicitor General Domenico stated, the inclusion of this language, without expressing the true intent and meaning of the measure, only exacerbates the problem and voter confusion.¹ This follows because it gives the voters the false impression that they cannot access a natural stream without the permission of a private property owner. However, this provision simply addresses a person's inability to "cross private land" without permission; it does not address the proposed public's use of water by floating craft through natural streams, allowing a boat to stop on private property, to tie-off a boat on a tree or other structure on private property, or to even fish a certain private stretch of a river. These are just a few of the many examples of the types of access the public would have on private property, without the consent of the owner or regard to the landowner's private property rights, if this measure is adopted.

The reasonable voter will not grasp this nuance. Voters will not understand or appreciate the sweeping change presented by the Initiative. This ballot title violates Colorado law because a general understanding of the effect of a "yes" or "no" vote will be unclear from reading the title. This Court has aptly recognized that "there may be situations, therefore, where the title and submission clause likely would create public confusion or ambiguity about the effect of an Initiative even though they merely repeat the language contained in the Initiative itself." *In*

¹ Mr. Domenico said, "[a]nd to me, the language later on, if anything, makes it more imperative to make that clear up above." Rehearing Transcript 49:10-12.

re Title, Ballot Title, Submission Clause, & Summary by the Title Board Pertaining to a Proposed Initiative on "Obscenity," 877 P.2d 848, 850 (Colo. 1994); *see also In re Title, Ballot Title, Submission Clause, & Summary Adopted April 17, 1996, by Title Setting Board Pertaining to Proposed Initiative Statute Proposed by Arthur Apple & James Meeker,* 920 P.2d 798, 803 (Colo. 1996) (title misleading as to true intent and meaning where the title and summary did not contain any indication that the geographic area affected would have been limited to the six-county Denver metropolitan area; therefore, there was a significant risk that voters statewide would misperceive the scope of the proposed initiative).

2. *The Initiative fails to inform the voter of the retroactive nature of measure*

This Court has held that a title adopted by the Title Board failed to provide a clear, concise summary of the initiative where it failed to convey that the proposed initiative contained numerous retroactive fundamental rights. *In re Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Section 2 to Article VII (Petition Procedures),* 900 P.2d 104, 109 (Colo. 1995).

At first glance, the Initiative may seem to propose only a prospective change in the law. However, a plain reading of the Initiative's language also reveals that the measure seeks to retroactively change Colorado law by asserting that the public already has the right to use the water of every natural stream within the State of

Colorado and that this right “historically included:” (1) the right to float; (2) the right to make contact with the bed and banks, including the nebulous reference to the public’s “easement to float;” and (3) the right to fish while floating. However, as discussed above, the Colorado Supreme Court has held that “the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner.” *Emmert* 597 P.2d at 1030. The ballot title does not reflect this proposed retroactive change.²

When pressed about the legal and practical impact of using the phrase “historically included” in the Initiative, counsel for the Proponents simply responded by stating that, “the courts will determine whether or not that has any particular impact.” Rehearing Transcript 20:25-21:2. General Domenico commented that counsel for the Proponents had been “coy” about how the “historically included” language should be interpreted, making it “a bit difficult for us to understand the measure and to write a title that accurately reflects” the measure’s intentions. Rehearing Transcript 24:23-25:12. Because the Proponents would not explain what was specifically intended by the inclusion of this language in the Initiative, the Title Board decided *sua sponte* that the language should be

² At the Rehearing, Petitioner Leede objected to having the Initiative simply regurgitate the same language as expressed by the text of the Initiative. However, the voter should understand that the measure proposes to retroactively interpret past rights.

read to be insignificant and left out of the title and submission clause.³ Rehearing Transcript 39:9-41:8.

The Title Board's decision is incongruent with the plain language of this Initiative, which expressly evidences the fact that this is a fundamental and material purpose of the measure. By its own plain language, the phrase "historically included" requires a constitutional reinterpretation of previously settled rights. Further, the Proponent's remarkable position is belied by the essential differences between the various related initiatives they have proposed. Specifically, the only difference between Proposed Initiatives 2009-2010 #87 and #88 is the addition of this "historically included" language. Similarly, the only difference between Proposed Initiatives 2009-2010 #89 and #90 is the addition of this same "historically included" language.

Clearly, this is a material term that the Proponents intended to have meaning and should have been included in the ballot title and submission clause. *See In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-02, #21 & #22, 44 P.3d 213, 221 (Colo. 2002)* (titles set by the Board created confusion and were misleading because they did not sufficiently inform the voter of the parental-waiver process and its virtual elimination of bilingual education); *see also In re*

³ This Court has remanded matters to the Title Board with directions to strike the titles and summary and return the initiatives to its proponents when the original text of the initiative is difficult to comprehend and the title and summary are not clear and cannot be presented to the voters as currently written. *See In re Ballot Title 1999-2000 # 37, 977 P.2d at 846.*

Petition Procedures, 900 P.2d at 109 (holding that that ballot title was insufficient because it failed to convey the fact that the initiative would create numerous “fundamental rights” retroactively to 1990 unrelated to procedural changes.)

3. *This Initiative and Proposed Initiative 2009-2010 #88 have duplicative titles and submission clauses*

This ballot title and submission clause also lead to impermissible voter confusion because they are duplicative of another ballot title and submission clause set by the Title Board in this election. Ballot titles “shall not conflict with those selected for any petition previously filed for the same election.” Colo. Rev. Stat. § 1-40-106(3)(b). If this ballot title, along with the ballot title for Proposed 2009-2010 Initiative #88, is not changed, the voters will have identical ballot titles and submission clauses for two separate and distinct initiatives. Despite fundamental differences between this Initiative and Proposed Initiative 2009-2010 #88, the titles set for both initiatives are identical.

The fundamental difference between these two initiatives is that this Initiative states that “[t]he right to use the water of every natural stream within the state of Colorado has *historically included* and shall continue to include:” (1) the right to float; (2) the right to make contact with the bed and banks, including the nebulous reference to the public’s “easement to float;” and (3) the right to fish while floating. (emphasis added). This language, as discussed above, clearly assumes that the public already has these rights. However, Proposed Initiative

2009-2010 #88 does not include this retroactive subject. This is a fundamental difference between the two initiatives. However, due to the duplicative ballot titles, the public will not know about the fundamental difference between these initiatives by merely reading the ballot titles and submission clauses. Clearly, these duplicative titles will lead to impermissible voter confusion.

This Initiative's ballot title is identical to Proposed Initiative 2009-2010 #88. Therefore, pursuant to Colorado law, this Court should invalidate this Initiative's ballot title because these two ballot titles are identical, while the initiatives themselves are substantively different. *See e.g., In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 722 (Colo. 1994) ("What is prohibited are conflicting ballot titles which fail to distinguish between overlapping and conflicting proposals.")

II. The Initiative Violates The Single Subject Requirement⁴

A. Standard of Review

No ballot title may be set for an initiative if the proposed measure contains more than one subject. *See* Colo. Const. art. V, § 1(5.5) & Colo. Rev. Stat. § 1-40-106.5. A ballot title violates this requirement if it has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In*

⁴ Petitioner Leede incorporates by this reference and endorses the single subject arguments made in Petitioner Kemper's Opening Brief for this Initiative.

re Title, Ballot Title, & Submission Clause for 2009-2010 #24, 218 P.3d 350, 352 (Colo. 2009) (citations omitted). It is not proper to simply broaden the subject of a title to give the appearance of a single subject. *In re Title, Ballot Title & Submission Clause, for 2007-2008*, #17, 172 P.3d 871, 873-74 (Colo. 2007) (“multiple subjects may be improperly offered as a single subject by stating the subject in broad terms”). “An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative.” *Id.* at 875.

B. The Initiative has Multiple Subjects

This Initiative contains two distinct and separate purposes, which are not dependent upon or connected with each other, as it attempts to apply this proposed constitutional amendment both prospectively and retroactively. First, the Initiative, as most initiatives, presents a prospective change to Colorado law. Second, the Initiative, by expressly stating that the public’s right to use water of every natural stream “historically included” certain rights, seeks to retroactively apply the proposed measure in a manner that is inconsistent with current Colorado law.

Furthermore, this Initiative contains additional substantive subjects: (1) the right to float; (2) the right to make contact with the bed and banks, including the

nebulous reference to the public's "easement to float;" and (3) the right to fish while floating.

1. *By retroactively changing Colorado law, this Initiative contains two distinct subjects*

This Initiative seeks to add a new section to the Colorado Constitution to grant the public the "right to use the water of every natural stream within the state of Colorado historically included and shall continue to include . . . the right to float any craft . . . the right . . . to make such contact with the bed or banks . . . [and] the right to fish while floating." As Proponents have stated, the purpose of this Initiative "has to do with the use of natural streams. That's the single subject." Rehearing Transcript 16:19-20.⁵

By its plain language, this Initiative contains a second subject: the retroactive application of rights granted to the public in this Initiative. The plain language of this Initiative states the right to use the water of every natural stream has "historically included" the right to float, the right to make contact with the bed or banks, and the right to fish while floating.

This Court has held the *retroactive* creation of rights is a separate subject. *In re Petition Procedures*, 900 P.2d at 109. In that case, this Court considered whether an initiative for a proposed constitutional amendment to the State

⁵ However, just as "water" was too broad a theme to unite multiple subjects into a single subject, so is the "use of a natural stream." *In re Title, Ballot Title, Submission Clause & Summary Adopted April 5, 1995, by the Title Board Pertaining to Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1080 (Colo. 1995).

Constitution dealing with “petition procedures” violated the constitutional and statutory single-subject requirement. There, the initiative proposed prospective and retroactive changes in initiative, referendum, and recall rights and procedures, which the Court found to be separate subjects and, thus, held that the measure violated the single subject requirement.

Furthermore, this Initiative does not merely seek to retroactively state what Colorado law should have held, but also seeks to retroactively *reverse* longstanding Colorado precedent and essentially re-write history. By declaring that the public “historically” has had, without consent of the landowner, the right to float, the right to trespass on private property while floating, and the right to fish while floating, this Initiative seeks to retroactively reverse this Court’s decision in *Emmert*. As discussed above, the *Emmert* decision clearly holds that the public does not have the rights enumerated in the Initiative unless the private property owners consent to such use.

During the Rehearing, members of the Title Board did express doubts regarding whether the Initiative complied with single subject requirements. As General Domenico correctly pointed out:

[S]ay the law were clear, clearly established and . . . that in fact these are not historically established rights and this would be a change in law . . . [w]ould that not be -- to the extent, then, that the historically included language were to be given effect, would it not be a second subject?....

....

... My view is that we would have a single-subject problem on our hands, if not necessarily a violation, if this really did purport to change historic law.

Rehearing Transcript 22:7-15, 39:12-15. Further, it is of no significance that a statement of the Initiative Proponents may assert a differing interpretation when the plain reading of the Initiative reveals that it creates prospective and retroactive rights. *See e.g., In re Ballot Title 2007-2008, #17, 172 P.3d at 876.* Here, a plain reading demonstrates that the retroactive application of substantive rights is coiled up in the folds of a complex initiative.

Colorado law has been clear, since the *Emmert* decision in 1979, that the public has no right to use waters overlying private property without consent of the owner. Therefore, this Initiative's attempt to retroactively change existing Colorado law constitutes a separate subject from this Initiative's purpose of prospectively changing Colorado law to grant the public the use of every natural stream without consent of the owner.

2. *Right to use the water, the right to trespass on private property, and the right to fish are separate subjects*

This Initiative embodies an instance where the title has been improperly broadened to hide, among other things, the multiple subjects of the Initiative. Here, the ballot title and submission clause describe the single subject of the Initiative as "the right to use the water of every natural stream within the state."

The Proponents have characterized this Initiative under an overarching and generic theme in order to combine different proposals in the hopes of getting unrelated subjects passed by enlisting support from various advocates of the subjects (e.g., commercial rafters, fisherman, and other outdoor recreational users)--thereby securing the enactment of subjects that could not be enacted on their merits alone. *See In re Proposed Initiative on "Public Rights in Water II,"* 898 P.2d at 1080 (holding that "[t]he common characteristic that the paragraphs all involve 'water' is too general and too broad to constitute a single subject.").

Moreover, this Initiative contains three distinct and separate purposes.

1. The Initiative seeks to grant the public "the right to use the water of every natural stream." The substantive purpose and subject of this Initiative is to allow the public the use the water of every natural stream, including portions overlying private property. In doing so, it would also reverse longstanding common law, which provides that the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner. *Emmert* 597 P.2d at 1030.

2. The Initiative also grants the public the right to trespass onto private property. The Initiative gives the public "[t]he right . . . to make such contact with the bed or banks of the natural stream below the high water mark that is the minimum possible for the full and safe enjoyment of the public's easement to

float.” This right to make contact with the bed or banks of a natural stream equates to giving the public the right to trespass on private property. The right to trespass is a completely different subject from the right to use the water of every natural stream.

3. The Initiative also provides the public “[t]he right to fish while floating.” This right to fish would allow the public to fish on waters overlying private property, which may be stocked with fish supplied by the private property owner. This is a purpose distinctly different from the right to float, the right to make contact, and a granted “easement to float” because fishing is a separate activity from floating and contacting the bed and banks.

The Initiative sets forth three distinct rights under this broad umbrella, but a voter reading the ballot title cannot ascertain whether the Initiative grants rights beyond the three enumerated subjects or whether the public’s right to use the water of every natural stream contains any restrictions or limitations. Thus, the title does not enable the voter, whether familiar or unfamiliar with the subject matter of this proposal, to determine intelligently whether to support or oppose this proposal.

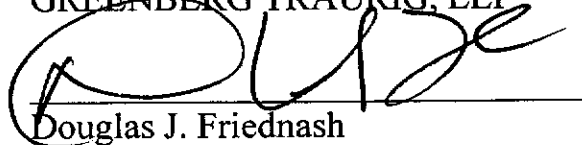
CONCLUSION

Petitioner Leede respectfully requests that this Court reverse the actions of the Title Board with directions to decline to set a title and return the Initiative to the Proponents for failure to comply with single subject requirements or, in the

alternative, that the title be corrected to accurately reflect the true intent and meaning of the Initiative.

Respectfully submitted this 21st day of May, 2010.

GREENBERG TRAURIG, LLP

A handwritten signature in black ink, appearing to read 'Douglas J. Friednash', written over a horizontal line.

Douglas J. Friednash

Cuneyt A. Akay

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2010, a true and correct copy of the foregoing **PETITIONER LEEDE'S OPENING BRIEF (PROPOSED INITIATIVE 2009-2010 #87)** was served via overnight delivery to the following:


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Karen Brock

APPENDIX A

RECEIVED

APR 09 2010

9:13 AM
CFA
MM

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

Colorado Secretary of State

Article XVI of the Constitution of the State of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

SECTION 9. RIGHTS OF USE – NATURAL STREAMS.

(1) **Purposes and findings.** REASONABLE ACCESS TO COLORADO'S NATURAL STREAMS AND THE LANDS IMMEDIATELY ADJACENT TO THE NATURAL STREAMS IS AN IMPORTANT ELEMENT OF SAFE USE OF STATE WATERS. THE PEOPLE OF COLORADO CONFIRM AND CLARIFY THAT SPECIFIC RIGHTS ARE ASSOCIATED WITH THIS ACCESS AND FURTHER ACKNOWLEDGE THAT THE PUBLIC'S EXERCISE OF SUCH RIGHTS DOES NOT ADVERSELY AFFECT PROPERTY INTERESTS OF LANDOWNERS WHOSE PROPERTIES ARE ADJACENT TO NATURAL STREAMS.

(2) **Rights of use.** THE RIGHT TO USE THE WATER OF EVERY NATURAL STREAM WITHIN THE STATE OF COLORADO HISTORICALLY INCLUDED AND SHALL CONTINUE TO INCLUDE:

(a) THE RIGHT TO FLOAT ANY CRAFT UPON ANY NATURAL STREAM THAT IS CAPABLE OF SUCH USE;

(b) THE RIGHT, AS A NECESSARY INCIDENT TO THAT USE, TO MAKE SUCH CONTACT WITH THE BED OR BANKS OF THE NATURAL STREAM BELOW THE HIGH WATER MARK THAT IS THE MINIMUM POSSIBLE FOR THE FULL AND SAFE ENJOYMENT OF THE PUBLIC'S EASEMENT TO FLOAT; AND

(c) THE RIGHT TO FISH WHILE FLOATING.

(3) **Limitations on rights of use.** NOTHING IN THIS SECTION SHALL BE CONSTRUED TO:

(a) ALLOW ACCESS TO A NATURAL STREAM BY CROSSING PRIVATE LAND WITHOUT PERMISSION;

(b) ALLOW THE DROPPING OR DRAGGING OF AN ANCHOR OR THE INTENTIONAL BROACHING OF A CRAFT;

(c) CREATE A WATER RIGHT, AFFECT ANY EXISTING WATER RIGHT, OR IMPAIR THE RIGHT TO APPROPRIATE WATER; OR

(d) AFFECT TITLE TO THE BED OR BANKS OF ANY NATURAL STREAM.

(4) **Definition.** "HIGH WATER MARK" OF A NATURAL STREAM MEANS MEANS THE VISIBLE CHANNEL OF A NATURAL WATERCOURSE WITHIN WHICH WATER FLOWS WITH SUFFICIENT

FREQUENCY SO AS TO PRECLUDE THE ERECTION OR MAINTENANCE OF MAN-MADE IMPROVEMENTS WITHOUT SPECIAL PROVISION FOR PROTECTION AGAINST FLOWS OF WATER IN SUCH CHANNEL OR THE CHANNEL DEFINED BY THE MEAN ANNUAL FLOOD, WHICHEVER IS GREATER.

APPENDIX B

Ballot Title Setting Board

Proposed Initiative 2009-2010 #87¹

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

An amendment to the Colorado constitution concerning public use of the water of every natural stream within the state, and, in connection therewith, declaring that the public may float any craft upon any natural stream that is capable of such use, make contact with the bed or banks of the natural stream below the high water mark, and fish while floating, and stating that the measure shall not be construed to allow access to a natural stream by crossing private land without permission, allow the dropping or dragging of an anchor or the intentional broaching of a craft, create a water right, affect any existing water right, or impair the right to appropriate water, or affect title to the bed or banks of any natural stream.

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 use of the water of every natural stream within the state, and, in connection therewith, declaring that the public may float any craft upon any natural stream that is capable of such use, make contact with the bed or banks of the natural stream below the high water mark, and fish while floating, and stating that the measure shall not be construed to allow access to a natural stream by crossing private land without permission, allow the dropping or dragging of an anchor or the intentional broaching of a craft, create a water right, affect any existing water right, or impair the right to appropriate water, or affect title to the bed or banks of any natural stream?

Hearing April 21, 2010:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 6:31 p.m.

Hearing April 30, 2010:

Motions for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 2:53 p.m.

¹ Unofficially captioned "Use of Colorado Water Streams" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

APPENDIX C

Initiative #88 - Final
and
Initiative #88
Final Ballot Title

RECEIVED

APR 09 2010 4:13am
CS
MH

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

Colorado Secretary of State

Article XVI of the Constitution of the State of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

SECTION 9. RIGHTS OF USE – NATURAL STREAMS.

(1) **Purposes and findings.** REASONABLE ACCESS TO COLORADO'S NATURAL STREAMS AND THE LANDS IMMEDIATELY ADJACENT TO THE NATURAL STREAMS IS AN IMPORTANT ELEMENT OF SAFE USE OF STATE WATERS. THE PEOPLE OF COLORADO CONFIRM AND CLARIFY THAT SPECIFIC RIGHTS ARE ASSOCIATED WITH THIS ACCESS AND FURTHER ACKNOWLEDGE THAT THE PUBLIC'S EXERCISE OF SUCH RIGHTS DOES NOT ADVERSELY AFFECT PROPERTY INTERESTS OF LANDOWNERS WHOSE PROPERTIES ARE ADJACENT TO NATURAL STREAMS.

(2) **Rights of use.** THE RIGHT TO USE THE WATER OF EVERY NATURAL STREAM WITHIN THE STATE OF COLORADO INCLUDES:

(a) THE RIGHT TO FLOAT ANY CRAFT UPON ANY NATURAL STREAM THAT IS CAPABLE OF SUCH USE;

(b) THE RIGHT, AS A NECESSARY INCIDENT TO THAT USE, TO MAKE SUCH CONTACT WITH THE BED OR BANKS OF THE NATURAL STREAM BELOW THE HIGH WATER MARK THAT IS THE MINIMUM POSSIBLE FOR THE FULL AND SAFE ENJOYMENT OF THE PUBLIC'S EASEMENT TO FLOAT; AND

(c) THE RIGHT TO FISH WHILE FLOATING.

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(a) ALLOW ACCESS TO A NATURAL STREAM BY CROSSING PRIVATE LAND WITHOUT PERMISSION;

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(c) CREATE A WATER RIGHT, AFFECT ANY EXISTING WATER RIGHT, OR IMPAIR THE RIGHT TO APPROPRIATE WATER; OR

(d) AFFECT TITLE TO THE BED OR BANKS OF ANY NATURAL STREAM.

Ballot Title Setting Board

Proposed Initiative 2009-2010 #88¹

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

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Hearing April 21, 2010:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 6:33 p.m.

Hearing April 30, 2010:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 2:57 p.m.

¹ Unofficially captioned "Use of Colorado Water Streams" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.