

SUPREME COURT, STATE OF COLORADO
101 West Colfax #800
Denver, Colorado 80202

ORIGINAL PROCEEDING PURSUANT TO C.R.S.
§ 1-40-107(2)

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE FOR 2007-
2010 #87 ("Use of Colorado Water Streams")

Petitioners: JOHN GREGORY LEED, Objector, and
DOUGLAS KEMPER a registered elector of the State
of Colorado

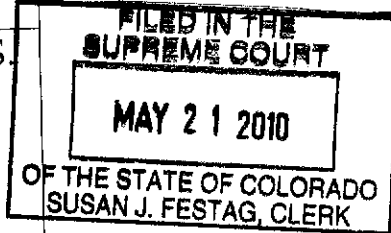
v.

Respondents: ROBERT HAMEL and JAY P.K.
KENNEY, Proponents.

and

Title Board: WILLIAM A. HOBBS, DANIEL
CARTIN and DANIEL D. DOMENICO.

Attorneys for Respondents:
Kara Veitch, Atty. Reg. No. 32227
Isaacson Rosenbaum P.C.
1001 17th Street, Suite 1800
Denver, Colorado 80202
Phone Number: (303) 292-5656
Fax Number: (303) 292-3152
E-mail: kveitch@ir-law.com



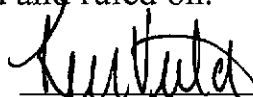
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Supreme Court Case
Number: 2010SA130

RESPONDENTS' OPENING BRIEF
(PROPOSED INITIATIVE 2009-2010 #87)

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 3,554 words.

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.



Kara Veitch

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I. STATEMENT OF ISSUES PRESENTED

1. Whether the Title Board correctly found that Initiative 2009-2010 #87 has a single subject of acknowledging the public right to use every natural stream in Colorado for floating.
2. Whether the title set for Initiative 2009-2010 #87 is not misleading because it adequately conveys the central features of the Initiative.

II. STATEMENT OF THE CASE

This Original Proceeding under C.R.S. § 1-40-107(2), challenges the actions of the Title Setting Board in setting a title (the "Title") for proposed Initiative 2009-2010 #87 ("Use of Colorado Water Streams") (the "Initiative"). The Respondents in this case are the proponents of the Initiative.

The Title Board conducted its initial public meeting and set the title, ballot title and submission clause for the Initiative on April 21, 2010. Petitioners, John Gregory Leed and Douglas Kemper, each filed separate Motions for Rehearing on April 28, 2010. The Motions for Rehearing were heard by the Title Board on April 30, 2010. At the rehearing, the Board granted in part and denied in part the Motions for Rehearing and set the Title. Petitioners each filed separate Petitions for Review with this Court on May 7, 2010, which have been consolidated into this action.

III. STATEMENT OF THE FACTS

The Initiative acknowledges that the public has the right to use every natural stream in Colorado for floating. As incident to floating, individuals are allowed to fish and, in order to safely and enjoyably float, to make contact with the bed or banks of the stream below the high water mark. The Initiative specifies that it will not: allow floaters to cross private land without permission; drop or drag an anchor; intentionally broach the floatation craft; or create, affect or modify water rights or title to the bed of the affected streams.

The Title Board set the following title:

An amendment to the Colorado constitution concerning public use of 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.

IV. SUMMARY OF ARGUMENT

The Initiative contains a single subject: acknowledging that the public may have certain uses of all natural streams in Colorado. The right to fish and make contact with the bed or banks of a natural stream below the high water mark, as incident to these uses, are not separate subjects; the Initiative recognizes an individual's right to do these activities only while floating.

The Title is clear and accurate. The Title declares that individuals have the right to float down every natural stream in Colorado. The omission of a specific reference that this right is granted without regard to the consent of the underlying landowners is not misleading, particularly given that the phraseology does not appear in the Initiative text. Similarly, it is not misleading to omit reference to the "historic" language in couching this perspective. Consequently, the Title Board's action in setting the Title should be upheld.

V. LEGAL ARGUMENT

A. Legal Standard of Review.

The Court's review of Title Board's actions is of limited scope. *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62* ("In the Matter of 2007-2008 #62"), 184 P.3d 52, 58 (Colo. 2008). The Court "will reverse the Board's action in preparing [titles] only if they contain a material and significant

omission, misstatement or misrepresentation." *Id.* This limited review "requires [the Court] to engage all legitimate presumptions in favor of the propriety of the Title Board's action in reviewing proposed initiatives." *Id.* Consequently, "when determining whether a proposed initiative comports with the single subject/clear title requirement, [the Court] may not address the merits of a proposed initiative, nor may [the Court] interpret its language or predict its application if adopted by the electorate." *Id.* (internal quotations omitted). The Court's inquiry is limited to the determination of whether the constitutional restriction on multiple subjects and unclear titles have been violated. *Id.* Moreover, "[i]n determining whether a proposed initiative contains more than one subject, [the Court] may not interpret its language or predict its application if adopted." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #255*, 4 P.3d 485, 495 (Colo. 2000). This includes the measure's application to constitutional, statutory and common law.

B. Initiative 2009-2010 #87 is a single subject.

1. *Parameters of Single Subject Analysis*

Article V, section 1(5.5) of the Colorado Constitution "requires that no measure shall be proposed by petition containing more than one subject." There is a violation of this requirement, when "the text of a measure [has] at least two

distinct and separate purposes which are not dependent upon or connected with each other." *In the Matter of the Title, Ballot Title, and Submission Clause for 2009-2010 #24* ("*In the Matter of 2009-2010 #24*"), 218 P.3d 350, 352 (Colo. 2009) (internal quotations omitted). "If the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law." *Id.* "[T]he single subject requirement does not preclude the use of provisions that are not wholly integral to the basis idea of a proposed initiative." *In re Proposed Initiative 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998).

The purpose of the single subject requirement is two fold: (1) "[I]t serves to ensure that each initiative depends upon its own merits for passage"; and (2) "[T]o prevent surreptitious measures so as to prevent surprise and fraud from being practiced upon voters." *In the Matter of the Title, Ballot Title, and Submission Clause 2007-2008 #61* ("*In the Matter of 2007-2008 #61*") 184 P.3d 747, 750 (Colo. 2008).

The single subject requirement must be liberally construed to avoid undue restrictions on the initiative process. *Id.* (citing *In re Proposed Initiative 1997-1998 #74* ("Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytical abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required

by the single subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.")

2. *The Initiative's single subject is recognizing the right to float.*

The single subject of the Initiative is to recognize the public's right to float down every natural stream in Colorado and, while floating, fish and make contact with the bed or banks of the stream below the high water mark. Fishing and contact with the bed or banks are not separate subjects. Rather, they specify what actions an individual may engage in as incident to floating. In other words, fishing and making contact are dependent upon and connected with floating. *See In re 2009-2010 #24*, 218 P.3d at 352.

It could be argued that the right to fish from any bank and stream bed is a separate subject. But, here, the right to fish only exists while an individual is floating. Importantly, the Initiative does not grant the public the right to fish from the banks or stream beds, and specifically does not grant the public the right to cross private land, except by floating.

Petitioners may argue that the "right to trespass" is a second, unrelated subject. Petitioners are mistaken. The right to trespass is merely a recharacterization of the right to float and this is not a separate subject. The right to exclude people from private property is a stick in the bundle of property rights.

Here, the Initiative recognizes that the stick to exclude people from floating down natural streams is not privately held; private land owners will retain control of the land, but they must acknowledge the right of persons to using the natural streams use – but limit their use – to that natural resource. These are not separate subjects. Because the Initiative does "not present a second issue coiled up in the folds of another, nor [does it] bundle two unconnected objectives under a single yes-or-no vote" the Title Board's decision should be affirmed. *See In re the Matter of the Title, Ballot Title, and Submission Clause for 2009-2010 #24 ("In the Matter of 2009-2010 #24")*, 215 P.3d 350, 354 (Colo. 2009).

3. *The Initiative's subject is not subdivided because it may – or may not – change current law.*

Petitioners will argue that because the Initiative changes common law property rights governing the ownership and use of streams overlying private property it has a second subject. Petitioner's contention is in error because any change in existing law affects only the use of the state's natural streams for purposes of floating.

Petitioners may point to *People v. Emmert*, 597 P.2d 1025 (Colo. 1979), for the proposition that owners of property beneath natural streams have the right to exclude people from floating and fishing on the stream. Even if Petitioners'

position is correct, the Initiative only affects those property rights with respect to floating. Thus, the alleged impact on property rights does not create a second subject.

Regardless, this Court may not consider the effect of the Initiative on the *People v. Emmert* decision or existing property rights law. "In determining whether a proposed initiative comports with the single subject requirement, [Courts] do not address the merits of a proposed initiative, nor [does the Court] interpret its language or predicts its application if adopted by the electorate." *In the Matter of 2007-2008 #62*, 184 P.3d at 59 (emphasis original). This Court's analysis is "limited to determining whether the constitutional prohibition against multiple subjects and unclear title has been violated." *Id.* at 58.

The long-range effect of Petitioners' argument would keep virtually every initiative off the ballot. An initiative will naturally impact current constitutional provisions, existing statutes and regulations, and even the common law. An initiative could not bring about meaningful reform if it were not allowed to affect the sources of related areas and legal authority.

"If the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law." *In the Matter of 2009-2010 #24*, 218 P.3d at 352. Here, The Initiative has a single purpose – to declare that individuals have

the right to float on every natural stream in Colorado. This right includes the right to fish while floating and to make contact with the bed or banks below the high water mark as is necessary for the "full and safe enjoyment of the public's easement to float." Because the Initiative has a single subject, the Title Board's action in setting the Title should not be overturned.

C. The title is clear and accurate.

1. *Parameters of Clear Title Analysis.*

The Court gives "great deference to the Title Board in the exercise of its drafting authority...." *In the Matter of 2007-2008 #62*, 184 P.3d at 60 (emphasis added). The goal of setting titles is to succinctly identify the purpose. *In re Proposed Initiative 1997-1998 #74*, 962 P.2d 927, 930 (Colo. 1998). Consequently, a title "need not spell out every detail of a proposed initiative in order to convey its meaning accurately and fairly." *Id.* Rather, titles need only convey the "central features" of the initiative. *In the Matter of the Title, Ballot Title, and Submission Clause 2007-2008 #61* ("*In the Matter of 2007-2008 #61*"), 184 P.3d 747, 752 (Colo. 2008).

The Court "will uphold the Board's choice of language if it clearly and concisely reflects the central features of the initiative." *In the Matter of 2007-2008 #61*, 184 P.3d at 752. The Court's role is not to "rephrase the language

adopted by the Board to obtain the most precise and exact title." *Id* at 752. The Court "will reverse the Title Board's decision only if the titles are insufficient, unfair or misleading." *In the Matter of 2007-2008 #62*, 184 P.3d at 60.

2. *The Title clearly and accurately describes the right to float.*

The Title is clear and accurately reflects the central features of the Initiative: acknowledging the right to float on every natural stream in Colorado, subject to specific limitations. Petitioners allege that the Title is misleading because it does not specify that the right to float is granted without regard to the land owner's consent. Such a statement is unnecessary. The phraseology is characterization, not a provision of the Initiative. It is not the Title Board's job to editorialize about the measure. Rather, it must summarize the measure's central features. *In the Matter of 2007-2008 #61*, 184 P.3d at 752. Here it has done so.

The Title acknowledges that "the public may float any craft upon any natural stream that is capable of such use...." (Emphasis added.) The term "any natural stream" would include streams that flow over private property. As a result, the Title clearly provides that individuals have a right to float on streams, including those over private property, without regard to the landowner's consent.

The Title adequately describes the ability to float through private property, but not cross private property to access a stream. The Initiative's purpose and

findings subsection states, "The People of Colorado... acknowledge that the public's exercise of such rights does not adversely affect property interests of landowners whose properties are adjacent to natural streams." The Title is clear. "[T]he measure shall not be construed to allow access to a natural stream by crossing private land without permission...." The limitation on crossing private property to access a stream is clearly conveyed in the Title.

Therefore, the Title Board's action in setting the Title should be upheld.

3. *The Title is not misleading despite the omission of "historically included" language.*

The Initiative provides, "The right to use the water of every natural stream within the state of Colorado *historically included* and shall continue to include...." (Emphasis added). Petitioners argue that Title is misleading because it does not incorporate this language. Petitioners further argue that the Title is misleading because the Initiative misstates Colorado law. According to Petitioners, there is no current or historical right to float and, under current Colorado law, floating on a stream through private property is trespass.

But the criminal trespass statutes list "stream banks and beds" as premises upon which trespass may be committed. C.R.S. § 18-4-504.5. The trespass statutes do not list streams. *Id.* Moreover, the water in the stream is not

necessarily owned by the underlying land owner. *Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 707 (Colo. 2002) ("[B]y reason of Colorado's constitution, statutes, and case precedent, neither surface water, nor ground water, nor the use rights thereto... belong to a landowner as a stick in the property rights bundle.") The water in the stream may be owned by the public.

Any reliance by Petitioners on the adoption of the principal of "cujus est solum, ejus est usque ad eum" (he who owns the surface of the ground has the exclusive right to everything above it) ("Cujus est solum Principal") in *Emmert* is misplaced. First, by its terms, *Emmert* does not apply to navigable streams. The parties in *Emmert* "stipulated that the [subject stream] was non-navigable and had not historically been used for commercial or trade purposes of any kind." *People v. Emmert*, 597 P.2d at 1026 and 1027 ("It is clear, therefore, that since the [subject stream] involved here is non-navigable....") Therefore, the holding in *Emmert* is limited to nonnavigable streams. *Id.* at 1026. (Question to be addressed by the Court was "Did the defendants have a right under section 5 of Article XVI of the Constitution of Colorado to float and fish on a nonnavigable natural stream as it flows through, across and within the boundaries of privately owned property without first obtaining the consent of the property owner?")

Second, the Cujus est solum Principal was long ago rejected by the United States Supreme Court as being obsolete. *Id.* (citing *United States v. Causby*, 328 U.S. 256, 261, 66 S.Ct. 1062, 1065, 90 L.Ed. 1206 (1946)). The Colorado Supreme Court also recognized the limitation of this principal. In *Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (Colo. 2002), landowners opposed a conditional water right application and sought a declaratory judgment that the storage of water above or below their lands would constitute a trespass. The landowners relied, in part, on the Cujus est solum Principal. In rejecting the landowners' position, this Court relied on an Ohio Supreme Court case which held, "[W]e do not accept appellant's assertion of absolute ownership of everything below the surface of their properties. Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property, we find that there are also limitations on the property owners' subsurface rights. We therefore extend the reasoning of [an earlier Ohio Supreme Court case], that absolute ownership of air rights is a doctrine which has no place in the modern world...." *Park County Sportsmen's Ranch, LLP*, 45 P.3d at 701.

There is nothing in the Initiative to suggest that it is creating a new right to float or amending existing property rights. The effect of the "historically included" language in the Initiative is beyond the Board's scope or this Court's review.

Petitioners are asking this Court to determine the Initiative's efficacy, construction and future application on property rights, "a task the Court cannot perform unless and until the voters approve the Initiative." *In the Matter of 2007-2008 #62*, 184 P.3d at 59. "In performing its title-setting function, the Board may not speculate on how a potential amendment would be interpreted and, if possible, harmonized with other relevant provisions. Such considerations are far beyond the scope of [the Court's] review of the titles and summary of an initiative petition." *In the Matter of 2009-2010 #24*, 218 P.3d at 355-56 (quoting *In re Title, Ballot Title, Submission Clause, and Summary for Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 721 (Colo. 1994).

The Court may not consider whether a better title would have included language recognizing the historical right to float. Courts "do not consider whether the Board set the best possible title, ballot title and submission clause and summary." *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008) (quoting *In re Fair Treatment Amendment*, 873 P.2d at 719. "Rather [the Court's] duty is to ensure that the title, ballot title and submission clause, and summary fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or

against a proposition by reason of the words employed by the Board." *Id.* (emphasis original). Here, the Title accurately conveys the central features of the Initiative – recognizing the right to float on any natural stream in Colorado. As a result, the Title Board's actions should be upheld.

4. *There is no potential for voter confusion.*

The Initiative and proposed Initiative #88 are substantially similar. There are only two differences: (1) the Initiative contains a definition of "High Water Mark", which is not included in proposed Initiative #88; and (2) the Initiative reads, "The right to use the water of every natural stream within the state of Colorado *historically included and shall continue to include...*" and proposed Initiative #88 reads, "The right to use the water of every natural stream within the state of Colorado *includes....*" (Emphasis added).

The titles for the Initiative and proposed Initiative #88 are identical and the titles for proposed Initiative #89 and proposed Initiative #90 are similar. C.R.S. § 1-40-106(3)(b) requires that "ballot titles... not conflict with those selected for any petition previously filed for the same election." "Such a conflict exists where the titles fail to accurately reflect the distinctions between the measures, and voters comparing the titles would not be able to distinguish between the two proposed initiatives." *In the Matter 2007-2008 #61*, 184 P.3d at 752.

Respondents, who are the proponents of all four initiatives, represent to the Court that they will pursue one of the four initiatives for the 2010 ballot. Because only one of the titles will be placed on the 2010 ballot, there will be no conflict in violation of C.R.S. § 1-40-106(3)(b).

VI. CONCLUSION

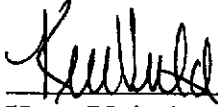
The Title Board correctly found that Initiative 2009-2010 #87 has a single subject: acknowledging the public's right to use every natural stream in Colorado for floating. This right is subject to specific limitations enumerated in both the Initiative and the Title.

The Title is not misleading. It clearly and accurately conveys the central features of the Initiative. Petitioners ask this Court to consider the efficacy, construction and future application of the Initiative. Specifically, Petitioners ask this Court to rule on the Initiative's effect on the *Emmert* case and existing property rights. The Court cannot consider these arguments in reviewing the actions of the Title Board.

Wherefore, Respondents respectfully request that this Court affirm the actions of the Title Board.

Respectfully submitted this 21st day of May, 2010.

ISAACSON ROSENBAUM P.C.

By: 
Kara Veitch
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2010, a true and correct copy of the foregoing **Respondent's Opening Brief**, was hand delivered to the following:

Douglas J. Friednash, Esq.
Cuneyt A. Akay, Esq.
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202

Stephen H. Leonhardt, Esq.
Alix L. Joseph, Esq.
Burns, Figa & Will, PC
6400 South Fiddlers Green Circle
Suite 1000
Greenwood Village, CO 80111

Maurice G. Knaizer, Esq.
First Assistant Attorney General
State Services Section
1525 Sherman Street, 6th Floor
Denver, CO 80203


Mary Kovalik