

SUPREME COURT, STATE OF COLORADO
101 W. Colfax, # 800
Denver, CO 80202

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

IN THE MATTER OF THE TITLE AND BALLOT
TITLE AND SUBMISSION CLAUSE FOR
PROPOSED INITIATIVE 2009-2010 # 89

Petitioners: DOUGLAS KEMPER a registered elector
of the State of Colorado

and

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

and

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

Attorneys for Petitioner:

BURNS, FIGA & WILL, P.C.
(A) Stephen H. Leonhardt (#15122)
(B) Alix L. Joseph (#33345)
6400 South Fiddlers Green Circle, Suite 1000
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FILED IN THE
SUPREME COURT
MAY -7 2010
OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case No.

10SA132

PETITION FOR REVIEW

Douglas Kemper, a registered elector of the State of Colorado, by and
through his counsel, Burns, Figa & Will, P.C., respectfully petitions this Court

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CLERK
COLORADO SUPREME COURT

pursuant to C.R.S. § 1-40-107(2) to review the actions of the Ballot Title Board with respect to the setting of the title, ballot title and submission clause for proposed Initiative 2009-2010 #89 which was submitted to appear on the November, 2010 ballot. Mr. Kemper is the Executive Director of the Colorado Water Congress.

I. ACTION OF THE BALLOT TITLE BOARD

The Ballot Title Board (the "Board") conducted a public meeting pursuant to C.R.S. § 1-40-106(1) on April 21, 2010, at which time it designated and fixed a title, ballot title and submission clause for the Initiative 2009-2010 #89. Mr. Kemper, a registered elector of the State of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on April 28, 2010. The Motion for Rehearing was heard at the next scheduled meeting of the Board on April 30, 2010. At the rehearing, the Board, by majority vote, amended the titles, but denied in all other respects Mr. Kemper's Motion for Rehearing. Mr. Kemper hereby seeks review of the final action of the Board pursuant to C.R.S. § 1-40-107(2) with regard to the issues set forth below.

II. ADVISORY LIST OF ISSUES PRESENTED

A. Whether, in identifying the measure's subject in the Title as "public use of the water of every natural stream within the state," The Board incorrectly determined that Initiative #89 is limited to a single subject, as required by Article V, Section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5, in light of the multiple purposes of this measure to:

1. Grant the public the right to float any craft upon any natural stream that is capable of such use, and while doing so, to make contact with private property underlying a natural stream below the "high water mark;" and
2. Declare, in direct opposition to the rule of law and property rights confirmed in *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979), that the right to use waters of natural streams "historically included" the right to float any craft upon any natural stream overlying private property that is capable of such use, including the specified right to make contact with the stream bed and banks on private property.

B. Whether the Board incorrectly denied the Petitioners' objection that the title and ballot title and submission clause ("Titles") for Initiative 2009-2010 #89 are misleading and likely to create confusion among the voters, are unfair and do not fairly express the true meaning and intent of the Initiative because:

1. The omission of the following material features of the Initiative render the Titles misleading:

i. The Declaration that "the right to use the water of every natural stream within the state of Colorado historically included . . . [the rights granted in the measure]."

ii. The fact that such rights are granted without regard to the landowner's consent, while declaring that "the public's exercise of such rights does not adversely affect property interests of landowners whose properties are adjacent to natural streams."

2. The Titles set for the Initiative are likely to create voter confusion in that they are identical to the Titles set for 2009-2010 Initiative #90, even though the text of Initiative #90 differs from that of this Initiative (#89) in material respects.

III. SUPPORTING DOCUMENTATION

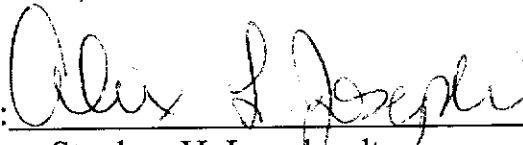
As required by C.R.S. § 1-40-107(2), a certified copy of Initiative 2009-2010 #89 with the corresponding title and submission clause, and a certified copy of Mr. Kemper's Motion for Rehearing and the Board's rulings thereon, are submitted herewith.

IV. RELIEF REQUESTED

Mr. Kemper respectfully requests this Court to find that the Title Board lacked jurisdiction to set the title, ballot title and submission clause because the measure contains multiple subjects or, in the alternative, order the Board to revise the titles and submission clause as specified above to reflect the true meaning and intent of Initiative #89 and to avoid voter confusion.

Respectfully submitted this 7th day of May, 2010.

BURNS, FIGA & WILL, P.C.

By: 
Stephen H. Leonhardt
Alix L. Joseph

6400 S. Fiddlers Green Circle, Suite 1000
Greenwood Village, CO 80111

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITION FOR REVIEW** was served via U.S. mail on this 7th day of May, 2010, as follows:

Via U.S. Mail:

Robert Hamel
P.O. Box 337
Cotopaxi, CO 81223
Proponent

Jay P.K. Kenney
910 Gaylord Street
Denver, CO 80206
Proponent


Via U.S. Mail & Email:

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Attorney for the Title Board



Paige Ranum



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **BERNIE BUESCHER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2009-2010 #89".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 4st day of May, 2010.



Bernie Buescher

SECRETARY OF STATE

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14
9:13am
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 HISTORICALLY INCLUDED AND SHALL CONTINUE TO INCLUDE:

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

(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.

(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.

**ISAACSON
ROSENBAUM P.C.**

THE BUSINESS OF SOLUTIONS®

Mark G. Grueskin
mgrueskin@ir-law.com

Direct Dial
303.256.3941

April 9, 2010

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APR 09 2010

01:13 PM
EG
MGM

Ms. Cesiah Gomez
Office of the Colorado Secretary of State
1700 Broadway, Suite 200
Denver, CO 80202

Colorado Secretary of State

Re: Initiative 2009-2010 #89

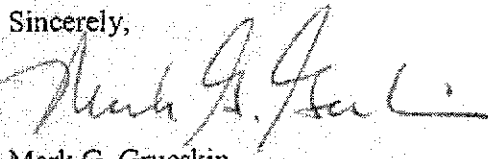
Dear Ms. Gomez:

Attached please find the original, amended, and final versions of Initiative 2009-2010 #89 for consideration by the Title Setting Board, submitted on behalf of the proponents by their counsel:

Robert Hamel
P.O. Box 337
Cotopaxi, CO 81223

Jay P.K. Kenney
910 Gaylord St
Denver, CO 80206

Sincerely,



Mark G. Grueskin

MGG/aak

Before the Colorado Title Setting Board

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APR 28 2010

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MOTION FOR REHEARING

Colorado Secretary of State

IN THE MATTER OF THE TITLE AND THE BALLOT TITLE AND SUBMISSION
CLAUSE SET FOR INITIATIVE 2009-2010 #89

Petitioner, Douglas Kemper, a registered elector of the State of Colorado, by and through his counsel, Burns, Figa & Will, P.C., hereby requests a rehearing and reconsideration of the Title Board's actions in this matter in setting the title and ballot title and submission clause (collectively the "Titles") on April 21, 2010, for Initiative #89 (the "Initiative"), which would amend Article XVI of the Colorado Constitution by adding a new Section 9 entitled "Rights of Use – Natural Streams."

Reconsideration is requested for the following reasons:

1. The Title Board lacks jurisdiction over this measure as the initiative violates the single-subject requirement. Colo. Const., art. V, sec. 1 (5.5).
2. The Titles violate C.R.S. § 1-40-106(3)(b) because they are misleading, likely to create confusion among the voters, do not correctly and fairly express the true intent and meaning of the initiative, contain a catch phrase, and fail to unambiguously state the principle of the provision sought to be added to the Constitution.

I. The Initiative Violates the Single-Subject Requirement.

The subjects of this measure include:

- a. Granting the public the rights to float any craft upon any natural stream that is capable of such use, regardless of the landowner's consent, and while doing so, to make contact with private property underlying a natural stream below the high water mark; and
- b. Declaring, in direct opposition to the rule of law established in *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979), that the right to use waters of natural streams "historically included" this right to float any craft upon any natural stream overlying private property that is capable of such use, including the specified right to make contact with the stream bed and banks on private property.

In *People v. Emmert*, the Colorado Supreme 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.” *Id.*, 597 at P.2d 1030.

In support of its decision, the Colorado Supreme Court further declared:

- i. “Section 5, Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation.” *Id.*, 597 P.2d at 1028;
- ii. “Constitutional provisions historically concerned with appropriation, therefore, should not be applied to subvert a riparian bed owner’s common law right to the exclusive surface use of waters bounded by his lands.” *Id.*, 597 P.2d at 1029; and
- iii. The “common law rule” of private ownership is “of more force and effect, . . . given its longstanding recognition in this state,” than competing rationales such as “the creation of a public trust based on usability.” *Id.*, 597 P.2d at 1027.

The measure seeks not only to overturn, but to expunge, this precedent by decreeing that Colorado’s constitutional right “historically included” the opposite principles.

II. The Titles Violate C.R.S. § 1-40-106(3)(b).

The Titles are improper and violate C.R.S. 1-40-106(3)(b) in the following respects:

- a. The omission of the following material features of the Initiative render the Titles misleading:
 - i. “The right to use the water of every natural stream within the state of Colorado historically included . . . [the rights granted in the measure].”
 - ii. “The people of Colorado . . . 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.”
- b. The “right to float” is a prohibited catch phrase that is intended to prejudice public consideration of the measure.
- c. The Titles set for the Initiative are likely to create voter confusion in that they are identical to those set for 2009-2010 Initiative #90, even

though the text of Initiative #90 differs from that of this Initiative (#89) in material respects. The text of Initiative #90 does not include the phrase "[t]he right to use the water of every natural stream within the state of Colorado **historically included and shall continue to include . . .**"; whereas, the text of this Initiative (#89) does include this phrase.

WHEREFORE, the Petitioner, Douglas Kemper, respectfully requests a rehearing and reconsideration of the Title Board's actions in setting titles for Initiative 2009-2010 #89.

Respectfully submitted this 28th day of April, 2010.

BURNS, FIGA & WILL, P.C.

By: 

~~Stephen H. Leonhardt~~

Stephen H. Leonhardt, #15122

Alix L. Joseph, #33345

6400 S. Fiddlers Green Circle, Suite 1000

Greenwood Village, CO 80111

**Attorneys for Petitioner
Douglas Kemper**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of April, 2010, a true and correct copy of the foregoing **MOTION FOR REHEARING** was served on the following via LexisNexis File & Serve or by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

Via U.S. Mail:


Robert Hamel
P.O. Box 337
Cotopaxi, CO 81223
Proponent

Jay P.K. Kenney
910 Gaylord Street
Denver, CO 80206
Proponent

Via U.S. Mail & Email:

Mark G. Grueskin, Esq.
Isaacson Rosenbaum, P.C.
1001 17th Street, Suite 1800
Denver, CO 80202
mgrueskin@ir-law.com
Attorney for the Proponents

s/ Paige Ranum



Paige Ranum

RECEIVED



APR 28 2010

ELECTIONS
SECRETARY OF STATE

3:25

COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 # 89 ("Use of Colorado Water Streams"¹)

MOTION FOR REHEARING

On behalf of John Gregory Leede, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2009-2010 #89 ("Use of Colorado Water Streams," hereinafter described as the "Initiative") which the Title Board ("Board") heard on April 21, 2010. This Motion for Rehearing presents three issues: (1) whether the Initiative violates the single subject requirement of the Colorado Constitution; (2) whether the ballot title is misleading because it fails to express the true intent and meaning of the Initiative; and (3) whether the title contains an impermissible catch phrase.

A. The Initiative violates the Single Subject Requirement.

A proposed ballot initiative must be limited to a single subject and a single, distinct purpose. *See* Colo. Const. art. V, § 1(5.5) & Colo. Rev. Stat. § 1-40-106.5. The purpose of the single-subject requirement for ballot initiatives is two-fold: to forbid the treatment of incongruous subjects in order to gather support by enlisting the help of advocates of each of an initiative's numerous measures and "to prevent surprise and fraud from being practiced upon voters." *See* C.R.S. § 1-40-106.5(e)(I, II). 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 &*

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.

Summary 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”).

However, 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 describes 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 a overarching and general 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 1076, 1080 (Colo. 1995) (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 distinct and separate purposes.

1. The Initiative seeks to grant the public “the right to use the water of every natural stream.” In doing so, it would to 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. *People v. Emmert*, 198 Colo. 137, 597 P.2d 1075, 1030 (Colo. 1979).

2. The Initiative 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.”

B. The Initiative Fails to Express the Initiative's True Intent and Meaning.

In addition to the separate, distinct, and unrelated subjects and purposes within the Initiative, the Initiative's title fails to fully express its true intent and meaning. Colo. Rev. Stat. §1-40-102(10) provides that the title should be a "brief statement that fairly and accurately represents the true meaning and intent of the proposed text of the initiative." Further, in setting a title, the 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, which shall correctly and fairly express the true intent and meaning thereof . . ." *In re Proposed Initiative on Sch. Pilot Program*, 874 P.2d 1066, 1069 (Colo. 1994).

This title misleads voters as to the Initiative's true intent and meaning. The title would mistakenly lead the voter to conclude that the rights currently exist; it does not fairly and accurately inform the voter that the measure would drastically change the law in Colorado. The true intent of this Initiative is to give the public the right to use waters of every natural stream regardless of private property rights. This right has never existed in Colorado. Moreover, this Initiative itself attempts to deceive the voter 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 and (2) the right to make contact with the bed and banks, including the nebulous reference to the public's "easement to float." However, 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." *People v. Emmert*, 597 P.2d 1025, 1030 (Colo. 1979). Therefore, the true intent and meaning of this proposed

Initiative is to grant new rights to the public and drastically change existing Colorado law and the ballot title fails to inform the public of this true intent and meaning.

The Initiative sets forth two distinct rights under this broad umbrella, but a voter reading the ballot title cannot ascertain whether the Initiative grants rights beyond the two 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.

C. The Title of The Initiative Contains An Impermissible Catch Phrase.

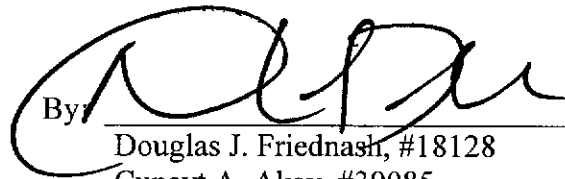
The ballot title of this Initiative contains the phrase "the right to float" to describe a portion of the purported public right to use every natural stream. This is an impermissible catch-phrase. "It is well established that the use of catch phrases or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000) (citations and internal quotations omitted). "Catch phrases" are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *Id.* In addition, "[s]logans are catch phrases tailored for political campaigns-brief striking phrases for use in advertising or promotion. They encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposal's merits." *Id.*

The catch-phrase "right to float" has been extensively used in newspaper articles and press releases over the past several months. Furthermore, this phrase masks the policy question regarding whether the public shall be allowed to access and use waters overlying private property. By including this phrase in the ballot title, the Board is tipping the substantive debate surrounding the issue of access and use of waters overlying private property to be submitted to the electorate.

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 28th day of April 2010.

GREENBERG TRAURIG, LLP

By: 
Douglas J. Friednash, #18128
Cuneyt A. Akay, #39085
Wm. Alex Furman, #38257

Petitioner's Address:


2100 Plaza Tower One
6400 South Fiddler's Green Circle
Greenwood Village, Colorado 80111

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2010, a true and correct copy of the foregoing **MOTION FOR REHEARING** was sent U.S. Mail as follows to:

Robert Hamel
P.O. Box 337
Cotopaxi, CO 81223

Jay P.K. Kenney
910 Gaylord Street
Denver, CO 80206


Karen Brock

Ballot Title Setting Board

Proposed Initiative 2009-2010 #89¹

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 and make contact with the bed or banks of the natural stream below the high water mark, 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 and make contact with the bed or banks of the natural stream below the high water mark, 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 6:34 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 3:05 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.