

SUPREME COURT, STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

ORIGINAL PROCEEDING PURSUANT TO
§1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

In the Matter of the Title and Ballot Title and
Submission Clause and Summary for 2009-2010
#91

Petitioner:

Christopher Howes, Objector,

v.

Respondents:

Richard G. Brown and Gerald L. Barber,
Proponents,

and

Title Board:

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Blue

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Case No.: 2010SA135

PETITIONER'S OPENING BRIEF

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I. ISSUES PRESENTED FOR REVIEW

A. Initiative proponents must submit an "amended draft with changes highlighted or otherwise indicated" to the Title Board. C.R.S. § 1-40-105(4). Proponents struck-through the entire original draft and submitted a wholly new draft as the amended draft. Did the proponents fail to submit a draft with "highlighted or otherwise indicated" changes, and, consequently, deny the Title Board of jurisdiction?

B. An initiative has multiple subjects if it groups distinct purposes under a broad theme or conceals a non-central purpose. This initiative groups a beverage tax, a statutory moratorium on changes to implementing entities and a stealthy, sub-rosa transformation of basin roundtables, and separate taxing and borrowing provisions. By grouping these topics, does the initiative violate the single-subject requirement?

C. This court will reject an initiative title that is insufficient, misleading, or contains a material and significant omission. This initiative's title omits the fundamental transformation of the basin roundtables, the exemption of alcoholic beverages from the beverage tax, the addition of significant borrowing authority, and imposes substantial new constitutional duties on the state Treasurer. Because the title fails to include these material provisions, should this court reject this initiatives title?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case is a challenge to the ballot title and submission clause under C.R.S. § 1-40-107(2).

B. Course of Proceedings and Disposition Below

Richard G. Brown and Garald L. Barber (alternatively the “Respondents” or the “Proponents”) submitted the original initiative language with Offices of Colorado Legislative Council Legislative Legal Services on March 26, 2010. Representatives of those offices held a review and comment hearing on April 9, 2010. The Proponents subsequently made extensive amendments to the initiative language and submitted the amended initiative language to the Secretary of State later that same day. The amended initiative language that the proponents submitted to the Secretary of State did not highlight, redline, or otherwise indicate specific or individual changes to the initiative's language. The amended language preserved the enacting clause, struck all text from this clause through the remaining six pages of the initiative, then inserted another six pages of new text.

On April 19, 2010, the Title Board considered Initiative 91 and determined that it had jurisdiction to set a title, whereupon it set a title for the initiative.

Christopher Howes filed a timely *Motion for Rehearing* on April 28, 2010, arguing *inter alia* that: (1) the Title Board did not have jurisdiction because following the review and comment hearing the proponents made substantial

amendments to the initiative language, but did not send a copy of the amended draft to the Title Board with the changes highlighted or otherwise indicated; (2) the initiative violated the single subject requirement; and (3) the title for Initiative 91 was misleading, inaccurate, and incomplete.

At the rehearing on April 30, 2010, Title Board amended the title. Specifically, it changed the title to use the term "tax" where it previously used the term "fee" and struck the impermissible catch phrase "water for future generations" before the term "fund." The Title Board did not change the title to identify new constitutional duties imposed on the State Treasurer, or state that the initiative only applies to non-alcoholic beverage containers. Additionally, the Title Board found that the measure had a single subject, and that the Proponents' amendments to the initiative language adequately highlighted or otherwise indicated changes to the revised initiative submitted to the Secretary of State.

Howes filed his *Petition for Review*. Howes filed his *Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2009-2010 #91* on May 7, 2010. This Court ordered submission of this *Petitioner's Opening Brief* concurrent with an opening brief from the respondent.

C. Statement of the Facts

The facts of this case and are stated above. The final text of Initiative #91 is contained in the certified copy of the *text, motion for rehearing, titles, and the*

rulings thereon of the Title Board on Proposed Initiative "2009-2010 #91," filed with the Court along with the Petition for Review.

The amended initiative language reviewed by the Title Board effects Colorado law in several ways. First, and most important, it creates a new tax on beverage containers. It imposes a set tax rate of one cent for each six fluid ounces, up to a maximum of fifty cents, on non-alcoholic beverage containers sold throughout the state. The amended initiative language also creates a new state fund to be overseen by the State Treasurer, the oversight itself a new duty for a constitutional officer. Additionally, the amended initiative language implements new procedures for the General Assembly to amend the tax and authorizes new powers to the General Assembly to borrow from a new state fund created through collection of the tax.

Finally, the amended initiative creates a four-year moratorium on changes by the General Assembly to existing basin roundtables and interbasin compact committees. The amended initiative language makes an express prohibition on the creation of any new agencies by the General Assembly that supersede or are superordinate to the basin roundtables or interbasin compact committees.

III. SUMMARY OF ARGUMENT

Although this court is deferential to Title Board actions and protective of the electorate's ability to use the initiate process, this initiative is a rare case. Allowing

this initiative to appear on the ballot would violate established precedents of this court.

First, the proponent's decision to redline all but the enacting clause of the initiative's original six-page text, and replace this with six new pages of amended text does not substantially comply with the mandatory requirement to highlight or otherwise indicate changes to an amended initiative. This failure deprived the Title Board of jurisdiction to set a title for the initiative.

Second, the initiative's broad purpose to conserve and protect Colorado waters masks subjects that are distinct from the beverage tax that is the initiative's central subject. These distinct subjects include a four-year moratorium on changes to the interbasin compact committee and to the basin roundtables and the novel (even revolutionary) and stealthy increase in the basin roundtable's authority that this moratorium locks in, and new legislative borrowing authority

Third, and finally, the initiative's title clearly misleads the electorate because it omits the administrative transformation of the basin roundtables, the initiative's exemption of alcoholic beverages, and the creation of new legislative borrowing authority, and imposition of new duties on the Treasurer.

IV. ARGUMENT

A. Standards of Review and Interpretation.

While the Court does not address the merits or future application of the

proposed initiative, it must “sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.”¹

B. The Title Board lacked jurisdiction because Proponents wholesale failure to adequately highlight or indicate changes in the amended initiative.

This is an issue of first impression. The Court has never confronted an instance where Proponents did not identify specific changes made to the initial version of an initiative.

In response to comments from Legislative Council and Legislative Legal Services, the Proponents made substantial changes to the initiative. Rather than highlighting or otherwise indicating specific changes to the initiative language, the Proponents submitted a wholesale “strike-below” in an attempt to indicate changes. Specifically, the Proponents submitted a document that reproduced the entire, revised version of the initiative, followed by the entire original initiative in strike-through font.²

Outside the enacting clause and the first subsection, no highlights, redlines, or other indicators appear marked on any page of the amended initiative language.

¹ *In re Title, Ballot Title, & Submission Clause & Summary for 1997-1998*, No. 84 961 P.2d 456, 458 (Colo. 1998); *In re Title, Ballot Title, & Submission Clause & Summary for 1997-1998*, No. 30, 959 P.2d 822, 825 (Colo. 1998).

² In the revised version, the Proponents retained part of the preface, specifically “Be it Enacted by the People of the State of Colorado: Secion 5 of Article VI of the constitution of the State of Colorado is amended to read:”

After the pages including the new initiative language, the Proponents inserted the original language from subsection (2) onward, with every word and every line struck through. No highlights, redlines, or other indicators appear marked on these pages indicating what language changed and what language remained the same.

This wholesale strike-through of the original language, combined with no indications in the revised language, did not did not properly indicate or highlight changes between the original and final version.

If an initiative proponent makes “*any* amendments” to a proposed initiative after the proponent’s final conference with the directors of the legislative council and the office of legislative legal services, “a copy of the of the amended draft with changes highlighted or otherwise indicated . . . *shall be* submitted to the secretary of state.”³ Because the statute uses the term “shall,” this requirement is mandatory.⁴ Furthermore, the Board may only retain jurisdiction to review the title if the Proponents comply with the change-identification requirement.⁵ An initiative proponent must substantially comply with the mandatory requirement to

³ C.R.S. 1-40-105(4) (emphasis added).

⁴ *Riley v. People*, 104 P.3d 218, 221 (Colo. 2004).

⁵ *In re Title, Ballot Title and Submission Clause, and Summary 1997-98, No. 109*, 962 P.2d 252 (Colo. 1998); *In re Title, Ballot Title and Submission Clause, and Summary for Proposed Initiated Constitutional Amendment “1996-3,”* 917 P.2d 1274, 1276 (Colo. 1996).

“highlight” or “otherwise indicate” changes in an amended initiative.⁶ Accordingly, this court has granted leeway to proponents who failed to meet the change-identification requirement for changes that were merely “technical and grammatical.”⁷ But “an appellate court may not ignore the total failure to meet those requirements” that the legislature designates as mandatory by using “shall.”⁸

Unlike the technical or grammatical changes at issue in *In Re Proposed Initiated Constitutional Amendment “1996-3,”* here the Proponents failed to highlight or indicate any changes. They did not indicate or highlight what language in the proposed initiative had changed and what remained the same. They merely deleted the initial version of the proposed initiative and replaced it with an entirely new version. In practical terms, they submitted the original and final versions only.

To determine what had changed, an interested citizen would have to tediously examine every word of both the initial and final versions of a single-spaced, six-page, 60 paragraph initiative, rather than just consult a red-lined version that reflects all edits. This case, however, is yet more extreme. Because the Proponents reorganized the initiative, an interested citizen would be required to

⁶ *Id.* at 1276; *but see McGee v. Secretary of State*, 896 A.2d 933, 939 (Me. 2006) (mandatory statutory term “must” in initiative filing deadline deprived secretary of state of authority to accept late-filed petitions that “substantially complied” with other requirements).

⁷ *In re Proposed Initiated Constitutional Amendment “1996-3,”* at 1276.

⁸ *In re A.P.H.*, 98 P.3d 955, 958 (Colo.App. 2004).

hunt through both versions and attempt to find where clauses had been moved (if not deleted entirely) in the final version.

This total failure to meet the mandatory requirement to highlight or indicate the changes between the initial and final versions of the proposed initiative divested the Board of jurisdiction to set the titles and summary. And by failing to indicate the changes in reorganization, the Proponents cannot meet the substantial compliance test, which looks to: (1) the extent of non-compliance; (2) whether non-compliance prevented substantial achievement of the statute's purpose; and (3) whether it can be reasonably inferred that proponents made a good-faith effort to comply.⁹

First, the Proponents' non-compliance was complete. The strike-below version submitted by the Proponents makes it impossible to track or identify any changes. They did not identify a single change. For example, the Paragraph 8(a) in the original version has been moved to Paragraph 6(a) in the final version. It is impossible to readily identify this change based on the strike-below provided by Proponents. Instead, an observer must spend hours trying to reconstruct the many changes made by Proponents.

Second, the non-compliance prevented substantial achievement of the statute's purpose. The purpose of the highlighting or otherwise indicating the change in the final version is self-evident: it allows readers, whether citizens,

⁹ *In re Proposed Initiated Constitutional Amendment "1996-3"*, at 1276.

interested parties, or government officials, to readily identify the changes made from the original to the final version. For example, a person (or a court), can readily determine whether all major changes were response to substantive questions and comments raised by the legislative council and legislative legal services.¹⁰ Without highlighted changes, citizens cannot readily determine whether any such changes might affect whether a citizen supports or opposes an initiative.

Finally, one cannot infer that the Proponents made a good -faith effort to comply, or whether non-compliance was part of an effort to mislead the public. On one hand, the Proponents did include a strike-below. On the other hand, the strike-below merely struck nearly all of the original initiative's language. Nonetheless, complete non-compliance and frustration of the statute's purposes, demonstrate that the Proponents did not meet the substantial compliance test.

C. Initiative 91 contains multiple subjects.

Under Colorado law, every proposed initiative must contain a single subject,¹¹ and no initiative may contain "more than one subject, which shall be clearly expressed in its title."¹² An initiative violates the single subject requirement when it: (1) relates to more than one subject; and (2) has at least two distinct and

¹⁰ See, e.g., *In re Matter of Proposed Initiative 1997-98 No. 10*, 943 P.2d 897, 901 (Colo. 1997).

¹¹ Colo. Const. art. V, § 1(5.5).

¹² *Id.*

separate purposes that are not dependant upon or connected with each other.¹³

This Court has recently stated that, “even when provisions share some common characteristic, they do not satisfy the single-subject requirement unless they have a unifying or common objective.”¹⁴ Consequently, themes that are “too general and too broad” cannot be applied to unite separate and discrete subjects into a single subject.¹⁵ Themes such as “water,”¹⁶ “monetary impact,”¹⁷ “non-emergency government services,”¹⁸ “environmental conservation” and “conservation stewardship”¹⁹ have each been rejected as topics too broad to link

¹³ *In re Title, Ballot Title, Submission Clause & Summary for a Proposed Initiative “Pub. Rights in Waters II”*, 898 P.2d 1076, 1078-79 (Colo. 1995); *In re Title, Ballot Title, & Submission Clause for 2005-2006, No. 55*, 138 P.3d 273, 277 (Colo. 2006); *In re Title, Ballot Title, & Submission Clause for 2007-2008, No. 61*, 184 P. 3d 747, 750(Colo. 2008); *Blake v. King*, 185 P.3d 142, 143(Colo. 2008).

¹⁴ *In re Title, Ballot Title & Submission Clause for 2007-2008, No. 62*, 184, P.3d 52, 57 (Colo. 2008).

¹⁵ *In re Title, Ballot Title, Submission Clause & Summary for a Proposed Initiative “Pub. Rights in Waters II”*, 898 P.2d 1076, 1080 (Colo. 1995); *In re Title, Ballot Title, & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 875-76 (Colo. 2007).

¹⁶ *In re “Pub. Rights in Waters II”*, at 1080.

¹⁷ *In re House Bill No. 1353*, 738 P.2d 371, 373 (Colo. 1987), (interpreting the single subject requirement for bills).

¹⁸ *In re Title and Ballot Title & Submission Clause for 2005-2006, No. 55*, 138 P.3d 273, 282 (Colo. 2006).

¹⁹ *In re Title, Ballot Title & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 875-76 (Colo. 2007).

discrete subjects. In each case this Court prohibited “grouping distinct purposes under a broad theme ... [to] satisfy the single subject requirement.”²⁰ That prohibition promotes the goal of barring “disconnected or incongruous measures” from passing in the same legislative act.²¹

1. The novel and significant administrative transformation that the initiative's four-year statutory moratorium imposes is a separate subject from a beverage-container tax.

The initiative locks-in changes to the basin roundtables and to the interbasin compact committee by imposing a four-year moratorium on any "amendment, repeal or modification" of the statutes that govern these entities.²² Constitutionally preventing the legislature from altering the form of statutory entities that it created is not necessarily connected to a beverage tax. A statutory moratorium alters fundamental legislature powers and prevents the legislature from exercising its constitutional powers on behalf of the people to respond to issues that involve agencies that it created. A tax does no such thing.

This distinctness and uniqueness of the statutory moratorium from the initiative's primary subject (a tax) is especially evident given the significance, scope, and novelty of the transformation of the basin roundtables that the initiative – very subtly and quietly – accomplishes. To see why, and to understand the

²⁰ *In re 2005-2006, No. 55*, at 278.

²¹ *Id.*

²² *Initiative*, § 10.

significance of the transformation that the initiative affects, one must first know how the basin roundtables currently function.

- a. The basin roundtables are currently toothless coordinators and facilitators with limited powers.

The legislature established eight permanent basin roundtables in 2006 to facilitate inter-basin discussion on water-management issues, and “to encourage locally-driven, collaborative solutions to water supply challenges.”²³ In their own words, “the basin roundtables facilitate discussions on water issues and encourage locally driven collaborative solutions.”²⁴ Their main responsibility” is “developing a basin-wide needs assessment.”²⁵

To perform their limited mission, the legislature gave the roundtables limited powers. These powers include assessing water-supply needs, proposing needs-based projects, making recommendations to the interbasin compact committee, and facilitating education, debate, and intra-basin dialogue and conflict-resolution related to water issues.²⁶ In short, as created by the legislature, the basin roundtables assess, educate, coordinate, and facilitate, and propose. They do not manage, administer, develop, or implement.

²³ C.R.S. § 37-75-104(1)(a).

²⁴ Interbasin Compact Committee, “Colorado Water for the 21st Century.”, <http://ibcc.state.co.us> (last visited May 24, 2010).

²⁵ *Id.*

²⁶ C.R.S. § 37-75-104 (2)(c)-(e).

- b. The initiative transforms the roundtables into well-funded, basin-wide water powerhouses.

The initiative fundamentally transforms both the funding and the authority of the basin roundtables. On the funding side, excepting maximum allocations of \$500,000 to each basin roundtable and to the interbasin compact committee, the initiative allocates 80% of its funds to the basin roundtables. According to its title, the initiative raises taxes by \$110 million. Thus, the roundtables will receive approximately \$88 million in new funding.

On the authority side, the initiative commands the roundtables to use this new \$88 million "only for the purposes specified in subsection (5) of this section."

At first glance, these ten purposes may seem innocuous and incidental. They involve:

- Protecting, administering, and developing renewable surface and groundwater supplies
- Drought mitigation strategies
- Water conservation and demand management
- Maximizing water re-use
- Fully utilizing of Colorado's water allocation
- Minimizing water loss by improving water storage, treatment and distribution
- Developing surface or aquifer water storage
- Furthering conjunctive use
- Improving water quality
- Management and stewardship of watershed habitat

But these seemingly innocuous authorized-spending categories are actually at the initiative's core, because they implicitly and vastly expand the basin roundtables' powers.

By commanding that the roundtables to use beverage-tax proceeds only for these specific purposes, the initiative implicitly authorizes the roundtables to pursue these purposes.²⁷ These purposes allow the roundtables to do far more than facilitate, coordinate, and plan. The newly empowered and funded roundtables can:

- Develop and implement water-conservation, demand-management, and drought-mitigation measures on a basin-wide basis;
- Develop surface or aquifer-based water storage projects; and
- Improve water storage, treatment, and distribution systems.

Perhaps most significantly, the newly-empowered and funded roundtables can expend funds on “the management and stewardship” of habitat “for species of animals, birds, and fish that are dependent on the watershed.” In effect, the initiative authorizes the roundtables to manage all land within the watershed on which any species that depends on the watershed resides. In this context, the initiative’s use of the word “stewardship,” is telling. A steward is “a person who manages another’s property or financial affairs” or “who administers anything as the agent of another or others.”²⁸ To expend funds on habitat “stewardship” the roundtables would necessarily manage or administer another’s property.

²⁷ *Initiative*, § 6(c)(II) (“The monies received by the roundtables *shall be used* only for the purposes specified in subsection (5) of this section.”) (emphasis added).

²⁸ Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/steward>, (last visited May 21, 2010).

- c. Transforming the basin roundtables is a separate subject than increasing beverage container taxes to protect and preserve Colorado water.

While locking in a fundamental transformation of the basin roundtables may be desirable, it too is a distinct and separate subject than imposing a new tax. This is so for at least two reasons.

First, grouping distinct purposes under a broad theme does not satisfy the single-subject requirement.²⁹ Just as the general theme of regulating water is too broad to prevent the public trust doctrine and water-district voting requirement from being distinct,³⁰ or conservation or environmental stewardship is too broad to encompass both an administrative reorganization and adopted a public-trust standard for a new agency to use in its decision-making,³¹ the initiative's theme of protecting and preserving Colorado waters cannot encompass the distinct subjects of transforming and imposing a statutory moratorium on further changes to the basin roundtables and assessing a new tax for water preservation.

The connection here between a locked-in administrative transformation and a tax is much more tenuous than seemingly more direct and intimate connections

²⁹ *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006).

³⁰ *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II."*, 898 P.2d 1076, 1080 (Colo. 1995).

³¹ *In re Title, Ballot Title & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 875-76 (Colo. 2007).

between subjects that this Court has held violated the single-subject rule. If the creation of a new agency and providing a standard of decision for the new agency – two things at least seemingly directly tied to and connected with a new agency – are (as the court has held) distinct subjects, then a tax and a locked-in administrative transformation - two things that are not as directly, intimately, or necessarily connected - must also be separate subjects. Transforming a coordinating and facilitating entity into a basin-wide operating authority that (among other things) is authorized to provide management and stewardship for all watershed-related wildlife habitat in its purview is a substantial — even revolutionary — change. It is not a related implementing detail or a “logical incident” of the initiative’s stated purpose.³² And it is not necessarily connected to the initiative’s stated (but overbroad) water-preserving subject. Thus, it is a separate, distinct subject.

Second, an initiative violates the single-subject rule if it hides purposes that are not related to its central theme.³³ This aspect of the single-subject rule prevents uninformed voting and surprise caused by items hidden within lengthy or complex

³² *In re 2005-2006 No. 55*, at 278-279 (quoting *In re Title, Ballot Title, Submission Clause & Summary for Proposed Initiative for 1999-2000, No. 258(A) “English Language Education in Pub. Schools”* 4 P.3d 1094, 1098 (Colo. 2000)).

³³ *In re 2005-2006, No.55*, at 277-78 (collecting cases).

proposals.³⁴ A key purpose and unexpected effect of this initiative — transforming the basin roundtables — is hidden. It is discoverable only through a close reading and appreciation of both the initiative's detailed text and how its sections interrelate, and knowing how basin roundtables presently function. A typical voter cannot reasonably be expected to have or to obtain this knowledge. As noted above, the administrative transformation of the basin roundtables is not related to or implied by the initiative's central theme. As such, the initiative violates the single subject requirement.

2. The new borrowing authority that the initiative authorizes is a separate subject than the beverage tax that the initiative imposes.

The initiative authorizes the legislature to borrow, interest-free, two-thirds of the six million dollar reserve fund that the initiative creates.³⁵ At first glance, this borrowing authority seems connected with the initiatives overall (and overbroad) purpose to protect and preserve Colorado water because the new borrowing authority is triggered by an action under the Colorado River Compact.³⁶ But a tenuous connection between borrowing and water cannot hide the differences between borrowing funds and imposing a new tax.

³⁴ *In re 2006-2006, No. 55*, at 277-78.

³⁵ *Initiative*, § 6(a).

³⁶ *Id.*

This Court has held that borrowing and taxation are a single subject only when an initiative proposed a new tax to retire specific new debt that an initiative also proposed.³⁷ In that initiative, the tax and the borrowing were inextricably intertwined because the tax provided a source of funds that were dedicated to repaying the borrowing. That is not the case here. Borrowing is neither the central subject nor the main feature of the beverage-tax initiative. The beverage tax is not dedicated to repaying borrowing, it provides a fund from which the legislature can borrow. And the initiative allows the legislature to enact a borrowing-repayment plan. Tax proceeds are not used to repay borrowing, which is, at best, an ancillary issue, rather than a central feature of the beverage-tax initiative.

Without an inextricable link between borrowing and a tax that is clear from an initiative's purpose and focus, increasing the legislature's borrowing ability is not a natural, logical, or foreseeable consequence of imposing a new tax, even where the borrowed funds are the same funds that the new tax raises. In fact, the Colorado constitution implicitly treats debt and taxes as distinct subjects, by mentioning them separately when requiring notice to voters.³⁸ Recognizing this separateness makes sense. Taxes provide revenue that can decrease debt; borrowing increases debt. Voters pay taxes immediately and expressly; state

³⁷ *Vern Bickel et. al v. City of Boulder*, 885 P. 2d 215, 229 (Colo.1995).

³⁸ Colo. Const, Art. X, § 20(3)(b) ("Titles shall have this order of preference: NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE.").

borrowing is typically repaid over time, and the details of how the state does so are seldom explicitly expressed.

D. The initiative's title is misleadingly insufficient.

A proposed initiative's subject must "be clearly expressed in its title." To do this, a ballot title must (1) "correctly and fairly express the true intent and meaning" of an initiative, and (2) "unambiguously state the principle of the provision sought to be added, amended or repealed."³⁹ This Court will reject a title if it is "insufficient, unfair, or misleading,"⁴⁰ "so inaccurate as to clearly mislead the electorate,"⁴¹ or it "contain[s] a material and significant omission, misstatement, or misrepresentation."⁴²

Here, the Board's title dutifully mentions the beverage container tax, its amount, its purpose ("providing moneys for water conservation in Colorado"), the purpose for which the funds may be spent ("preserving the availability of water"), exceptions created by two-thirds-majority, and a four-year moratorium on changes to basin-roundtable or interbasin-compact-committee statutes. Nevertheless, the

³⁹ C.R.S. § 1-40-106(3)(b).

⁴⁰ *Blake v. King*, 185 P.3d 142, 146 (Colo., 2008).

⁴¹ *Matter of Title, Ballot Title and Submission Clause, and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 314 (Colo. 1994).

⁴² *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1099 (Colo. 2000).

title does not sufficiently summarize the initiative because it omits two material elements. Without these elements, the title will clearly mislead the electorate because it does not fairly and correctly express the initiative's true intent and meaning.

1. Omitting the transformative expansion of the basin roundtables clearly misleads the electorate by omitting the *de facto* creation of eight new authoritative, basin-wide water powerhouses.

The first omitted material element is the transformation and expansion of the basin roundtables and the scope of their new, basin-wide authority. Failing to mention this misleads the electorate into believing that the state will merely spend beverage-tax funds to preserve water, ignoring the *de facto* creation of eight new administrative bodies. The title fails to inform the electorate that the initiative transforms eight sleepy facilitating roundtables into basin-wide expenditure and water-policy powerhouses, with new authority to implement, develop, and manage significant areas of intra-basin water policy, including authority to expend funds for habitat stewardship. Failing to disclose this will mislead voters by concealing a substantial policy change and delegation of authority to obscure entities of which few voters have ever heard.

2. The title misleads the electorate into believing that the beverage tax is a "sin tax" by omitting its exclusion of alcoholic beverages.

The Title Board approved a title that states that the initiative taxes "certain beverage containers" and exempts "certain fluids and beverages" from this tax.

Using the generic terms "certain" and "beverages" misleads the electorate by failing to notify voters that the tax excludes the politically potent and substantively significant category of alcoholic beverages.

The initiative's initial reference to "certain beverage containers" misleads the electorate by failing to inform voters that the proposed tax is not a "sin tax" that taxes traditionally-targeted and regulated "beverages": those that contain alcohol. Without these specifics, many voters are likely to infer that the tax specifically targets, rather than exempts, alcoholic beverages. The generic term 'beverage' is commonly used as slang for a beverage that contains alcohol. When an adult states that he or she 'thinks she will have a beverage,' a typical listener does not interpret this as a desire for fruit juice or cola, but for an alcoholic drink. The preceding modifier, "certain" reinforces the natural particularity of this association. Even if the term "beverage" was not associated with alcohol, preceding "beverage" with "certain" particularizes the term "beverage" so that it evokes an alcoholic beverage. This is particularly true for a beverage that triggers a tax. The public is conditioned to alcohol being regulated. And it is also familiar with efforts to raise revenues by taxing items or activities that are commonly thought to be harmful, such as cigarettes and liquor. A "sin tax" is an established and specific term of art that includes alcohol.⁴³ Against this background, taxing a "certain beverage" naturally

⁴³ Merriam-Webster Online Dictionary, [http://www.merriam-webster.com/dictionary/sin tax](http://www.merriam-webster.com/dictionary/sin%20tax) (last visited May 24, 2010).

leads many voters to mistakenly believe that the initiative taxes the very containers that it actually exempts: containers filled with alcoholic beverages.

The initiative's second reference to 'certain beverages,' in "exempting from the tax certain fluids and beverages" reinforces this confusion. Against a background in which alcohol is both heavily regulated and traditionally targeted for taxation, exempting 'certain beverages' leads voters to believe that the tax excludes non-alcoholic-beverage containers, rather than specifically applying to such containers. A title that confuses voters into believing that the initiative will tax the very beverage containers that it actually exempts impermissibly misleads the electorate.

3. The title misleads the electorate by failing to disclose that it authorizes the legislature to borrow six million dollars from beverage tax revenues.

Finally, the title also misleads the electorate by failing to mention that it authorizes the legislature to borrow, interest-free, two-thirds of the six million dollar reserve fund that the initiative creates.⁴⁴ Omitting four-million dollars of interest-free borrowing authority is significant. As noted in the Colorado Constitution, Article 10, Sec. 20(3)(b), without expressly mentioning this authority, voters would not naturally know that the initiative either authorizes the legislature to borrow beverage-tax proceeds, or that the initiative could increase Colorado's outstanding debt. The initiative creates a separate fund that is exempt from

⁴⁴ *Initiative*, § 6(a).

TABOR's restriction against borrowing from general revenues. An initiative title should be explicitly inform voters if TABOR, or any other constitutional provision, is being bypassed, because this is likely to affect voter support for an initiative. The absence of new borrowing authority from the initiative's title is a "significant and material" omission.

4. Failing to inform voters that the initiative imposes new constitutional duties on the state Treasurer is a significant and material omission from this title.

Sections four and six of the initiative impose new constitutional duties on Colorado's Treasurer. Section four requires the Treasurer to administer the "Water for Future Generations Fund" (the "Fund"). Section six requires the Treasurer to disburse monies from this fund in a particular manner. The initiative's title does not mention any new Treasurer duties.

This omission is both significant and material. The Treasurer is one of only four elected state-wide officers. As such, any constitutional change to his required duties is inherently significant. Imposing new duties on the Treasurer is also material. Being administered and automatically disbursed by the Treasurer are make removes Fund monies from legislative political pressures. Freedom from these pressures ensures that Fund monies will only be expended for the initiative's stated purposes. Without this assurance, the Fund could easily be used for any purpose that a fruitfully imaginative, politically-pressured legislature might conjure.

V. CONCLUSION

This Court should deny the title and submission clause set by the Title Board.

Respectfully submitted this 24th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2010, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was placed in the United States mail, postage prepaid, to the following:

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