

SUPREME COURT STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT MAY 21 2010 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲COURT USE ONLY ▲
ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2009) Appeal from the Ballot Title Setting Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2009-2010#91	
Petitioners: Christopher Howes, Objector Respondents: Richard G. Brown and Garald L. Barber, Proponents and Title Board: William A. Hobbs, Sharon Eubanks, and Geoff Blue	Case No. 2010 SA 135
RESPONDENT OPENING BRIEF	

The proponents, Richard G. Brown and Garald L. Barber, are named respondents in the petition filed by Mr. Christopher Howes. The citizen proponents of initiative 2009-2010 #91 are not attorneys and are not represented by legal counsel. The proponents are not intimately familiar with all of the protocols and procedures appropriate to the filing of briefs before the Supreme Court and ask for the Court's indulgence if our brief strays from those protocols or formats.

This brief from the proponents is in response to the Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2009-2010 #91 ("Container Fee to Fund Water Preservation and Protection) filed by Mr. Christopher Howes through his legal counsel Scott E. Gessler and Mario D. Nicolais.

ISSUES PRESENTED BY MR. HOWES

- A. Mr. Howes has raised an objection that the final draft submitted to the Secretary of State for Title Board action was flawed because the proponents used a common technique of striking language to be deleted from the original draft that was submitted to the Legislative Council and Legislative Legal Services and substituting a reorganized draft with modifications. The amendment to the original draft arose as part of the Legislative Council and Legislative Legal Services analysis. Mr. Howes further contends that the proper way to make such changes is by some sort of "highlighted" version.

Response and Comments:

We agree with the decision made by the Title Board and disagree with the contention made by Mr. Howes.

In preparing the original draft and then amending the draft following the Review and Comment meeting, we relied on information that is published on the web site of the General Assembly and on information published by the Secretary of State. The published information is meant to guide citizen proponents and includes basic and general drafting conventions to be followed. Moreover in our communications with the professional staff of the Legislative Council, no information was provided to us that indicated that there might be a preferred or generally accepted format that was required or recommended for use with respect to a modified draft.

The analysis prepared by Legislative Council and Legislative Legal Services staff contains many technical points with respect to drafting. For example, the memorandum sets forth standards for using capital letters, such as the use of small caps rather than all caps. The memorandum includes guidelines with respect to inserting left tabs at the beginning of the first line of each new section, subsection, paragraph and sub-paragraph. The memorandum includes guidelines for the preferred

uses of commas, and grammatical preferences for common words such as "that" v. "which". One of the technical distinctions made by the staff was that word "non-alcohol" should be used in lieu of the word "non-alcoholic." However, the memorandum does not include guidelines or protocols that address what type of formatting might be a preferred form for amending an original draft to prepare it for filing with the Title Board. The proponents are given only the statutory guidance that changes must be highlighted or otherwise indicated.

As Mr. Howes notes in his petition with his quotation of the relevant part of 1-40-105 (4), CRS, the proponents are obligated to submit an "amended draft with changes highlighted or otherwise indicated" to the Title Board. Since the amended draft was reorganized as a direct result of comments and recommendations made by Legislative Council and Legislative Legal Services staff, we believe that the use of the common technique of striking out old language that was in the original draft was both a sufficient indication of the changes and also a simplification of the organization making the amended version easier to read and understand.

Changes to be made by the proponents as a result of the Review and Comment meeting fall into two categories. If the changes are made as a result of the technical and substantive comments made by the professional staff, an amended version may go forward to the Title Board. If, however, the changes are outside the technical and substantive comments made by the professional staff the measure must be resubmitted for a new analysis. The changes that we made to the original draft were the result of the technical and substantive issues raised by the professional staff. One of the most significant, and most helpful, was the recommendation to reorganize the measure and the staff provided some examples of how certain provisions could be consolidated and reorganized. We attempted to follow those recommendations and the use of the strike out technique was the logical way of responding to the reorganization.

In the absence of a drafting manual, template or set of examples published by the Legislative Council, Legislative Legal Services or the Secretary of State which could be relied on by citizen proponents as an objective guide to amending original drafts, the argument made by Mr. Howes could have an unfortunate and unanticipated perverse effect on proposals that have been through the process and have been submitted to the Title Board in good faith by their proponents. Without an objective guide, proponents would be at the mercy of challenges of a hypertechnical nature pitting one form of highlighting against another form of highlighting. This would place the Title Board, and potentially the Supreme Court, in the position of having to determine whether a redline version is superior to a shadow highlight or whether either of them are superior to an underlined version.

The Title Board considered Mr. Howes' challenge at both the original hearing and also at the rehearing. After considerable discussion, the Title Board determined that the method of using a strike out was appropriate for a measure that was being reorganized. We agree with the determination made by the Title Board and ask the Court to affirm that decision.

B. Mr. Howes challenges whether the measure is limited to a single subject.

Response and Comments: In order to make his argument appear substantive, Mr. Howes selectively lifts various integral parts of the measure and holds them up as being separate and distinct subjects. We agree with the Title Board that the four component parts of the measure cited by Mr. Howes are not individual separate subjects. These elements are integrated parts of a comprehensive framework designed to govern how the container tax is to be levied and administered. Mr. Howes has mistakenly assumed that a measure which is comprehensive and detailed must be composed of more than one subject. In the case of Initiative #91, the rationale for

making it comprehensive and detailed was to tie together the critical parts to ensure that the measure was an integrated and internally consistent framework.

The measure is a very straightforward revenue raising system that has the following component parts:

1. The measure imposes a flat tax on containers that hold certain identified non-alcohol beverages.
2. The measure specifies the amount of the tax to be imposed.
3. The measure specifies upon what tangible products the tax is to be imposed.
4. The measure creates a special fund in the State Treasury into which the revenues generated from the container tax are to be deposited.
5. The measure specifies what the moneys in the fund can be used for. These uses are specific and the moneys may not be used for any other purposes.
6. The measure instructs the State Treasurer how and when to distribute the moneys in the fund.
7. The measure specifies the powers of the General Assembly with respect to the fund and the tax structure, and places certain limitations on the General Assembly while setting forth some responsibilities for the appropriation of a percentage of the moneys in the fund.
8. The measure identifies and specifies the roles to be played by the basin roundtables and the Interbasin Compact Committee.
9. The measure specifies certain accountability standards for the fund and upon those who will be recipients of the moneys from the fund.

The entire framework is a comprehensive one and each component part of the system has a critical role to play in its operation. Removing any of the component parts would result in a destabilization of the operation of the fund.

Mr. Howes selects four elements of the comprehensive revenue system and asserts that each of them somehow constitutes a unique element that is unrelated to the comprehensive system. Yet, Mr. Howes has failed to provide any detailed discussion of why each of these elements is unrelated to the comprehensive system or is not an integral part of the system functioning as intended.

Briefly to Mr. Howes' four points:

1. The measure would impose a new tax on beverage containers that are filled with specifically identified non-alcohol beverages – that is central to the initiative.

Without the revenue stream being established, the remainder of the framework would make no sense. The fact that the measure imposes a tax that will result in an increase of state tax revenues by an estimated \$110 million is set forth in both the Title and the Submission Clause.

2. Mr. Howes' assertion concerning the requirement that the General Assembly use a two-thirds majority for certain votes related to the containers subject to the tax is only partially accurate. The measure specifies that if the General Assembly seeks to exempt any particular products from the tax it must craft the exemption to not create a competitive disadvantage for similar products that would remain subject to the tax and must use a two-thirds vote to accomplish the exemption. The products to be taxed are defined in the measure, which will be part of the Constitution. Referring a proposed amendment to the Constitution requires a two-thirds vote of each house, so the requirement is consistent with that long standing standard.

However, Mr. Howes does not address the power of the General Assembly to refer a statute to the people to include a previously not taxed product by a simple majority of each house.

The measure does not restrict the revenues that would accrue to the fund solely to the container tax. The General Assembly has the power to enact statutes that would channel other existing revenues, say from the severance tax, to the fund. Changing the destination of an existing tax could likely be accomplished by legislative act without running afoul of the voter approval requirements of TABOR. Nothing in the measure prevents the General Assembly from referring a statute imposing a tax on some other product or activity the revenues from which would go to the fund. Such a referral would be accomplished with a simple majority vote of each house.

3. Mr. Howes asserts that the moratorium on legislative changes to the basin roundtables is a separate subject. Again we disagree. The use of the roundtables is a central element of the measure and the moratorium is designed to automatically repeal in four years. With 80% of the revenues to be used by and through the roundtables, it was our belief that a temporary period of stability was essential to the success of the program. The period of four years was specifically selected because there will be a new Governor and cabinet in place in January, 2011 and the General Assembly will undergo legislative redistricting which must be in place in time for the 2012 general election cycle. It is our belief that a four year moratorium on changing the fundamental structure and operations of the roundtables is a critical element to ensure the stability of the comprehensive system and to ensure

that a high level of accountability for the moneys made available from the fund is established and made operational.

Mr. Howes' contention selectively fails to note that the moratorium is for four years and that it expires and the section of the measure establishing the moratorium is automatically repealed on January 1, 2015. Nothing in the measure prevents or limits the General Assembly from enacting a new scheme to supplant the roundtables which has an effective date of January 1, 2015. Nothing in the four year moratorium would prevent the General Assembly from referring changes to or abolition of the roundtables at the 2012 general election. Mr. Howes' contention as set forth in his petition is that the moratorium would be a permanent bar that would prohibit the General Assembly from developing any modifications to the roundtable system or replacing it entirely, and that is clearly not the case.

4. Mr. Howes asserts that the authority for the General Assembly to borrow up to \$4,000,000 from the reserve account of the fund for the express purposes of defending the State of Colorado against a legal action brought under the Colorado River Compact is a separate issue. Again, we agree with the reasoned determination of the Title Board and disagree with Mr. Howes. The measure specifically establishes that the General Assembly is to appropriate moneys from the fund to the Colorado Water Conservation Board for its statutory duties among which is "the administration of the interstate compacts and equal apportionment decrees for water to which the State is a party." The provision that Mr. Howes addresses is consistent with that appropriation authority and is for the same protection of the State. It is our belief that the State will face several more years of inadequate budgetary resources and it is a critical element of the measure that the

General Assembly have ready access to a significant amount of money to appropriate to the Attorney General or for the retention of special legal counsel in the event there is a call on the Compact.

It should be noted that these four points were made to the Title Board at both the hearing and rehearing and that after due consideration were rejected by the Title Board. We agree with the determination and decision of the Title Board.

- C. Mr. Howes asserts that the title and submission clause set by the Title Board are insufficient because they do not highlight three specific issues that Mr. Howes believes should be set forth in the title and submission clause.

Response and Comments: At the hearing, the Title Board made edits to the Title and Submission Clause in response to Mr. Howes' concerns. We agree with the changes made by the Title Board and the Board's determination that further changes suggested by Mr. Howes would have not assisted the voters. To each of Mr. Howes' assertions:

1. *That the title and submission clause do not identify new constitutional duties imposed on the State Treasurer.*

This is a standard fiduciary responsibility that is inherent in the entire purpose of a State Treasurer.

The State Treasurer administers other programs that have been created by the General Assembly which are not part of the duties set forth in the Constitution. For example, the State Treasurer administers the Abandoned Property Program under which assets from dormant accounts and other sources are transferred to the State Treasurer. The Treasurer is responsible for attempting to notify the owners that their property can be redeemed.

When the property must be liquidated, the Treasurer has the responsibility for transferring some of the funds to the State's high risk insurance pool, Cover Colorado.

The "duties" set forth in the measure are common administrative tasks that any person serving as a Treasurer of a government would be expected to perform. Rather than "duties" as Mr. Howes inaccurately contends, these requirements are really tasks to be performed under the general duties one would expect of a custodian of public funds.

2. *That the General Assembly receives new borrowing authority.*

The Title Board was not persuaded by this argument, and we believe this mischaracterization of the discretionary borrowing authority is misleading. The measure authorizes the General Assembly to make use of up to a maximum of \$4,000,000 for the sole purpose of defending the State against a call on the Colorado River Compact. This is a very limited authority and carries with it a requirement that the use be accomplished by bill and that a plan of repayment must be part of the bill. If the General Assembly is in session, a bill can be quickly placed on the Governor's desk. If the General Assembly is not in session, the authority is a simple subject for the Governor to frame a call around. The General Assembly may wish at some point to enact legislation that is a contingency and have the authority to use the funds given prior approval and to set forth how the reserve account would be replenished.

While use of the term "borrowing" may be grammatically correct, it does not necessarily connote the incurring of debt as the word "debt" is commonly understood. If the General Assembly must exercise this discretionary authority, the use would be little more than an accounting transfer. The use would be the State temporarily borrowing moneys from itself with an obligation to pay itself back under a repayment plan that it has created and can

change with another legislative act. The measure further provides that the General Assembly does not need to pay interest on the borrowing. A more accurate way of viewing the authority is as an emergency reserve that can be used quickly by the General Assembly when other funds which might be used are otherwise obligated and there is a liquidity concern and a need to act quickly. The plan to repay the reserve account can be as simple as using some of the moneys from the fund that are to be appropriated to the Colorado Water Conservation Board or the State Engineer. Additionally, there is no prohibition in the measure against the roundtables participating in the reimbursement of the reserve account from their distribution of fund moneys. The Colorado River Roundtable, for example, may have an immediate interest in participating in the legal action and could use some of its distribution for those expenses.

3. *That the initiative only applies to non-alcoholic beverage containers.*

We believe Mr. Howes' request, if granted, would be highly misleading to the voters. It is true that the tax would be imposed on containers that hold certain non-alcohol beverages, but it is not true that all non-alcohol beverages would be subject to the tax. The measure specifically exempts dairy products, medicines, and fountain beverages. To accept Mr. Howes' request would suggest to the voters that these otherwise exempted products are to be subject to the tax.

Relief Requested by Mr. Howes

Mr. Howes requests the Court to do one of two things. First, he asks the Court to reverse the actions of the Title Board with directions to the Board to decline to set a title and to return the proposed initiative to the proponents. Alternatively, if the Court declines to reverse the Title Board, Mr. Howes

requests that the Court remand the Title and Submission Clause to the Title Board with instructions to set a complete and accurate Ballot Title and Submission Clause.

We believe that neither requested action is justified on the basis of the information provided to support Mr. Howes' objections.

With respect to Mr. Howes' request regarding the rejection of the Title Board's decisions and actions, we believe that he is incorrect on both his objections. We concur with the Title Board that the modified draft initiative meets the requirement for indicating changes to the original draft. We also believe that the measure constitutes a single subject and Mr. Howes' attempt to create the illusion of separate subjects through a process of deconstruction to isolate integral component parts of the measure and hold them out in an artificial manner as being unrelated is simply wrong.

With respect to Mr. Howes' request that, alternatively, the Court remand the Title and Submission Clause to the Title Board with instructions to modify the Title and Submission Clause, we believe that incorporating Mr. Howes' objections will only serve to lengthen the Title and Submission Clause and actually mislead the voters. To tell the voters that the measure creates a new constitutional duty for the State Treasurer is misleading since the requirements are consistent with the normal duties of the State Treasurer and the accomplishment of those activities are no more than administrative tasks that are routine. To tell the voters that the measure would be vested with new borrowing authority is a mischaracterization of the discretionary authority granted to the General Assembly to use a portion of the moneys in the reserve account for the very narrow and very specific purpose of defending the State in the event of a call on the Colorado River Compact. To tell the voters that the measure only applies to non-alcohol beverage containers would mislead the voters into assuming that exempted products such as dairy products, medicines, and fountain drinks would be subject to the tax.

As the citizen proponents of the measure, we believe that Mr. Howes has failed to demonstrate any material defects or deficiencies in the Title and Submission Clause set by the Title Board and we request that the Court affirm the decisions of the Title Board.

Respectfully submitted this 21st day of May, 2010.

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2010, a true and correct copy of the foregoing Respondent Opening Brief in the Matter of the Title and Ballot Title and Submission Clause and Summary for proposed initiative 2009-2010 #91 (Container Fee to Fund Water Preservation and Protection) was placed in the United States mail, postage prepaid, through overnight express mail, to the following:

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