

RECEIVED



APR 28 2010

3:25

ELECTIONS
SECRETARY OF STATE

COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 # 88 (“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 #88 (“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.”

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

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 includes (1)

the right to float, (2) the right to make contact with the bed and banks, including the nebulous reference to the public's "easement to float", and (3) the right to fish while floating. However, 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 three distinct rights under this broad umbrella, but a voter reading the ballot title cannot ascertain whether the Initiative grants rights beyond the three enumerated subjects or whether the public's right to use the water of every natural stream contains any restrictions or limitations. Thus, the Title does not enable the voter, whether familiar or unfamiliar with the subject matter of this proposal, to determine intelligently whether to support or oppose this proposal.

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 by 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