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In re Title, Ballot Title, & Submission Clause v. Brandon, 960 P.2d 672 (Colo. 1998)

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appellants' claim under *Orr*, as Golden's 1960's decrees addressed the historic consumptive use of Priority 12 water. The supreme court rejected appellants' motion for partial summary judgment on issue preclusion grounds.

The court decided that the appellants' second and third claims of injury were not precluded, and addressed each. The appellants' second claim was that Golden had expanded its use beyond the c.f.s. limitations decreed in the 1960s by changing its pattern of use from a peak flow to a base flow. The court accepted the water court's factual conclusions as sufficiently supported by the record. The water court had relied on and accepted Gary Thompson's testimony that Golden had not changed its pattern of use in forty years. As the water court failed to address the appellants' third claim, regarding the increase in law acreage irrigated by Golden's Priority 12 water, the supreme court remanded the issue for determination of the validity of the claim.

Chip Cutler

***In re Title, Ballot Title, & Submission Clause v. Brandon*, 960 P.2d 672 (Colo. 1998)** (holding that in setting the title for a proposed statutory amendment, the initiative title setting board did not abuse its discretion by omitting the definition of the term "nonexempt well," and that the fiscal impact statement which did not specify which "taxpayers" a possible refund provision would effect did not mislead voters).

The Title Initiative Setting Board ("Board") fixed a title, ballot title and submission clause, and summary for a proposed statutory amendment. The amendment called for the installation of water meters by the state engineer on all wells in the unconfined aquifer in Water Division 3, which were not exempt pursuant to Colorado Revised Statutes § 37-92-601 and § 37-92-602. The initiative summary included a fiscal impact statement ("Impact Statement") which outlined the costs associated with the proposed amendment. The Impact Statement indicated that due to state spending limits, the state might have to refund some fee revenues generated by the initiative to taxpayers.

Registered voters petitioned the court to review the action taken by the Board claiming that the titles and summary misled the electorate because the Board failed to (i) properly define the term "non-exempt" well; and (ii) specify which taxpayers might be entitled to a tax refund, and therefore abused its discretion.

The court explained that the scope of review in such a case is limited to ensuring that the title, ballot title and submission clause, and summary fairly reflect the proposed initiative in a way that does

not mislead petition signers and voters into support for or against a proposition by reason of the words employed by the Board. Furthermore, the court must conduct the review with all legitimate presumptions in favor of the Board, without addressing the merits of the proposed legislation.

Following those standards, the court found that the Board did not abuse its discretion in using the term "nonexempt" well without further defining the term. The court pointed out that the actual verbiage used in the title and summary referred to wells not exempt under the Colorado Revised Statutes. The court further explained that due to potential future legislative and judicial interpretation the Board could not define the complex definition contained in the statutes without a detailed statutory explanation.

The court also rejected the petitioners' claim that the Impact Statement misled voters by failing to specify which taxpayers might receive a refund. The court noted that the initiative itself did not include a reference to a refund. Furthermore, the Impact Statement mentioned only a possibility of a refund, and the General Assembly would determine the appropriateness of such an action. The court further explained that mentioning the refund served only to promote and clarify the statewide implications of the proposal. To that end, the Board properly used its discretion in determining how to describe the fiscal impact of the proposal without creating prejudice for or against the proposal.

Stephen Lawler

Ed. note: The Colorado electorate defeated the initiative in the November 1998 general election.

City of Lafayette v. New Anderson Ditch Co., 962 P.2d 955 (Colo. 1998) (holding that the court will not make a conditional exchange right absolute where the applicant does not have a legal right to use the point of diversion identified in the proposed absolute decree).

In order to complete a large water project, the City of Lafayette ("Lafayette") acquired several water rights through agreements with numerous entities for a right to divert water. One of the rights included a conditional right of exchange with the Anderson Ditch, owned by the New Anderson Ditch Company. In 1987, the water court granted Lafayette's application for various conditional rights. Part of the final decree included language which stated that if Lafayette had not obtained a legal right to use the Anderson Ditch by April, 1993, the right to this point of diversion would terminate. Subsequently, Lafayette entered into a contract with New Anderson which permitted