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SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue, Denver, Colorado 80203 ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board	FILED IN THE SUPREME COURT JUN 13 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲ COURT USE ONLY ▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #13 **Petitioner**: J. GREG SCHNACKE, v. **Respondents**: MEGAN FERLAND and MATT SAMELSON, Proponents, and **Title Board**: WILLIAM A. HOBBS, DANIEL DOMINICO, and SHARON EUBANKS.	Case No. 07SA154
Attorneys for Respondents: Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: 303/256-3978 Fax Number: 303/292-3152 E-mail: eramey@ir-law.com	
RESPONDENTS' OPENING BRIEF	

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Megan Ferland and Matt Samelson ("Respondents"), through their undersigned counsel, respectfully submit the following Opening Brief supporting the final action of the Ballot Title Setting Board concerning Proposed Initiative for 2007-2008 #13 ("Severance Tax on Oil and Gas").

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW[1]

1. Does the initiative violate the single subject requirement set forth in Colo. Const. art. V, §1(5.5), by imposing a new tax on oil and gas extraction and requiring the revenues from that tax to be spent on programs unrelated to the "subject" (*i.e.*, source) of the tax?

2. Does the title fail to inform voters of the measure's true meaning and intent because it does not accurately disclose the final, full fiscal year dollar increase that will result from the new tax as required by Colo. Const. art. X, §20?

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[1] With the exception of the parenthetical and correction of the constitutional citation in Issue #1, Respondents' Statement is drawn from the statement of "Issues Presented" in the Petition for Review. The Court is also respectfully advised that these issues (and virtually the entirety of Respondents' opening arguments) are identical to those posed in Case No. 07SA155, In re Proposed Initiative for 2007-2008 #14, with regard to a substantially similar initiative. Respondents submit that it would be both appropriate and efficient for the Court to consolidate this case with Case No. 07SA155 for adjudication.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Before the Title Board.

Petitioner seeks review of the actions of the Ballot Title Setting Board regarding proposed Initiative for 2007-2008 #13. Respondents Megan Ferland and Matt Samelson are the proponents of the initiative.

The Title Board conducted its initial public meeting and set a title, ballot title, and submission clause for proposed Initiative for 2007-2008 #13 on May 2, 2007. Petitioner filed a Motion for Rehearing on May 8, 2007, objecting to the actions of the Title Board upon the two bases noted above. The Motion for Rehearing was heard at the next regularly scheduled meeting of the Title Board on May 16, 2007. At the rehearing, the Title Board overruled Petitioner's objections. Petitioner filed his Petition for Review with this Court on May 21, 2007.

B. Statement of Facts.

Proposed Initiative for 2007-2008 #13 would adopt, by constitutional amendment, a new "severance" tax upon gross income attributable to the sale of oil and gas extracted within the state. The initiative also dedicates the uses for the new tax revenue – 25% to be distributed to counties and municipalities socially or economically impacted by the oil and gas extraction industry and 75% to be appropriated as may be determined by the General Assembly.

As required by Colo. Const. art. X, §20(3)(c), the title commences with an estimate of the first full fiscal year dollar tax increase proposed by the initiative, *i.e.*, "State taxes shall be increased $244.6 million annually . . . ." The estimate reflects the net increase in statewide severance taxes resulting from the adoption of the new tax and concurrent incorporated repeal of the current statutory severance tax – see ¶ (6) of the initiative.

III. SUMMARY OF THE ARGUMENT

1. By imposing a new tax on gross income from the sale of oil and gas extracted in the state and concurrently dedicating uses for that revenue, proposed Initiative for 2007-2008 #13 does not violate the single subject requirement.

2. The title set for proposed Initiative for 2007-2008 #13 fairly and accurately discloses the estimated dollar amount of the first full fiscal year tax increase generated by the initiative as required by Colo. Const. art. X, §20(3)(c).

IV. ARGUMENT

A. Proposed Initiative for 2007-2008 #13 Contains a Single Subject.

As best these Respondents can discern from the Petition for Review, Petitioner is submitting that a proposed initiative may not – consistent with the single subject requirement of Colo. Const. art. V, §1(5.5), and §1-40-106.5, C.R.S.

(2006) – enact a tax and, concurrently, dedicate uses for the revenues generated by that tax if those uses are "unrelated to the subject of the tax."

The new tax at issue is a severance tax upon income generated by the sale of oil and gas extracted within the state. Petitioner appears to be arguing that the initiative may not designate a use for these revenues, unless those uses are related to the extraction or sale of oil and gas (the "subject" of the tax).

The purpose of the single subject requirement has been recognized as essentially two-fold: (1) "to forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;" and (2) "to prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon the voters." Section 1-40-106.5(1)(e)(I), (II), C.R.S. (2006). This Court has recognized the single-subject requirement to be "intended to prevent voters from being confused or misled and to ensure that each proposal for change is considered on its own merits." In re Proposed Initiative for 1997-1998 #74, 962 P.2d 927, 928 (Colo. 1998).

Proposed Initiative for 2007-2008 #13 has a single purpose – to create an enhanced revenue stream for the state and dedicate the uses for that revenue. There is no effort at "logrolling," *i.e.*, enlisting support for the passage of one measure by attaching it to another. And, there is no effort to be surreptitious or to surprise the voters.

Petitioner does not appear (at least at this stage) to be suggesting that a single measure may not both: (1) create or enhance a revenue stream; and (2) provide how that revenue shall be used. Indeed, to do so would be to suggest that the voters (and presumably the legislature) may only adopt taxes for their own sake and must wait until another day – or at least another measure – to say how the resulting revenue will be used.

Petitioner does appear to suggest, however, that any dedication of tax revenues – at least within the measure adopting the tax – must be "related" to the "subject" of the tax. Thus, arguably, if the state taxes income from the sale of oil and gas, it may only use those revenues for a purpose "related" to the extraction or sale of oil and gas. By extension, one must suppose, property tax revenues could only be dedicated to something having to do with the property taxed, retail sales tax revenues could only be used for purposes "related" to the retail commerce being taxed, and income tax revenues would have to be dedicated to some use

"related" to the production of income being taxed – at least within the confines of the measure adopting or enhancing the tax. Concomitantly, one could not (at least in a single measure) provide tax revenues for schools, or higher education, or transportation, or the environment – or the general fund – without finding something to tax that would be "related" to those uses.

Respectfully, these Respondents are unaware of any authority, judicial or statutory, in Colorado or elsewhere, for such a proposition. The constraints that such a proposition would place upon the ability of the people, and presumably the legislature (subject to its own single subject requirement per Colo. Const. art. V, §21), to create and dedicate tax revenues would be legion.

There is certainly no effort here to "logroll" – this is not an effort to enlist support for taxing the oil and gas industry simply for the sake of taxing the oil and gas industry, nor would taxing the oil and gas industry likely serve as a hook to enlist otherwise flagging support for either enhancing the general fund or providing financial assistance to communities impacted by oil and gas extraction. There is certainly nothing surreptitious or surprising buried in the measure, either in terms of purpose or effect. *Cf.*, In re Proposed Initiative for 2005-2006 #55, 138 P.3d 273, 280-81 (Colo. 2006). And, except for finding a source to enhance state revenues generally (75%), the only dedicated purpose for the revenues created by

this initiative is indisputably "related" to the extraction of oil and gas (by directing distributions to communities impacted by this extraction).

Absent some consideration not present in this initiative, creating or enhancing a source of tax revenue and specifying uses for that revenue within a single fiscal measure (*i.e.*, specifying why the proponents seek to enhance tax revenues in the first place) does not run afoul of any reasonable interpretation of the single subject requirement.

B. The title for proposed Initiative for 2007-2008 #13 fairly and accurately discloses the estimated dollar amount of the first full fiscal year tax increase generated by the initiative as required by Colo. Const. art. X, §20(3)(c).

Colo. Const. art. X, §20(3)(c), requires ballot titles for measures proposing tax increases to begin with the words "SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY . . . ?" As tax revenues are problematic to predict, the "first full fiscal year dollar increase" is generally an estimate. If the estimate is low, the excess realized revenue must be refunded in the next fiscal year. Id.

Proposed Initiative for 2007-2008 #13 would adopt a new severance tax, while concurrently repealing the existing severance tax. See ¶ (6). Two estimates of the "first full fiscal year dollar increase" were obtained – one being an estimate of the anticipated gross revenues from the new tax alone (without consideration of

revenues lost by repeal of the old tax) and the other being an estimate of the net tax increase caused by adopting the new tax and concurrently repealing the old tax. The Title Board was confronted by the question of which estimate to use in the title. It chose the latter – the estimated net increase in the first fiscal year's state severance taxes resulting from the initiative as a whole.

These Respondents submit that the Title Board's decision was correct. Simply stating the gross effect of the new tax would be misleading, suggesting an increase in severance taxes and revenues significantly higher than the net effect to be realized through passage of the initiative. The net estimate utilized by the Board accurately reflects the increased amount of taxes that actually would be paid, and revenue that actually would be available, should the voters pass the initiative.

V. CONCLUSION

For the reasons set forth above, Respondents respectfully request the Court to affirm the actions of the Title Board with regard to proposed Initiative for 2007-2008 #13.

Respectfully submitted this 13th day of June, 2007.

ISAACSON ROSENBAUM P.C.

By: _____
Edward T. Ramey, # 6748

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2007, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was served via hand delivery to the following addressees:

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