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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203 303.861.1111 ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007)	FILED IN THE SUPREME COURT JUN 20 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
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	▲ **COURT USE ONLY** ▲ **Case No. 07SA154**
Attorneys for Petitioner: Sean R. Gallagher, #16863 Jacqueline S. Cooper, #35066 Hogan & Hartson LLP 1200 17th Street, Suite 1500 Denver, Colorado 80202 Tel: (303) 899-7300 Fax: (303) 899-7333 srgallagher@hhlaw.com jscooper@hhlaw.com	

PETITIONER'S ANSWER TO BOARD

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J. Greg Schnacke ("Petitioner"), a registered voter in the State of Colorado, through undersigned counsel, respectfully submits this Answer Brief pursuant to C.R.S. section 1-40-107(1) and seeks review of the Title Setting Board's ("Title Board") action in setting a title, ballot title, and submission clause for Proposed Initiative 2007-2008 #13 ("Initiative #13").

ARGUMENT

THE SUBJECT INITIATIVE VIOLATES THE SINGLE SUBJECT RULE BECAUSE IT CONTAINS MULTIPLE, DISTINCT AND SEPARATE PROVISIONS THAT ARE NOT DEPENDANT UPON OR NECESSARILY CONNECT TO EACH OTHER.

The Board contends that the purpose of the new severance tax proposed in Initiative #13 encompasses a single purpose—namely, to assist energy-impacted communities. *See* Answer Brief of Title Board at 5-6. However, the Board focuses only on the fact that twenty five percent income derived from the new tax will be distributed to energy-impacted communities and ignores the provisions regarding imposition of the tax itself. The heart of the initiative is the creation of a new tax and the elimination of the ad valorem tax credit. These provisions (sections two through four) focus solely on the creation of a taxing mechanism on the oil and gas industry, and have nothing to do with the social or economic impact of oil and gas production on communities impacted by the industry.

This distinction between the source and the beneficiaries of the new severance tax is not inconsequential. This Court has made clear that disparate

purposes, while connected thematically, may not be addressed in a single initiative unless they are necessarily and properly connected. That means that tax cuts may not be accomplished through an initiative when those cuts will affect unrelated state spending. *See In Re 1997-1998 #84 and #85*, 961 P.2d 456 (Colo. 1998) (holding initiative that would both implement local tax cuts and impose mandatory restrictions on state spending on unrelated state programs violates single subject requirement). Likewise, in this case, a tax *increase* that affects unrelated state spending violates the single subject rule.

The Board cites two, out-of-state cases for the proposition that initiatives such as Initiative #13 are consistent with the single subject requirement. The First, *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360 (Cal. 1991), involved an initiative that imposed an increased tax on tobacco products and directed that revenues generated from the new tax would be spent on various programs related to tobacco use. 806 P.2d at 1365-66. The stated purpose of the initiative was to reduce the economic costs of tobacco use in California, and the proceeds of the new tax would be used to reduce smoking among children, support medical research into tobacco-related diseases, treat people suffering from tobacco-related diseases, and support treatment for indigent patients. *Id.* at 1365, 1366 n8. The court applied California's standard for its single subject requirement ("an initiative . . . does not violate the single subject requirement if . . . all of its

parts are reasonably germane to each other") and held that the measure satisfies California's single subject rule because "the measure's spending provision direct new revenues . . . precisely to tobacco-related problems." *Id.* at 1365, 1366 (citations and internal quotation marks omitted).

The second case, *Sunbehm Gas, Inc. v. Conrad*, 310 N.W.2d 766 (N.D. 1981), involved a proposed initiative that would impose a severance tax on oil and gas and distribute the revenues from the tax to various state programs. In upholding the initiative, the court noted that North Dakota, like California, interprets the state's single subject rule to require only "that all matters treated by one piece of legislation be *reasonably germane to one general subject or purpose*." *Id.* at 772. Thus, because all of the measure's provisions related to the "general subject" of revenue and taxation, it satisfied the single subject requirement. *Id.* at 772-73.

This case, and this state's single subject rule, are distinguishable from these two cases. First, and most obviously, this Court's interpretation of the single subject requirement differs significantly from those of the California and North Dakota courts. This Court has made clear that an initiative violates the single subject rule when it (1) relates to more than one subject, and (2) has at least two separate and distinct purposes that are not related to each other. *In re Title, Ballot Title and Submission Clause for 2003-2004 #32 & #33*, 76 P.3d 460, 461 (Colo.

2003) (citations omitted). An initiative cannot satisfy the single subject requirement when its provision merely related to a general subject or theme, as is the case in both California and North Dakota. *See In re "Public Rights in Waters II,"* 898 P.3d 1076, 1080 (Colo. 1995) (disparate provisions could not be contained in a single provision even though all provision related generally to water policy).

Second, this case is distinguishable from *Kennedy Wholesale* because Initiative #13, unlike the initiative at issues in *Kennedy Wholesale*, does not direct revenues generated from the new tax directly to programs related to the measure's central purpose. In *Kennedy Wholesale*, the measure's central purpose was expressly to reduce the economic impacts of tobacco use in the state, and all of the measure's provisions related to that purpose. In this case, Initiative #13 contains at least two disparate purposes: (1) imposing an increased tax burden on oil and gas producers to stem natural resource extraction in the state, and (2) distributing the revenues generated from the new tax to "energy impacted communities" and the general fund—a purpose that encompasses very different policy considerations from the first purpose.

Put simply, Initiative #13 violates the single subject requirement because it contains disparate purposes. While it may be appealing to believe that the power to tax necessarily implies the power to direct spending, this Court's analysis of the single subject rule reveals that the issue is not so simple. Any measure, regarding

tax or otherwise, must address *only* a single subject. If an initiative attempt to reach out to different groups with different interests and achieve disparate goals, that initiative violates the single subject requirement.

CONCLUSION

For the reasons given above, Petitioner, again, respectfully requests that this Court reverse the action of the Title Board and return this matter to the Title Board with directions to strike the title and summary and return Initiative #13 to the proponents.

Respectfully submitted this 20th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2007, a true and correct copy of the foregoing **PETITIONER'S ANSWER TO BOARD** was placed in the United States mail, postage prepaid, to the following:

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APPENDIX A

Final Language for Proposed Initiative, Ballot Proposal #13

Be it Enacted by the People of the State of Colorado:

Article X of the Constitution of the State of Colorado is hereby amended BY THE ADDITION OF A NEW SECTION to read:

SECTION 22. SEVERANCE TAX ON OIL AND GAS. (1) THE PEOPLE OF THE STATE OF COLORADO HEREBY FIND THAT NONRENEWABLE NATURAL RESOURCES OF OIL AND GAS ARE A PART OF COLORADO'S TREASURE AND LEGACY AND, WHEN REMOVED FROM THE EARTH, THE VALUE OF SUCH RESOURCES TO THE STATE OF COLORADO IS IRRETRIEVABLY LOST; AND THAT IT IS APPROPRIATE AND FITTING THAT THE STATE ASSESS A TAX UPON INCOME DERIVED FROM THE EXTRACTION AND SALE OF SUCH NONRENEWABLE RESOURCES AND DEDICATE THE REVENUES COLLECTED FOR THE BENEFIT AND WELFARE OF THE PEOPLE OF COLORADO.

(2) IN ADDITION TO ANY OTHER TAX, THERE SHALL BE LEVIED, COLLECTED, AND PAID FOR ALL OR ANY PART OF EACH TAXABLE YEAR COMMENCING ON OR AFTER JANUARY 1, 2008, A TAX UPON THE GROSS INCOME ATTRIBUTABLE TO THE SALE OF OIL AND GAS SEVERED FROM THE EARTH IN THIS STATE. THE TAX FOR OIL AND GAS SHALL BE AT THE FOLLOWING RATES OF THE GROSS INCOME:

(A) UNDER THREE HUNDRED THOUSAND DOLLARS SHALL BE EXEMPT; AND

(B) THREE HUNDRED THOUSAND DOLLARS AND OVER SHALL BE FIVE PERCENT OF THE ENTIRE GROSS INCOME OR AT SUCH GREATER RATE AS MAY BE DETERMINED BY THE GENERAL ASSEMBLY.

(3) THERE SHALL NOT BE ALLOWED AS A CREDIT AGAINST THE TAX CREATED BY THIS SECTION ANY AMOUNT BASED ON AD VALOREM TAXES ASSESSED ON THE VALUE OF REAL OR PERSONAL PROPERTY.

(4) ALL REVENUES RECEIVED BY OPERATION OF THIS SECTION SHALL BE EXCLUDED FROM FISCAL YEAR SPENDING, AS THAT TERM IS DEFINED IN SECTION 20 OF ARTICLE X OF THIS CONSTITUTION, AND FROM THE SPENDING LIMITS CONTAINED WITHIN SECTION 20 OF ARTICLE X, OR WITHIN ANY OTHER LAW, UPON STATE GOVERNMENT AND ALL LOCAL GOVERNMENTS RECEIVING SUCH REVENUES.

(5) THE REVENUES, INTEREST INCOME, AND INTEREST GENERATED BY OPERATION OF THIS SECTION SHALL BE APPROPRIATED ANNUALLY IN THE FOLLOWING PROPORTIONS:

(a) TWENTY-FIVE PERCENT OF SUCH REVENUES SHALL BE APPROPRIATED AND DIRECTLY DISTRIBUTED TO COUNTIES AND MUNICIPALITIES SOCIALLY OR ECONOMICALLY IMPACTED BY THE DEVELOPMENT, PROCESSING, TRANSPORTATION, OR ENERGY CONVERSION OF THE NONRENEWABLE NATURAL RESOURCES OF OIL AND GAS.

(b) SEVENTY-FIVE PERCENT OF SUCH REVENUES CREATED BY THIS SECTION SHALL BE APPROPRIATED AS MAY BE DETERMINED BY THE GENERAL ASSEMBLY.

(6) SECTION 39-29-105 COLORADO REVISED STATUTES IS HEREBY REPEALED.

(7) THE GENERAL ASSEMBLY MAY ENACT AN EXEMPTION FOR OIL AND GAS WELLS OF MINIMAL PRODUCTION LEVELS.

(8) THE GENERAL ASSEMBLY IS DIRECTED TO MAKE SUCH CONFORMING AMENDMENTS AND ADDITIONAL ENACTMENTS TO THE COLORADO REVISED STATUTES AS MAY BE NECESSARY AND APPROPRIATE TO REALIZE THE PURPOSES OF THIS SECTION. TO THE EXTENT CONSISTENT WITH THE PURPOSES HEREOF, ALL PROVISIONS OF ARTICLE 29 OF TITLE 39 OF THE COLORADO REVISED STATUTES NOT SPECIFICALLY REPEALED HEREIN SHALL REMAIN EFFECTIVE UNLESS AND UNTIL REPEALED OR MODIFIED BY THE GENERAL ASSEMBLY.

(9) THIS SECTION IS EFFECTIVE JANUARY 1,2008.