

Supreme Court, State of Colorado 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: April 23, 2014 2:26 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Setting Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013–2014 #85 (“Oil and Gas Operations”) Petitioners: Mizraim Cordero and Scott Prestidge; v. Respondents: Caitlin Leahy and Gregory Diamond; and Ballot Title Setting Board: Suzanne Staiert, Daniel Domenico, and Jason Gelender.	<p style="text-align: center;">▲ Court Use Only ▲</p>
Attorneys for Petitioners: Sarah M. Clark, #39367 Michael F. Feeley, #12266 Brownstein Hyatt Farber Schreck LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202 303.223.1100 tel 303.223.1111 fax sclark@bhfs.com, mfeeley@bhfs.com	Case No. _____
<p style="text-align: center;">Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2013–2014 #85 (Unofficially Captioned “Oil and Gas Operations”)</p>	

Petitioners Mizraim Cordero and Scott Prestidge, registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to section 1-40-107(2), C.R.S. (2013), to review

the final action of the Ballot Title Setting Board (“Title Board” or “Board”) with respect to the setting of the title, ballot title, and submission clause (collectively “titles”) for Proposed Initiative 2013–2014 #85 (“Initiative #85” or “proposed initiative”), unofficially captioned by legislative staff for tracking purposes as “Oil and Gas Operations.”

I. Procedural History and Actions of the Title Board

Respondents Caitlin Leahy and Gregory Diamond are the proponents of Initiative #85 and submitted the proposed initiative to the Office of Legislative Council. After a review and comment hearing was held, the proposed initiative was filed with the Secretary of State and scheduled for a hearing before the Title Board. On April 3, 2014, the Title Board held the hearing and found a single subject and set the titles for Initiative #85.

On April 10, Petitioners filed a timely motion for rehearing, alleging violation of the single subject requirement and that the titles were unfair, misleading, and failed to include key aspects of the proposed initiative. The Title Board held a rehearing on April 16 and granted the motion only to the extent that the Board made changes to the titles. The motion was denied in all other respects.

II. Jurisdiction and Supporting Documentation

Petitioners are registered electors who seek review of these issues under section 1-40-107(2). Petitioners' motion for rehearing was timely filed with the Title Board within seven days of the Board's decision on single subject and setting of the titles. § 1-40-107(1)(a). Additionally, Petitioners have timely filed this petition for review within seven days of the Board's ruling on their motion for rehearing. § 1-40-107(2).

As required by section 1-40-107(2), certified copies of the following documents are appended: (1) the final version of Initiative #85 that was filed with the Secretary of State; (2) the original titles set by the Title Board; (3) the motion for rehearing; (4) the Title Board's ruling on the motion for rehearing and the titles set by the Board at the rehearing. Petitioners respectfully submit that the Title Board erred in finding a single subject and in setting unclear titles. Accordingly, this matter is properly before this Court.

III. Advisory Statement of Issues Presented for Review

The proposed initiative violates the single subject requirement under the guise of regulating oil and gas operations by both: (a) seeking to override the state's current rules prohibiting oil and gas wells to be located within a certain number of feet of buildings; and (b) seeking to divest property owners

of the rights and protections afforded by sections 14 and 15 of the Colorado constitution concerning the taking of private property.

Alternatively, the titles set for the proposed initiative are unfair, misleading, and fail to include key aspects of the proposed initiative because: (a) they do not inform voters that the proposed initiative's prohibition on locating oil and gas wells a certain number of feet from occupied structures applies only to new wells that need a permit to explore or produce oil and gas resources belonging to the State of Colorado, and not to private or federal mineral interests; (b) they use the alliterative and innocuous phrase "statewide setback" rather than the more descriptive, understandable, and common word "prohibition"; and (c) they risk deceiving voters that the proposed initiative has the power to bar federal takings claims.

IV. Relief Requested

Petitioners respectfully request that the Court, after consideration of the parties' briefs, reverse the Title Board's ruling on grounds that because Initiative #85 improperly contains multiple subjects, the Board lacked jurisdiction to set titles for the proposed initiative. Alternatively, Petitioners request that the Court reverse the Title Board's ruling on grounds that the titles set by the Board are unfair, misleading, and fail to include key aspects of the proposed initiative, and that the Court remand Initiative #85 to the

Board with instructions for redrafting fair and accurate titles for the proposed initiative.

Respectfully submitted: April 23, 2014.



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Certificate of Service

I hereby certify that on April 23, 2014, a true and correct copy of this **Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2013-2014 #85 (Unofficially Captioned "Oil and Gas Operations")** was filed electronically through ICCES, which caused automatic electronic notice of such filing upon:

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STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **SCOTT GESSLER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, motions for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2013-2014 #85 'Oil and Gas Operations'"

.....

..... IN TESTIMONY WHEREOF I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 18th day of April, 2014.



A blue ink signature of Scott Gessler is written over a horizontal line.

SECRETARY OF STATE

RECEIVED

MAR 21 2014

Colorado Secretary of State

SWARD 1:12 P.M.

2013-2014 #85 - FINAL

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

SECTION 1. In the constitution of the state of Colorado, add article XXX as follows:

ARTICLE XXX

Mandatory Setback of Oil and Gas Wells

Section 1. Purposes and findings. THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE:

(a) THAT THE CONDUCT OF OIL AND GAS OPERATIONS, INCLUDING THE USE OF HYDRAULIC FRACTURING, MAY IMPACT PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT;

(b) THAT ANY IMPACTS ARE EXPERIENCED MOST DIRECTLY IN LOCAL COMMUNITIES;

(c) THAT SUCH IMPACTS ARE MINIMIZED AND MITIGATED BY LOCATING WELLS AWAY FROM OCCUPIED STRUCTURES; AND

(d) THAT TO PRESERVE THE PUBLIC'S HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO ESTABLISH A STATEWIDE SETBACK REQUIRING NEW OIL AND GAS WELLS TO BE LOCATED AWAY FROM OCCUPIED STRUCTURES, INCLUDING HOMES, SCHOOLS AND HOSPITALS.

Section 2. Grant of authority. THE PEOPLE OF THE STATE OF COLORADO HEREBY ESTABLISH A STATEWIDE SETBACK THAT ALL NEW OIL AND GAS WELLS REQUIRING A STATE OR LOCAL PERMIT, INCLUDING THOSE USING HYDRAULIC FRACTURING, MUST BE LOCATED AT LEAST ONE THOUSAND FIVE HUNDRED FEET FROM OCCUPIED STRUCTURES. FOR PURPOSES OF THIS ARTICLE, "OCCUPIED STRUCTURE" MEANS ANY BUILDING OR STRUCTURE THAT REQUIRES A CERTIFICATE OF OCCUPANCY, OR BUILDING OR STRUCTURE INTENDED FOR HUMAN OCCUPANCY, INCLUDING HOMES, SCHOOLS, AND HOSPITALS. FOR PURPOSES OF THIS ARTICLE, "OIL AND GAS OPERATIONS" MEANS EXPLORATION FOR AND PRODUCTION OF COLORADO'S OIL, GAS, OTHER GASEOUS AND LIQUID HYDROCARBONS, AND CARBON DIOXIDE. THE OWNER OF A HOME MAY WAIVE THIS SETBACK ONLY WITH REGARD TO THE OWNER'S HOME.

Section 3. Not a taking. APPLICATION OF THE STATEWIDE SETBACK ESTABLISHED PURSUANT TO THIS ARTICLE SHALL NOT BE CONSIDERED A TAKING OF PRIVATE PROPERTY NOR REQUIRE THE PAYMENT OF JUST COMPENSATION PURSUANT TO SECTIONS 14 AND 15 OF ARTICLE II OF THE COLORADO CONSTITUTION.

Section 4. Self executing, severability, conflicting provisions. ALL PROVISIONS OF THIS ARTICLE ARE SELF-EXECUTING, ARE SEVERABLE, AND SHALL SUPERSEDE CONFLICTING STATE AND LOCAL LAWS AND REGULATIONS. LAWS AND REGULATIONS MAY BE ENACTED TO FACILITATE THE OPERATION OF THIS ARTICLE, BUT CANNOT IN ANY WAY REDUCE THE SETBACK STANDARD OR THE POWERS AND RIGHTS ESTABLISHED IN THIS ARTICLE.

Ballot Title Setting Board

Proposed Initiative 2013-2014 #85¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least 1,500 feet from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least 1,500 feet from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution?

*Hearing April 3, 2014:
Single subject approved; staff drafts amended; titles set.
Hearing adjourned 10:55 a.m.*

¹ Unofficially captioned “**Oil and Gas Operations**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

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APR 10 2014

COLORADO TITLE SETTING BOARD

Colorado Secretary of State

S.WARD 3:38 P.M.

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2013-2014 #85

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2013-2014 #85

On behalf of Mizraim Cordero and Scott Prestidge, registered electors of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2013-2014 #85 ("Initiative"), and as grounds therefore states as follows:

I. THE MEASURE IMPERMISSIBLY CONTAINS SEVERAL SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE CONSTITUTIONAL AND STATUTORY SINGLE-SUBJECT REQUIREMENT.

Under article V, section 1(5.5) of the Colorado constitution and section 1-40-106.5, C.R.S., proposed ballot measures must contain only a single subject. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects." *Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause 1990-2000 #104)*, 987 P.2d 249, 253 (Colo. 2000).

As reflected in the language of the Initiative, as well as in the colloquy between the proponents' attorney and the Board at the April 3 hearing, the Initiative impermissibly weaves together the following multiple subjects:

1. Overriding current statewide setback rules with an expanded statewide setback from all "occupied structures," as that term is defined in the Initiative (§ 2);
2. Depriving property owners of the rights and protections granted under sections 14 and 15 of the Colorado constitution (§ 3);
3. Limiting the use of hydraulic fracturing in "oil and gas operations," as that term is defined in the Initiative (§ 2); and
4. Authorizing a homeowner to waive a setback as to the homeowner's home (§ 2).

These are separate and distinct subjects that violate the constitutional and statutory single-subject requirement. The Initiative thus fails to meet the jurisdictional threshold for the Board to set a title and, on rehearing, title setting should be denied.

II. THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE AS DRAFTED CONTAIN IMPERMISSIBLE CATCH PHRASES AND FAIL TO DESCRIBE THE PURPOSE OF THE INITIATIVE.

In the alternative, the title and ballot title and submission clause are misleading and confusing because they contain impermissible catch phrases and fail to fairly express the true intent and meaning of the Initiative.

Pursuant to section 1-40-106(3)(b), a proposed initiative's title and ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the proposed initiative." The statute also requires a proposed initiative's title and ballot title and submission clause to be sufficiently clear and brief. "[A] material omission can create misleading titles." *Garcia v. Chavez (In re Title, Ballot and Submission Clause 1999–2000 #258A)*, 4 P.3d 1094, 1098 (Colo. 2000). Titles are also prohibited from containing a "catch phrase" that unfairly prejudices the proposal in its favor because such catch phrases contravene section 1-40-106(3). *Id.*

Here, the Initiative's title was set as follows:

An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least 1,500 feet from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution.

The Initiative's ballot title and submission clause was set as follows:

Shall there be an amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least 1,500 feet from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution?

For the following reasons, the title and ballot title and submission clause are misleading and confusing:

1. The catch phrase "statewide setback" has an alliterative quality that masks its true, plain language meaning in a way that is likely to elicit support for the Initiative without contributing to public understanding of the effect of the Initiative;
2. Use of the term "new" is a vague catch phrase that is likely to prejudice the Initiative in its favor without contributing to public understanding of the reach of the Initiative;
3. The catch phrase "hydraulic fracturing" is politically charged and its inclusion is likely to appeal to voter emotion without contributing to public understanding of the relationship between the Initiative and hydraulic fracturing;

4. The title and ballot title and submission clause fail to describe the effect of the Initiative as an override of current statewide setback rules; and
5. The title and ballot title and submission clause fail to describe the type of oil and gas wells affected by the Initiative.

Accordingly, the title and ballot title and submission clause, as drafted, do not conform to the statutory requirements of section 1-40-106(3)(c) or to the case law construing the statute and require amendment consistent with these concerns.

III. REQUEST FOR RELIEF TO GRANT THE MOTION FOR REHEARING AND TO REJECT THE MEASURE FOR LACK OF JURISDICTION OR, ALTERNATIVELY, TO AMEND THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE.

Because the Initiative contains multiple subjects, the Board lacks jurisdiction to set a title. To the extent the Board determines it has jurisdiction to set a title, the title and ballot title and submission clause, as drafted, contain impermissible catch phrases and fail to describe the purpose of the measure in ways that are misleading and confusing.

Accordingly and pursuant to section 1-40-107(1), C.R.S., the objectors request that this Motion for Rehearing be granted and that the Board reject the Initiative for lack of jurisdiction or, alternatively, amend the title and ballot title and submission clause consistent with the concerns set forth above.

Respectfully submitted this 10th day of April, 2014.



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Ballot Title Setting Board

Proposed Initiative 2013-2014 #85¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, changing existing setback requirements to require any new oil or gas well to be located at least 1,500 feet from the nearest occupied structure; authorizing a homeowner to waive the setback requirement for the homeowner's home; and establishing that the statewide setback requirement is not a taking of private property requiring compensation under the Colorado constitution.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, changing existing setback requirements to require any new oil or gas well to be located at least 1,500 feet from the nearest occupied structure; authorizing a homeowner to waive the setback requirement for the homeowner's home; and establishing that the statewide setback requirement is not a taking of private property requiring compensation under the Colorado constitution?

*Hearing April 3, 2014:
Single subject approved; staff drafts amended; titles set.
Hearing adjourned 10:55 a.m.*

*Rehearing April 16, 2014:
Motion for Rehearing granted to the extent that the Board made changes to the titles; denied in all other respects.
Hearing adjourned 2:19 p.m.*

¹ Unofficially captioned “**Oil and Gas Operations**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.