Certification of Word Count: 2,578

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT JUN 13 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from Ballot Title Board	▲ COURT USE ONLY ▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008 #14 J. GREG SCHNACKE, Petitioner, v. MEGAN FERLAND AND MATT SAMELSON, PROPONENTS AND WILLIAM A. HOBBS, DANIEL DOMENICO AND SHARON EUBANKS, TITLE BOARD, Respondents.	Case No.: 07SA155
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 5th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record	

~~ANSWER~~ BRIEF OF TITLE BOARD

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STATUTES

William A. Hobbs, Daniel Domenico and Sharon Eubanks, as members of the Title Board (hereinafter "Board"), hereby submit their Answer Brief.

STATEMENT OF THE ISSUES

1. Does proposed initiative 2007-2008 #14 (#14) contain a single subject?

2. Does the statement of the tax increase in the title comply with the requirements of Colo. Const. art. X, § 20(3)(c)?

STATEMENT OF THE CASE

On April 20, 2007 the proponents submitted #14 to the Title Board ("Board"). On May 2, 2007, the Board determined that the content of #14 constituted a single subject and proceeded to set a title. On May 8, 2007, the opponents filed a motion for rehearing. They contended that the measure contained more than one subject because it created a new tax and dedicated the revenues from the tax to programs unrelated to the tax. They also alleged that the titles failed to inform the voters of the estimate of the final, full tax year dollar increase that will result from the new tax. On May 16, 2007 the Board denied the motion for rehearing. J. Greg Schnacke, an opponent, filed a timely appeal with this Court. A certified copy of the entire administrative record has been filed.

STATEMENT OF THE FACTS

#14 imposes a tax on the gross income from the sale of oil and gas severed from the ground. It contains the following provisions:

Section 1 states:

> The people of the State of Colorado hereby find that nonrenewable natural resources of oil and gas are 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.

Section 2 establishes the tax rate. Section 3 prohibits the reduction of the tax by credits for ad valorem taxes assessed on the value of real or personal property. Section 4 excludes revenues generated by the tax from the revenue limits imposed by Colo. Const. art. X, § 20. Section 5 mandates that revenue from the tax be distributed as follows: (1) twenty-three percent of the revenues to the capital construction expenditures reserve established in section 22-54-117, C.R.S.; (2) fifteen percent to the education fund created in Colo. Const. art. IX, § 17; (3) fifteen percent to the capital construction fund established in § 24-75-302, C.R.S.; (4) twenty-three percent to the counties and municipalities impacted socially or

economically by the extraction of oil and gas; and (5) twenty-four percent to be appropriated by the General Assembly. Section 6 repeals § 39-29-105, C.R.S. because the statute sets a tax rate that conflicts with the proposed constitutional amendment. Section 7 authorizes the General Assembly to exempt oil and gas wells with *de minimus* production levels. Section 8 directs the General Assembly to make conforming amendments. Pursuant to section 9, the effective date of the measure is January 1, 2008.

SUMMARY OF THE ARGUMENT

1. #14 contains only one subject: A severance tax on gross income from oil and gas extraction. The designation of revenues to specified funds is part and parcel of the imposition of the tax.

2. The titles are valid. The titles accurately reflect the tax increase, as required by Colo. Const. art. X, § 20(3)(c). Art. X, § 20(3)(c) requires only that the titles disclose the first full fiscal year if the tax is not phased in.

ARGUMENT

I. The measure contains only one subject: A severance tax on gross income for oil and gas extraction.

The opponent contends that the Board should not have set titles because #14 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it "relate[s] to more than one subject and ...[has] at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006)(*#55*); *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 215 (Colo. 2002)(quoting *In re Proposed Initiative "Public Rights in Water II"*, 898 P.2d 1076, 1078-79 (Colo. 1995) (*#21*). A proposed initiative that "tends to effect or to carry out one general objective or purpose

presents only one subject." *In re Ballot Title 1999-2000 #25,* 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43,* 46 P.3d 438, 442 (Colo. 2002) (*#43*).

The Court will not address the merits of a proposed initiative, interpret it or construe its future legal effects. *#21,* 44 P.3d at 215-16, *#43,* 46 P.3d at 443. The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *#55,* 138 P.3d at 278. The single subject requirement must be liberally construed to avoid the imposition of undue restrictions on initiative proponents. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74,* 962 P. 2d 927, 929 (Colo. 1998).

The opponent contends that #14 has two distinct and separate purposes which are not dependent or connected with each other: (1) the imposition of a tax on gross income from oil and gas extraction, and (2) the allocation of the revenues from the tax that are unrelated to the subject of the tax.

A strong link exists between the imposition of the tax and the appropriation and distribution of the tax revenues for school construction, § 22-54-117; for elementary and high schools, art. IX, § 17; and for "counties and municipalities socially or economically impacted by the development, processing, transportation, or energy conversion of the nonrenewable natural resources of oil and gas." (#14, section 22(5)). It is undisputed that oil and gas extraction imposes significant costs on local governments for education, roads, public safety, courts and social services. The revenues dedicated to the counties and municipalities are intended to help the affected communities deal with the impact of extraction of oil and gas on their communities. The measure assures that each community has the resources necessary to cope with the impact of extraction.

Courts in other states have rejected arguments similar to that posed by the opponent. The North Dakota Supreme Court addressed a tax measure similar to #14. *Sunbehm Gas Co. v. Conrad,* 310 N.W.2d 766 (N.D. 1981). An initiated measure imposed an oil extraction tax. The revenues from the tax were placed in an oil extraction development fund. Forty-five percent of the revenues were allocated to the state school aid program. Ten percent was dedicated to a special trust fund. The remaining forty-five percent was allocated to the state's general fund for general state purposes. (The formula was later amended to provide for a

sixty-ten-thirty split.) The plaintiff argued that the establishment of the fund, the allocation of the money in the fund and the provision of certain tax credits constituted multiple subjects. The court rejected the claim, finding that these matters "related to or are in consequence of the imposition of the oil extraction tax." *Id.* at 773.

In *Kennedy Wholesale, Inc. v. State Board of Equalization*, 806 P.2d 1360 (Cal. 1991), a distributor of tobacco products challenged the California Tobacco Tax and Health Protection Act on the ground that it violated the single subject rule. Under the Act, revenue generated by a tax increase on tobacco products was deposited in a cigarette surtax fund. The money in the fund could be used for tobacco-related education programs, tobacco-related disease research and payment for certain medical care. In addition, the money could be allocated to fire prevention, environmental conservation, protection of wildlife, and enhancement of parks and recreation. The distributor contended that the measure violated the single subject rule because it did not guarantee that every expenditure from the fund would be related to tobacco use. The California Supreme Court rejected the challenge, noting that the expenditures for non-tobacco related items were merely collateral effects. *Id.* at 254. See also, *Advisory Opinion to the Attorney General re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines*

in Parimutuel Facilities, 880 So.2d 522, 524 (Fla. 2004)(imposition of tax on slot machines and allocation of tax to public education not separate subjects)

There is also a strong link between the tax imposed by the measure and the allocation of a portion of the revenues to the general fund and to the capital construction fund. The General Assembly has recognized the connection between the oil and gas severance tax and the allocation of the revenues to the general fund. The legislative declaration to the statute authorizing the existing oil and gas severance tax provides:

> (1)The general assembly hereby finds and declares that, when nonrenewable natural resources are removed from the earth, the value of such resources to the state of Colorado is irretrievably lost. Therefore, it is the intent of the general assembly to recapture a portion of this lost wealth through a special excise tax, in addition to other business taxes, on the nonrenewable natural resources removed from the soil of this state and sold for private profit.
>
> (2) The general assembly further finds and declares that the severance of nonrenewable resources provides a potential source of revenue to the state and its political subdivisions. Therefore, it is the intent of the general assembly to impose a tax on the process of severance in addition to other business taxes.
>
> (3) It additionally is the intent of the general assembly that a portion of the revenues derived from such a severance tax be used by the state for public purposes, that a portion be held by the state in a perpetual trust fund, and that a portion be made available to local

governments to offset the impact created by nonrenewable resource development.

Section 39-29-101, C.R.S. (2006). The General Assembly recognizes that the extraction of nonrenewable resources such as oil and gas affects both state government and political subdivision. Therefore, the revenues can be used for both state and local government purposes.

The Court has long acknowledged the nexus between taxation of any item not prohibited by the State Constitution and the need to raise revenues to pay for the general functions of the State. The State "has the unlimited power of taxation, not only as to the subjects of taxation, but also as to the rate, and may tax its own citizens for the prosecution of any particular business." *Parsons v. People*, 32 Colo. 221, 76 P. 666, 670 (1904). A tax may be imposed on a narrow range of subjects for the purpose of raising money for the general fund. For example, this Court has concluded that a tax imposed upon a narrow subject and allocated to a more general purpose does not violate the single subject rule. *In re Hunter's Estate*, 97 Colo. 279, 49 P.2d 1009 (1935). Colorado assessed a surcharge on inheritance taxes, fees paid to the Secretary of State and motor vehicle registration fees, and allocated the surcharge to the old age pension fund. The Court found that

the imposition of the three additional charges served one purpose and did not violate the single subject rule. *Id.* 97 Colo. at 286-87, 49 P.2d at 1011.

For these reasons, the Court must conclude that #14 contains a single subject.

II. The titles comply with Colo. Const. art. X, § 20(3)(c). The titles set forth the tax increase for the first fiscal year.

The opponent contends that the titles fail to comply with Colo. Const. art. X, § 20(3)(c) because they fail to disclose the final, full fiscal year dollar increase that will result from the new tax. For the following reasons, the Court must reject the claim.

Article X, §20(3)(c) provides, in pertinent part:

> Ballot titles for tax or bonded debt increases shall begin, **"SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final full fiscal year dollar increase) ANNUALLY...?"**

#14 repeals section 39-29-105, C.R.S. (2006). This section imposed a graduated tax on the gross income attributable to the sale of oil and gas severed from the earth. The tax ranged from 2% for income under $25,000 to 5% for income of $300,000 and over. Section 39-29-105(1)(b), C.R.S. (2006). In addition, the statute authorized as a credit against the tax an amount equal to

eighty-seven and one-half percent of certain ad valorem taxes. Section 39-29-105(2)(b), C.R.S. (2006).

#14 imposes a tax rate of 5% on gross income attributable to the sale of oil and gas severed from the earth. It also provides that the state may not create a credit against the tax in any amount based upon ad valorem taxes assessed on the value of real of real or personal property.

The Office of State Planning and Budgeting estimated that the enactment of the measure would result in a tax increase of $244.6 million annually. (Ex. A, attached hereto.) It arrived at this figure by subtracting the gross amount of severance tax revenue estimated under the present tax structure from the gross amount of severance tax revenue estimated under #14.

The opponent apparently contends that the title must include the sum of $428.3 million, which is the gross amount estimated to be collected annually under #14. This analysis is incorrect. It is not the gross amount collected under the new tax but rather the amount of the tax *increase* that must be included in the titles. *Bolt v. Arapahoe County School District No. 6*, 898 P.2d 525, 537 (Colo. 1995)("The overriding scheme of Amendment 1 with respect to taxes evidence an intent on the part of voters to limit tax *increases* that do not receive prior voter

approval.") In this case, the increase is the difference between the amount raised under the present tax schedule and the amount to be raised if #14 passes.

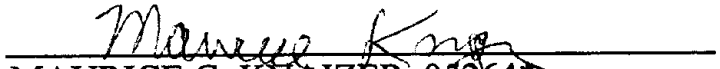
Under article X, § 20(3)(c) the Board must place in the titles the amount of the tax increase in the first fiscal year of the tax if the tax is not phased in. If the tax is phased in, then the Board must set forth the amount of the tax increase when the tax increase is fully implemented.

#14 does not phase in a tax increase. Instead, it increases the tax rate as of January 8, 2008. The Board therefore properly set forth the amount of the tax increase in the first year of implementation.

CONCLUSION

For the reasons stated herein, the Court must approve the action of the Title Board.

JOHN W. SUTHERS
Attorney General



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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of June, 2007, I served a true and complete copy of the foregoing ***Answer Brief of Title Board*** by overnight courier (DHL Express) to each of the following:

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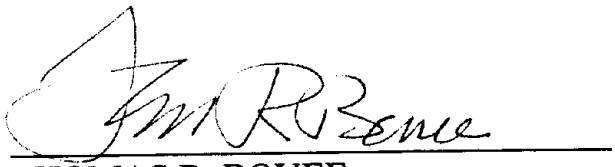

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Bill Ritter, Jr.
Governor
Todd Saliman
Director

MEMORANDUM

TO: Title Setting Review Board

FROM: Todd Saliman, Director

DATE: April 30, 2007

SUBJECT: Fiscal Analysis for Proposed Ballot Initiative #14

Ballot Initiative #14 would repeal the existing severance tax statutes and replace them with a new tax set forth in the Constitution. Apart from some minor but important technicalities, the most noticeable change in tax policy is to eliminate the *ad valorem* tax credit allowed on oil and natural gas. As the initiative appears to constitute a new tax, the Governor's Office of State Planning and Budgeting (OSPB) is tasked with calculating the annual amount of the tax increase as specified by TABOR in the following format: "Shall state taxes be increased $_____ annually...?"

The OSPB has several concerns regarding proposed Ballot Initiative #14. They are outlined below. These concerns relate solely to estimating the fiscal impact of the initiative. It is important to note that the revenue received from this tax increase could vary greatly from the fiscal estimate if passed. In an effort to create a reasonable fiscal estimate, the OSPB consulted with the Department of Local Affairs and Legislative Council Staff economists on the assumptions inherent to this analysis.

- **Severance taxes are extremely volatile.** Energy prices are effectively determined by a small cartel of OPEC ministers, whose future output decisions will hinge on unknown economic and geopolitical events. The production decisions of firms in Colorado depend on several variables apart from output price, such as interest rates, technological ability and the political climate around drilling in areas of environmental significance. Colorado is a marginal state with respect to energy production, and as such it experiences all of the booms and busts of the industry in an aggravated manner.

- **The fiscal impact of this initiative is not observable *ex post*.** As this initiative replaces an existing tax with a new one, it is simply not possible to identify the net revenue gain after the fact. Whereas under the existing statutes, firms had incentives to operate across several counties in order to maximize their *ad valorem* credit, the new constitutional language would incentivize firms to arrange their corporate ownership structure so as to come in under the $300,000 gross revenue threshold. Consequently, it will not be possible to examine data and determine what the existing severance tax would have generated were it not repealed. Therefore, there is no basis for calculating the net revenue gain for TABOR compliance purposes. For the reference of the title board, the OSPB will

EXA

furnish two numbers: the estimated incremental revenue impact from the entire initiative, and a forecast of the gross amount of tax revenue generated by the new tax.

Fiscal Analysis

Prices for Colorado's natural gas and oil are a weighted approximation, derived at the point-of-sale at hubs located in surrounding states where Colorado natural gas and oil is priced. These weighted prices are tracked by the Colorado Oil and Gas Conservation Commission and accessible from their website (http://oil-gas.state.co.us/). Colorado is distant from markets, leading to generally lower prices and a "basis differential" from national market gas prices. Ultimately, the basis differential, combined with national market behavior in response to supply and storage capacity, all act to create an extremely dynamic price environment.

The OSPB used the component analysis done by the Department of Local Affairs to establish the percentage increase DOLA expects to see in oil and gas tax revenue above DOLA's current-law forecast. After some technical adjustments regarding differences in assumptions between the OSPB and DOLA forecasts, this growth factor was applied to the OSPB forecast to establish the forecast of the gross amount of tax revenue resulting from the new tax.

The OSPB estimates that the gross amount of tax revenue generated by the new tax will be $428.3 million in FY 2008-09. The OSPB March 2007 forecast of severance tax revenue in FY 2008-09 is $183.7 million, **which leaves the incremental impact of this initiative at $244.6 million.** The OSPB wishes to reiterate that this incremental amount is the difference between two forecasts, which are both heavily dependent on price and volume forecasts that can vary widely from actual data. As indicated above, it will not be possible to calculate the true fiscal impact of this initiative, because the old severance tax will be abolished and the new tax is structured differently from the old one.

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 13 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, #14 **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. 07SA155**
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	

OPENING BRIEF

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State Statutes

Colorado Constitution

J. Greg Schnacke ("Petitioner"), a registered voter in the State of Colorado, through undersigned counsel, submits this Opening 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 #14 ("Initiative #14").

Initiative #14 would impose a new severance tax on income generated from oil and gas production and require the state to use revenues generated from the new tax to pay for various programs unrelated to oil and gas. Pursuant to this Court's interpretation of the single subject rule, these dual purposes cannot be combined in a single initiative. Moreover, the title and summary do not accurately disclose the full fiscal impact of the new tax, in violation of Article X, section 20 of the Colorado Constitution. Thus, Petitioner respectfully requests that this Court reverse the actions of the Title Board with directions to decline to set a title and to return the Proposed Initiative to the proponents.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Initiative #14 violate the single subject requirement set forth in Colo. Const. Art. V, § 21 by both 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 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?

STATEMENT OF THE CASE

This is a challenge to the actions of the Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2007-2008 #14.

The Title Board conducted its initial public meeting and set a title for Proposed Initiative 2007-2008 #14 on May 2, 2007. The Petitioner filed a Motion for Rehearing on May 8, 2007 pursuant to C.R.S. § 1-40-107(1). At the rehearing, which was held on May 16, 2007, the Board denied Petitioner's motion. Petitioner hereby seeks review of the final action of the Title Board regarding Proposed Initiative 2007-2008 #14.

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

> State taxes shall be increased $244.6 million annually by an amendment to the Colorado constitution concerning the severance tax on the sale of oil and gas extracted in the state, and, in connection therewith, effective January 1, 2008, replacing the existing severance tax with a new severance tax of five percent of the gross income from the sale of oil and gas extracted in the state; permitting the general assembly to increase the rate of the new severance tax without future voter approval; exempting taxpayers with less then $300,000 of gross income from the tax; permitting the general assembly to enact an exemption for minimal producing oil and gas wells; prohibiting a credit against the tax for property taxes paid; exempting revenues from the tax from state and local government spending limits; and requiring specified percentages of the tax revenues to be distributed for (1) school district capital construction, (2) counties and

municipalities impacted by the development, processing, transportation, or energy conversion of oil and gas, (3) public elementary and secondary education, (4) state capital construction, and (5) such other purposes as determined by the general assembly.

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

> Shall state taxes be increased $244.6 million annually by an amendment to the Colorado constitution concerning the severance tax on the sale of oil and gas extracted in the state, and, in connection therewith, effective January 1, 2008, replacing the existing severance tax with a new severance tax of five percent of the gross income from the sale of oil and gas extracted in the state; permitting the general assembly to increase the rate of the new severance tax without future voter approval; exempting taxpayers with less then $300,000 of gross income from the tax; permitting the general assembly to enact an exemption for minimal producing oil and gas wells; prohibiting a credit against the tax for property taxes paid; exempting revenues from the tax from state and local government spending limits; and requiring specified percentages of the tax revenues to be distributed for (1) school district capital construction, (2) counties and municipalities impacted by the development, processing, transportation, or energy conversion of oil and gas, (3) public elementary and secondary education, (4) state capital construction, and (5) such other purposes as determined by the general assembly?

SUMMARY OF THE ARGUMENT

1) Proposed Initiative 2007-2008 #14 violates the single subject requirement because it contains multiple, distinct and separate purposes that are not dependent upon or connected with each other—creating a new tax and dedicating the revenues from that tax to certain programs. There is no necessary or proper connection between these two purposes, even under the

general theme of "tax revenue," and therefore the measure contains more than one subject in violation of Colo. Const. Art. V, § 21.

2) The title fails to inform voters of the measure's true meaning and intent because it fails to disclose the final, full fiscal year dollar increase that will result from the new tax to be established in the Colorado constitution. See Colo. Const. Art. X, § 20(3)(c).

ARGUMENT

A. Proposed Initiative #14 Violates the Single Subject Rule Because it Encompasses More than One Subject

The Colorado Constitution prohibits initiatives containing more than one subject:

> No measure shall be proposed by petition containing more than one subject which shall be clearly expressed in its title . . . . If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

Colo. Const. Art. V, § 1(5.5); *see also* C.R.S. § 1-40-106.5(1)(a). While this Court may not examine the merits of a proposed initiative, it must sufficiently examine an initiative to determine whether it violates this constitutional mandate. *Title, Ballot Title and Submission Clause, and Summary for 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

The single subject requirement protects voters from fraud and surprise by promoting clarity in drafting and discouraging overly complex measures that hide intended effects in the folds of complicated language. *In re "Public Rights in Waters II"*, 898 P.3d 1076, 1079 (Colo. 1995). It also ensures that initiatives are judged on their merits alone. *Id.* at 1078. In particular, the rule seeks to prevent the "evil" of "log rolling," or combining disparate subjects in the hope of attracting support from various factions that may have different or conflicting interests. *Id.; In re 1997-98 #30*, 959 P.2d at 825 (citing *In re Parental Choice in Education*, 917 P.3d 292, 294 (Colo. 1996)) (additional citations omitted). Put simply, the rule is meant to ensure that any initiative presented to the voters is clearly expressed and dependent solely on its merits for passage.

An initiative violates the single subject requirement if 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). In this spirit, an initiative "may neither hide purposes unrelated to its central theme nor group distinct purposes under a broad theme." *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006).

In *Public Rights in Waters II*, this Court disapproved of a proposed initiative that would both adopt the public trust doctrine for the state's waters and impose

certain voting requirements on water conservancy and water conservation districts on single subject grounds. The Court observed that it could find "no unifying or common objective" between the two purposes included in the initiative, and that the common characteristic shared by the two purposes, "water," was "too general and too broad to constitute a single subject." *Public Rights in Water II*, 898 P.2d at 1080.

Likewise, in *In Re 1997-1998 #84 and #85*, 961 P.2d 456 (Colo. 1998), the Court disapproved of an initiative that would both implement local tax cuts and impose mandatory restrictions on state spending on state programs. The latter effect, which was not obvious from the initiative's title, was a "purpose both hidden and unrelated to the central theme of effecting tax cuts." *In re 2005-2006 #55*, 138 P.3d at 277 (analyzing *In re 1997-1998 #84 and #85*). Thus, the Court held that the initiative violated the single subject requirement because it sought both to impose a tax cut *and* to affect unrelated state spending on state programs. *In re 1997-1998 #84 and #85*, 961 P.2d at 460-61.

Pubic Rights in Waters II and *In re 1997-1998 #84 and #85* are both instructive in analyzing Initiative #14, which suffers from similar problems as the measures analyzed in those cases. Namely, Initiative #14 contains disparate purposes connected only by a general theme, and it seeks both to impose a new tax *and* mandates the manner in which the revenues from the new tax must be used.

Initiative #14 seeks to amend Article Ten of the Colorado Constitution to add a new severance tax on oil and gas. In paragraphs two and three, Initiative #14 increases the tax burden on oil and gas producers by imposing a new severance tax on income derived from oil and gas and eliminating the *ad valorem* tax credit, which is allowed as a set-off under the current severance tax statute:

> (2) In addition to any other tax, there shall be levied, collected, and pain for all or any part of each taxable year commencing on or after January 1, 2008 , at tax upon the gross income attributable to the sale of oil and gas severed from the Earth in this State. . . .
>
> * * *
>
> (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.

Paragraph 5 then directs the general assembly to appropriate and distribute the revenues from the new severance tax as follows:

> (a) Twenty-three percent of such revenues shall be appropriated to the capital construction expenditures reserve established in section 22-54 117(1.5), Colorado Revised Statutes, or any successor reserve, for the purposes set forth therein.
>
> (b) Fifteen percent of such revenues shall be appropriated to the state education fund created pursuant to section 17 of article IX of the Colorado Constitution.
>
> (c) Fifteen percent of such revenues shall be appropriated to the capital construction fund created pursuant to section 24-75-302, Colorado Revised Statutes, or any successor fund, for the purposes set forth therein.
>
> (d) Twenty-three 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.

(e) Twenty-four percent of such revenues shall be appropriated and distributed as may be determined by the general assembly.

These provisions encompass two very different purposes that invoke very different goals and policy considerations. The first purpose, described in paragraphs two and three, is to increase the tax burden on oil and gas producers. Presumably, the intent behind the new severance tax is to curtail oil and gas production in the state, as the emotional language used to describe oil and gas extraction suggests:

(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 . . . .

The second purpose, described in subsections (a) through (e) of paragraph five, raises a host of policy considerations that are distinct, to say the least, from the first purpose. To increase the tax burden on producers of oil and gas, thereby making the business of oil and gas extraction more costly in the state, is a separate policy decision than how the state should distribute those revenues. This is particularly true where, as here, those revenues are being dedicated to uses that are completely unrelated to the primary purpose of the tax.

Indeed, Initiative #14 presents a classic example of "log rolling." Education, capital construction, and "energy impacted" communities are all issues that attract distinct constituencies. The obvious effect of paragraph five of Initiative #14 is to

attempt to enlist support from these various constituencies by promising that they will all benefit from passage of the initiative. This is precisely the type of mischief the single subject rule was meant to prevent—that proponents will seek support from various factions whose interests may be opposed to secure passage of a measure that could not succeed on its merits alone. *See Public Rights in Waters II*, 898 P.2d at 1080. Such a result is not permissible. The fact is that, like the initiatives considered by this Court in *In re1997-1998 #84 and #85*, Initiative #14 seeks to effect a change in tax revenues *and* to influence unrelated state spending, purposes that are not necessarily related to or dependent upon each other. As such, Initiative #14 violates the single subject requirement, and, accordingly, this Court should return the initiative to the Title Board with instructions to decline to set a title and return the initiative to the proponents.

B. The Title Does Not Accurately Inform Voters of the Full Fiscal Year Dollar Increase that will Result from the New Tax

Section Twenty of Article Ten of the Colorado Constitution requires that any initiative proposing a new tax shall include in its title the full fiscal impact of the new tax. *See* Colo. Const. Art. X, § 10(3)(c). In this case, the Title Board determined that the full fiscal impact of the new severance tax would be $244.6 million. As explained below, this amount is woefully inaccurate and based on faulty information.

1) *The Title does not Comply with the Requirements of Article Ten, Section Twenty of the Colorado Constitution because it does not Accurately State the Full Fiscal Impact of the New Tax*

By its terms, Initiative #14 repeals the existing severance tax and replaces it with an entirely new tax.[1] As such, the ballot title must state the "full fiscal impact" of the new tax. *See* Colo. Const. Art. X, § 20(c)(3). The title set by the Title Board sets the fiscal impact of the new tax at $244.6 million, which represents the incremental impact of the new tax, or the difference between revenues generated by the existing severance tax and revenues generated by the new tax. *See Fiscal Analysis for Proposed Ballot Initiative #14*, attached hereto as Ex. 1, at 1 estimate ignores the letter and spirit of Article Twenty, Section Ten of the Colorado Constitution as it does not inform the electorate of the true fiscal impact of the proposed new tax.

Because the proposed severance tax is completely new—and repeals the existing tax—the ballot title must inform voters of the *full* fiscal impact of the new tax. According to the fiscal analysis provided by the Office of State Planning and Budgeting, the full fiscal impact of the new tax is $428.3 million. *See* Ex. 1 at 2. As stated, the ballot title is misleading because it does not reveal the full fiscal impact of the new tax, and, accordingly, the action of the Title Board should be vacated.

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[1] Paragraph 6 of Initiative #14 provides: "Section 39-29-105 [the current severance tax statute] Colorado Revised Statutes is hereby repealed."