

**Supreme Court, State of Colorado
2 East 14th Avenue
Denver, Colorado 80203**

DATE FILED: April 23, 2014 2:39 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 #86 (“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.**

▲ Court Use Only ▲

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. _____

**Petition for Review of Final Action of Ballot Title Setting Board
Concerning Proposed Initiative 2013–2014 #86
(Unofficially Captioned “Oil and Gas Operations”)**

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 #86 (“Initiative #86” 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 #86 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 #86.

On April 10, Petitioners filed a timely motion for rehearing, alleging violation of the single subject requirement and that the titles were unfair, misleading, failed to include key aspects of the proposed initiative, and improperly conflicted with the titles previously set for another 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 #86 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 development 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. In addition, the titles set for Initiative #86 improperly mirror the titles previously set by the Board for another proposed initiative, preventing voters comparing the titles from being able to distinguish between the two proposed initiatives.

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 #86 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, fail to include key aspects of the proposed initiative, and improperly conflict with titles previously set for another proposed initiative, and that the Court remand Initiative #86 to the Board with instructions for redrafting fair and accurate titles for the proposed initiative.

Respectfully submitted: April 23, 2014.



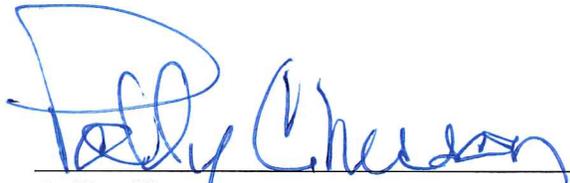
Sarah M. Clark, #39367
Michael F. Feeley, #12266
Brownstein Hyatt Farber Schreck LLP
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202
303.223.1100 tel
303.223.1111 fax
sclark@bhfs.com, mfeeley@bhfs.com
Attorneys for Petitioners

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 #86 (Unofficially Captioned "Oil and Gas Operations")** was filed electronically through ICCES, which caused automatic electronic notice of such filing upon:

Edward T. Ramey, Esq.
Martha Tierney, Esq.
Heizer Paul LLP
2401 Fifteenth Street, Suite 300
Denver, Colorado 80202
Attorneys for Respondents

Maurice G. Knaizer, Esq.
LeeAnn Morrill, Esq.
Office of the Colorado Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Attorneys for the Ballot Title Setting Board



Polly Chesson
Brownstein Hyatt Farber Schreck LLP



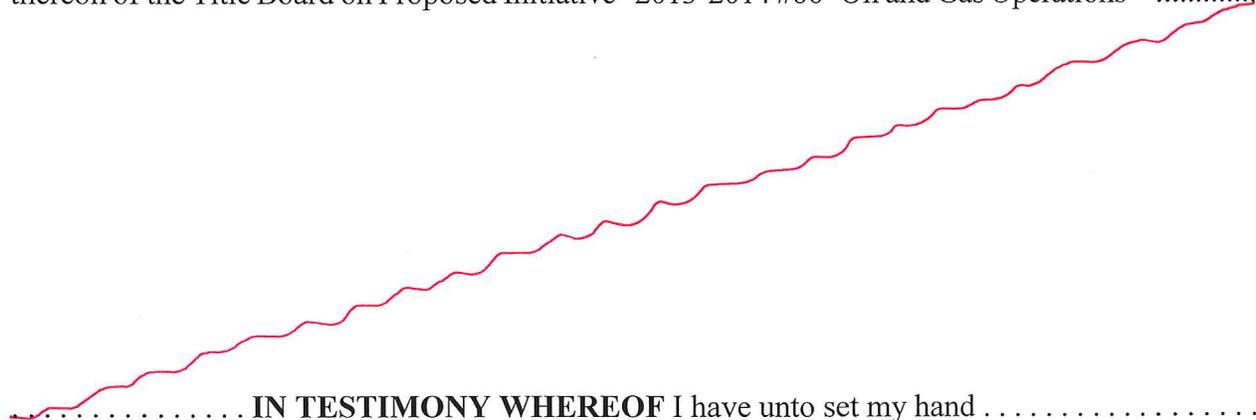
STATE OF COLORADO

DEPARTMENT OF
STATE

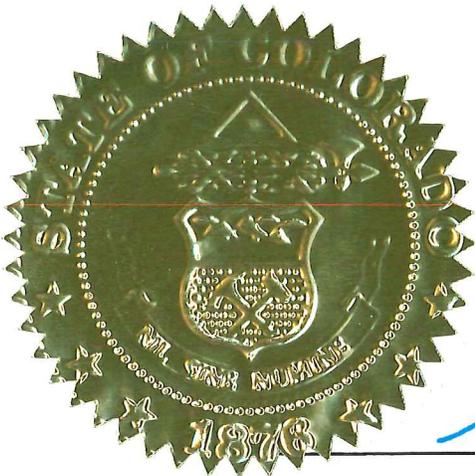
CERTIFICATE

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 #86 '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 handwritten signature in blue ink, reading "Scott Gessler", is written over a horizontal line.

SECRETARY OF STATE

RECEIVED

MAR 21 2014

2013-2014 #86 - FINAL

Colorado Secretary of State

S. WARD 1:15 P.M.

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 DEVELOPMENT, 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 TWO THOUSAND 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 DEVELOPMENT" 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 #86¹

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 2,000 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 2,000 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 draft amended; titles set.
Hearing adjourned 10:59 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.

RECEIVED

APR 10 2014

Colorado Secretary of State

S. WARD 3:38 P.M.

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2013-2014 #86

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2013-2014 #86

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 #86 ("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 during 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 development," 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 CONFLICT WITH THOSE PREVIOUSLY SELECTED, CONTAIN IMPERMISSIBLE CATCH PHRASES, AND FAIL TO DESCRIBE THE PURPOSE OF THE INITIATIVE.

In the alternative, the title and ballot title and submission clause as drafted conflict with a title and ballot title and submission clause previously selected for a 2013-2014 proposed initiative. Moreover, 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.

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 2,000 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 2,000 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?

Pursuant to section 1-40-106(3)(b), ballot titles "shall not conflict with those selected for any petition previously filed for the same election." "Such a conflict exists where the titles fail to accurately reflect the distinctions between the measures, and voters comparing the titles would not be able to distinguish between the two proposed measures." *Paredes v. Corry (In re Title, Ballot Title, & Submission Clause 2007-2008 #61)*, 184 P.3d 747, 752 (Colo. 2008).

Here, the title and ballot title and submission clause conflict with the title and ballot title and submission clause previously selected for Proposed Initiative 2013-2014 #85. When asked by the Board to explain the relationship between Proposed Initiative 2013-2014 #85, Proposed Initiative 2013-2014 #86, Proposed Initiative 2013-2014 #87, and Proposed Initiative 2013-2014 #88, the proponents' attorney described them as a "packet" of initiatives with "little tweaks" to each of them and characterized them as having an identical single subject: "I would say for all of #85 through #88, they create a setback requirement for new oil and gas wells from occupied structures." Thus, if the proponents' position is that these four initiatives are the same, then there is no disagreement that the titles conflict and it cannot be the case that voters will be able to distinguish between them.

In addition, the statute requires the title and ballot title and submission clause to "correctly and fairly express the true intent and meaning" of the proposed initiative. "[A] material omission can create misleading titles." *Garcia v. Chavez (In re Title, Ballot Title, &*

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.*

For the following reasons, the title and ballot title and submission clause as drafted here 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.

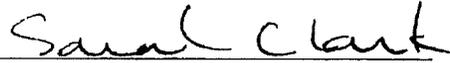
Hence, the title and ballot title and submission clause, as drafted, do not conform to the statutory requirements of section 1-40-106(3)(c) or to the case law construing the statute and require amendment consistent with these concerns.

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, conflict with those previously drafted, contain impermissible catch phrases, and fail to describe the purpose of the Initiative.

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.



Sarah M. Clark, Atty. Reg. #39367
Michael F. Feeley, Atty. Reg. #12266
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Suite 2200
Denver, Colorado 80202
(303) 223-1100 tel
(303) 223-1111 fax
sclark@bhfs.com
mfeeley@bhfs.com

012082\0002\11151774.2

Attorneys for Mizraim Cordero and Scott Prestidge

Ballot Title Setting Board

Proposed Initiative 2013-2014 #86¹

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 2,000 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 2,000 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 draft amended; titles set.
Hearing adjourned 10:59 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 2:28 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.