

SUPREME COURT
STATE OF COLORADO

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2 East 14th Avenue
Denver, CO 80203

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 Initiatives 2013-
2014 #90, #91, #92, and #93 ("OIL AND GAS
OPERATIONS")

Petitioners:

Mizraim Cordero and Scott Prestidge,

v.

Respondents:

Caitlin Leahy and Gregory Diamond,

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason
Gelender.

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Case No. 2014SA120,
2014SA121, 2014SA123 and
2014SA124

OPENING BRIEF OF THE TITLE BOARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raise and ruled on.

/s/ Sueanna P. Johnson

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Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (the "Title Board"), by and through undersigned counsel, hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

1. Do Proposed Initiatives 2013-2014 #90, 2013-2014 #91, 2013-2014 #92 and 2013-2014 #93 each contain a single subject?
2. Do the titles and ballot titles and submission clauses for Proposed Initiatives 2013-2014 #90, 2013-2014 #91, 2013-2014 #92 and 2013-2014 #93 each correctly and fairly express the true intent and meaning of each proposed initiative?

STATEMENT OF THE CASE

These cases are appeals of ballot title settings by the Title Board pursuant to § 1-40-107(2), C.R.S. (2013). On March 21, 2014, Caitlin Leahy and Gregory Diamond ("Proponents") filed Proposed Initiatives 2013-2014 # 90, #91, #92 and #93 ("#90," "#91," "#92," "#93," or collectively "Initiatives") with the Colorado Secretary of State. The Title Board conducted hearings for each measure on April 3, 2014 and set

titles. On April 10, 2014, Petitioners Mizraim Cordero and Scott Prestidge (“Petitioners”) submitted a motion for rehearing for each measure. The Title Board considered the motions on April 16, 2014. The Title Board granted the motions in part and set the titles. The Petitioners then filed appeals on April 23, 2014. The Court consolidated the appeals for briefing purposes.

The Proponents also challenged the Title Board’s refusal to include the words “hydraulic fracturing” in the titles for Initiative #90.

STATEMENT OF THE FACTS

I. Initiative #90

Initiative #90 would add Article XXX to the Colorado Constitution. Section 1 sets forth the following purposes and findings: (a) “the conduct of oil and gas development may impact public health, safety, welfare and the environment;” (b) “any impacts are experienced most directly by local communities;” (c) “to preserve the public’s health, safety, welfare, and the environment, the people desire to expand the authority of local governments by vesting in them the right to regulate oil and gas development.”

Section 2 of the measure vests in each local government “the right, power and authority... to regulate oil and gas development within their geographic borders.” Local governments may enact prohibitions on oil and gas development. Local enactments may be more restrictive than state laws or regulations. The measure defines “oil and gas development” to mean “exploration for and production of Colorado’s oil, gas, other gaseous and liquid hydrocarbons, and carbon dioxide.” This section applies to both statutory and home-rule cities and counties.

Section 3 of the measure declares that the local enactments are not takings and do not require compensation. Section 4 of the measure states that the provisions are self-executing and severable, and supersede conflicting state and local laws. If a local law conflicts with a state law or regulation, the more restrictive provision governs.

II. Initiative #91

The language of Initiative #91 is the same as that of #90 with the following exceptions: (1) the word “operations” is substituted for the word “development” in Section 2 and (2) the measure does not include a takings section.

III. Initiative #92

The language of Initiative #92 is the same as that of #90 with the following exceptions: (1) Section 1 adds a declaration and finding “that the citizens of local communities have historically relied upon local governments to regulate local land uses and to minimize potential land use conflicts between industrial development and residential development” and (2) the measure does not include a takings section.

IV. Initiative #93

The language of Initiative #93 is the same as that of #90 with the following exception: (1) Section 1 adds the same declaration and finding regarding historical reliance that is added to Initiative #92.

SUMMARY OF THE ARGUMENT

The Initiatives meet the single subject requirement. The single subject is the right to local government regulation of oil and gas development or operations.

The titles and submission clause for the Initiatives meet the clear title standards established by this Court. They fairly and accurately set forth the major elements of the measure.

ARGUMENT

I. The Initiatives contain only one subject

A. The standard of review to determine single subject.

The Colorado Constitution prohibits the Title Board from setting titles for a proposed initiative if the initiative contains more than one subject. *In re Title, Ballot Title and Submission Clause for 2007-2008 #61*, 184 P.3d 747, 749 (Colo. 2008). An initiative violates the single subject requirement if (1) it relates to more than one subject, and (2) has two or more distinct purposes which are not dependent upon or connected with each other. *Id.* at 750; *see also In re Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 57 (Colo. 2008). The single subject requirement serves two functions: (1) it ensures that an initiative depends upon its own merits for passage, and (2) it precludes the likelihood of surprise and fraud upon the voters by preventing surreptitious measures. *Id.* The subject of the initiative should be capable of being clearly expressed in the initiative's title. *In*

re Title, Ballot Title and Submission Clause and Summary for 2005-2006 #73, 135 P.3d 736, 738 (Colo. 2006).

A proposed initiative may be broad. Breadth alone does not violate the single subject requirement if the provisions of a proposal are connected. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 254 (Colo. 2000) (“*In re #256*”).

B. The single subject of the Initiatives is local government regulation of oil and gas.

As Petitioners correctly assert, each of the measures expands the power of local governments to prohibit or limit oil and gas development within their respective jurisdictions. Each of the sections is related to this subject. Section 1 of each measure provides the rationale and the factual underpinnings.

Section 2 of each measure describes the grant of authority, the scope of the grant of authority and limits on the authority. This section allows local laws to be more restrictive than the State’s laws. It includes a definition of “oil and gas development (operations).” It also

states that the provisions would apply to all cities, towns, counties, and cities and counties. Section 3 of #90 and #93 states that any law shall not be deemed a “taking” under Colo. Const. art. II, §§ 14 and 15.

The last section of each measure states that it is self-executing and that its provisions are severable. The last section also states that the more restrictive law applies when local and state laws conflict.

The Petitioners contend that Petitions 90-93 constitute multiple subjects. According to Petitioners, the measures: (a) “Expand[] the authority of local governments to or prohibit or limit the exploration and production of ‘Colorado’s oil and gas;” (b) “Exempt[] local governments from complying with the requirements of Article XX and Section 16 of Article XIV of the Colorado Constitution;” (c) “Chang[e] the legal standard used to determine the validity of a local law that conflicts with a state law” (preemption); and (d) with respect to #90 and #93 , “Deprive[s] property owners of rights and protections granted under Sections 14 and 15 of Article II of the Colorado Constitution.”

The Petitioners overstate the reach of the measures. The measures do not purport to effect broad changes in these other

constitutional provisions. Rather, the measures impact other constitutional provisions only with respect to local government regulation of oil and gas development. The measures recognize that these other constitutional provisions are related and establish the details of the relationship. They do not carve broad exceptions to constitutional home rule provisions, the preemption doctrine or the takings provisions. The measures are *in pari materia*, with these other provisions. *See Colorado Project-Common Cause v. Anderson*, 495 P.2d 220, 222 (1972) (courts will interpret constitutional or statutory provisions dealing with same subject matter together).

This Court has concluded that similar measures contained only one subject. *In re #256, supra.*; *see also In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 #113*, 962 P.2d 970 (Colo. 1998) (“*In re #113*”); *In re Title, Ballot Title and Submission Clause and Summary for 1997-98 #112*, 962 P.2d 255 (Colo. 1998) (“*In re #112*”).

In re #256 dealt with proponents who introduced a measure that would have shifted the power to make certain land use decisions from

counties, cities and counties, cities and towns to the respective electors of those communities. The subject of the measure was “management of growth.” The measure contained numerous and detailed provisions giving the voters within these jurisdictions the power to make decisions regarding growth. As part of this challenge, the objectors contended that *In re #256* would alter the power and authority of home rule cities to make land use decisions; transfer land use authority; give to voters the power to make land use decisions; alter the right to petition; and restrict certain agricultural uses. 12 P.3d at 254.

This Court rejected the single subject challenge and held:

The Initiative here addresses numerous issues in a detailed manner. However, all of these issues...relate to the management of development. (citation omitted). The referendum requirement reflects a choice that the voters have a more direct say in managing future development; the curtailment of home rule powers over development is a necessary result of that choice. The exceptions from the definition of “development” reflect policy choices by the proponents, but these choices are related to the purpose of the initiative.

Id.

In re #113 dealt with proponents who sought to regulate pig farms. The measure gave to the state department of public health and environment the obligation to issue discharge permits for certain pig farm operations and directed the water quality control commission to implement regulations governing waste disposal. In addition, the measure authorized local governments to impose more stringent requirements than those imposed by the state departments. Objectors stated that the measure contained multiple subjects. This Court disagreed. 962 P.2d at 970.

In re #112 dealt with proponents who offered a constitutional amendment that would have required the governments to treat all similar livestock operations in a uniform manner. It would have invalidated existing laws and rules in addition to creating uniform requirements. Opponents contended that the repeal of these laws and rules constituted a separate subject. This Court rejected the single subject challenge. 962 P.2d at 256.

The measures in this case, like those in *In re #256*, *In re #112*, and *In re #113* have only one subject. The measures each relate to the

regulation of oil and gas. They designate local governments as the governmental entities with the primary legal authority to regulate oil and gas within their respective jurisdictions. The measures set forth the scope of the powers. The Court must reject the single subject challenges.

II. The Titles are clear, fair and brief.

A. The standard of review with respect to setting a title.

The titles must clearly express the single subject of the proposal. The language of the titles cannot obscure the meaning of the measure. The titles must enable all citizens, whether familiar or unfamiliar with the subject matter, to determine whether to support the proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010) (“*In re #45*”).

The Title Board must “consider the confusion that might be caused by misleading titles” and “avoid titles for which the general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear.” § 1-40-106(3)(a), C.R.S. (2013). Ballot titles shall be brief. *Id.* The Title Board

is not required to discuss every aspect of a measure, provide specific explanations or discuss every possible effect of the measure on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 314, 315 (Colo. 1994) (“*Political Finance*”).

The Court has set forth the following directive for ballot titles:

We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major elements of the initiative. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal but need not include every detail.

In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22, 4 P.3d 213, 222 (Colo. 2002) (“*In re #21*”).

When the Court reviews a challenge to the clear title requirement, it employs all legitimate presumptions in favor of the propriety of the Board’s decision. *In re #45*, 234 P.3d at 645. The Court will examine the text to determine whether the titles and submission clause are consistent with the standards established in statute. The Court will not

determine the efficacy, construction or future application of the proposal, if passed. *Id.*

The clear title requirement does not mandate that details of the single subject must be expressed in the initial clause. Rather, the Title Board meets its obligations if the initiative's single subject is "clearly expressed in its titles." *In re #45*, 234 P.3d at 647. Thus, the Court will review the language used throughout the titles. If the language of the titles, read as a whole, adequately conveys the meaning of a measure, the Court will affirm the decision of the Title Board. *Id.* at 648. Titles are sufficient if they provide voters with a "reasonably ascertainable expression of the initiative's purpose." *Id.*

The Title Board is not required to explain the relationship of the proposed measure to existing laws that are not in the text of the measure. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255*, 4 P.3d 485, 498 (Colo. 2000) (titles are not "misleading because they do not refer to the Initiative's possible interplay with existing state and federal laws"); see also *Political Finance*, 877 P.2d at 315.

The Court has recognized that the Title Board has the difficult task of balancing the competing interests of the proponents against concerns raised by opponents and other members of the public. *In re Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives Nos. 67, 68 and 69*, 293 P.3d 551, 554 (Colo. 2013). The Title Board's decisions are presumptively valid. The Title Board has considerable discretion in setting ballot titles. The Court does not demand that the Title Board set the best possible titles. It will reverse the Title Board's action only if the titles are insufficient, unfair or misleading. *In re Ballot Title 2011-2012 No. 45*, 274 P.3d 576, 582 (Colo. 2012).

B. The Petitioners clear title challenges are without merit.

For each measure, the Petitioners contend that the titles are deficient because they do not include a phrase indicating that the measure is limited to minerals “belonging to the state.” This argument is without merit.

Each measure defines oil and gas development or operations to mean “exploration for and production of Colorado’s oil, gas, other gaseous and liquid hydrocarbons, and carbon dioxide.” The definition refers to minerals located within Colorado’s borders. It is not necessary to include a reference to “Colorado’s” because the public is already aware that local governments do not have any authority to enact laws or regulations beyond the local government’s (and Colorado’s) borders.

The Petitioners also argue that the titles set for #91, #92 and #93 conflict with those set for #90. The Court must reject this argument.

Section 1-40-106(3) (b), C.R.S. (2013) provides that “ballot titles...shall not conflict with those selected for any petition previously filed for the same election.” “[A] conflict exists where the titles fail to

accurately reflect the distinctions between the measures, and ‘voters comparing the titles [not] be able to distinguish between two proposed measures.’” *In re Title, Ballot Title and Submission Clause 2007-2008 #61*, 184 P.3d 747, 752 (Colo. 2008) (quoting *In re Proposed Initiated Constitutional Amendment Concerning the “Fair Treatment II”*, 877 P.2d 329, 333 (Colo. 1994)).

The language in each measure is substantially identical and the titles reflect the language. However, the titles also inform the public of the differences. The major differences among the measures concern the terms “development” and “operations” and provisions regarding takings. Measures #90, #92 and #93 use the term “development” while #91 uses the term “operations.” The titles reflect this difference. Measures #90 and #93 include takings provisions, while measures #91 and #93 do not. Again the titles reflect the difference.

C. Exclusion of the term “hydraulic fracturing” in #90 does not render the title inaccurate.

The Proponents have appealed the titles set for #90. They argue that the titles do not fairly and accurately reflect the measure because

the titles omit the phrase “including hydraulic fracturing.” They contend that “hydraulic fracturing” is a central purpose of the measure. The language of the measure belies this argument. The measure states that local governments have “the right, power and authority to regulate oil and gas development within their geographic borders,” which “includes the ability to enact prohibitions or limits on oil and gas development, including hydraulic fracturing.” Thus, the central feature is the grant to local governments of broad power to regulate oil and gas development, of which hydraulic fracturing is but one example. In the interest of clarity and brevity, the Title Board properly exercised its discretion to refuse to include a reference to hydraulic fracturing.

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the actions of the Title Board and approve the titles for #90, #91, #92, and #93.

Respectfully submitted this 13th day of May, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on this 13th day of May, 2014, I duly served this **OPENING BRIEF OF THE TITLE BOARD** on all parties via ICCES or regular mail, first class postage prepaid, addressed as follows:

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