

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: February 11, 2016 9:10 AM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #62 (“Prohibition on Use of Hydraulic Fracturing”)</p> <p>Petitioners: TRACEE BENTLEY AND STAN DEMPSEY</p> <p>v.</p> <p>Respondents: BRUCE MASON AND KAREN DIKE</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; JASON GELENDER; AND FREDERICK R. YARGER</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioner:</p> <p>Richard C. Kaufman, No. 8343 Matthew K. Tieslau, No. 47483 RYLEY CARLOCK & APPLEWHITE 1700 Lincoln Street, Suite 3500 Denver, Colorado 80203 Telephone: (303) 863-7500 Facsimile: (303) 595-3159</p>	<p>Case Number: 16SA____</p>
<p>PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2015-2016 #62 (“PROHIBITION ON USE OF HYDRAULIC FRACTURING”)</p>	

Tracee Bentley and Howard Stanley Dempsey (“Petitioners”), registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to C.R.S. § 1-40-107(2), to review the actions of the Title Setting Board with respect to the title, ballot title, and submission clause set forth in Initiative 2015-2016 #62 (“Prohibition on Use of Hydraulic Fracturing”) (hereinafter “Proposed Initiative”).

STATEMENT OF THE CASE

A. Procedural History of Proposed Initiative #62

Bruce Mason and Karen Dike (“Proponents”) are the designated proponents of the Proposed Initiative. Proponents submitted a final version of the Proposed Initiative to the Secretary of State on January 8, 2016 for purposes of having the Title Board set title. The Secretary of State or his designee is a member of the Title Board. The review and comment hearing required by C.R.S. § 1-40-105(1) was conducted by the Offices of Legislative Council and Legislative Legal services on January 20, 2016.

The Title Board considered and set title for the Proposed Initiative at its January 20, 2016 meeting. On January 27, 2016 Petitioners timely filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1)(a), alleging that the Proposed Initiative violated the one subject requirement contained within the Colo. Const. art. V., § 1(5.5) and C.R.S. § 1-40-106.5, and that the Proposed Initiative’s title did not accurately reflect the subject matter of the initiative as required by the Colorado Revised Statutes Section 1-40-106(3)(c) which rendered the title misleading. The Title Board considered Petitioners’ Motion at its February 3, 2016 meeting. The Motion for Rehearing was granted to the extent that the Board made limited changes to the title and submission clause but was denied in all other respects.

B. Jurisdiction

Petitioners submit this matter to the Colorado Supreme Court for review pursuant to C.R.S. § 1-40-107(2). Petitioners timely filed the Motion for Rehearing with the Title Board pursuant to C.R.S. § 1-40-107(1) and timely filed this Petition for Review within seven days from the date of rehearing as required by C.R.S. § 1-40-107(2).

Consistent with the requirement set forth in section 1-40-107(2), Petitioners have attached the following documents certified by the Secretary of State: (1) the original version of the Proposed Initiative filed by the Proponents; (2) the original and amended ballot title set for this measure; (3) the Petitioners' Motion for Rehearing; and (4) the Title Board's ruling on the Motion for Rehearing. Petitioners respectfully submit that the Title Board erred in denying the Motion for Rehearing and therefore this matter is properly before this Court.

GROUND FOR APPEAL

The following is an advisory list of issues and grounds for appeal which will be discussed in full detail in Petitioner's brief:

A. The Initiative Impermissibly Contains Multiple Subjects in Violation of the Colorado Constitution and Statutes

The Title Board violated Colo. Const. art. V., § 1(5.5) and C.R.S. § 1-40-106.5 when it set title for the Proposed Initiative. These sections require that every constitutional amendment proposed by initiative be limited to a single subject which shall be clearly expressed in its title. The Proposed Initiative includes the following unrelated subjects:

- (1) Section 1(c) states the purpose of the initiative is the complete ban of the well stimulation technique known as hydraulic fracturing on all land within Colorado except Federal and Indian land. The same subsection states such ban "will not be repugnant to the Constitution of the United States." On the one hand, the initiative bans an oil and gas

process and on the other, defines the relationship between the ban and the United States Constitution. The two subjects are not dependent upon each other. Although the reference to the United States Constitution is vague, the rights of citizens or entities under fundamental federal law are a separate subject from a particular ban on an oil and gas process.

(2) Section 3 prohibits hydraulic fracturing “in all oil and gas development in all lands within Colorado, excluding federal land and Indian reservations.” That is the primary purpose of Initiative #62. Section 4 adds an additional subject and purpose by eliminating property rights under art. II, §§14 and 15 of the Colorado Constitution which is not dependent on the ban of an oil and gas process. Property rights are a separate subject from hydraulic fracturing. Indeed, Initiative #62 has three separate subjects, including a ban of hydraulic fracturing, elimination of state property rights, and a redefinition of rights under the United States Constitution.

These subjects are not connected or interdependent and therefore the Board lacked jurisdiction to set title.

B. The Initiative’s Provisions are so Vague that the Title does not Encompass and Reflect the Purpose of the Proposal

The Title Board violated Section 1(5.5) of Article V of the Colorado Constitution when it set title for the Proposed Initiative. This section requires that the ballot title set by the Board clearly and correctly express the subject of the Initiative. The Proposed Initiative title fails to accurately reflect the subject matter in order to avoid confusion in the following ways:

(1) In section 1(c), the proposed initiative purports to establish that the text is not “repugnant to the Constitution of the United States.” The Title Board failed to mention that provision

when setting the title. Therefore, the electorate will be unaware that this initiative in any way is affecting their federal constitutional rights.

- (2) In section 2, the definition of “environment” “includes air, water, land, and ecological systems.” The term “includes” means that some but not all of the items covered by the word “environment” are set forth. The title does not reflect that additional unstated subjects are included.
- (3) Section 3 prohibits the use of hydraulic fracturing on all lands within the state of Colorado excluding Federal and Indian lands. The title does not reflect that this ban is effectively tantamount to a total ban of the upstream oil and gas industry in Colorado. Over 90% of oil and gas wells in Colorado require hydraulic fracturing to economically produce oil and gas. The title does not reflect the real purpose, the termination of oil and gas development in Colorado, and therefore is an inaccurate representation of the issue before the electorate.
- (4) The Title Boards inclusion of language regarding fees and costs is misleading since the proposal does not limit fees and costs to only plaintiffs who prove a violation occurred. The proposal allows plaintiffs who bring an action to recover fees and cost regardless of the outcome of the action. Therefore, the title improperly represents the text of the initiative found in section 5.
- (5) The Title Board impermissibly interpreted the intent of Initiative #62 when the Board requested proponents’ attorney to state the intent of the provision in Section 5 which allows for the award of attorney’s fees and costs. The clear language of the initiative states that “plaintiffs” may recover fees and costs when they bring an action to enforce the proposal. The initiative does not limit such recovery to prevailing plaintiffs who

prove a violation occurred. The proposal awards fees and costs to plaintiffs regardless of whether they prevail or prove a violation. Therefore, the Title Board impermissibly interpreted the intent and meaning of that section.

All of the above issues demonstrate that the ballot title set by the Board did not clearly express the subject of the Proposed Initiative and as such the Proposed Initiative should be void as its title and submission clause is confusing and misleading.

PRAYER FOR RELIEF

Petitioners respectfully request that after consideration of the parties' briefs, this Court determine that Proposed Initiative contained multiple distinct subjects and as such the Title Board lacked jurisdiction to set title and therefore title setting must be denied. Alternatively, Petitioners request that the Court determine that the title as set is confusing, misleading, and not clearly reflective of the subject of the Proposed Initiative and thus remand the Initiative to the Title Board with instructions to redraft the title to accurately and clearly represent the text of the Proposed Initiative.

Respectfully submitted this 10th day of February 2016 by:

RYLEY CARLOCK & APPLEWHITE

By: *s/ Richard C. Kaufman* _____

Richard C. Kaufman, No. 8343

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on the 10th day of February, 2016, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2015-2016 #62 (“PROHIBITION ON USE OF HYDRAULIC FRACTURING”)** was electronically filed with the court via ICCES and served via U.S mail, postage prepaid, addressed to the following:

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s/Ann I. Palius



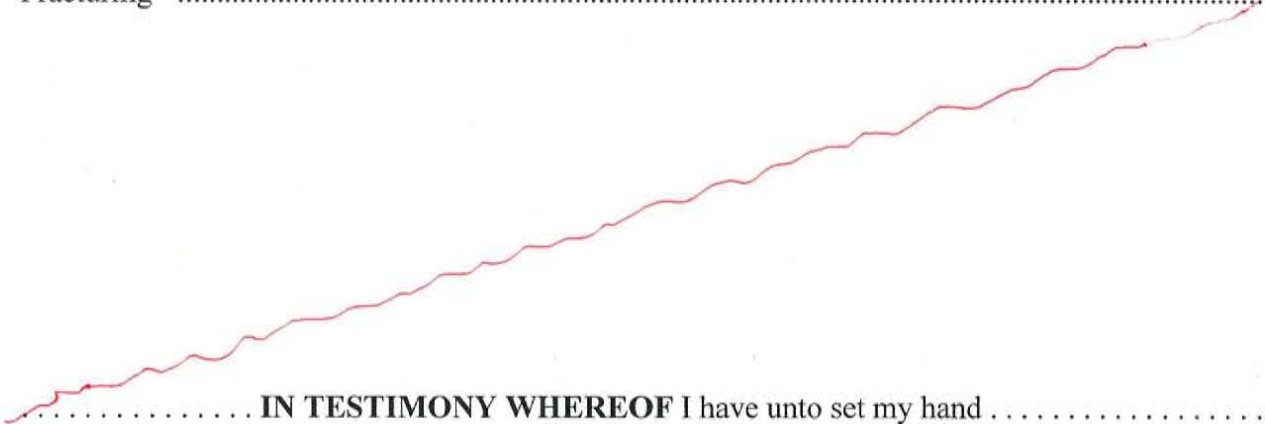
STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **WAYNE W. WILLIAMS**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, motion for rehearing, and the rulings thereon of the Title Board for Proposed Initiative "2015-2016 #62 'Prohibition on Use of Hydraulic Fracturing'"



..... **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 9th day of February, 2016.

Wayne W. Williams

SECRETARY OF STATE



Ballot Title Setting Board

DATE FILED: February 11, 2016 9:12 AM

Proposed Initiative 2015-2016 #62¹

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

An amendment to the Colorado constitution concerning a ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban and obtain damages; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred.

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 ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban and obtain damages; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred?

Hearing January 20, 2016:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 12:03 p.m.

Rehearing February 3, 2016:

Motion for Rehearing granted only to the extent that the Board made changes to the titles; denied in all other respects.

Hearing adjourned 11:02 a.m.

¹ Unofficially captioned “**Prohibition on Use of Hydraulic Fracturing**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

RECEIVED 10:37 A.M.
JAN 27 2016 SWARD

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE
2015-2016 #62

DATE FILED: February 11, 2016 9:12 AM

MOTION FOR REHEARING

Registered electors, Tracee Bentley and Stan Dempsey, through their legal counsel, Ryley Carlock & Applewhite, request a rehearing of the Title Board for Initiative 2015-2016 No. 62. As set forth below, Ms. Bentley and Mr. Dempsey respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

TITLE AND SUBMISSION CLAUSE

On January 20, 2015, the Title Board designated the title as follows:

An amendment to the Colorado constitution concerning a ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred.

The Title Board set the ballot title and submission clause as follows:

Shall there be an amendment to the Colorado constitution concerning a ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred?

GROUND FOR RECONSIDERATION

I. THE INITIATIVE IMPERMISSIBLY CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE COLORADO CONSTITUTION AND STATUTES.

The Colorado Constitution and statutes require that each initiative that proposes an amendment to the Constitution shall contain only one subject and that subject shall be clearly expressed in the title. *See* Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5; *In re Title, Ballot Title,*

Submission Clause, 974 P.2d 458, 463 (Colo. 1999) (a proposed initiative violates the single subject rule where it “has at least two distinct and separate purposes which are not dependent upon or connected with each other.”). The Board set title for Initiative No. 62 despite the fact that it contains multiple distinct and separate purposes that are not dependent upon or connected with one another. Specifically, the initiative includes the following several, unrelated subjects:

- (1) Section 1(c) states the purpose of the initiative is the complete ban of the well stimulation technique known as hydraulic fracturing on all land within Colorado except Federal and Indian land. The same subsection states such ban “will not be repugnant to the Constitution of the United States.” On the one hand, the initiative bans an oil and gas process and on the other, defines the relationship between the ban and the United States Constitution. The two subjects are not dependent upon each other. Although the reference to the U.S. Constitution is vague, the rights of citizens or entities under fundamental federal law are a separate subject from a particular ban on an oil and gas process.
- (2) Section 3 prohibits hydraulic fracturing “in all oil and gas development in all lands within Colorado, excluding federal land and Indian reservations.” That is the primary purpose of Initiative #62. Section 4 adds an additional subject and purpose by eliminating property rights under Art. II, §§14 and 15 of the Colorado Constitution which is not dependent on the ban of an oil and gas process. Property rights are a separate subject from hydraulic fracturing. Indeed, Initiative #62 has three separate subjects, including a ban of hydraulic fracturing, elimination of state property rights, and a redefinition of rights under the Constitution of the United States.

These subjects are not connected or interdependent and therefore the Title Board lacks jurisdiction to set a title.

II. THE INITIATIVE’S PROVISIONS ARE SO VAGUE THE BOARD CANNOT SET A TITLE THAT ENCOMPASSES AND REFLECTS THE PURPOSE OF THE PROPOSAL.

Colorado Revised Statute §1-40-106(3)(c) requires the ballot title to accurately reflect the subject matter of an initiative to avoid confusion over its meaning and purpose. *Aisenberg v. Campbell*, 987 P.2d 249, 253 (2000). The Title set for Initiative No. 62 violates this statutory provision in the following ways:

- (1) In section 1(c), the proposed initiative purports to establish that the text is not “repugnant to the Constitution of the United States.” The Title Board failed to mention that provision when setting the title. Therefore, the electorate will be unaware that this initiative in any way is affecting their federal constitutional rights.
- (2) In section 2, the definition of “environment” “includes air, water, land, and ecological systems.” The term “includes” means that some but not all of the items covered by the

when setting the title. Therefore, the electorate will be unaware that this initiative in any way is affecting their federal constitutional rights

- (2) The title is vague and misleading because it fails to include a definition of “oil and gas development” found in section 2 of the initiative.
- (3) Section 3 terminates the use of hydraulic fracturing on all lands within the state of Colorado excluding federal lands and Indian reservations. The title does not reflect that banning this chemical process represents the termination of the oil and gas industry in Colorado because over 90% of the oil and gas wells require hydraulic fracturing to produce oil and gas. The title does not reflect the real purpose and therefore is an inaccurate representation of the issue before the electorate.
- (4) The Title Board’s inclusion of language regarding fees and costs is misleading since the proposal does not limit fees and costs to only plaintiffs who prove a violation occurred. The proposal allows plaintiffs who bring an action to recover fees and cost regardless of the outcome of the action. Therefore, the title improperly represents the text of the initiative found in section 5.
- (5) The Title Board impermissibly interpreted the intent of Initiative #62, when the Board requested proponents’ attorney to state the intent of the provision in Section 5 which allows for the award of attorney’s fees and costs. The clear language of the initiative states that “plaintiffs” may recover fees and costs when they bring an action to enforce this proposal. The initiative does not limit such recovery to prevailing plaintiffs who prove a violation occurred. The proposal awards fees and costs to plaintiffs regardless of whether they prevail or prove a violation. Therefore, the Title Board impermissibly interpreted the intent and meaning of that section.
- (6) The title fails to reflect that in section 5 both damages and penalties may be assessed for a violation of the initiative. Damages normally compensate a party for actual loss while penalties are monetary assessments in addition to damages. The title fails to reflect this important distinction.
- (7) The title fails to reflect that based on distinction pointed out in the preceding paragraph, a court may only distribute “penalties” to local governments which does not include damage awards..

Based on the foregoing, Ms. Bentley and Mr. Dempsey respectfully request the Title Board conduct a re-hearing on the title set for Initiative 2015-2016 #40.

Respectfully submitted this 27th day of January, 2016 by:

RYLEY CARLOCK & APPLEWHITE



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RECEIVED

JAN 08 2016

S. WARD
1:58 PM.

Original
Initiative 2015-2016 #62

Colorado Secretary of State

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

DATE FILED: February 11, 2016 9:11 AM

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

ARTICLE XXX

Ban on Hydraulic Fracturing

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

(a) THAT OIL AND GAS DEVELOPMENT USING HYDRAULIC FRACTURING, HAS DETRIMENTAL IMPACTS ON PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT;

(b) THAT THE PROTECTION OF PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT HAS PRIORITY OVER THE RIGHTS OF OIL AND GAS DEVELOPMENT; AND

(c) THAT TO SAFEGUARD AND DEFEND PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO PROHIBIT THE USE OF HYDRAULIC FRACTURING IN OIL AND GAS DEVELOPMENT WITHIN THE GEOGRAPHIC BOUNDARIES OF THE STATE OF COLORADO, EXCLUDING FEDERAL LAND AND INDIAN RESERVATIONS.

(d) SUCH PROHIBITION IS DEEMED NECESSARY TO THEIR SAFETY AND HAPPINESS AND WILL NOT BE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

Section 2. Definitions. (a) "OIL AND GAS DEVELOPMENT" MEANS EXPLORATION FOR AND PRODUCTION AND PROCESSING OF OIL, GAS, OTHER GASEOUS AND LIQUID HYDROCARBONS, AND CARBON DIOXIDE, AS WELL AS THE TREATMENT AND DISPOSAL OF WASTE ASSOCIATED WITH SUCH EXPLORATION AND PRODUCTION.

(b) "HYDRAULIC FRACTURING" MEANS THE WELL STIMULATION PROCESS USED TO EXTRACT DEPOSITS OF OIL, GAS, AND OTHER HYDROCARBONS THROUGH THE INJECTION OF WATER, SAND, AND CHEMICALS UNDER HIGH PRESSURE INTO GEOLOGIC FORMATION(S).

(c) "ENVIRONMENT" INCLUDES AIR, WATER, LAND, AND HEALTH, AND ECOLOGICAL SYSTEMS.

Section 3. Prohibition of Hydraulic Fracturing. THE USE OF HYDRAULIC FRACTURING IS PROHIBITED IN OIL AND GAS DEVELOPMENT IN ALL LANDS WITHIN THE GEOGRAPHIC BOUNDARIES OF THE STATE OF COLORADO, EXCLUDING FEDERAL LAND AND INDIAN RESERVATIONS.

Section 4. Not a taking. THE PROHIBITION OF HYDRAULIC FRACTURING IS NOT A TAKING OF PRIVATE PROPERTY AND DOES NOT REQUIRE THE PAYMENT OF COMPENSATION PURSUANT TO SECTIONS 14 AND 15 OF ARTICLE II OF THE COLORADO CONSTITUTION.

Section 5. Enforcement and Damages. ANY PERSON(S) OR GOVERNMENTAL ENTITY MAY ENFORCE THIS ARTICLE THROUGH AN ACTION BROUGHT IN A COURT OF COMPETENT JURISDICTION. SUCH PERSON(S) OR GOVERNMENTAL ENTITY SHALL HAVE THE RIGHT TO SEEK DECLARATORY RELIEF, EQUITABLE RELIEF INCLUDING WITHOUT LIMITATION INJUNCTIVE RELIEF, AND/OR DAMAGES. UPON DETERMINATION THAT A VIOLATION OF THIS ARTICLE HAS OCCURRED, PENALTIES MAY BE ASSESSED BY THE COURT OR JURY TO BE PAID INTO THE REGISTRY OF THE PRESIDING COURT AND DISTRIBUTED BY SUCH COURT TO THE LOCAL COMMUNITY WHERE THE VIOLATION(S)

OCCURRED. THE PLAINTIFFS IN SUCH ACTION SHALL BE ENTITLED TO RECOVER ALL REASONABLE COSTS OF LITIGATION, INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND COSTS.

Section 6. Self executing, severability, conflicting provisions. ALL PROVISIONS OF THIS ARTICLE ARE SELF-EXECUTING, ARE SEVERABLE, AND SUPERSEDE CONFLICTING STATE AND LOCAL LAWS AND REGULATIONS. LAWS AND REGULATIONS MAY BE ENACTED TO FACILITATE THE OPERATION OF THIS ARTICLE, BUT IN NO WAY LIMITING OR RESTRICTING THE PROVISIONS OF THIS ARTICLE.

Ballot Title Setting Board

DATE FILED: February 11, 2016 9:11 AM

Proposed Initiative 2015-2016 #62¹

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

An amendment to the Colorado constitution concerning a ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred.

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 ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred?

Hearing January 20, 2016:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 12:03 p.m.

¹ Unofficially captioned “**Prohibition on Use of Hydraulic Fracturing**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.