

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 15, 2020 4:19 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2019) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #313</p>	
<p>Petitioner: Timothy Steven Howard, v.</p>	
<p>Respondents: Diana Schwenke and David Davia, and Title Board: Theresa Conley, David Powell, and Jason Gelender.</p>	<p>▲ COURT USE ONLY ▲ Case No. 2020SA158</p>
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<p>THE TITLE BOARD'S OPENING BRIEF</p>	

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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,720 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Emily Buckley

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- (1) Whether the Title Board correctly determined that Proposed Initiative 2019-2020 #313 contains a single subject.
- (2) Whether the title is incomplete or misleading and fails to advise the voters of the central purpose of the measure.¹

STATEMENT OF THE CASE

Proponents Diane Schwenke and David Davia seek to circulate #313 to obtain the requisite number of signatures to place a measure on the ballot to enact § 34-60-132 in Colorado's revised statutes. The proposed initiative seeks to prohibit the oil and gas conservation commission ("COGCC") from repealing or amending to make less stringent certain oil and gas and air quality rules. *See* Record filed April 30, 2020 ("Record") at 2.

The Board concluded that the measure contained a single subject and proceeded to set a title at its April 15, 2020 meeting. *Id.* at 3. Petitioner Timothy Howard filed a timely motion for rehearing, arguing

¹ This appeal raises substantially the same issues as *In re Proposed Initiative 2019-2020 #312*, 2020SA138 (Colo. Filed Apr. 22, 2020).

that #313 contained multiple subjects and that the title was misleading. *Id.* at 4–8. On April 23, 2020, the Board denied Petitioner’s motion in its entirety. *Id.* at 9.

SUMMARY OF ARGUMENT

The Board’s actions in setting #313 should be affirmed. The single subject of #313 is prohibiting the oil and gas conservation commission from repealing or amending to make less stringent certain of its rules and rules over which it has authority. The provisions of the measure that Petitioner challenges on single subject grounds are either necessarily and properly connected to that subject or constitute impermissible speculation about the possible effects of the measure.

Petitioner also challenged the clear titles in his petition for review. The title set by the Board is not misleading.

ARGUMENT

I. Standards governing titles set by the Board.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause for 2009-10 #45* (“*In re #45*”), 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants

great deference to the Board in the exercise of its drafting authority.

Id. The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board’s decision only if the title is insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

The Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause for 2009-10 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Section 1-40-106(3)(b), C.R.S., establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, and Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008). The statute provides:

In setting a title, the title board shall consider the public confusion that might be caused by

misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a “yes/for” or “no/against” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed...within two weeks after the first meeting of the title board. ...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered “yes/for” (to vote in favor of the proposed law or constitutional amendment) or “no/against” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

II. The proposed initiative contains a single subject.

A. Standard of review and preservation.

When this Court reviews “the Title Board’s single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions. [It] will only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 8

(quotation omitted). The Title Board agrees that Petitioner preserved the single subject issue by raising it in the motion for rehearing.

B. The single subject requirement is met.

The single subject of #313 prohibiting the oil and gas conservation commission from repealing or amending to make less stringent certain rules. The title as set by the Board is as follows:

A change to the Colorado Revised Statutes prohibiting the oil and gas conservation commission from repealing or amending to make less stringent: 1) specified oil and gas conservation commission rules related to oil and gas safety, aesthetic and noise control, spills, reclamation, and flowlines, and, 2) if otherwise given such authority, specified air quality control commission rules related to air emission reductions and inventory.

Record at 3.

The Proponents conceded that the COGCC currently does not have authority to affect the AQCC rules, but Proponents stated they intended to run #313 in tandem with other initiatives that would allow COGCC some degree of approval over AQCC rules, specifically Proposed Initiatives 2019-2020 #309–#311. *See* April 15, 2020 Afternoon Session, <https://tinyurl.com/yc52eov8>, at 4:50:30–4:60:00.

At the rehearing, Petitioner argued that the single subject test is not met because COGCC has no current authority to repeal or make less stringent certain Air Quality Control Commission (“AQCC”) Air Emission Reduction Rules. Petitioners argued in their motion for rehearing that #313 “expressly states that specific AQCC rules ‘shall not be repealed or amended by the oil and gas commission or its successor to make them less stringent.’ The COGCC lacks that power, but by stating that a commission will not do something it does not have the authority to do, it has created a second subject in conflict with the APA.” Record at 4.

Number 313 does not create additional authority for COGCC to affect the AQCC rules, and thus does not create a second subject. Further, Petitioners’ argument goes to the merits of the measure and does not weigh in favor of rejecting the measure on single-subject grounds. “In determining whether a proposed initiative comports with the single subject requirement, [the Court does] not address the merits of a proposed initiative, nor [does the Court] interpret its language or predict its application if adopted by the electorate.” *In re Title, Ballot*

Title, & Submission Clause for 2007-2008 #62, 184 P.3d 52, 59 (Colo. 2008) (quotations omitted). Petitioner’s arguments concern the potential effects and consequences of the measure.

But “the effects this measure could have on Colorado law if adopted by voters are irrelevant to [a] review of whether the proposed initiative and its Titles contain a single subject.” *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 17 (quotations and alterations omitted); *see also Matter of Title, Ballot Title and Submission Clause for 2019-2020 #3*, 442 P.3d 867, 870 (Colo. 2019) (“[T]o conclude that the initiative here comprises multiple subjects would require us to read language into the initiative that is not there and to address the merits of that initiative and suggest how it might be applied if enacted. As noted above, however, we are not permitted to do so.”). Therefore, the Board correctly found that #313 contains a single subject.

III. The title set by the Board is not misleading and does not contain a catch phrase.

A. Standard of review and preservation.

When considering a challenge to a title, the Court should not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only “ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed.” *Id.* The Board agrees that Petitioner preserved her challenge to the title of #313.

B. The title accurately reflects the measure.

The Board’s title for #313 is not misleading or incomplete. Number 313 prohibits COGCC from repealing or amending to make less stringent certain of its rules and rules over which it has authority. Petitioner argues that the title is misleading and incomplete because:

(a) “[m]ultiple agencies actually could repeal certain rules in the Proposed Initiative’s enumerated list of rules or make them less stringent;”

(b) the title “[f]ails to convey that the recent COGCC flowline rulemaking could be repealed or amended” because it fails to include the January 1, 2020 effective date;

(c) the title insufficiently informs voters that the proposed initiative contemplates repealing or amending recent AQCC rules; and

(d) the Board added clarifying language to the ballot title that is not reflected in the proposed initiative.

Petition at pp 3-4.

These arguments are without merit. The title as set by the Board accurately and properly reflects the intent of the initiative, and Petitioner’s arguments do not demonstrate how the title could be considered insufficient, unfair, or misleading. *See In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d at 26; *In re #45*, 234 P.3d at 648. Further, contrary to Petitioner’s first, second, and third (arguments (a) through (c)), “the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme.” *In re #90*, 328 P.3d at 162. And with respect to Petitioner’s fourth argument (d), the Board’s language clarifying that the COGCC is prohibited from repealing or amending to make less stringent specified AQCC rules related to air emission

reductions and inventory only “*if otherwise given such authority*” serves to clarify—not confuse—#313 for voters. Because the title set by the Board is not incomplete or misleading, the Board’s title should be affirmed.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 15th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 15th day of May, 2020, addressed as follows:

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