

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #312 (“Oil and Gas Development Rules”)</p> <p>Petitioner: TIMOTHY STEVEN HOWARD a/k/a TIM HOWARD,</p> <p>v.</p> <p>Respondents: DIANE SCHWENKE AND DAVID DAVIA,</p> <p>and</p> <p>Title Board: THERESA CONLEY, DAVID POWELL, AND JASON GELENDER.</p>	COURT USE ONLY
<p><i>Attorneys for Respondent:</i> Matt Samelson, #44085 Matt Sura, #44089 Western Environmental Law Partners 7354 Cardinal Lane Longmont, CO 80503 (720) 563-1866 matthewsamelson@gmail.com mattsura.law@gmail.com</p>	Supreme Court Case No. 2020SA159
PETITIONER’S OPENING BRIEF	

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 the applicable word limits set forth in C.A.R. 28(g) because it contains 3,700 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, 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 and C.A.R. 32.

By: /s/ Matt Samelson
Matt Samelson, #44085

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RULES

2 CCR 404-1, Table 910-116

Tim Howard (“Petitioner”), a registered elector of the State of Colorado, through undersigned counsel, respectfully submits this Opening Brief:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Ballot Title Setting Board (“Title Board”) erred when setting a title for the Proposed Initiative 2019-2020 #312 (“Proposed Initiative”) because the measure contains more than a single subject in violation of Colo. Const. art. V, §1(5.5) and section 1-40-106.5(1)(e), C.R.S. (2019)?
2. Whether the Title is misleading because it fails to inform voters of certain central elements of the Proposed Initiative, including:
 - a. The Title fails to convey that recent, stricter rules by the COGCC and recent, stricter air emission standards and emission inventory rules by the AQCC could be repealed.
 - b. The COGCC will still not have the power to amend or repeal AQCC regulations no matter if voters vote "yes/for" or "no/against" the measure.
 - c. Certain environmental and public safety rules in the measure can still be repealed or made less stringent by entities other than the COGCC.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings before the Title Board.

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. (2019) of the title setting for the Proposed Initiative. On April 3, 2020, the last day to file for measures to appear on the November 2020 General Election Ballot, Diane Schwenke and David Davia (“Respondents”) submitted the Proposed Initiative to the Title Board for the setting of a title, ballot title, and submission clause pursuant to section 1-40-106, C.R.S. (2019). The Title Board held a hearing on April 15, 2020 and determined that the Proposed Initiative contained a single subject, and set the title, ballot title, and submission clause (the “Title”).

Petitioner filed a timely Motion for Rehearing on April 22, 2020, contending that, first, the Proposed Initiative contained multiple subjects (Mot. for Reh’g § I); and, second, the Titles were incomplete and misleading (Mot. for Reh’g § II). The Title Board conducted a rehearing on April 23, 2020, at which time the Title Board denied the Motion for Rehearing in its entirety.

Petitioner filed a Petition for Review with this Court pursuant to section 1-40-107(2), C.R.S. (2019) on April 30, 2020.

B. Statement of Facts

The Proposed Initiative requires the oil and gas commission to not repeal or makes less stringent certain rules promulgated by the Colorado Oil and Gas Conservation Commission (“COGCC”) and the Colorado Air Quality Control Commission (“AQCC”) as they existed on January 1, 2020. The Proposed Initiative refers to a generic oil and gas commission and not to the COGCC because the Proposed Initiative would be placed on the ballot in partnership with Proposed Initiative 2019-2020 #311, which, in part, eliminates the COGCC and creates a new independent oil and gas board.

The Title set for the Proposed Initiative at the April 23, 2020 hearing states:

SHALL THERE BE AN AMENDMENT TO THE COLORADO CONSTITUTION 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?
(Emphasis added)

SUMMARY OF THE ARGUMENT

The Title Board erred in setting Title for the Proposed Initiative because it violates the single subject requirement. The Proposed Initiative creates a second subject by seeking to prohibit a generic oil and gas commission from repealing or

making less stringent certain environmental and public safety rules promulgated by the COGCC and the AQCC as of January 1, 2020.

In addition, the Title is misleading and will cause public confusion because it is unclear. The Title is misleading because it contains a material and significant omission by failing to inform voters that recent COGCC flowline rules and recent AQCC air emission rules promulgated in 2019 as well as the upcoming COGCC “Mission Change” rulemaking noticed for September of 2020 could be repealed or made less stringent. The Title for the Proposed Initiative demonstrates a textbook case where a “yes/no” vote will be unclear because if the Colorado electorate approved the Proposed Initiative it would prevent the oil and gas commission from making air quality rules less stringent but does not give the commission the power to amend those air quality regulations. It would not matter if the voter voted “yes/for” or “no/against” this measure because either way the oil and gas commission lacks the authority over AQCC regulations. Finally, the Titles are unclear because voters will be surprised to learn that certain environmental and public safety rules in the measure can still be repealed or made less stringent by entities other than the COGCC.

Because the Proposed Initiative violates the single subject requirement and the Titles are misleading, the Title Board decision should be overturned.

ARGUMENT

I. The Proposed Initiative violates the single subject requirement.

A. Standard of review and preservation of the issue

In reviewing Title Board decisions, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 328 P.3d 155, 158 (Colo. 2014). A proposal violates the single subject requirement for initiatives if its text “relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.” *People ex rel. Elder v. Sours*, 74 P. 167, 177 (1903); see *In re Proposed Initiative 2001–02 #43*, 46 P.3d 438, 441 (Colo. 2002) (describing use of *Sours* test to analyze ballot initiatives). Though neither addressing the merits nor potential applications of a proposed initiative, “we must examine their wording to determine whether the initiatives and their titles comport with the single subject and clear title requirements.” *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). “In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.*

Respondent preserved this issue in his Motion for Rehearing, § I.

B. The Proposed Initiative violates the single subject requirement by prohibiting AQCC rules from being repealed or made less stringent.

The Proposed Initiative violates the single subject requirement by both prohibiting COGCC rules from being repealed as well as rules from the AQCC. The inclusion of the rules from an entirely different agency is an impermissible additional subject.

The single subject requirement for ballot initiatives is meant to prevent proponents from engaging in “log rolling” tactics of combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have different or even conflicting interests. *Id.* at 465. Putting aside the question of the efficacy of inserting more than one hundred pages of rules from the COGCC about everything from tank labeling to weed control standards into the state constitution by reference, the addition of dozens of pages of unrelated AQCC regulations to the Colorado Constitution is another subject and prevents the Title Board from having jurisdiction in this matter.

II. The Title fails to comply with the constitution’s clear title requirement.

A. Standard of review and preservation of the issue

In reviewing Title Board decisions, this Court “employ[s] all legitimate

presumptions in favor of the propriety of the Board’s actions.” *In re 2013–2014 #90*, 328 P.3d at 158. This Court neither addresses the merits of the Proposed Initiative nor suggests how it might be applied if enacted. *Id.* at 159.

“The Title Board is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *Id.* at 162. “The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *Id.* The Court will generally defer to the Title Board’s language choices unless the titles set “contain a material and significant omission, misstatement, or misrepresentation.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998).

The Court does “not consider whether the Title Board set the best possible title.” *Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 569 (Colo. 2016). But “the title must fairly reflect the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board. *In re 2013–2014 #90*, 328 P.3d at 162. The Title Board is successful when the language results in “fair, clear, and accurate titles that do not mislead the voters.” *In re Title, Ballot Title and*

Submission Clause, and Summary for 1999-00 #256, 12 P.3d 246, 254 (Colo. 2000).

Respondent preserved this issue in his Motion for Rehearing, § II.

B. The Title is misleading and suffers from omissions that must be corrected before being presented to Colorado voters for signatures or the ballot.

The Title for the Proposed Initiative fails to meet the constitutional requirement that the single subject be “clearly expressed in its title.” Colo. Const. art. V, § 1(5.5). “The title and submission clause should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re 2013–2014 #90*, 328 P.3d at 162. As written, the Title will not allow the voters to understand the Proposed Initiative or the consequences of “yes/for” or a “no/against” vote as required by section 1-40-106(3)(b), C.R.S. (2019).

The Proponents are attempting to enshrine more than 100 pages of COGCC and AQCC rules into the state constitution to forbid future oil and gas commissions from repealing or making those rules less stringent. The Proposed Initiative is misleading because voters will be surprised to learn that (1) recent, stricter rules by the COGCC and recent, stricter air emission standards and emission inventory rules by the AQCC could be repealed, (2) the oil and gas commission will still not

have the power to amend or repeal AQCC regulations regardless if voters approve or reject the measure; and (3) certain environmental and public safety rules in the measure can still be repealed or made less stringent by entities other than the COGCC. The “proposed changes materially alter current law and might well be of significance to voters,” but the changes are unclear because the Title is misleading. *Matter of 2015-2016 #73*, 369 P.3d at 570.

1. Failure to include an effective date is a material and significant omission because strict new rules by the COGCC and the AQCC could be repealed.

The Title language is going to confuse voters because the Title states certain health and safety rules will be constitutionally protected but then fails to state the effective date of the rules that are to be protected. As written, the Title contains “a material and significant omission, misstatement, or misrepresentation,” *Matter of 1997-1998 #62*, 961 P.2d at 1082, and will not enable the electorate to intelligently determine whether to support or oppose such a proposal. *In re Title, Ballot Title, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010).

The proponents have stated that the Proposed Initiative would only be run with Proposed Initiative 2019-2020 #311 that creates an independent oil and gas

board.¹ When run in tandem with #311, the purpose of the Proposed Initiative is to assure voters that the new independent board will not make COGCC or AQCC rules less stringent.² However, the rules professed to be protected by the Proposed Initiative have only recently been adopted and therefore will not be protected by the Proposed Initiative. Substantially more protective new COGCC flowline rules took effect on January 14th, 2020 and new AQCC rules that require increased leak detection and repair requirements near homes took effect on February 14th, 2020. Moreover, in September 2020, the COGCC is undertaking a complete overhaul of its rules that will be adopted in order to ensure that they protect public health, safety, and welfare, including protection of the environment and wildlife resources.³ The rulemaking will include changes related to oil and gas safety, aesthetic and noise control, and spills. None of these new rules will be protected by this initiative.

For example, a plain reading of the Title suggests that flowline rules will be

¹ Title Board hearing, April 15, 2020:

https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=166 at 4:50:43.

² *Id.* at 5:03:15 to 5:05:24.

³ COGCC, Case Management Order, Docket No. 200300071, May 4, 2020.

Available at: <https://drive.google.com/drive/folders/1vIFxHezh0gNI-2NXwMIROGgdiaCoQhH2> (To consider “amendments to Commission Rules of Practice and Procedure, 2 C.C.R. 404-1 (“Rules”), 100-Series, 200-Series, 300-Series, 400-Series, 500-Series, and 600-Series as part of its “Mission Change” Rulemaking.”)

constitutionally protected (“An amendment to the Colorado constitution prohibiting the oil and gas conservation commission from repealing or amending to make less stringent . . . specified oil and gas conservation commission rules related to . . . flowlines.”). The new rules were written in response to the Firestone tragedy in 2017, where two people were killed when their home exploded due to an unmapped and improperly abandoned natural gas flowline. The COGCC enacted three fundamental changes to the agency’s flowline and inactive well rules: (1) requiring mapping data for flowlines and a publicly available online map of the flowlines; (2) enabling inspections when an operator wanted to reactivate an inactive flowline or well; and (3) requiring third-party verification for flowlines abandoned underground. The new rules received extensive media attention.⁴

⁴ For example: Judith Kohler, NEW RULES FOR OIL, GAS FLOW LINES UP NEXT FOR COLORADO REGULATORS, Denver Post, September 5, 2019, *available at* <https://www.denverpost.com/2019/09/05/cogcc-colorado-oil-gas-flow-lines/>; Judith Kohler, NEW STATE RULES WILL CREATE FIRST-EVER PUBLIC MAPPING OF UNDERGROUND OIL, GAS LINES, Denver Post, November 21, 2019., *available at* <https://www.denverpost.com/2019/11/21/colorado-adopts-rule-mapping-oil-gas-lines/>; John Herrick, NEW RULES CALL FOR THOUSANDS OF MILES OF UNDERGROUND OIL AND GAS LINES TO BE MAPPED AND MADE PUBLIC, Colorado Independent, November 22, 2019 *available at* <https://www.coloradoindependent.com/2019/11/22/flow-lines-oil-gas-cogcc-rules-maps/>; COLORADO OIL AND GAS REGULATORS APPROVE NEW POST-FIRESTONE BLAST FLOWLINE RULES, Associated Press, November 22, 2019, *available at* <https://www.cpr.org/2019/11/22/colorado-oil-and-gas-regulators-approve-new-post-firestone-blast-flowline-rules/>; NEW RULES ADOPTED FOR COLORADO OIL AND GAS FLOWLINES, Channel 9 News, November 21, 2019, *available at* <https://www.9news.com/article/news/local/local-politics/cogcc-public-hearings-flowline-rulemaking-colorado/73-2ff5f80f-5b8e-41f3-bb80-9a1c112677a0>.

Colorado voters would be surprised to learn that the Proposed Initiative, which purports to protect COGCC flowline rules, would actually allow the recently implemented rules to protect Coloradans from abandoned flowlines to be repealed or amended. Not including the effective date of the regulations that would be protected is a “material and significant omission.” A voter would be misled into believing that a “yes/for” vote protects the recently-enacted, existing flowline rules, when, in fact, a “yes/for” vote does not protect those rules.

The same “material and significant omission” will confuse voters about whether the recently adopted AQCC air emission standards and emission inventory rules will be protected. Setting aside the fact that the COGCC has no power to repeal or make less stringent AQCC rules, the Proposed Initiative reads as if the COGCC could not repeal or make less stringent existing AQCC rules. Voters reading the Title could believe that a “yes/for” vote protects existing air emission standards and emission inventory rules, when, in fact, a “yes/for” vote allows all those rules that were enacted after January 1, 2020, to be repealed or made less stringent.

Finally, the COGCC has announced extensive rulemaking for the entire 200, 300, 400, 500 and 600 series rules covering many subjects purportedly protected

by the Proposed Initiative.⁵ The COGCC is planning to adopt regulations by September so they will take effect before election day.⁶ Voters that read the Title would fairly assume that rules in effect as of the time of the election would be protected.

Because the Title fails to include the effective date of January 1, 2020 for the rules that the Proposed Initiative would protect, voters will not realize that many of the recently enacted COGCC rules and AQCC rules may be repealed or made less stringent. The failure to include an effective date is a material and significant omission that will prevent the electorate from understanding or intelligently voting on the proposal. *Matter of 1997-1998 #62*, 961 P.2d at 1082.

2. The COGCC will still not have the power to amend or repeal AQCC regulations no matter if voters vote “yes/for” or “no/against” the measure.

Because the oil and gas commission does not have the power to repeal or amend AQCC rules and the Proposed Initiative does not give the COGCC such powers, the Title is unclear. “In setting a title, the title board shall consider the

⁵ COGCC Case Management Order, *Ibid*.

⁶ Aldo Svaldi, COLORADO NEW OIL AND GAS PERMITS PLUNGE BY 96% IN APRIL FROM A YEAR EARLIER, Denver Post, April 30,2020. Available at: <https://www.denverpost.com/2020/04/30/coronavirus-colorado-oil-and-gas-permits-plunge/> ([COGCC Director]“Robbins expects the final rules will be ready by Nov. 1, ahead of the election. One goal of that deadline is to head off ballot measures that will be addressed in the new rules.”)

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.” Section 1-40-106(3)(b), C.R.S. (2019). Here, a “yes” vote means that the oil and gas commission would not have the power to repeal or make less stringent certain AQCC rules. A “no” vote has the exact same outcome. The Proposed Initiative is asking the Colorado electorate to take away powers from a state agency that already does not have such powers.

The Title is misleading because the underlying Proposed Initiative is misleading. “(P)erhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 44*, 977 P.2d 856, 858 (Colo. 1999). The Title Board recognized the inherent disconnect of asking voters to remove a power from a state agency that it did not possess, and attempted to rectify by adding the clause “if otherwise given such authority” to the measure’s provision on AQCC air emission and inventory rules. Unfortunately, the additional clause only leads to more potential voter confusion. By reading the Title, a voter could fairly surmise that the initiative grants the oil and gas commission air quality authority when, in fact, it does not. As a result of the additional clause the effect of a ‘yes/for’ or ‘no/against’ vote remains unclear because either vote results in the

same outcome. The general understanding of the effect of a "yes" or "no" vote will be unclear for the Proposed Initiative. *See generally* Section 1-40-106(3)(b), C.R.S. (2019); *see also In re Title, Submission Clause & Summary Pertaining to a Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994).

3. Certain environmental and public safety rules in the measure can still be repealed or made less stringent by entities other than the COGCC.

The Title is confusing because it states that the COGCC cannot repeal or make less stringent certain oil and gas and AQCC rules. However, numerous other agencies or entities can repeal certain rules in the proposed initiative or make them less stringent. An obvious example is the AQCC itself can make its own rules less stringent. Furthermore, COGCC rules included in the Proposed Initiative reference and incorporate statutes, rules, and national codes and standards that apply oil and gas development in Colorado that are beyond the control of the COGCC. The entities that have the ability to repeal or make Colorado oil and gas development rules less stringent include the United States Congress, Bureau of Land Management, Colorado General Assembly, Colorado Water Quality Control Commission, Colorado AQCC, Colorado Hazardous Materials and Waste Management Division, National Fire Protection Association Code, and the American Petroleum Institute.

For example, buried in the COGCC exploration and production waste (“E&P Waste”) management rules is 2 CCR 404-1, Table 910-1. The table lists contaminants of concern and their acceptable concentration levels. The table contains concentration levels for 37 organic compounds, inorganics, and metals including, but are not limited to, benzene, toluene, ethylbenzene, xylenes (BTEX), arsenic, lead, and mercury. Table 910-1 is featured in 27 COGCC rules ranging from management of exploration and production waste, produced water disposal, impacted ground water, and soil sampling analysis.⁷ Table 910-1 is critical to the COGCC rules pertaining to establishing the permitting, construction, operating and closure requirements for pits, methods of E&P waste management, procedures for spill/release response and reporting, and sampling and analysis for remediation activities.

Other agencies and a federal statute set the concentration for all but three of the contaminants of concern. The COGCC relies on the maximum contaminant levels established by the Federal Safe Drinking Water Act, the Colorado Department of Public Health and Environment’s Hazardous Materials and Waste

⁷ The rules that utilize Table 910-1 include 2 CCR 404-1, 901.c, 901.f, 905.b.(1), 905.b.(3)B, 905.b.(4), 905.d, 906.a, 906.c, 907.a.(1), 907.c.(2), 907.d.(3)A, 907.d.(3)B, 907.e.(2)F, 908.b.(9)B, 908.c, 909.b.(2), 909.b.(5), 909.e, 910.a, 910.b.(2), 910.b.(2)C, 910.b.(3)C, 910.b.(3)D, 910.b.(3)E, 910.b.(4)A, 910.b.(4)B, and 910.b.(4)D.

Management Division Table 1 Colorado Soil Evaluation Values, the Colorado Department of Public Health and Environment's Water Quality Control Commission Regulation 41 and analysis determined by the USDA Agricultural Handbook 60 method. The COGCC relies on experts in other agencies and a federal statute to set concentration levels for contaminants of concern. Therefore, these other agencies and Congress can repeal or make less stringent the concentrations in Table 910-1, which would repeal or make less stringent 27 COGCC rules.

The lack of clarifying language in the Title is "a material and significant omission, misstatement, or misrepresentation," *Matter of 1997-1998 #62*, 961 P.2d at 1082, that would lead a voter to believe that the air quality rules and oil and gas rules could not be repealed or made less stringent. Without clarifying language, voters will not realize that the COGCC does not, in fact, have control over air quality rules nor many of the COGCC's own oil and gas standards.

CONCLUSION

The Petitioner respectfully submits that the Title Board erred in denying his Motion for Rehearing on April 23, 2020. Therefore, the Petitioner respectfully requests that the Title Board's decisions in considering and setting titles for the Proposed Initiative should be reversed.

Respectfully submitted this 15th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPENING BRIEF was served via US Mail or email to the proponents on 15th day of May, 2020 to the following:

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