

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2021-2022)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2023-2024 #47

Petitioners: Steven Ward and Timothy E.
Foster,

v.

Respondents: Paul Culnan and Patricia
Nelson,

and

Title Board: Theresa Conley, Kurt
Morrison, and Jerry Barry.

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Case No. 2023SA162

THE TITLE BOARD'S CORRECTED 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, 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 2,829 words.

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.

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TABLE OF CONTENTS

ISSUES ON REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. The title for #47 satisfies the clear title standard.	5
A. Standard of review and preservation.	5
B. “Fracking” is not a catchphrase.	6
C. The title is not misleading by clarifying that the measure “allow[s] permitted oil and gas operations to continue.”	9
D. The title accurately describes #47’s phaseout of new oil and gas operation permits.	10
E. The Title Board reasonably excluded referencing #47’s prohibition on new oil and gas facilities and new oil and gas locations.	12
F. Response to the Ward petition.	13
II. The proposed initiative contains a single subject.	14
A. Standard of review and preservation.	14
B. The measure satisfies single subject.	15
CONCLUSION	16

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>City of Fort Collins v. Colo. Oil & Gas Ass’n</i> , 2016 CO 28.....	8
<i>City of Longmont v. Colo. Oil & Gas Ass’n</i> , 2016 CO 29.....	8
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52.....	14, 15
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #85</i> , 2014 CO 62.....	6, 7, 8
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #90</i> , 2014 CO 63.....	5, 6, 10, 13
<i>In re Title, Ballot Title, & Submission Clause for 2015-2016 #63</i> , 2016 CO 34.....	7
<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #3</i> , 2019 CO 57.....	14, 15
<i>In re Title, Ballot Title & Submission Clause for 2019-2020 #3</i> , 2019 CO 107.....	6, 7, 12
<i>In re Title, Ballot Title, & Submission Clause for 2021-2022 #16</i> , 2021 CO 55.....	14
<i>In re Title, Ballot Title, & Submission Clause Pertaining to Sale of Table Wine in Grocery Stores</i> , 646 P.2d 916 (Colo. 1982)	10
STATUTES	
§ 1-40-106, C.R.S.	10, 12
§ 1-40-107, C.R.S.	2

CONSTITUTIONS

Colo. Const. art. V, § 1(5.5) 14

OTHER AUTHORITIES

Fracking, Merriam-Webster's Dictionary, <https://www.merriam-webster.com/dictionary/fracking> 7

Phaseout, Merriam-Webster's Dictionary, <https://www.merriam-webster.com/dictionary/phaseout> 11

ISSUES ON REVIEW

- I. Whether the Title Board set a clear title for 2023-2024 #47.
- II. Whether #47 contains a single subject.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #47 seeks to prohibit new fracking operations in Colorado, beginning in 2031. Fracking, which is also called “hydraulic fracturing,” is defined by the measure as “an oil and gas extraction process in which fractures in rocks below the earth’s surface are opened and widened by injecting proppants, water, and chemicals at high pressure.” *See Record*, p 4, filed June 28, 2023.¹ While the measure would allow current fracking operations to continue under current oil and gas operation permits, it would prohibit any future operation permits that incorporate fracking, beginning in 2031. *Id.*²

¹ Both petitioners filed the record with their petition for review. The two records are identical.

² Proposed initiative 2023-2024 #47 is almost identical to #46. The only meaningful difference is that #46 contains a provision that creates a program to explore transition for oil and gas workers impacted by the fracking ban. *See Record*, pp 4-5. The legal issues raised in the two

The Title Board set a title on the measure at its May 17, 2023 hearing. *Id.* at 2. Petitioners Timothy E. Foster and Steven Ward then filed timely motions for rehearing under § 1-40-107, as did the Proponents. *Id.* at 7, 71, 80. Both Petitioners argued that the word “fracking” is a catchphrase that should not be used in the title, in addition to other objections to the language used in the title. *Id.* at 7, 78. Petitioner Ward also argued that the measure contained multiple subjects. *Id.* at 71. For their part, the Proponents argued that the title should include the phrase “to protect land, air and water” in its description of #47. *Id.* at 81.

The Board held the rehearing on June 21, 2023. *Id.* at 3. After multiple hours of argument, the Board denied all motions for rehearing in their entirety. *Id.* The title is set as follows:

A change to the Colorado Revised Statutes concerning discontinuing the issuance of new oil and gas operation permits that utilize fracking by December 31, 2030, and, in connection therewith, requiring the phase-out of new oil and gas operation permits that utilize fracking; allowing

cases are identical and the Title Board’s opening brief in each case is substantively identical.

permitted oil and gas operations that utilize fracking to continue; and requiring the state to explore transition strategies for impacted oil and gas workers who may transition to other employment.

Id. Petitioners Foster and Ward filed timely appeals to this Court.

SUMMARY OF THE ARGUMENT

Petitioner Foster raises a number of clear title objections. His lead argument is that the term “fracking” is an impermissible catchphrase. But that word clarifies, rather than obscures, the meaning of the initiative. Fracking has become the most commonly understood term to describe the process of removing hydrocarbons from the earth by injecting fluids to fracture bedrock. This Court has used the term throughout its opinions, and the dictionary does not list it as a slang term. And it is also the term used in the proposed initiative itself. Therefore, the title’s use of the word “fracking” is not an impermissible catchphrase but rather contributes to a voter’s understanding.

The remaining clear title objections fare no better. Foster objects that the title clarifies that #47 will allow fracking to continue under previously issued permits even though the measure itself doesn’t

expressly say so. But a title may clarify the scope of an initiative by using terms not used in the initiative itself. Here, the phrase in question clarifies that the measure will stop new fracking permits but allow operations under previously issued permits to continue, removing a potential source of voter confusion.

Foster also argues that the title uses the word “phase-out” in a misleading manner because the measure does not require the fracking permits to have a shorter duration. But that is not what the title says—the title says that the measure will “requir[e] the phase-out of new oil and gas operating permits,” which accurately describes what the measure does.

Finally, Foster complains that the title does not mention that the measure will also not allow for the permitting of new fracking facilities. But that is an implementation detail that naturally follows from #47’s central feature—the prohibition on new fracking permits—and so it does not need to be separately spelled out in the title.

Petitioner Ward states in his petition for review that he objects on both clear title and single subject grounds. But his petition doesn't specify which issues he will advance in this Court, and so the Board is unable to respond at this time. The Board generally objects to this deficient disclosure of issues but reserves the right to respond to the issues in its answer brief. Likely many of his clear title arguments overlap with Foster's and so are addressed in this brief. As to Ward's single subject objection(s), they are meritless because the single subject here is clear: discontinuing permitting for future fracking operations.

ARGUMENT

I. The title for #47 satisfies the clear title standard.

A. Standard of review and preservation.

“The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission

clause.” *Id.* The Court will reverse the title set by the Board “only if a title is insufficient, unfair, or misleading.” *Id.* ¶ 8. The Court does 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.

The Board agrees that Foster preserved his challenges to the title set by the Board. Record, pp 7-12. Ward’s petition for review does not specifically identify the issues he intends to raise, but only states: “As outlined in the Motion for Rehearing, the Proposed Initiative contains multiple subjects and fails to describe the purpose and effects of the Proposed Initiative fairly or accurately.” Ward Pet. for Review at 3. Based on that disclosure, the Board is unable to determine whether Ward’s issues are preserved.

B. “Fracking” is not a catchphrase.

Foster argues “fracking” is an impermissible catchphrase. The Board “must avoid using catch phrases when setting a title.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #85*, 2014 CO 62, ¶ 31. A phrase is a catchphrase if it “work[s] in favor of a proposal without

contributing to voter understanding.” *In re Title, Ballot Title, & Submission Clause for 2015-2016 #63*, 2016 CO 34, ¶ 24. But “phrases that merely describe the proposed initiative are not impermissible catch phrases.” *In re 2013-2014 #85*, 2014 CO 62, ¶ 31. Nor is a phrase a catchphrase “when it contributes to a voter’s rational comprehension and does not promote impulsive choices based on false assumptions about the initiative’s purpose and its effects if enacted.” *In re 2019-2020 #3*, 2019 CO 107, ¶ 28 (quotations omitted).

Here, the word “fracking” “contributes to a voter’s rational comprehension” of #47 and so is not a catchphrase. *Id.* “Fracking” is a commonly used term to describe the process of hydraulic fracturing in oil and gas development. It is not listed in the dictionary as a slang term and has been used since the 1950s. “Fracking,” Merriam-Webster’s, <https://www.merriam-webster.com/dictionary/fracking>.

“Fracking” is also frequently used by courts and others as a descriptive, commonly understood term. This Court began a 2016 decision as follows: “Hydraulic fracturing, commonly known as fracking,

is a process used to stimulate oil and gas production from an existing well.” *City of Longmont v. Colo. Oil & Gas Ass’n*, 2016 CO 29, ¶ 1. The word appears 40 times in that decision. The Court also used the word “fracking” that many times in the companion case *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 2016 CO 28. Just as this Court reasonably decided in 2016 that the word “fracking” more would more clearly convey its meaning, so, too, did the Title Board.

Finally, the measure itself uses the word “fracking” to describe the object of its regulation. Record, p 4. Not only is “fracking” a more commonly understood term than “hydraulic fracturing,” but it is also how #47 refers to what is being regulated. Accordingly, “the titles’ use of the term [‘fracking’] was drawn directly from the text of the Proposed Initiative[], and its inclusion in the title provided an accurate description of what the Proposed Initiative[] would do.” *In re 2013-2014 #85*, 2014 CO 62, ¶ 32.

C. The title is not misleading by clarifying that the measure “allow[s] permitted oil and gas operations to continue.”

Foster next objects to the title’s use of the phrase “allowing permitted oil and gas operations that utilize fracking to continue.”

Foster argues that #47 itself does not provide for such continuation, but that is only the effect of current law and so “is beyond the Title Board’s power to include” in a title. Record, p 11.

Foster’s argument is wrong in two respects. First, the measure does provide for the continuation of existing oil and gas operations. By its terms, the prohibition applies only to “new oil and gas operation permits.” Record, p 4. It necessarily follows that the measure will have no effect on existing operations.

Second, the objected-to phrase is not speculation as to potential effects of the measure, but rather a clarification of the measure’s scope. Without the clarifying language, a voter may be uncertain as to whether the measure would ban all fracking. The included language removes that potential source of confusion. Avoiding “public confusion”

is one of the Title Board’s primary objectives in setting a title. § 1-40-106(3)(b). And although “the specific wording is not found in the text of the proposed statute[,] that does not preclude the Board from adopting language which explains to the signers of a petition and the voter how the initiative fits in the context of existing law.” *In re Title, Ballot Title, & Submission Clause Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916, 921 (Colo. 1982). The highlighted language does that and falls within the Board’s “discretion [to] resolv[e] interrelated problems of length, complexity, and clarity” in the title. *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board therefore properly included that language in the title.

D. The title accurately describes #47’s phaseout of new oil and gas operation permits.

Foster next takes issue with the title’s statement that the measure “requir[es] the phase-out of new oil and gas operation permits that utilize fracking” because #47 “does not phase out the duration of new permits but only limits the granting of such permits.” Foster Pet.

for Review at 4. Foster’s apparent understanding of the word “phase-out” is too narrow.

The measure requires the Colorado Oil and Gas Conservation Commission to develop a timetable for considering new fracking permits between 2026 and 2030, “with criteria for an iterative and consistent reduction in permits approved each year.” Record, pp 4-5. In other words, the Commission will develop criteria to reduce the number of permits issued each year. That is a phase-out of permits because it is a “gradual stopping” of issuing permits. *See* “Phaseout,” Merriam-Webster’s, <https://www.merriam-webster.com/dictionary/phaseout>. Foster argues that phase-out implies a reduction in the duration of permits, but that’s plainly not what the title says. Rather, the title states that #47 will phase-out “new oil and gas operation permits that utilize fracking.” Because #47 will gradually stop the issuance of new fracking permits, that’s exactly what it does. The title is thus accurate and clear.

E. The Title Board reasonably excluded referencing #47's prohibition on new oil and gas facilities and new oil and gas locations.

Finally, Foster argues that the title should mention that #47 prohibits certain new oil and gas “facilities” and “locations.” The General Assembly has instructed the Board that “[b]allot titles shall be brief.” § 1-40-106(3)(b). Accordingly, the title must “summarize the central features of a proposed initiative,” but it need not “include a description of every feature” of the measure. *In re 2019-2020 #3*, 2019 CO 107, ¶ 16.

Here, the title makes clear that future fracking operations will be significantly curtailed and no new permits will be issued. The portion of the measure concerning “facilities” and “locations” follows naturally from that prohibition. After all, if there are no new fracking permits, then it follows that there will be no new fracking facilities or locations. Therefore, given the Board’s broad “discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause,” the title reasonably focuses on the

measure's prohibition on future fracking permits. *In re 2013-2014 #90*, 2014 CO 63, ¶ 24.

F. Response to the Ward petition.

It is not clear what clear title arguments Ward intends to make. His petition for review contains only a generic statement that #47 “fails to describe the purpose and effects of the Proposed Initiative fairly or accurately.” Ward Pet. for Review at 3. The primary clear title argument Ward made before the Title Board concerned whether fracking was a catchphrase, which is addressed above. *See Record*, p 78.

His motion for rehearing also identified several other clear title objections in a cursory manner. *See id.* at 79. It is unclear which, if any, of these violations he intends to advance on appeal. The Board objects to this method of disclosing issues for review. It does not afford the Board a fair opportunity to address the issues in both an opening and answer brief. The Board nevertheless reserves the right to respond in its answer brief to any of these arguments Ward chooses to advance in his opening brief.

II. The proposed initiative contains a single subject.

A. Standard of review and preservation.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). The Court will “overturn the Board’s finding that an initiative contains a single subject only in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). “In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. In doing so, the Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional

single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8. To satisfy the single-subject requirement, the “subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8.

The Title Board agrees that Ward raised single subject objections in his motion for rehearing. Record, p 71. However, because Ward’s petition does not identify which single subject arguments he is advancing before this Court, the Board cannot say whether the single subject arguments he will make here are preserved.

B. The measure satisfies single subject.

This proposed initiative does not present a particularly close question on single subject. Indeed, only one of the two Petitioners even bothers to present a single subject argument.

The single subject of #47 is discontinuing issuing new oil and gas permits that utilize fracking. To accomplish this, the measure defines fracking and instructs the Commission to gradually phase-out issuing new fracking permits, until new fracking permits are prohibited

altogether in 2031. These and other implementing details contained in the two-page measure are spokes around the hub of discontinuing new fracking permits. There is no single subject problem.

Once again, Ward fails to identify in his petition for review on what grounds he believes the measure contains multiple subjects. His motion for rehearing contains eight subheadings under the single subject heading. Record, pp 71-78. It's impossible for the Board to know whether he is advancing some, all, or none of those arguments here. The Board again objects to this deficient identification of issues because it leaves the Board uncertain of the arguments Ward will make to this Court. The Board therefore again reserves the right to respond in its answer brief to the single subject arguments Ward actually advances.

CONCLUSION

The Court should affirm the title set by the Title Board.

Respectfully submitted on this 21st day of July, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S CORRECTED OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 21st day of July, 2023, addressed as follows:

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