

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR INITIATIVE 2023-2024 #44

MOTION FOR REHEARING

On behalf of Steven Ward, registered elector in the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing of the Title Board's ("Board") May 3, 2023, decision related to Initiative 2023-2024 #44 ("Measure").

On May 3, 2023, the Board conducted a hearing on Proposed Initiative 2023-2024 #44. The Board found a single subject and proceeded to set title as follows:

"A change to the Colorado Revised Statutes concerning discontinuing the issuance of new oil and gas operation permits by December 31, 2030, and, in connection therewith, requiring the phase-out of new oil and gas operation permits in order to protect land, air, and water; allowing existing oil and gas operations to continue; and requiring the state to explore transition strategies for impacted oil and gas workers who may transition to other employment."

As demonstrated below, the Measure is in direct violation of the Colorado Constitution and unequivocally conflicts with established legal precedent related to single subject and clear title. The Board lacks jurisdiction to set title as the Measure contains multiple subjects. Petitioner additionally asserts the title is not clear, contains a catch phrase and omits important features of the Measure.

I. Single Subject: The Title Board Lacks Jurisdiction Over #44 Because the Measure Does Not Contain a Single Subject.

The purpose of the Measure is to require the Colorado Oil and Gas Conservation Commission (the "Commission") to discontinue issuance of oil and gas permits by December 31, 2030. However, the Measure strays far from this subject and contains multiple provisions that are disconnected from the purpose.

As set forth in the Colorado Constitution and affirmed by the Colorado Supreme Court, the single subject requirement guards against a measure confusing voters in two separate ways. First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions that may have different or even conflicting interests could lead to the enactment of Measures that would fail on their own merits. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 442 (Colo. 2002). Second, the single subject requirement prevents "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative."

Id. see also In re Title, Ballot Title and Submission Clause for Proposed Initiative for 2011-12 No. 3, 274 P.3d 562, 566 (Colo. 2012).

A. The Measure Vaguely Invalidates Certain Rules and Preserves Other Rules Rendering Impact of Measure Incomprehensible and Creating Separate and Distinct Subjects.

The Measure requires the continuation of a subset of Commission Agency Rules that ensure the “protection of public health, safety, welfare, the environment, and wildlife for all existing oil and gas operations.” (“continued rules”)¹ The Commission’s current rules define their scope and application:

The Commission’s Rules are promulgated to regulate Oil and Gas Operations in a manner to *protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife resources*, and to protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from Oil and Gas Operations. (Rule 201)(emphasis added)

Logically, this means that *all* the rules must be codified. However, the Measure doesn’t allow for this result. While the Measure requires the continued rules, it also requires the repeal of existing Commission rules related to new permits (“repealed rules”).

To add to the confusion, the Measure does not identify with any specificity which rules should be continued, or which rules should be repealed. The Measure also does not provide for a solution when the purpose of a continued rule is intertwined with the purpose of the same rule that must be repealed. In this regard, people voting on this Measure will not even know which rules they are voting on repealing. The Measure’s impact on eliminating certain rules and preserving other rules is incomprehensible.

Furthermore, SB19-181 specifically changed the statutory mission of the Commission to regulate Oil and Gas Operations in a manner “to protect public safety, health, welfare, the environment and wildlife resources”. Suggesting now that banning oil and gas is *necessary* “**in order to protect land, air, and water**” directly conflicts with the existing statute that requires regulations that protect land, air and water. The omission of wildlife protection in the new rulemaking standard is also a shift from the status quo. The measure surreptitiously changes the mission of the Commission and forces it to operate in conflict with the statute.

If the Board cannot comprehend the actual effect of the initiative, the initiative cannot be forwarded to the voters and must, instead, be returned to the proponent." *In re Proposed Initiative for 1999-2000 No. 25, 974 P.2d 458, 469, (Colo. 1999).*

¹ **SECTION 3.** 34-60-106 (20.5)(d) THE CONTINUATION OF COMMISSION RULES ENSURING THE PROTECTION OF PUBLIC HEALTH, SAFETY, WELFARE, THE ENVIRONMENT, AND WILDLIFE FOR ALL EXISTING OIL AND GAS OPERATIONS.

B. Rule Mandates combined with a Materially Changing Authority/Jurisdiction of the Commission are Separate and Distinct Subjects.

The Measure operates to remove the discretion the Commission would otherwise have over rulemaking provided under Colorado Administrative Procedures Act. C.R.S. § 24-4-103 and §34-60-108.

While the Measure directs the actions of the Board, it does not factor for the Commission’s inability to codify these rules without oversight. The board’s actions in adopting the rules are not a *fait accompli* to banning permits. Under the Colorado Constitution, the General Assembly and Governor ultimately maintain authority over rulemaking through the annual rule review bill and power to veto. This interference in the rulemaking process by an administrative agency has no proper or necessary connection to the discontinuance of permits. Nor is there any connection between the mandate on continued rules and the discontinuance of permits.

Furthermore, SB19-181 specifically changed the statutory mission of the Commission to regulate Oil and Gas Operations in a manner “to protect public safety, health, welfare, the environment and wildlife resources”. Suggesting now that banning oil and gas is *necessary* “**in order to protect land, air, and water**” directly conflicts with the existing statute that requires regulations that protect land, air and water. The board cannot change its mission and operate in conflict with the statute.

An initiative violates the single subject rule when it proposes a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010) (citing *In re No. 29*, 972 P.2d at 262–65; *In re # 64*, 960 P.2d at 1197–1200.)

This codification of existing rules, combined with the establishment of a new independent oil and gas board, was a basis for the board’s rejection of jurisdiction in 2019-2020 Initiatives #307-#310, *Establish the Independent Oil and Gas Board*. The same principle applies here where the Measure operates to codify existing rules and change the jurisdiction of an administrative agency.

C. The Repeal of Permits Creates Another Separate and Distinct Subject.

The discontinuance of permits is a subject separate from the revocation of existing permits. One is a change to future applications and the other is the revocation of an existing right.

The single subject requirement for ballot initiatives is meant to prevent proponents from engaging in this type of “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. *In Matter of Title, Ballot Title*, 374 P.3d 460, 465 (Colo. 2016)

Voters who want to discontinue permits but not affect existing property rights will have to choose between these competing interests. There is no reason to presume that voters who may support the former would support the later. A voter who supports the Measure’s provision related to discontinuance of permits may not even be aware that the Measure will result in the revocation of existing permits. This subject is buried in the Measure. Combining different subjects creates

the risk of surprising voters with a surreptitious' change, because voters will focus on the discontinuance of permits and overlook the revocation.

D. Changing COGCC’s Duties to Monitoring, Plugging and Remediating is Another Separate and Distinct Subject.

The Measure transitions the jurisdiction of the GOGCC to “primarily monitoring, plugging, and remediating of facilities permitted prior to December 31, 2030.” Currently, under C.R.S. § 34-60-106 the Commission has broad powers over oil and gas production in Colorado. These include several powers that are unrelated to monitoring, plugging and remediating facilities, including:

- Issuance of certificates of clearance in connection with the transportation and delivery of oil and gas;
- Limit the production of oil or gas, or both, from any pool or field for the prevention of waste;
- Power to make determinations, execute waivers and agreements, grant consent to delegations, and take other actions required or authorized for state agencies by those law and regulation of the United States which affect the price and allocation of natural gas and crude oil;
- Prescribe special rules and regulations governing the exercise of function delegated to or specified for it under the federal “Natural Gas Policy Act of 1978”;
- As to class II injection wells classified in 40 CFR 144.6, may perform all acts for the purpose of protecting underground sources of drinking water in accordance with state programs authorized by 42 U.S.C. sec. 300f et seq., and regulations under those sections, as amended.

These functions are not necessarily related to the permitting process. Yet, the Measure, without explicitly repealing the responsibilities, requires that the Commission no longer work on these issues as a “primary” function. In this regard, the Measure is now allocating time management of a state agency.

As stated above, an initiative violates the single subject rule when it proposes a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91, supra.*

E. Creating “Office of Future Work” Is a Separate and Distinct Subject.

The Measure creates an “office of future work” to transition workers and communities from oil and gas.² This has no connection to the discontinuance of permits. At best, it addresses a

² **SECTION 5.** 8-83-604 THE PURPOSE OF THE PROGRAM IS TO IDENTIFY STRATEGIES AND FUNDING TO ASSIST SECTORS OF OIL AND GAS EMPLOYEES WHO WILL TRANSITION TO OTHER EMPLOYMENT AS A RESULT OF THE STATE’S REDUCED RELIANCE ON FOSSIL FUEL EXTRACTION. THE OFFICE SHALL CONSULT WITH OTHER RELEVANT OFFICES AND AGENCIES WITHIN THE STATE AND RELEVANT OFFICES OR AGENCIES OUTSIDE OF THE STATE REGARDING SUCCESSFUL WORKFORCE TRANSITION MODELS AND PROGRAMS IMPLEMENTED BY THOSE OFFICES OR

potential consequence of the Measure. This provision is only inserted in the Measure to garner support from a faction that would not support the discontinuance of oil and gas permits but do support government sponsored employee services. Measures which can pass only by combining subjects that appeal to different factions violate the single-subject requirement. *See In re 2011-2012 No. 3*, 274 P.3d at 566.

Additionally, the creation is wholly removed from oil and gas regulatory statutes. Instead, it is created by adding a new § 8-83-604 to C.R.S., Title 8, Labor and Industry. By proposing initiative #45, which does not contain this provision, Proponents demonstrate they can change the permit process without creating a new “office of future work”. These provisions are legally independent of each other.

II. The Ballot Title and Submission is Incomplete, Misleading and Contains a Catch Phrase.

A. Catch Phrase: The Ballot Language, “in order to protect land, air, and water” Is a Catch Phrase.

“Catch phrases” and words that could form the basis of a slogan should be carefully avoided in writing a ballot title and submission clause. *Splets v. Klausling*, 649 P.2d 303 (Colo.1982). “Catch phrases” are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase. *Garcia v. Chavez (In re Title, Ballot Title & Submission Clause)*, 4 P.3d 1094, 1100 (Colo. 2000).

The Court determines the existence of a catch phrase or slogan in the context of contemporary political debate. *See In re Ballot Title 1999-2000 # # 227 & 228*, 3 P.3d 1, 6; *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993). In setting the titles, the Board must “correctly and fairly express the *true* intent and meaning” of the proposed initiative and must “consider the public confusion that might be caused by misleading titles.” § 1-40-106(3)(b), 1 C.R.S. (1999); *In re Ballot Title 1999-2000 # # 245(f) & 245(g)*, 1 P.3d 739, 743 (Colo. 2000).

In *Garcia, supra*, the principal purpose of the amendment was to direct public schools to deliver instruction in English. The ballot title was set as follows:

An amendment to the Colorado Constitution concerning English language education, and in connection therewith, requiring all children in Colorado public schools to be taught English *as rapidly and effectively as possible . . .*.(Emphasis added.)

The Court found the words operate as both a catch phrase and a slogan. They mask the policy question regarding whether the most rapid and effective way to teach English to non-English

AGENCIES. THE PROGRAM SHALL EXPLORE FEDERAL, STATE, AND LOCAL SOURCES OF FUNDING AND FINANCIAL INCENTIVES TO ASSIST TRANSITIONING WORKERS AND COMMUNITIES ECONOMICALLY RELIANT ON OIL AND GAS PRODUCTION.

speaking children is through an English immersion program, a question of great public debate. The Court further found that the “as rapidly and effectively as possible” language in the titles tipped the substantive debate on an issue to be submitted to the electorate. Even though the initiative contained this language, the Title Board was not permitted to include the wording where it is constituted a catch phrase. *Citing See In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994).

The established legal precedent prohibiting catch phrases and slogans renders use of the phrase “**in order to protect land, air, and water**” improper and illegal. Inserting the proponent’s campaign slogan in the title is precisely the type of language the clear title requirement protects against. By including “in order to protect land, air, and water” the Board masks the policy question of whether banning oil and gas production in Colorado will protect land, air and water, a matter of great public debate. It also tips the debate through the use of this catch phrase.

The Board’s job is to capture the *true* intent of the Measure and not include unabashed language that advocates for a Measure. While the Board may look the proponent’s stated intent, they may not use slogans and catch phrases in presenting this to the voters.

B. Misleading: The Title is Misleading and Fails to Inform Voters of Measures’ Central Features.

In fixing a title and a summary, the Board's duty is “to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice” *In re Proposed Initiative for 1999-2000 No. 29,* 972 P.2d 257, 266 (Colo. 1999) (quoting *In re Ballot Title “1997-1998 # 62,”* 961 P.2d 1077, 1083 (Colo. 1998)). Here, because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.

The title does not even inform voters of substantial and material changes in state law resulting from this Measure. The title fails to inform voters that this Measure will transform the jurisdiction and duties of the Colorado Oil and Gas Conservation Commission. The title does not inform voters that the Measure will eliminate certain Commission Rules and preserve other Commission Rules. And the title does not even mention the fact that the Measure would transform the Colorado Oil and Gas Conservation Commission into a minimized role of “primarily monitoring, plugging, and remediating of facilities permitted prior to December 31, 2030.”

Further, the title is misleading in that it states it “allows for existing oil and gas operations” when, in fact, it does not allow for permit amendments and repeals existing permits if no operational by 2033.

For the foregoing reasons, the Petitioner respectfully requests the Board grant the motion for rehearing and deny the title as set.

Respectfully submitted this 10th day of May 2023.

s/Suzanne Taheri
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