

**IN RE: TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE
FOR INITIATIVE 2023-2024 #46
("CONCERNING OIL AND GAS PERMITS THAT INCORPORATE THE USE OF
FRACKING")**

Initiative Proponents;
Paul Culnan and Patricia Nelson

Objector:
Timothy E. Foster

MOTION FOR REHEARING

By undersigned counsel, Timothy E. Foster, a registered voter of Mesa County, objects to the titles set for Initiative #46, pursuant to C.R.S. § 1-40-107(1)(a)(I).

On May 3, 2023, the Title Board set the following ballot title and submission clause for Initiative #46:

Shall there be 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 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?

- I. The Board approved a misleading and inaccurate title.**
 - A. The titles uses a term ("fracking") that is jargon and will mislead voters, and this confusion will be substantial as the titles use this term three (3) times.**

Proposed section 34-60-103(45.7) of this initiative defines "fracking" as follows;

"FRACKING," OTHERWISE KNOWN AS "HYDRAULIC FRACTURING," MEANS 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."

1. *“Fracking” is not a commonly understood term, as it is jargon for “hydraulic fracturing” and connotes multiple, conflicting popular meanings.*

According to one of the state’s leading scholars on contemporary issues in the American West, Professor Patricia Limerick of the University of Colorado who directed the Center of the American West at CU,¹ “Even the most fundamental terms can lead conversationalists into muddles; in some instances, **participants in the unconventional oil and gas debate use the exact same words in very different ways** (for a case study, head straight to hydraulic fracturing).” See <https://www.colorado.edu/center/west/projects-publications/energy-mining/hydraulic-fracturing-glossary#Hydraulic%20Fracturing> (last viewed May 22, 2023) (emphasis added). In that regard, “In public debates about unconventional oil and gas extraction, **the terms ‘hydraulic fracturing’ and ‘fracking’ are used in multiple, and sometimes conflicting, ways.** The confusion this causes has the potential to derail conversations and stall communication.” *Id.* (emphasis added).

The specifics of miscommunication around this term are telling. “**Some people use ‘hydraulic fracturing’ and ‘fracking’ to mean the particular and specific technique** used to fracture oil-and-gas-bearing formations far below the surface. **Others use the terms to mean the whole process of constructing and operating a well, plus maintaining and operating surface facilities** like compressors, storage ponds, and pipelines.” *Id.* (emphasis added). Thus, “fracking” is as easily and regularly interpreted to mean a technology used to recover certain oil and gas reserves as it is to mean the entire recovery operation, including all of the involved facilities and processes. This latter meaning is inconsistent with proposed section 34-60-103(45.7) in #46.

Prof. Limerick’s caution relates directly to the exercise of setting a ballot title on this topic. “**This disconnection in meaning can cause participants in the same conversation to talk past each other. Clear use of terms is key to making conversations on hydraulic fracturing (or ‘fracking’) productive and meaningful.**” *Id.* (emphasis added). Certainly, that clarity is the goal of this Board and the title setting process generally.

Thus, the use of “fracking” in the titles is likely to leave voters with inconsistent and inaccurate understandings of the measure on which they are asked to vote.

2. *“Fracking” has multiple defined meanings on which voters are likely to rely, and if left unaddressed in the titles, this inconsistency will mislead voters.*

As noted above, #46 defines “fracking” 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.” But this definition does not reflect the common definition(s) used for “fracking.”

¹ Prof. Limerick’s professional qualifications can be found at <https://www.colorado.edu/center/west/about/patty-limerick> (last viewed May 23, 2023). Her co-authors for the material cited here were Prof. Adrienne Kroepsch and Will Rempel of the University of Colorado.

For example, at the initial title setting hearing, proponents pointed the Title Board to an industry trade association website that asks, “What is fracking?” But when that publicly accessible source answers the question, it does so with a definition that varies in a material way from proposed section 34-60-103(45.7). It adds the element, not found in #46, of conditioning “fracking” on the use of “a technique known as horizontal drilling.”

Fracking, or hydraulic fracturing, first invented in 1947, is the process of extracting oil or natural gas from rock formations through drilling – today, **using a technique known as horizontal drilling** – and then using high pressured water to move the natural gas or oil to the surface where it is collected.

<https://www.cred.org/explore/what-is-fracking> (last viewed May 22, 2023) (emphasis added). But Initiative #46’s definition of “fracking” is not limited to horizontal drilling and thus is significantly broader than the source of common understanding identified by Proponents. In addition to this difference from #46, this definition omits the elements of a process using “proppants” and “chemicals” which are contained in #46’s definition.

Additionally, the dictionary definition of “fracking” to which Prof. Limerick pointed in her writing, cited above, is the Merriam-Webster dictionary definition, and it states that “fracking” means “the **injection of fluid** into shale beds at high pressure in order to free up petroleum resources (such as oil or natural gas).” <https://www.merriam-webster.com/dictionary/fracking> (last viewed May 22, 2023) (emphasis added). Unlike proposed section 34-60-103(45.7), this definition refers to the injection of “fluid” rather than “water” and omits any reference to “proppants” or “chemicals.”

As if these meanings did not create enough concern, HB22-1348 was adopted last year and amended the same title, article, and part of the Colorado Revised Statutes as #46 seeks to amend. Section 1, subsection (2)(b) of that bill’s legislative declaration equates “hydraulic fracturing” with “fracking” in a manner similar to proposed section 34-60-103(45.7) of #46. *See* https://leg.colorado.gov/sites/default/files/2022a_1348_signed.pdf (last viewed May 22, 2023).

That law’s definition of “hydraulic fracturing treatment” is different than #46’s definition of fracking/hydraulic fracturing. Under C.R.S. § 34-60-132(p), a hydraulic fracturing treatment “means all stages of the treatment of a well by the application of hydraulic fracturing fluid under pressure, which treatment is expressly designed to initiate or propagate fractures in an underground geologic formation to enhance the production of oil and gas.” As compared to #46, this current statutory definition does not refer to “proppants” or “chemicals,” substitutes “fluid” for “water,” requires only “pressure” rather than “high pressure,” and includes “all stages” of the process instead of just the “extraction process” addressed by #46.

Therefore, however common a word “fracking” may be in common parlance, it isn’t a term that has a commonly accepted or understood meaning. That gap in understanding will lead to a similar gap in voter appreciation on what Initiative #46 is seeking to accomplish and should not be embraced in these titles.

3. “Fracking” is accomplished in ways that do not meet this measure’s definition of the term, but voters can only presume the titles’ unqualified reference to “fracking” is all-inclusive.

Initiative #46 conditions “fracking” on the use of the injection of “water, proppants, and chemicals at high pressure.” But there are waterless fracking technologies as well, and because “fracking” is not defined in the ballot title, voters would be lead to believe that the waterless technologies are also included.

For instance, one form of fracking uses carbon dioxide instead of water in the fracturing process. <https://pubs.acs.org/doi/pdf/10.1021/acsomega.1c01059> (last viewed May 22, 2023). Other technologies include using liquid petroleum gas or emulsion-based fluids as “waterless” forms of this process. See Joint Research Center of European Commission, “State of the art report on waterless stimulation techniques for shale formations,” 4-6, 8-9 (2016). <https://publications.jrc.ec.europa.eu/repository/handle/JRC103643> (last viewed May 23, 2023).

By its terms, Initiative #46 would not affect these alternative technologies. But voters would not be aware of that fact, based on the use of a too-inclusive term, “fracking,” in the titles.

4. To provide clarity to voters, the initiative’s definition should be used instead of the term that causes confusion.

Titles must not include vague language that leads to voter confusion. “[T]he clear title requirement seeks to accomplish two overarching goals: prevent voter confusion and ensure that the title adequately expresses the initiative’s intended purpose.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶11, 413 P.3d 151, 153. Titles should use a definition that “adopts a legal standard that is new and likely to be controversial, even though limited in application to the implementation of the proposed” measure. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

To meet those standards, the titles here should be revised as follows, even if the other changes addressed elsewhere in this motion are not also made:

Shall there be a change to the Colorado Revised Statutes concerning discontinuing by December 31, 2030 the issuance of new oil and gas operation permits that utilize fracking an oil and gas extraction process in which fractures in rocks below the earth’s surface are opened and widened by injecting, at high pressure, water, chemicals, and materials intended to prevent fractures from closing² by December 31, 2030, and, in connection therewith, requiring the phase-out of such new oil and gas operation permits ~~that utilize fracking~~; allowing 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?

² Initiative #46’s definition lists injections of “proppants, water, and chemicals.” As “proppants” is defined by the statute to be amended by #46 as “materials inserted or injected into an underground geologic formation during a hydraulic fracturing treatment that are intended to prevent fractures from closing,” C.R.S. § 34-60-132(s), that definition is used in this title language to provide clarity to voters.

Besides its clarity that will benefit voters, this revised language also meets the Supreme Court’s test for ballot titles dealing with the issue of oil and gas development raised by #46. In *In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2013-2014 #90*, 2014 CO 63, 328 P.3d 155, the Court found that a ballot title that referred to “oil and gas development” did not need to also include the phrase, “including hydraulic fracturing.” Even though “including hydraulic fracturing” was part of the proposed initiative in #90, it was not needed in the titles as “the reference in the title to ‘oil and gas development’ is sufficient to describe the scope of the initiative.” *Id.* at ¶36. Here, #46 refers to an “oil and gas extraction process,” and the title could do use that wording to meet the clear title requirement in law.

B. The title is misleading as it states only “permitted” oil and gas operations will be allowed to continue their operations.

The title states that #46 “allow[s] permitted oil and gas operations to continue.” Here, “permitted” is a vague term, given the double meaning of that word as “allowed” or “authorized” or as having received a “permit” from the Colorado Oil and Gas Commission.

C. The title is misleading in stating that the measure “allow[s] permitted oil and gas operations to continue” as there is no such provision in #46.

Initiative #46 does not expressly provide for the continued operation of any permitted location or facilities. At most, it provides for “[t]he continuation of commission rules ensuring the protection of public health, safety, welfare, the environment, and wildlife for all existing oil and gas operations.” *See* proposed § 34-60-106(20.5)(d).

In other words, #46 provides for continued rules for issues *relating to* oil and gas operations. It does not affirmatively provide for continuation of oil and gas operations in their own right. If such continuation may occur due to already existing laws, that is a characterization of current law that is beyond the Title Board’s power to include here. This phrase should thus be deleted from the titles.

D. The title is misleading where it in referring to the “phasing out” of permits.

The title states that this measure “requir[es] the phase-out of new oil and gas operation permits.” This reference will confuse voters.

The common meaning of “phase-out” is “to stop using something gradually in stages over a period of time.”³ As a result, voters will be left with the impression that #46 imposes limited *durations* on any new permits granted. But that’s not what the measure does. It changes the Commission’s power to grant permits rather than changing the effective period during which new permits can be used.

³ https://www.oxfordlearnersdictionaries.com/us/definition/american_english/phase-out#:~:text=phase%20somethingout&text=to%20stop%20using%20something%20gradually,phased%20out%20by%20next%20year.

In terms of the substantive law changed by this measure, #46 only uses “phasing out” of a new permit regarding its provision that its new limits “do not constitute waste.” *See* proposed § 34-60-106(2.5)(b). To the extent that Proponents intend that “phasing out” is shorthand for the required “reduction in permits approved each year” between 2026 and 2030, the title should be specific about that construction, as addressed above.

E. The title is misleading because it does not reflect #46’s prohibition on permit modification or its required expiration of certain of the new permits.

Initiative #46 requires Commission rules “to **prohibit** the modification and require the expiration of all previously issued permits by December 31, 2033, if drilling operations have not commenced by that date.” *See* proposed § 34-60-106(20.5)(c); *see also* proposed § 29-20-104(1)(h)(II) (permitting of new facilities and locations “is prohibited pursuant to section 34-60-106(20.5)”).

A provision that alters the modification of operating permits is a key element of an initiative. Changes to what will or will not be permitted under the initiative – such as potential modification of permits – must be accurately described in the titles. *See In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215*, 3 P.3d 11 (Colo. 2000) (striking title language that incorrectly portrayed a measure’s limit on modifying certain extractive permits).

Similarly, the title is silent about the required expiration of permits granted where oil and gas production has not commenced. The measure does not just limit the number of new permits to be issued but also reimposes time clock for activation of certain of those new permits. This is an important feature of Initiative #46 that should be related in the titles.

F. The title is misleading in that it does not relate that the measure specifically “prohibit[s]” permitting of any new “oil and gas facilities” and “oil and gas locations.”

This title is couched as a discontinuation of permitting of oil and gas operations. But the measure itself refers to the legal changes as a prohibition. *See* proposed § 34-60-106(20.5)(c) (permit modification is prohibited) and § 29-20-104(1)(h)(II) (permitting of new oil and gas facilities and locations is prohibited).

In addition, the title does not identify to what this prohibition applies. Yet, the measure is specific that it applies to “oil and gas facilities” and “oil and gas locations” which have specific definitions that are different than “oil and gas operations.” *Compare* C.R.S. § 34-60-103(6.2), (6.4), and (6.5).

The titles should be specific as to the measure’s undisputed “prohibition” on permitting of oil and gas “facilities” and “locations.”

RESPECTFULLY SUBMITTED this 24th day of May, 2023.

RECHT KORNFELD, P.C.

s/ Mark Grueskin

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CERTIFICATE OF SERVICE

I, Mark Grueskin, hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #46** was sent this day, May 24, 2023, via email to Paul Culnan and Patricia Nelson, via their counsel of record, Martha Tierney, at:

mtierney@tls.legal

s/ Mark Grueskin