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Colorado Secretary of State
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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2013–2014 #82

MOTION FOR REHEARING

Registered electors, Mizraim S. Cordero and Scott Prestidge, through their legal counsel, Hogan Lovells US LLP, request a rehearing of the Title Board for Initiative 2013-2014 #82. As set forth below, Mr. Cordero and Mr. Prestidge respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

TITLE AND SUBMISSION CLAUSE

On April 2, 2014, the Title Board designated the title as follows:

An amendment to the Colorado constitution increasing the authority of local governments to restrict the time, place, and manner of oil and gas development, including prohibitions and moratoria, and deeming such local restrictions not to be in conflict with the state's interests.

The Title Board set the ballot title and submission clause as follows:

Shall there be an amendment to the Colorado constitution increasing the authority of local governments to restrict the time, place, and manner of oil and gas development, including prohibitions and moratoria, and deeming such local restrictions not to be in conflict with the state's interests?

GROUNDS FOR RECONSIDERATION

I. The Proponents Failed to Submit the Measure to Legislative Council and the Office of Legal Services for Review and Comment.

By submitting the final text of measure #82 directly to the Title Board, proponents failed to comply with Article V, Section 1(5) of the Colorado constitution, which requires that proposed initiated constitutional amendments be submitted to Legislative Council and the Office of Legal Services for review and comment. *See Matter of Title, Ballot Title & Submission Clause, & Summary Adopted May 16, 1990*, 797 P.2d 1283, 1287 (Colo. 1990).

The purpose of the review and comment meeting is to inform the public, as well as the proponents, of the potential impacts of the proposed initiative. *Id.* If, after the review and comment meeting, proponents make substantial changes to the petition, proponents are required to submit the amended measure to the legislative offices for additional review and comment. *Id.*;

C.R.S. § 1-40-105(2). Failure to adhere to this requirement deprives the Title Board of jurisdiction to set title. *Matter of Title,* 797 P.2d at 1287.

As noted by the representative for Legislative Council and the Office of Legal Services, Ms. Eubanks, proponents made significant changes to the original text of #82 and did not submit the final text of the measure to the legislative offices. When comparing the final text of measure # 82 to the original text, it is clear that the final version bears little resemblance to the original. Rather, the final version is an entirely new measure. The table below illustrates the major differences between the drafts.

Section	Original #82	Final #82
1. Purpose and findings	States that: • the Colorado constitution confers certain "inalienable rights" and that local governments may enact laws intended to protect such inalienable rights. (Emphasis added).	States that:[1] • the development of oil and gas may impact local interests; • the public relies upon local governments to regulate land uses; • local governments are entitled to protect people and communities using the "precautionary principle"; and • to protect such interests, the authority of local governments shall be expanded to allow for regulation of oil and gas development.
2. Definitions	Defines: • local government	Defines: • local government; and • "oil and gas development," to include "all physical or chemical processes or procedures used to explore for, extract, process, produce, store, or transport petroleum products, including natural gas, byproducts such as asphalt, or waste. Retailers of petroleum product consumer goods are not developers."

[1] Much of this text was taken directly from other local-control initiatives 2013-204 (*see e.g.* #93 attached hereto as Exhibit B), submitted by different proponents.

3. Authority of Local Governments	Allows local governments to: • restrict the "time, place or method of oil and gas development," • however, no such limitation may be less stringent than existing state and federal law.	Allows local governments to: • prohibit or restrict the time place and manner of oil and gas development, • however, no such limitation may be less protective of "any interest including public health, welfare, safety, or air or water quality, than any other existing Colorado, federal, or concurrent local provision."

See Amended Text of #82, attached hereto as Exhibit A.

Relying on C.R.S. § 1-40-105(2), proponents argued that the changes to the measure were made in "direct response" to the numerous questions included in the Review and Comment Memorandum. *See* C.R.S. § 1-40-105(2) (stating that, "If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition shall be resubmitted to the directors for comment.") (emphasis added). Whether or not proponents made these changes in "direct response" to the questions posed in the review and comment public misses the point.[2] The Colorado constitution requires significantly amended measures go through the review and comment process. *Matter of Title,* 797 P.2d at 1287.

In *Matter of Title*, the Colorado Supreme Court held that the Title Board lacked jurisdiction to set title for an amended measure because the proponents failed to submit the amendment to the legislative offices for review and comment. 797 P.2d at 1287. In that case, proponents submitted two measures to the Title Board for title setting, the "April initiative" and the "May initiative." *Id.* at 1285. Proponents first submitted the April initiative to the legislative offices for review and comment and to the Board for title setting. *Id.* After title was set on the April initiative, proponents submitted the May initiative directly to the Title Board for title setting. *Id.* Proponents argued that they were not required to submit the May initiative to the legislative offices for review and comment because the May initiative was simply an amended version of the April initiative that used the same language, but was more limited in scope. *Id.* at 1287. The Supreme Court disagreed and held that the Title Board lacked jurisdiction to set title pursuant to Article V, Section 1(5) of the Colorado constitution. *Id.* Among other concerns, the Court stated that, "Without the public meeting for comments and review on the May initiative, the public would have no way to know that some portions of the April initiative had been revised and resubmitted for the setting of a new title. Contrary to the constitutional requirement, there

[2] Notwithstanding, at the title hearing, proponents could not explain how the amended measure was revised in direct response to the questions of the legislative offices.

was no opportunity for public analysis of the May initiative before it was submitted to the Secretary of State for fixing the title." *Id.* (emphasis added).

Given this constitutional requirement, C.R.S. § 1-40-105(2) cannot be construed to allow proponents to draft a substantial amendment and submit it directly to the Title Board without review and comment. Such a construction would be contrary to the primary purpose of the review and comment process – to inform the public and proponents of the proposed initiative's potential impacts. *See Matter of Title,* 797 P.2d at 1287. Because the proponents failed to submit the final text of #82 to the legislative offices, the public was not notified that the final text of #82: (1) does not protect inalienable rights, (2) incorporates an entirely new and different "Purpose and Findings", (3) includes an expansive definition of "oil and gas development" covering petroleum products, byproducts, asphalt and waste, and (4) prohibits local laws that are "less protective of any interest." Accordingly, the Title Board lacks jurisdiction to set title for measure #82.

II. The Initiative Impermissibly Contains Multiple Subjects.

Contrary to the requirement that every constitutional amendment proposed by initiative be limited to a single subject, which shall be clearly expressed in its title (Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5), the Board set title for initiative #82 despite the fact that it contains multiple, distinct and separate purposes that are not dependent upon or connected with each other. Specifically, under the guise of local control of "oil and gas development" the initiative actually includes the following several, unrelated subjects:

(1) Expanding the authority of local governments to prohibit oil and gas development (#82, § 3(a));

(2) Granting local governments the ability to restrict the "time, place and manner of oil and gas development" (#82, § 3(a));

(3) Expanding the authority of local governments to regulate "petroleum products" including "byproducts such as asphalt or waste" (#82, § 2(b));

(4) Deeming that local restrictions and prohibitions of oil and gas development are not in conflict with the state's interest; and

(5) Empowering local governments to "protect their people and their communities using the precautionary principle" (#82, § 1(a)).

Each of these subjects is not interdependent or connected to the other. The Title Board therefore lacks jurisdiction to set title and title setting should be denied.

III. The Measure's Grant of Authority to Local Governments is So Vague that It Is Not Possible to Set a Title that Accurately Reflects the Measure's Purpose.

The measure purports to grant authority to local governments to prohibit or restrict the time, place and manner of "oil and gas development." However, the measure's definition of "oil and gas development" and the limits placed on local governments when enacting such laws are so vague that the Board cannot set an adequate title pursuant to C.R.S. § 1-40-106(3)(c), for the following reasons:

(1) The measure purports to grant authority to local governments "to protect their people and communities using the precautionary principle." However, the measure does not provide a definition of "precautionary principle." Therefore, no title can accurately describe this grant of authority to local governments.

(2) The definition in Section 2(b) of "oil and gas development" is so expansive and unclear that it could be construed to allow local laws affecting a limitless number of industries, businesses, and products. Among other things, this definition allows local governments to regulate all facets of the production of petroleum products, petroleum byproducts, asphalt and waste. Other than the inclusion of natural gas and asphalt, petroleum products and byproducts are not defined and could be construed to include <u>the thousands</u> of commercial products made from petroleum (*e.g.* plastics, paints, tires, gasoline, and fabrics). Moreover, the measure grants local governments authority to regulate "all physical or chemical processes or procedures used to explore for, extract, process, produce, store or transport," such products. In addition to traditional upstream exploration and production of oil and gas, this could encompass a vast array of activities including the manufacturing and shipping of all petroleum based products, oil refining, natural gas gathering and processing, public utilities, production, and storage and transportation of "waste." Therefore, no title can describe the extent to which local governments may regulate "oil and gas development" pursuant to this measure.

(3) The last sentence in Section 2(b): "Retailers of petroleum product consumer goods are not developers" further adds to the vagueness of the measure. The term "developer" does not appear in any other part of measure. Therefore, it is unclear what, if any, affect this sentence has on the authority of local governments.

(4) Finally, in section 3(c), the measure states that local governments may not enact regulations that are less protective of "any interest, including public health…, than any other existing Colorado, federal or concurrent local provision." However, it is unclear the extent to which Section 3(c) limits the authority of local governments. The term "interest" is not defined. In addition to "<u>public</u> health, welfare safety or air or water quality," this term could be construed to include property rights, contractual rights, or other individual interests. Additionally, the term "concurrent local provision" is also

vague and unclear. Therefore, no title can described how the authority of local governments is limited by section 3(c).

The language of the measure is so vague that no title can correctly and fairly express the true purpose of the measure.[3] Therefore, the Title Board lacks jurisdiction to set a title.

IV. The Title and Submission Clause as Drafted Fail to Describe Important Aspects of the Measure.

A measure's title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. C.R.S. § 1-40-106(3)(a). "[A] material omission can create misleading titles." *In re Title, Ballot and Submission Clause 1999–2000 #258A*, 4 P.3d 1094, 1098 (Colo. 2000). The title and submission clause for measure #82 are misleading and confusing because they fail to describe important aspects of the measure. Among other defects, the title and submission clause:

(1) Do not reflect the grant of local governmental authority to protect people and communities under the precautionary principle as provided in Section 1(a);

(2) Fail to provide notice of the expansive definition of oil and gas development provided in Section 2(b); and

(3) Do not describe the limits of local authority described in 3(c).

Based on the foregoing, Mr. Cordero and Mr. Prestidge request a rehearing of the Title Board for Initiative 2013-2014 #82. Because the initiative is incapable of being expressed in a single subject, was not submitted for review and comment, and is impermissibly vague, the Title Board lacks jurisdiction to set a title and should reject the measure. Alternatively, Mr. Cordero and Mr. Prestidge respectfully request that the Title Board amend the title consistent with the concerns set forth above.

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[3] The vagueness of this measure further underscores the necessity of the review and comment process (*see infra* § II).

Respectfully submitted this 9th day of April, 2014 by:

HOGAN LOVELLS US LLP

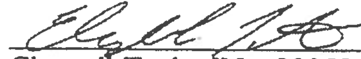

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EXHIBIT A

Initiative #82 Proposal as revised with changes highlighted

Be it Enacted by the People of the State of Colorado:

SECTION 1. ~~Article XVIII of t~~ The constitution of the state of Colorado, Article XVIII is amended by the addition of a new section, Section 17 ~~to read~~ as follows:

Section 17: Local Control of Oil and Gas Development (1) Purpose and findings. (a) ~~THE COLORADO CONSTITUTION CONFERS CERTAIN RIGHTS ON THE CITIZENS OF THE STATE, INCLUDING INALIENABLE RIGHTS UNDER ARTICLE II, SECTION 3.~~ THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT THE DEVELOPMENT OF OIL AND GAS, INCLUDING THE USE OF HYDRAULIC FRACTURING, MAY IMPACT LOCAL INTERESTS SUCH AS AIR QUALITY, PUBLIC HEALTH, SAFETY, WELFARE, PROPERTY VALUES AND THE CHARACTER OF OUR COMMUNITIES; THAT THE PUBLIC HAS HISTORICALLY RELIED UPON LOCAL GOVERNMENTS TO REGULATE CERTAIN LOCAL LAND USES AND TO MINIMIZE POTENTIAL CONFLICTS BETWEEN INDUSTRIAL DEVELOPMENT AND THE INTERESTS OF THE LOCAL COMMUNITY; THAT LOCAL GOVERNMENTS ARE ENTITLED TO PROTECT THEIR PEOPLE AND THEIR COMMUNITIES USING THE PRECAUTIONARY PRINCIPLE; THAT TO PROTECT THESE INTERESTS THE PEOPLE DESIRE TO EXPAND THE AUTHORITY OF LOCAL GOVERNMENTS BY VESTING IN THEM THE RIGHT TO IMPOSE LOCAL RESTRICTIONS ON OIL AND GAS DEVELOPMENT WITHOUT FEAR OF STATE PREEMPTION.

(b) ~~LOCAL GOVERNMENTS IN THE STATE OF COLORADO MAY ENACT LOCAL CHARTER AMENDMENTS, LAWS, ORDINANCES AND/OR REGULATIONS INTENDED TO PROTECT THE INALIENABLE RIGHTS OF ITS CITIZENS.~~ THE PURPOSE OF THIS AMENDMENT IS TO EMPOWER ALL OF COLORADO'S LOCAL GOVERNMENTS TO ADOPT RULES, SUCH AS CHARTER AMENDMENTS, LAWS, ORDINANCES, OR REGULATIONS, TO PROTECT THEIR PUBLIC, THEIR COMMUNITIES, AND THEIR AIR, WATER, AND LAND THROUGH ADDITIONAL LOCAL RESTRICTIONS ON OIL AND GAS DEVELOPMENT, INCLUDING BANS OR MORATORIA ON HYDRAULIC FRACTURING.

(2) Definitions. (a) "LOCAL GOVERNMENT" MEANS ANY COUNTY, CITY AND COUNTY, CITY, OR TOWN, WHETHER STATUTORY OR HOME RULE, LOCATED IN THE STATE OF COLORADO.

(b) "OIL AND GAS DEVELOPMENT" INCLUDES ALL PHYSICAL OR CHEMICAL PROCESSES OR PROCEDURES USED TO EXPLORE FOR, EXTRACT, PROCESS, PRODUCE, STORE, OR TRANSPORT PETROLEUM PRODUCTS, INCLUDING NATURAL GAS, BYPRODUCTS SUCH AS ASPHALT, OR WASTE. RETAILERS OF PETROLEUM PRODUCT CONSUMER GOODS ARE NOT DEVELOPERS.

(3) ~~Local Control of Oil and Gas Development.~~ Grant of authority. (a) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, LOCAL GOVERNMENTS IN COLORADO MAY ~~PLACE RESTRICTIONS ON~~ RESTRICT THE TIME, PLACE OR ~~METHOD~~ MANNER OF OIL AND GAS DEVELOPMENT, INCLUDING BUT NOT LIMITED TO PROHIBITIONS AND MORATORIA ~~THE USE OF HYDRAULIC FRACTURING, THAT ARE INTENDED TO PROTECT THEIR COMMUNITIES AND CITIZENS.~~

~~(c)~~ (b) ~~ANY S~~ SUCH RESTRICTIONS ~~PLACED BY LOCAL GOVERNMENTS ON OIL AND GAS DEVELOPMENT~~ ARE DEEMED NOT TO BE IN CONFLICT WITH THE STATE'S INTERESTS.

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~~(b)~~ (c) NO LOCAL GOVERNMENT MAY ENACT ANY ~~LIMITATIONS,~~ RULES ~~OR REGULATIONS~~ ON OIL AND GAS DEVELOPMENT THAT ~~ARE~~ IS LESS ~~STRINGENT THAN~~ PROTECTIVE OF ANY INTEREST, INCLUDING PUBLIC HEALTH, WELFARE, SAFETY, OR AIR OR WATER QUALITY, THAN ANY OTHER EXISTING ~~STATE~~ COLORADO, ~~AND~~ FEDERAL, OR CONCURRENT LOCAL PROVISIONS.

(4) **Self-executing and severability~~, CONFLICTION~~ provisions.** ALL PROVISIONS OF THIS SECTION ARE SELF-EXECUTING AND SEVERABLE.

~~2/21/14~~
3/17/14

To:

~~Mike Mauer, Director~~
~~Colorado Legislative Council Staff~~
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Secretary of State
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EXHIBIT B

2013-2014 #93 Original

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VERSION #3D

Be it enacted by the People of the State of Colorado:

The constitution of the state of Colorado is amended BY THE ADDITION OF A NEW ARTICLE: ***

LOCAL GOVERNMENT CONTROL OF OIL AND GAS OPERATIONS INCLUDING HYDRAULIC FRACTURING

SECTION 1. PURPOSES AND FINDINGS.

THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT THE CONDUCT OF OIL AND GAS OPERATIONS, INCLUDING THE USE OF HYDRAULIC FRACTURING, MAY IMPACT PROPERTY VALUE, PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT; THAT ANY IMPACTS ARE EXPERIENCED MOST DIRECTLY IN LOCAL COMMUNITIES; THAT THE CITIZENS OF LOCAL COMMUNITIES HAVE HISTORICALLY RELIED UPON LOCAL GOVERNMENTS TO REGULATE LOCAL LAND USES AND TO MINIMIZE POTENTIAL LAND USE CONFLICTS BETWEEN INDUSTRIAL DEVELOPMENT AND RESIDENTIAL DEVELOPMENT; THAT TO PRESERVE THE PUBLIC'S HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO EXPAND THE AUTHORITY OF LOCAL GOVERNMENTS BY VESTING IN THEM THE RIGHT TO REGULATE OIL AND GAS OPERATIONS.

SECTION 2. GRANT OF AUTHORITY.

THE PEOPLE OF THE STATE OF COLORADO HEREBY VEST THE RIGHT, POWER AND AUTHORITY IN LOCAL GOVERNMENTS TO REGULATE OIL AND GAS OPERATIONS WITHIN THEIR GEOGRAPHIC BORDERS; THIS RIGHT, POWER AND AUTHORITY INCLUDES THE ABILITY TO ENACT LOCAL PROHIBITIONS OR LIMITS ON OIL AND GAS OPERATIONS, INCLUDING HYDRAULIC FRACTURING. LOCAL LAWS, REGULATIONS, ORDINANCES, OR CHARTER PROVISIONS MAY BE MORE RESTRICTIVE AND PROTECTIVE OF A COMMUNITY'S HEALTH, SAFETY, WELFARE AND ENVIRONMENT THAN LAWS THAT MAY BE ENACTED BY THE GENERAL ASSEMBLY OR REGULATIONS ADOPTED BY EXECUTIVE AGENCIES OF THE STATE. FOR PURPOSES OF THIS ARTICLE, "OIL AND GAS OPERATIONS" MEANS EXPLORATION FOR AND PRODUCTION OF COLORADO'S OIL, GAS, OTHER GASEOUS AND LIQUID HYDROCARBONS, AND CARBON DIOXIDE. THE PROVISIONS OF THIS ARTICLE SHALL APPLY TO EVERY COLORADO CITY, TOWN, COUNTY, AND CITY AND COUNTY, NOTWITHSTANDING ANY PROVISION OF ARTICLE XX, OR SECTION 16 OF ARTICLE XIV, OF THE COLORADO CONSTITUTION.

SECTION 3. NOT A TAKING.

ANY LAW, REGULATION, PROHIBITION, OR LIMIT ENACTED PURSUANT TO THIS ARTICLE SHALL NOT BE CONSIDERED A TAKING OF PRIVATE PROPERTY NOR REQUIRE THE PAYMENT OF JUST COMPENSATION PURSUANT TO ART. II, SECTIONS 14 AND 15 OF THE COLORADO CONSTITUTION.

SECTION 4. SELF EXECUTING, SEVERABILITY, CONFLICTING PROVISIONS.

ALL PROVISIONS OF THIS ARTICLE ARE SELF-EXECUTING, ARE SEVERABLE, AND SHALL SUPERSEDE CONFLICTING STATE AND LOCAL LAWS AND REGULATIONS. LAWS AND REGULATIONS MAY BE ENACTED TO FACILITATE THE OPERATION OF THIS ARTICLE, BUT IN NO WAY SHALL THEY LIMIT OR RESTRICT THE PROVISIONS OF THIS ARTICLE OR THE POWERS AND RIGHTS HEREIN GRANTED. IF ANY LOCAL LAW, REGULATION, ORDINANCE, OR CHARTER PROVISION ENACTED OR ADOPTED PURSUANT TO THIS ARTICLE CONFLICTS WITH A STATE LAW OR REGULATION, THE MORE RESTRICTIVE AND PROTECTIVE LAW OR REGULATION SHALL GOVERN.