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JAN 27 2016

SWARD

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE
2015-2016 #62

MOTION FOR REHEARING

Registered electors, Tracee Bentley and Stan Dempsey, through their legal counsel, Ryley Carlock & Applewhite, request a rehearing of the Title Board for Initiative 2015-2016 No. 62. As set forth below, Ms. Bentley and Mr. Dempsey 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 January 20, 2015, the Title Board designated the title as follows:

An amendment to the Colorado constitution concerning a ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred.

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

Shall there be an amendment to the Colorado constitution concerning a ban on the use of hydraulic fracturing in oil and gas development and, in connection therewith, excluding federal land and Indian reservations from the ban; stating that the ban is not a government taking of private property for public or private use that requires the payment of compensation under the Colorado constitution; authorizing any person to sue to enforce the ban; awarding reasonable costs of litigation upon determination that a violation occurred; authorizing a court or jury to assess penalties for a violation of the ban to be paid to the local government where the violation of the ban occurred?

GROUND FOR RECONSIDERATION

I. THE INITIATIVE IMPERMISSIBLY CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE COLORADO CONSTITUTION AND STATUTES.

The Colorado Constitution and statutes require that each initiative that proposes an amendment to the Constitution shall contain only one subject and that subject shall be clearly expressed in the title. *See* Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5; *In re Title, Ballot Title,*

Submission Clause, 974 P.2d 458, 463 (Colo. 1999) (a proposed initiative violates the single subject rule where it “has at least two distinct and separate purposes which are not dependent upon or connected with each other.”). The Board set title for Initiative No. 62 despite the fact that it contains multiple distinct and separate purposes that are not dependent upon or connected with one another. Specifically, the initiative includes the following several, unrelated subjects:

- (1) Section 1(c) states the purpose of the initiative is the complete ban of the well stimulation technique known as hydraulic fracturing on all land within Colorado except Federal and Indian land. The same subsection states such ban “will not be repugnant to the Constitution of the United States.” On the one hand, the initiative bans an oil and gas process and on the other, defines the relationship between the ban and the United States Constitution. The two subjects are not dependent upon each other. Although the reference to the U.S. Constitution is vague, the rights of citizens or entities under fundamental federal law are a separate subject from a particular ban on an oil and gas process.
- (2) Section 3 prohibits hydraulic fracturing “in all oil and gas development in all lands within Colorado, excluding federal land and Indian reservations.” That is the primary purpose of Initiative #62. Section 4 adds an additional subject and purpose by eliminating property rights under Art. II, §§14 and 15 of the Colorado Constitution which is not dependent on the ban of an oil and gas process. Property rights are a separate subject from hydraulic fracturing. Indeed, Initiative #62 has three separate subjects, including a ban of hydraulic fracturing, elimination of state property rights, and a redefinition of rights under the Constitution of the United States.

These subjects are not connected or interdependent and therefore the Title Board lacks jurisdiction to set a title.

II. THE INITIATIVE’S PROVISIONS ARE SO VAGUE THE BOARD CANNOT SET A TITLE THAT ENCOMPASSES AND REFLECTS THE PURPOSE OF THE PROPOSAL.

Colorado Revised Statute §1-40-106(3)(c) requires the ballot title to accurately reflect the subject matter of an initiative to avoid confusion over its meaning and purpose. *Aisenberg v. Campbell*, 987 P.2d 249, 253 (2000). The Title set for Initiative No. 62 violates this statutory provision in the following ways:

- (1) In section 1(c), the proposed initiative purports to establish that the text is not “repugnant to the Constitution of the United States.” The Title Board failed to mention that provision when setting the title. Therefore, the electorate will be unaware that this initiative in any way is affecting their federal constitutional rights.
- (2) In section 2, the definition of “environment” “includes air, water, land, and ecological systems.” The term “includes” means that some but not all of the items covered by the

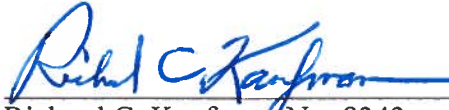
when setting the title. Therefore, the electorate will be unaware that this initiative in any way is affecting their federal constitutional rights

- (2) The title is vague and misleading because it fails to include a definition of “oil and gas development” found in section 2 of the initiative.
- (3) Section 3 terminates the use of hydraulic fracturing on all lands within the state of Colorado excluding federal lands and Indian reservations. The title does not reflect that banning this chemical process represents the termination of the oil and gas industry in Colorado because over 90% of the oil and gas wells require hydraulic fracturing to produce oil and gas. The title does not reflect the real purpose and therefore is an inaccurate representation of the issue before the electorate.
- (4) The Title Board’s inclusion of language regarding fees and costs is misleading since the proposal does not limit fees and costs to only plaintiffs who prove a violation occurred. The proposal allows plaintiffs who bring an action to recover fees and cost regardless of the outcome of the action. Therefore, the title improperly represents the text of the initiative found in section 5.
- (5) The Title Board impermissibly interpreted the intent of Initiative #62, when the Board requested proponents’ attorney to state the intent of the provision in Section 5 which allows for the award of attorney’s fees and costs. The clear language of the initiative states that “plaintiffs” may recover fees and costs when they bring an action to enforce this proposal. The initiative does not limit such recovery to prevailing plaintiffs who prove a violation occurred. The proposal awards fees and costs to plaintiffs regardless of whether they prevail or prove a violation. Therefore, the Title Board impermissibly interpreted the intent and meaning of that section.
- (6) The title fails to reflect that in section 5 both damages and penalties may be assessed for a violation of the initiative. Damages normally compensate a party for actual loss while penalties are monetary assessments in addition to damages. The title fails to reflect this important distinction.
- (7) The title fails to reflect that based on distinction pointed out in the preceding paragraph, a court may only distribute “penalties” to local governments which does not include damage awards..

Based on the foregoing, Ms. Bentley and Mr. Dempsey respectfully request the Title Board conduct a re-hearing on the title set for Initiative 2015-2016 #40.

Respectfully submitted this 27th day of January, 2016 by:

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