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**By Steven Ward at 1:26 pm, Apr 22, 2020**

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE BALLOT TITLE AND SUBMISSION CLAUSE FOR  
INITIATIVE 2019-2020 #311

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MOTION FOR REHEARING

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Tim Howard (“objector”), a registered elector of the State of Colorado, through undersigned counsel, hereby submits this Motion for Rehearing of Initiative 2019-2020 #311 pursuant to Section 1-40-107(I)(a)(I) C.R.S. As grounds therefore objector states the following:

**I. The Title Board lacks jurisdiction over Initiative #311 because it contains multiple separate and distinct subjects in violation of the Constitution’s single subject requirement.**

Initiative #311 contains multiple subjects and therefore the Title Board lacks jurisdiction to set title. Colorado law requires “that every constitutional amendment or law proposed by initiative ... be limited to a single subject, which shall be clearly expressed in its title.” C.R.S. § 1-40-106.5(1)(a); see also Colo. Const. art. V, § 1(5.5) (“No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title...”). A proposed initiative violates this rule if its text “relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.” *People ex rel. Elder v. Sours*, 74 P. 167, 177 (1903); see *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d 438, 441 (Colo. 2002) (describing use of *Sours* test to analyze ballot initiatives). As such, the subject matter of an initiative must be “necessarily and properly connected” rather than “disconnected or incongruous.” *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative “Pub. Rights in Waters II,”* 898 P.2d 1076, 1079 (Colo.1995). A proponent’s attempt to characterize a proposed initiative under “some overarching theme” will not save the measure if it contains separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442.

In this case, the proponents attempt to use an overarching theme of “concerning the regulation of oil and gas operation” to fuse together separate and unconnected purposes. The central theme of the initiative is disbanding the Colorado Oil and Gas Conservation Commission (“COGCC”) and replacing it with the Independent Oil and Gas Board. However, the following subject is “coiled up in the folds” of the initiative that either would not have passed on their own accord or were written with the intent of misleading voters to garner support from those with diverse interests, *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 566 (Colo. 2012), by granting the new board veto authority over new rules promulgated by four other state agencies, requiring vetoes of certain state agency rules, and creating a new rulemaking process that falls outside the state Administrative Procedures Act.

**The proposed initiative grants the Independent Board veto authority over new rules promulgated by four other state agencies, requires that the Board vetoes other state**

**agency rules that do not adequately balance the needs of oil and gas development with public health and safety, and creates a new rulemaking process that falls outside the state Administrative Procedures Act**

Initiative #311 grants the Independent Oil and Gas Board veto authority over the rulemaking of the Air Quality Control Commission (“AQCC”), Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission. This veto authority granted to the Independent Board is a separate subject. This “surreptitious provision ‘coiled up in the folds’ of a complex initiative,” *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442; see C.R.S. § 1-40-106.5(1)(e)(II), is unrelated to eliminating the COGCC and replacing it with the Independent Board.

Initiative #311, at proposed Colo. Const. Art. XVIII, Sec. 17(12) states:

BECAUSE THE FOLLOWING AREAS OF REGULATION ARE OF SUCH IMPORTANCE IN BALANCING THE PUBLIC HEALTH, SAFETY AND WELFARE OF CITIZENS WITH RESPONSIBLE DEVELOPMENT THAT REVIEW AND OVERSIGHT BY MORE THAN ONE AUTHORITY IS WARRANTED, THE FOLLOWING ENTITIES OR ANY SUCCESSOR ENTITIES HAVE THE AUTHORITY TO ADOPT RULES PURSUANT TO THE FOLLOWING STATUTES OR SUCCESSOR STATUTES, BUT SUCH RULES SHALL ONLY BECOME EFFECTIVE UPON APPROVAL OF THE INDEPENDENT BOARD:

- (a) THE AIR QUALITY CONTROL COMMISSION FOR RULES REGARDING ARTICLE 7 OF TITLE 25, COLORADO REVISED STATUTES, THE EMISSION OF AIR POLLUTANTS FROM OIL AND GAS OPERATIONS;
- (b) THE WATER QUALITY CONTROL COMMISSION FOR RULES REGARDING ARTICLE 8 OF TITLE 25, COLORADO REVISED STATUTES, THE DISCHARGE OF WATER POLLUTANTS FROM OIL AND GAS OPERATIONS;
- (c) THE STATE BOARD OF HEALTH FOR RULES REGARDING SECTION 25-11-104, COLORADO REVISED STATUTES, THE DISPOSAL OF NATURALLY OCCURRING RADIOACTIVE MATERIALS AND TECHNOLOGICALLY ENHANCED NATURALLY OCCURRING RADIOACTIVE MATERIALS FROM OIL AND GAS OPERATIONS; AND
- (d) THE SOLID AND HAZARDOUS WASTE COMMISSION FOR RULES REGARDING:
  - (I) ARTICLE 15 OF TITLE 25, COLORADO REVISED STATUTES, THE DISPOSAL OF HAZARDOUS WASTE FROM OIL AND GAS OPERATIONS; OR
  - (II) SECTION 30-20-109(1.5), COLORADO REVISED STATUTES, THE DISPOSAL OF EXPLORATION AND PRODUCTION WASTE FROM OIL AND GAS OPERATIONS.

The initiative language does not state what form the “approval of the Independent Board” must take. Whether the Independent Board must take formal action to affirm the agencies’ rules or if it must undertake a separate independent rulemaking, the result is the same: No rule pertaining to oil and gas development that is passed by these four agencies may go into effect without the approval of the Independent Board.

As written, the Independent Board’s authority over the rulemaking of the AQCC, Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission occurs despite the fact that the other state agencies have different missions and expertise. For example, the AQCC, acting on its authority pursuant to Article 7 of Title 25 of the Colorado Revised Statutes, would not be permitted to enact new oil and gas operation rules to address compliance with federal ozone standards without the explicit approval of the Independent Board. The considered judgment and expertise of the AQCC to accomplish its mission of achieving “the maximum practical degree of air purity in every portion of the state, to attain and maintain the national ambient air quality standards, and to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the national ambient air quality standards,” C.R.S. § 25-7-102(1), and its efforts to meet federal and state legislative air quality

mandates are made subservient to the expertise and judgment of the Independent Board that is charged with balancing public health, safety, and welfare with responsible oil and gas development.

The expertise, judgment, and missions of the Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission will also be subservient to the new Independent Board.

Initiative #311 requires the Independent Board to veto any rules from the four outside agencies that do not meet a “balance requirement.” Pursuant to subsection 12, the Independent Board may only authorize rules regulations promulgated by the AQCC, Water Quality Control Commission, State Board of Health, or Solid and Hazardous Waste Commission that adequately balance the public health, safety, and welfare of citizens with responsible oil and gas development. But the requirement to “balance” responsible oil and gas development with protection of public health and safety is not required for rules initiated by the Independent Board nor is the requirement to balance public health and welfare with oil and gas development a requirement in the four other state agencies.

The wholesale shift of authority from state agencies charged with protecting public health, air quality, drinking water quality, radioactive and hazardous waste disposal to the Independent Board is an unlawful second subject.

Granting veto authority to one executive branch agency for rules promulgated by another executive branch agency also runs counter to the rules of all four impacted executive agencies and conflicts with the Colorado Administrative Procedures Act (“APA”). The Colorado APA only grants the General Assembly, the legislative branch, the legal authority to determine if a new or amended rule complies with statutes via the annual rule review bill, and the Governor, executive branch, has the power to veto the annual rule review bill. C.R.S. § 24-4-103 (8)(c) & (d). The Colorado APA process for adopting rules does not contemplate another agency also having to adopt the same rule.

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.) Granting veto authority to the new board over four other agencies within the Executive Branch is a separate subject.

## **II. Even if the Title Board has jurisdiction, the Ballot Title and Submission Clause is incomplete and misleading.**

Several parts of the proposed initiative are not adequately described in the title. The title and submission clause should allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. *In re 2013–2014 #90*, ¶ 23, 328 P.3d at 162. The Title Board’s language must “clearly and concisely reflect the central features of a proposed initiative.” *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P.2d 963, 970 (Colo.

1992). To accomplish this task, the Court has required an initiative’s title to provide enough information that a voter, “whether familiar or unfamiliar with the subject matter of a particular proposal, [can] determine intelligently whether to support or oppose such a proposal.” *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 328 P.3d 155, 162 (Colo. 2014). In addition, the title must “correctly and fairly express the true intent and meaning” of the initiative. CRS §1-40-106(3)(b).

As described in the section above detailing the multiple legal frameworks, the ballot title needs to clearly alert voters what agencies the Independent Board can exert veto authority over and that they will be required to balance protection of public health, safety and welfare with responsible oil and gas development. Proposed language is included in Exhibit A.

### **III. Conclusion**

Accordingly, the objector respectfully requests that this Motion for Rehearing be granted and a hearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 22nd day of April, 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR REHEARING was served via US Mail or email to the proponents on 22nd day of April, 2020 to the following:

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## EXHIBIT A

### Proposed Initiative 2019-2020 #311

An amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning the regulation of oil and gas operations, and, in connection therewith, replacing the oil and gas conservation commission with a new independent oil and gas board; specifying the appointment process for and qualifications of board members with the intent of ensuring the political independence of the board; vesting all regulatory power and jurisdiction over oil and gas development in the board except as otherwise specified; specifying a requirement that rules pertaining to oil and gas operations promulgated by ~~the air quality control commission, water quality control commission, board of health, and the solid and hazardous waste commission~~ **the air quality control commission, water quality control commission, board of health, and the solid and hazardous waste commission** ~~certain other state rule-making entities~~ may become effective only upon approval of the board; ~~requiring the board to approve those rules promulgated by other state agencies only if they~~ **requiring the board to approve those rules promulgated by other state agencies only if they** ~~balance the protection of the public health, safety, and welfare of citizens, and the protection of the environment, with the responsible development of oil and gas resources;~~ **balance the protection of the public health, safety, and welfare of citizens, and the protection of the environment, with the responsible development of oil and gas resources;** and specifying that nothing in the amendment alters, impairs, or negates local governments' authority to regulate oil and gas development in accordance with existing statutory law.