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COLORADO TITLE SETTING BOARD

Colorado Secretary of State

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION
CLAUSE FOR INITIATIVE 2017-2018 #163

MOTION FOR REHEARING

On behalf of Neil Ray, registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing for Initiative 2017-2018 #163 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

- I. INITIATIVE #163'S ABSTRACT PROVIDES VOTERS WITH NO ESTIMATES OR FISCAL NUMBERS, FAILS TO COMPLY WITH THE REQUIREMENTS SET FORTH IN SECTION 1-40-105.5, AND WILL MISLEAD VOTERS.**

a. Introduction

This motion, like many before it this initiative cycle, is necessary because Legislative Council is not creating initial fiscal impact statements as required by law. When the General Assembly passed House Bill 15-1057, which added C.R.S. § 1-40-105.5 to the statute, the legislature's intent was to provide voters with fiscal impact information earlier in the initiative process when they are deciding whether to sign a petition, and so that they need not wait until the Bluebook process after a measure is already on the ballot to get that information.¹ The General Assembly thus intended a robust fiscal impact statement and a meaningful abstract to be included on the petition form itself. In fact, legislators passed an amendment to the

¹ At House Bill 15-1057's March 25, 2015 hearing in the House Committee on Veteran Affairs, Representatives Court and Delgrosso, the primary sponsors of the bill, unequivocally clarified what was to be included in an initial fiscal impact statement. Hearing on H.R. 1057 Before the H. Comm. on Veterans Affairs, 1st Regular Sess., 70th Gen. Assembly (Colo. Mar. 25, 2015) (statements of Representatives Court and Delgrosso). Representative Court explained that the bill's purpose was to put an initiative's fiscal impact, the information that goes in the Blue Book, out earlier before signatures were collected. *Id.* at 50:58-52:20. This was "a matter of transparency and public information." *Id.* at 51:44.

bill providing that the full abstract, rather than a two-sentence summary of the abstract, which the original bill proposed, be included on every page of the petition.²

This process serves an important purpose; the fiscal impact statement's abstract is one of two items summarizing the measure (the other being the title) that is included in the petition. Because of its importance, section 1-40-105.5 lays out what must be included in the fiscal impact statement and abstract, and section 1-40-107(2)(a)(II) provides that the abstract may be challenged at a rehearing if it fails to meet section 1-40-105.5's requirements. Specifically, each abstract must include:

- (a) An estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted;
- (b) A statement of the measure's economic benefits for all Coloradans;
- (c) An estimate of the amount of any state and local government recurring expenditures or fiscal liabilities if the measure is enacted.

C.R.S. § 1-40-105.5(3).

Despite the legislative direction to draft fiscal impact statements and abstracts to provide meaningful fiscal information to voters early in the ballot initiative process, Legislative Council has again, in this measure, drafted them devoid of any estimates that would help voters decide whether to sign a petition to place a proposed measure on the ballot. The entirety of Legislative Council's analysis of the fiscal and economic impacts of Initiative #163 is as follows:

State and Local Government Revenue and Expenditures. The measure is expected to decrease the amount of severance tax, royalty payments, and lease revenue that state and local government collects in the future, and the amount of state and local expenditures of that revenue.

² Representative Delgrosso, in response to a question posed at that hearing as to whether the amendment would require the two-sentence summary or the full abstract on the petition's first page, explained that the first page of the petition would still include the full abstract to provide voters with more information on the measure's fiscal impacts. *Id.* at 58:40–59:35. The representative's response to another question, this time from a person testifying in opposition to the bill, confirmed that the abstract was meant to address both state and local economic impacts, just like fiscal notes. *Id.* at 1:36:53–1:37:33.

Economic Impacts. The measure constrains oil and gas well location throughout the state by increasing the current 500 foot setback to a 2,500 foot setback. This will prohibit oil and gas development on about 450 acres surrounding a given point, instead of 18 acres under current law. As a result, future oil and gas development will be prohibited on significant portions of land in the Raton basin in south-central Colorado and the Denver-Julesberg basin in central and northern Colorado, and by lesser amounts in western Colorado. Since proximity to a well has been shown to reduce home values, larger setbacks will help preserve property values for homeowners. To the extent that well proximity impacts health outcomes, larger setbacks will prevent lost economic productivity from illness and reduce medical costs. Lower oil and gas production will constrain regional economic activity by reducing industry employment and profits, and reducing rent and royalty income to mineral owners.

As a result, Initiative #163's fiscal impact statement and abstract are inadequate and, despite available information, provide voters no concrete information on the measure's economic impacts. The Objector therefore challenges the abstract on all three grounds listed in Section 1-40-107(1)(a)(II):

1. the estimates (or lack thereof) included in the abstract are incorrect;
2. the abstract does not comply with the requirements set forth in section 1-4-105.5; and
3. the abstract is misleading and prejudicial.

b. The abstract is legally inadequate because it does not contain an estimate.

Section 1-40-107(1)(a)(II)(A) permits an objector to challenge an estimate in the abstract if his or her motion contains documentation that supports a different estimate. Here, Chris Brown, the Director of Policy and Research for the Common Sense Policy Roundtable submitted³ to Legislative Council (1) an economic assessment of a 2,500-foot oil and gas setback conducted in June 2016 by the University of Colorado's Leeds School of Business (the "CU Study")⁴; (2) the March 2018 Economic & Revenue Forecast presentation to the Joint Budget Committee by Legislative Council Staff⁵; and (3) a link to preliminary mapping offered by Vital

³ A copy of the email Mr. Brown submitted is attached as Exhibit 1.

⁴ The CU Study is attached to this Motion as Exhibit 2.

⁵ The Economic & Revenue Forecast presentation is attached to this Motion as Exhibit 3.

For Colorado.⁶ Together, these sources provide Legislative Council with updated mapping for the new setback ballot measure, core data points already developed by Legislative Council that can be used to estimate the impact from such a setback measure, and a thoughtful approach to estimate the loss in oil and gas production and statewide economic activity based on publicly available mapping of the surface restrictions from a setback measure. In particular, the latest economic and revenue outlook projects that oil and gas production, absent a larger setback requirement, will add a combined value of over \$14 billion to \$16 billion to the Colorado economy over the next two years while contributing between \$122M to \$140M in severance tax revenue alone. This does not include additional state or local revenue from sales, property, or income taxes related to oil and gas production.

Despite this already available raw data and a study demonstrating how it could be utilized to provide fiscal estimates to include in the abstract, Legislative Council defaulted to another largely meaningless abstract devoid of any estimates at all. Therefore, the abstract's estimates are incorrect because instead of providing estimates with actual numbers, the abstract merely states that severance tax, royalty payments, and lease revenue collected by state and local governments "is expected to decrease." This is not an estimate.

There is no doubt that Initiative #163's setback will result in adverse economic impacts due to reduced development. In fact, the abstract states that "[l]ower oil and gas production will constrain regional economic activity by reducing industry employment and profits, and reducing rent and royalty income to mineral owners." But even if Legislative Council feels unable in coming up with estimates to make the simple assumption that less available land for oil and gas production will reduce oil and gas production in an unbiased way, it could have qualified any estimate by stating "assuming the setback, which would reduce the available land for oil and gas production, results in lower oil and gas production . . ." It also could have provided estimates with ranges based on varying assumptions.

Nevertheless, no numbers or ranges were provided, even though the University of Colorado's Leeds School of Business's study demonstrated how numbers could be reached. The CU Study explains that a 2,500 setback, which would eliminate access to over 90 percent of land susceptible for oil and gas development, **would cause the state to lose an average of 104,000 jobs annually over the next 15 years, GDP to decline an average of \$14 billion, and Coloradans to lose an annual average total of \$8.3 billion in real**

⁶ The following is a link to the preliminary mapping:
[http://www.vitalforcolorado.com/latest 2 500 ft setback initiative.](http://www.vitalforcolorado.com/latest%20500%20ft%20setback%20initiative)

income.⁷ It states that many jobs would be lost due to a similar 2016 setback (a compounding average annual reduction in total employment of 2.8 percent from 2017-2031). The CU Study also notes on page 12 that because oil “[w]ells typically record the greatest volume of production in year 1 and decrease at a slower rate with each successive year,” the measure would result in a depletion of new oil well production at a rate of 42 percent in year 1, 24 percent in year 2, 18 percent in year 3, and 6.9 percent per year by year 15. Similarly, the CU Study noted on page 15 that natural gas well production would deplete at a rate of 17 percent in year 1, 12 percent in year 2, 10 percent in year 3, and 8.2 percent per year by year 15.

Legislative Council could have used these estimates or updated them, but it did not. This is simply not a case where it was difficult or impossible to provide quantitative estimates.

c. The abstract is legally inadequate because it fails to comply with the requirements of Section 1-40-105.5(3).

Because the abstract is devoid of any estimate at all, it correspondingly fails to comply with the statutory requirements to provide estimates. Section 1-40-105.5(3) requires that the abstract include *estimates* of: (1) “the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted”; and (2) “the amount of any state and local government recurring expenditures or fiscal liabilities if the measure is enacted.” See *Estimate*, Webster’s Third New International Dictionary (1993) (“[A] judgment made from usually mathematical calculation especially from incomplete data”). The section also requires that the abstract include “[a] statement of the measure’s economic benefits for all Coloradans,” which should be interpreted to include both benefits and detriments to be impartial.

Not only could Legislative Council have provided the estimates in the CU Study or updated them for 2018, it also could have calculated other estimates for the measure’s impact, including its impact on severance taxes, royalty payments, and lease revenue that state and local governments will collect in the future. The data needed to make these calculations is available in the CU Study, Legislative Council’s own Economic & Revenue Forecast, and Vital for Colorado’s mapping; all

⁷ Specifically, the CU Study explains on page 2 that, assuming a 90.2 percent reduction in new production beginning in 2017, in the first five years GDP would lower by an average of \$7.1 billion and 54,000 jobs would be lost, and GDP would lower by an average of \$14.5 billion and 104,000 jobs would be lost between 2017 and 2031. This is an average annual reduction in total employment of 2.8 percent from 2017-2031, and an average annual reduction in state GDP of 3.4 percent for the same period.

Legislative Council needed to do was use the available data to create the estimates.⁸ For example, page 18 of the Economic & Revenue Forecast includes an oil and gas severance tax forecast. If it can make this forecast, it can make other forecasts to estimate the likely economic impacts of Initiative #163.

In addition, the abstract's statement of the measure's economic benefits (and corresponding detriments) is inadequate because, at minimum, it should have included the job loss figures in the CU Study, which demonstrate that a 2,500-foot setback would significantly reduce job creation to the detriment of all Coloradans (and not just to those associated with the oil and gas industry), or created similar estimates on its own.

d. *The abstract is misleading and prejudicial.*

Because the measure's abstract does not include actual estimates and instead provides vague generalities, it fails to express the magnitude in GDP decline, job loss, and other adverse economic effects. Stating that "lower oil and gas production will constrain regional economic activity by reducing industry employment and profits" without tying it to lower gas production, or that revenue "is expected to decrease," mitigates the measure's actual effect. Voters would be left with nothing meaningful before deciding whether to sign a petition.

The abstract's section on economic impacts is in particular prejudicial because, without citing any support, it states that "[s]ince proximity to a well has been shown to reduce home values, larger setbacks will help preserve property values for homeowners." This statement does not indicate that any preservation to property values would only be to homeowners within the setback distance and not all Coloradans. Similarly, the abstract states that "[t]o the extent that well proximity impacts health outcomes, larger setbacks will prevent lost economic productivity from illness and reduce medical costs."⁹ Again, this statement does not indicate that these purported health benefits would impact only those Coloradans who currently live close to oil and gas production. These statements also come before any mention of possible negative economic effects to Coloradans and

⁸ For example, studies concerning La Plata County, California, and New Mexico explicitly quantify state and local fiscal impacts associated with changes in oil and gas production. The studies can be found via these links: [http://c.ymcdn.com/sites/nmtri.site-ym.com/resource/resmgr/Studies and Reports/2014 NMTRI Oil and Gas Study.pdf](http://c.ymcdn.com/sites/nmtri.site-ym.com/resource/resmgr/Studies%20and%20Reports/2014%20NMTRI%20Oil%20and%20Gas%20Study.pdf); <https://www.fortlewis.edu/portals/157/docs/eis/EIS-oilgas.pdf>; https://laedc.org/wp-content/uploads/2012/04/EconomicImpactofOilFieldInvestmentDelays_REV.pdf.

⁹ These statements likely come from information submitted by the measure's proponents, which Legislative Council appears to have taken at face value.

outnumber the sentence vaguely mentioning adverse economic consequences two to one. Combined with the fact that the sentence about negative adverse economic consequences appears to limit these consequences to lower profits to those in the oil and gas industry and lower income to mineral owners, this section appears to take the position that the setback would be an overall positive for all Coloradans. This is simply not true.

As a result, because Legislative Council has failed to perform the economic analysis to create estimates, voters are left with fiscal information that diminishes the measure's effect on the Colorado economy while bolstering potential, and uncited, health benefits. This misleading and prejudicial abstract must be rewritten.

e. Legislative Council is looking to the Title Board for guidance.

A comparison of the abstract Legislative Council drafted for Initiative #163 and the abstract for Initiative #97 amended by this Title Board shows that Legislative Council is listening to these rehearings on the abstracts and is adjusting their future abstracts based on Title Board's comments and modifications. For example, Initiative #163's abstract adopted many of the Title Board's modifications to Initiative #97's abstract, including a statement that the measure would change the current 500 foot setback to a 2,500 foot setback and the acreage involved for each setback distance.¹⁰

Because the Colorado Supreme Court has deferred to the Title Board on the drafting of the abstract and Legislative Council is heeding guidance from the Title Board, any strong message about the need for more meaningful fiscal information must come from the Title Board. If an abstract, such as Initiative #163's, fails to meet the statutory requirements and does not include any estimates despite available information to make those estimates, this board should not limit its role to minor modifications. Otherwise, statutory insufficient abstracts will, without any means to fix them, find their way on to the petition forms to the detriment of the Colorado voters.

Specifically, the Title Board should have the power to make greater modifications and hold the rehearing while Legislative Council drafts more fiscal information. Although the issue of the Title Board's authority to send a measure

¹⁰ One edit the Title Board made to Initiative #97's abstract that was not included by Legislative Council in Initiative #163's abstract is altering the phrase "is expected to decrease" in the State and Local Government Revenue and Expenditures section to read "is highly likely to decrease." The Objector believes that the Title Board should make this modification, among many others, to Initiative #163's abstract.

back to Legislative Council was briefed in Initiative #97's appeal, the Colorado Supreme Court affirmed the Title Board's actions without opinion. Thus, why the Court affirmed or the Court's view of that issue is unknown and remains an open question. Therefore, nothing prevents the board from holding over the rehearing to ensure that a measure's abstract is statutorily compliant. At bare minimum, if the Title Board determines that an abstract is devoid of estimates and fails to meet the statutory requirements, it should refuse to approve the abstract, at least until either it or Legislative Council fixes the deficiency.

CONCLUSION

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

Respectfully submitted this 11th day of April, 2018.

/s/ Jason R. Dunn

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