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MEMORANDUM

November 29, 2011

TO: Phillip Doe and Richard G. Hamilton

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #45, concerning diversion of state waters

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this proposed initiative, proposed initiative 2011-2012 #3, concerning the public trust doctrine, was the subject of a memorandum dated May 14, 2010. Proposed initiative 2011-2012 #3 was discussed at a public meeting on May 18, 2010. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment appear to be:

1. To change the Colorado constitution to require water rights to be curtailed if necessary to prevent irreparable harm to natural elements of the public's dominant water estate;
2. To apply the prior appropriation doctrine to all waters, whether appropriated or unappropriated and regardless of whether the waters are part of any natural stream;
3. To specify that water rights are usufructory rights;
4. To clarify that, under the prior appropriation doctrine, it is the public that grants the right to use water to appropriators;
5. To require the executive, legislative, and judicial branches of government to enforce and implement the proposed initiative;
6. To grant to any citizen of the state of Colorado standing to bring an action to compel the state to enforce the proposed initiative; and
7. To make the proposed initiative self-enacting and self-executing.

Technical Comments:

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Is the first line intended to be a title?
2. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado." To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative before the amending clause.
3. Standard drafting practice has changed for amending clauses. The new style of amending clause should read:

In the constitution of the state of Colorado, **amend** section 6 of article XVI as follows:

4. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section or subsection, including amending clauses and section headings.
5. In the first paragraph, the section number and headnote should be in bold type and there should be a period after "Section 6" rather than a colon.

6. When amending a section of the Colorado constitution, strike type is used to delete language and small caps are used to show new language. Current law cannot be deleted without showing it as such in strike type. Stricken text should precede new text where such changes appear together. The following current language is missing and should be shown in strike type: On line 1, after "divert" insert "~~the unappropriated~~" and after "waters" insert "~~of any natural stream~~".
7. It is standard drafting practice to use SMALL CAPITALS rather than ALL CAPS to show the language being added to the constitution. Note that although the new text in the proposed initiative should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate, including the first letter of the first word of each sentence.
8. On line 3 of subsection (1), the commas following "LIMITED" and "CURTAILED" and the words "SO AS" are not grammatically necessary.
9. In subsection (1), a "usufruct use" of water is redundant.
10. On line 2 of subsection (2), the stricken language needs only a single strike type line, not a double line, through it.
11. Subsection (2) should end with a period.
12. On lines 3 and 4 of subsection (3), the words "SO AS" are not grammatically necessary.
13. Standard drafting practice is to avoid ambiguous citation references and instead cite to the specific provision that is referenced.
 - a. On line 1 of subsection (4), what does the word "hereunder" refer to? Does it mean the "in this section", "in this subsection (4)", or "in subsections (4), (5), and (6) of this section"?
 - b. On line 3 of subsection (7), what does the word "hereto" refer to? Does it mean "in this section"?

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Proposed initiative 2011-2012 #3 would have adopted the public trust doctrine and also addressed stream access rights. While this proposed initiative does not address access rights, it does specify that the public owns a "dominant water estate" that may require water rights to be curtailed to prevent irreparable harm to natural elements of the public's dominant water estate. How does this aspect of the proposed initiative differ from proposed initiative

2011-2012 #3 regarding the public trust doctrine?

3. Regarding subsection (1):
 - a. This prohibits uses of water from causing "irreparable harm to the public's estate." What is "irreparable harm"?
 - b. Does the "public's dominant water estate" apply to water imported into the state? If so, does it limit or restrict the use of water imported into the state?
4. What is the intent and effect of deleting the phrase "of any natural stream" in subsections (1) and (2)? Would the prior appropriation system then apply to, e.g., nontributary groundwater? Would the public's rights in water continue to apply to water that has been diverted into a reservoir or ditch?
5. Regarding subsection (3):
 - a. Current law already specifies that water rights are usufructory and that appropriators must release appropriated waters that have been beneficially used back to the stream for use by other appropriators, if there are any. What is your intent in specifying these things in the proposed initiative?
 - b. What is the effect of the requirement that the water must be returned "unimpaired"? Does it restrict uses that consume part of an appropriation through evaporation, plant uptake, or other mechanisms? Under current law, certain types of water, called foreign water, may be used to extinction. Does this measure affect the use of foreign water, including water imported into a basin and nontributary ground water? If so, would the proponents consider adding language to clarify permissible uses of foreign water?
6. Subsection (4) states that the public confers the privilege of using water by grant for the common good.
 - a. Since statehood, the constitution has allowed appropriators to create water rights, which are a type of real estate protected by the federal and state constitutions against takings without due process and compensation. Does the proposed initiative apply to these pre-existing rights? If so, the proposed initiative, by treating water rights as a privilege and subjecting them to curtailment, arguably causes a taking of the water right. Is this your intent? How would the state pay due compensation?
 - b. Currently, water can be appropriated for any beneficial use, including purely private uses. Does subsection (4) limit beneficial uses to only those that promote the common good?
7. In subsection (5), the phrase "that confers, by grant, the use of the public's water to users and that stipulates that uses of water shall be protective of the public's rights and interests," appears intended to restate the effect of the proposed amendment, but does so in a summary way that differs from the language used elsewhere. Do the proponents intend the phrase to have substantive effect, or is it merely descriptive? If it is substantive, what are the effects of the phrase's differences from the rest of the section? If it is only descriptive, would the proponents consider deleting it from the proposed initiative?

8. What do the proponents intend by stating that the proposed initiative is "self-enacting"?