

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

May 14, 2010

TO: Phillip Doe and Richard Hamilton

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #3, concerning the public trust doctrine

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.

#### Purposes

The major purposes of the proposed amendment appear to be:

1. To adopt a public trust doctrine to protect the public's interests in waters of natural streams;
2. To make the use of the public's waters by appropriation servient to the public's dominant water estate;
3. To require water use rights held by the state of Colorado for government operations to be held in trust for the public and to prohibit the state of Colorado from transferring water rights

from the public estate to proprietary interest;

4. To include the public's access to the waters of a natural stream as part of the public doctrine;
5. To require the executive, legislative, and judicial branches of government to enforce and implement the doctrine; and
6. To grant to any person of the state of Colorado standing to bring an action enabling the doctrine.

### 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. The heading "**INITIATIVE FOR THE ADOPTION OF THE COLORADO PUBLIC TRUST DOCTRINE**" at the beginning of the proposed initiative is unnecessary and can be removed.
2. With regard to the amending clause of the proposed initiative, the word "of" should be inserted after "article XVI."
3. The section heading and proceeding headnote should be in bold lowercase type instead of in small caps, as follows:

#### **Section 5. Water of streams public property - public trust doctrine.**

4. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, or paragraph, including amending clauses and section headings, except for the first subsection that directly follows the headnote, as shown below:

**Section 5. Water of streams public property - public trust doctrine.** (1) The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared. . .

(2) THIS COLORADO PUBLIC TRUST DOCTRINE IS ADOPTED, AND IMPLEMENTED, BY THE PEOPLE. . .

In addition, it is standard drafting practice to insert two spaces after a numbered or lettered subdivision in parentheses rather than a left tab or several spaces, as they appear in the current proposed initiative.

5. In subsection (2), the proponents might consider inserting the word "HEREBY" before "ADOPTED" to conform with standard drafting practice.

6. In paragraph (a) of subsection (4), the proponents should insert "THE STATE OF" after "AS A GRANT FROM THE PEOPLE OF" to conform to standard drafting practice.
7. In paragraph (e) of subsection (4), the word "STREAM" should be plural (i.e., STREAMS), and the word "OR" should be inserted before the word "WELL-BEING".
8. It is standard drafting practice to capitalize only proper nouns such as "Colorado." Therefore, any references to "PUBLIC TRUST DOCTRINE" should be "PUBLIC TRUST DOCTRINE".
9. The paragraph letters within subsections (4) and (5) should be lowercase rather than small caps; for example, (A) should appear as (a), (B) as (b), and so on. In addition, in subsection (4), paragraph (g) should be relettered as paragraph (f) to follow paragraph (e) in alphabetical order.
10. To conform to standard drafting practice, the phrase "THIS COLORADO PUBLIC TRUST DOCTRINE" that appears in subsections (5)(a), (5)(d), and (6) should instead read "THE COLORADO PUBLIC TRUST DOCTRINE".
11. It is standard drafting practice to avoid using the phrase "provisions of", as it tends to be redundant. In subsection (5)(a), the phrase "IN CONCERT WITH PROVISIONS OF THIS COLORADO PUBLIC. . ." can be changed to "IN CONCERT WITH THE COLORADO PUBLIC. . .".
12. Hyphens are used internally in some compound words to separate the words forming the compound word. Hyphens connect the words of a compound modifier that comes before the word being modified; however, hyphens are not used this way with compound parts ending in "-ly". The term "naturally-wetted", used in subsections (5)(b) and (5)(c), should not be hyphenated.
13. In the first line of subsection (6), the proponents should consider deleting the phrase "PROVISIONS CONTAINED WITHIN THIS COLORADO PUBLIC TRUST DOCTRINE" and substituting "SUBSECTIONS (2) TO (7) OF THIS SECTION"; similarly, subsection (7) should begin "THIS SECTION IS" instead of "PROVISIONS OF 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. As a change to the Colorado constitution, the proposed initiative may be amended only by a subsequent amendment to the constitution. Is this your intention?
3. What will be the effective date of the proposed initiative?

4. Does the proposed initiative incorporate all elements of the public trust doctrine, or would the adoption of the proposed initiative result in the enactment, by implication, of elements of the public trust doctrine that are not stated here or otherwise cause consequences that are only implied by the doctrine? If the latter, what are some or all of those implied consequences?
5. Regarding subsection (2):
  - a. What are the "public's interests in the water of natural streams"?
  - b. What "rights of use and public enjoyment" does the public own?
  - c. Are those interests and rights different from "the public's estate in water" as used in subsection (3)? If not, the proponents should consider using consistent terminology.
6. Regarding subsection (3):
  - a. What is the effect of specifying that the public trust doctrine has legal authority superior to the terms of contracts and property law?
  - b. Would just compensation be required to be paid pursuant to section 15 of article II of the Colorado constitution for a taking of a water right that was adversely affected by implementation of the doctrine?
7. Regarding subsection (4) (b), how are appropriative water rights servient to the doctrine? Could the proposed initiative be used to abrogate, invalidate, impair, or interfere with prior, vested water rights? Could the proposed initiative be used to alter the timing or decrease the amount of diversions of prior, vested water rights?
8. Regarding subsection (4) (d), who is authorized to manage the use of water rights to protect the natural environment and the public's use and enjoyment of the state's waters? What type of management is contemplated by this authority? Would the managing entity have the authority to promulgate rules?
9. Regarding subsection (4) (e), what is "natural stream well-being"? What diversions would be affected by the dominance and priority of the well-being of the public or a natural stream? How is this effect determined, and who determines it?
10. Regarding subsection (4) (g), what is a transfer "to proprietary interest"? Does subsection (4) (g) prevent the state from selling any of its water rights?
11. Regarding subsection (5):
  - a. What rights of public access does this subsection grant the public? Access across private property to any stream? The right to float on streams? To wade? To walk along the stream? To fish?
  - b. What do the following phrases mean? Do these terms differ from one another? If not, the proponents should consider using consistent terminology.
    - i. The "wetted natural parameter [perimeter?] of a stream bank of a water course" as referred to in paragraph (a)?
    - ii. The "naturally-wetted high water mark of the stream" as referred to in paragraph (b)?

- iii. The "naturally-wetted lands of the shores of the stream" as referred to in paragraph (c)?
  - c. Is the navigation servitude referred to in paragraph (b) a federal servitude or, if not, how does it differ from the federal navigation servitude?
  - d. Does paragraph (c) absolutely immunize every person from both civil and criminal trespass with regard to any and all conduct of the person that occurs within the water of a natural stream, its streambed, and the naturally wetted lands of the shores of the stream? If not, what conduct is not immunized?
  - e. In paragraph (d), how is it that the public's "use" of water "shall not be controlled in law as a usufruct"? Isn't a right to use water a usufructory right?
12. Who is a "citizen of the state of Colorado"? Americans are citizens of the United States, but residents of a particular state. Do you intend to deny standing to people who are not citizens of the United States?