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MEMORANDUM

April 12, 2010

TO: Phillip Doe and Richard Hamilton

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #2, 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 be held in trust for the public;

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;
6. To grant to any person of the state of Colorado standing to bring an action enabling the doctrine; 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. With regard to the enacting clause, amending clause, and article heading of the proposed initiative:
 - a. The enacting clause and the amending clause should not be in a single paragraph together, but should instead be two separate clauses. Both clauses should also not be bolded.
 - b. Section 1 (8) of article V of the Colorado constitution states, "The style of all laws adopted by the people through the initiative shall be, 'Be it Enacted by the People of the State of Colorado'". To conform to this constitutional requirement, the proponents should capitalize the word "enacted."
 - c. The amending clause should follow the enacting clause in a separate paragraph and, in the amending clause, the phrase "of article XVI" should be added after "Section 5," so that the clause reads:

Section 5 of article XVI of the constitution of the state of
Colorado is amended to read:
 - d. Article headings are included only when an entire article is being amended, added, or repealed. Thus, the article heading is not necessary and should be deleted.
2. 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. Similarly, instead of indenting entire paragraphs (a), (b), (c), and (d) in subsections (3) and (5), and subparagraphs (I) and (II) in subsection (3) (c), the proponents should simply insert a left tab at the beginning of the first line of each paragraph and subparagraph.
3. The headnote of section 5 should accurately reflect the major provisions of the subject matter

of the section and should be updated to reflect the new language the proponents are adding. For example, the headnote could read:

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

(1) The water of every natural stream, not . . .

4. With regard to the numbering and organization of the new language in the proposed initiative, the proponents might consider renumbering and combining provisions as suggested below:

a. The broad subject matter of section 5 is that the waters of natural streams are public property. Subsections (2) through (6), which are being added to section 5 by the proponents, deal exclusively with the public trust doctrine and elements of the doctrine. Rather than breaking up all of the doctrine provisions into different subsections, it makes sense to group together all of the public trust doctrine provisions into one subsection. Subsection (7), because it concerns the whole section 5, would remain in its own subsection.

b. The component parts of constitutional sections do not follow standard outline form and can only be broken down into lesser subdivisions (that is, subsections can be divided into paragraphs, paragraphs into subparagraphs, and subparagraphs into sub-subparagraphs) in the following two ways:

i. The first and more common method is to denote those lesser subdivisions by listing them according to similar subject matter following the introductory portion to that section division, which ends with a colon. For example:

(2) This subsection (2) can be broken down into the following three lesser section divisions:

- (a) Paragraphs;
- (b) Subparagraphs; and
- (c) Sub-subparagraphs.

ii. The second method is to group similar thoughts under a larger section division. For example:

(1) (a) This subsection (1) is divided into paragraphs.

(b) This subsection (1) contains three paragraphs, (a), (b), and

(c).

(c) This paragraph (c) and paragraphs (a) and (b) all pertain to the same subject.

Since the proponents have not included introductory portions in the subsections and paragraphs that are broken down into paragraphs and subparagraphs, respectively, those subsections and paragraphs should be broken down as indicated in ii. above.

If the proponents were to input these suggested changes, the new language of the proposed initiative would be organized as follows:

- (2) (a) THE PEOPLE OF THE STATE OF COLORADO
- (b) (I) THE USE OF THE PUBLIC'S WATERS BY
- (II) THE PUBLIC CONFERS THE RIGHT TO
- (III) WATER USE USUFRUCT RIGHTS SHALL
- (IV) (A) USUFRUCT PROPERTY RIGHTS CONFERRED
- (B) USUFRUCT WATER USE PROPERTY RIGHTS
- (C) AN ESTATE IN WATER IN COLORADO
- (V) A USUFRUCT WATER PROPERTY RIGHT
- (c) WATER USE RIGHTS HELD BY THE STATE
- (d) (I) PUBLIC ACCESS TO THE WATER OF
- (II) THE RIGHT OF THE PUBLIC TO THE USE
- (III) NEITHER THE WATERS OF A NATURAL
- (IV) PUBLIC USES OF WATERS IN NATURAL
- (e) ENFORCEMENT AND IMPLEMENTATION OF
- (3) PROVISIONS OF THIS SECTION ARE SELF-ENACTING

Note that if the proponents reorganize the proposed initiative as indicated above, references to "THIS SECTION" would need to change to "THIS SUBSECTION (2)".

5. In subsection (2):
 - a. The phrase "THE PEOPLE OF THE STATE OF COLORADO OBLIGE THE ADOPTION AND IMPLEMENTATION OF THE PUBLIC TRUST DOCTRINE . . ." is archaic. It is standard drafting practice to avoid using archaic language and, therefore, the proponents might consider rephrasing that language to something like "THE PUBLIC TRUST DOCTRINE IS HEREBY CREATED BY THE PEOPLE OF THE STATE OF COLORADO . . ." or "THE PUBLIC TRUST DOCTRINE IS HEREBY ADOPTED AND IMPLEMENTED BY THE PEOPLE OF THE STATE OF COLORADO . . ."
 - b. The phrase "THE PUBLIC'S INTERESTS IN WATERS." could be rephrased as "THE PUBLIC'S INTERESTS IN WATERS OF NATURAL STREAMS."
 - c. It is not clear what the proponents intend to accomplish with the second sentence. However, if the proponents choose to keep that language in the proposed initiative, the first letter of the word "Article" should not be capitalized, "v" should be ALL CAPS, not small caps, and instead of saying "the Colorado constitution," the proponents should say "this constitution" since the reference is within the constitution, so that the reference would read "SECTION 1 OF ARTICLE V OF THIS CONSTITUTION."
6. In subsection (3) (c), the proponents refer to a "A USER", but it appears the proponents may mean "AN APPROPRIATOR." Also, it appears the word "ITS" is missing and should be inserted before the word "WATERS."
7. In subsection (3) (d), "WELLBEING" should be spelled "WELL-BEING."
8. In subsection (5) (b), generally, neither/nor is used to group two things, not three or more things. The proponents might consider rephrasing subsection (5) (b), depending on what the proponents mean, to read, "THE WATERS OF A NATURAL STREAM, THE STREAMBED OF A

STREAM, AND THE WETTED PARAMETER LANDS INCIDENT TO THE [STREAM OR] STREAMBED SHALL NOT BE SUBJECT TO THE LAWS OF TRESPASS . . ."

9. In subsection (5) (c), "IN THE USE OF, AND IN THE ENJOYMENT OF," can be rephrased as "IN THE USE AND ENJOYMENT OF."
10. In subsection (6), the proponents might consider changing "ANY PERSON" to "ANY CITIZEN."
11. In subsections (3), (4), (5), and (6) of the proposed initiative, the proponents refer to the "PROPERTY RIGHT ASSOCIATED WITH THE USE OF WATER," "WATER USE RIGHT," "USUFRUCT PROPERTY RIGHT," "RIGHT TO THE USE OF ITS WATER," "WATER USE USUFRUCT RIGHTS," "USE USUFRUCT RIGHTS," "USUFRUCT PROPERTY RIGHTS," "USUFRUCT WATER USE PROPERTY RIGHTS," "USUFRUCT WATER PROPERTY RIGHT," and "RIGHT OF THE PUBLIC IN THE USE OF . . . THE PUBLIC'S OWN WATER." It is unclear if the proponents are referring to one, two, or three different rights, as they are referred to in different ways. For consistency, the proponents may want to choose one of those ways to refer to the right or rights in the initiative.
12. It is standard drafting practice to only capitalize proper nouns such as "Colorado." Therefore, any references to "PUBLIC TRUST DOCTRINE" should be "PUBLIC TRUST DOCTRINE" and "ARTICLE" should be "ARTICLE."
13. When referring to "*the* public trust doctrine" or "*the* public doctrine elements" in the proposed initiative, it is more appropriate, since the new language of the initiative is actually the doctrine, to refer to it as "THIS PUBLIC TRUST DOCTRINE" or "THIS DOCTRINE." Or, the proponents could simply refer to "THIS SECTION [OR SUBSECTION (2)]" in place of "public trust doctrine" or "public trust doctrine elements."
14. Throughout the proposed initiative, the proponents use either the term "WATER" or "WATERS," depending on the use of the term. For consistency, the proponents may want to change the following instances of the term "WATER" to "WATERS":
 - a. In subsection (3), the first "WATER";
 - b. In subsection (3) (a);
 - c. In subsection (3) (b), the second "WATER";
 - d. In subsection (3) (d), the third "WATER";
 - e. In subsection (5);
 - f. In subsection (5) (c).
15. With regard to commas, it is standard drafting practice that a series of three or more items is set off by commas, including a comma between the second-to-last item and the conjunction, and it is standard drafting practice to set off certain phrases (i.e., introductory, parenthetical, or prepositional phrases) with commas.
 - a. In subsection (3) (a), the comma after the word "SAME" is unnecessary;
 - b. In subsection (3) (c), the comma after the word "ENVIRONMENT" is unnecessary;
 - c. In subsection (6), a comma should be added after the word "LEGISLATIVE."
16. Words and phrases such as "OF THE SAME," "HEREIN," and "THEREOF" are archaic and vague

and can lead to unintended interpretations. It is standard drafting practice to avoid such words and phrases. The proponents should consider specifying exactly what provisions they are referring to. The following are suggested changes regarding such words and phrases:

- a. In subsection (3) (a), change "OF THE SAME" to "OF THE WATERS";
- b. In subsection (5) (b), change the first "THEREOF" to "OF A [or SUCH] STREAM," change "THERE TO" to "TO THE STREAMBED," and change the second "THEREOF" to "OF THE [or SUCH] STREAMS";
- c. In subsection (6), change "AS HEREIN ANNOUNCED" to "AS PROVIDED IN THIS SECTION [or THIS SUBSECTION (2)]."

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 refer to 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. What are the "uses" allowed by the "people of the state" under this section?
6. 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?
7. 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?
8. If a water right owner enters into a contract regarding the water right or if the managing entity promulgates rules, does paragraph (1) (c) make that contract or those rules unenforceable in some circumstances? If so, what are those circumstances?
9. Subsection (3) (d) of this measure states that "A usufruct water property right shall require the water use appropriator to return water unimpaired to the public after use." The provision

raises the following questions:

- a. How can an appropriator impair water and what types of activities are limited by this provision? For example, does this measure prohibit an appropriator from affecting water quality or temperature? Would the proponents consider adding a definition of "unimpaired"?
 - b. Most water uses, such as irrigation, consume part of the water that is diverted. For example, more than 40 percent of the water that is diverted to flood-irrigate alfalfa may be lost to a stream through evaporation and plant uptake. Does subsection (3) (d) of this measure prohibit or otherwise limit consumptive uses? Would the proponents consider adding language to clarify what, if any, limit is placed on consumptive uses?
 - c. Under current law, persons who divert water from one basin to another basin, in what are called "transbasin diversions," are not required to return the unconsumed water to the basin of origin. Instead, the owners of such water rights may use this water, also called "foreign water," to extinction or allow the remaining water to return to the basin of introduction. What is the effect of subsection (3) (d) on transbasin diversions? Does it require persons who divert water from one basin to another to return the remaining water to the basin of origin? For example, would Denver be required to return part of the water from its water treatment plant to the Colorado River Basin? Could water from another source be substituted? Would the proponents consider adding language to explain how this provision affects transbasin diversions?
10. What is the public's "water estate"?
 11. What rights of public access does subsection (5) grant the public? Access across private property to any stream? The right to float on streams? To fish?
 12. How is the "high water mark" determined? Is this the highest recorded flood? Or the average height of a stream?
 13. How does the "high water mark" differ from the "wetted parameter [perimeter?] lands" incident to the waters and streambed of a natural stream? How does the "streamcourse" differ from the "streambed" and its incident wetted parameter lands?
 14. Subsection (5) (c) specifies that public uses of water are not subject to appropriation, but subsection (1) states that the property of the public in the water of natural streams is subject to appropriation. Can the proponents clarify this conflict?
 15. Who is a "person of the state"? A Colorado resident? Anyone who happens to be in Colorado? How would a person of the state "enable" the proposed initiative, particularly given that subsection (7) specifies that the proposed initiative is self-enacting and self-executing?