**MEMORANDUM**

March 31, 2014

**TO:** Ryan Ross and Mark McIntosh

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2013-2014 #113, concerning Provisions for Reapportionment and Redistricting

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 to the Colorado constitution appear to be:

1. To create competitive congressional and legislative districts.
2. To ensure each state senate district is located entirely within the boundaries of a congressional district.
3. To increase the number of state house of representatives districts by five.
4. To require that each state senate district is comprised of two state house of representatives districts.
5. To eliminate the Colorado reapportionment commission and the processes currently utilized for apportioning the congressional, state house of representatives, and state senate districts.

# 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. Standard drafting practice does not include a statement of intent. If the proponents intend the statement of intent to be reproduced in the constitution, would the proponents consider relocating this statement?
2. New language is shown in small capitals typeface, not ALL CAPS.
3. The text of the constitutional section should follow the heading, like so: "**Section 47. Composition of Districts** (1) The number of active and…"
4. When amending a section by repealing all the previous language and adding new language, it is standard drafting practice to either show the old language in strike type and then the new language in small cap language after the stricken language or to do a "repeal and reenact" of the section and simply show the proposed new language in all small caps without showing the old language. In this initiative, this potentially applies to sections 45, 48, 49, and 50.
5. Each constitutional section of article V that you are amending requires a separate amending clause. Delete the commands before the language in each section (i.e., "Repeal. Add:") The amending clauses should read as follows:
   1. In the constitution of the state of Colorado, **amend** section 44 of article V as follows:
   2. In the constitution of the state of Colorado, **repeal and reenact, with amendments,** sections 45, 48, 49, and 50 of article V as follows: [assuming the proponents wish to repeal and reenact these sections; see above question].
   3. In the constitution of the state of Colorado, **amend** section 46 of article V as follows:
   4. In the constitution of the state of Colorado, **amend** section 47 of article V as follows:
6. Sections 49 and 50 of article V of the Colorado constitution currently exist. Do you intend to replace the existing language in the current sections 49 and 50 with the severability and effective date language contained in the proposed initiative? Or do you intend that the language in sections 49 and 50 of the proposed initiative not be part of the constitution but simply provide direction regarding the proposed initiative? Or do you intend that the new sections 49 and 50 coexist with the existing sections 49 and 50, in which case the sections in the proposed initiative should be renumbered for clarity?
7. It is standard drafting practice to use a capital letter only in the first word of a headnote.
8. When including a date in the text, the month should be written out. For example, "October 1" instead of "Oct. 1".
9. When referring to a subsection within the current section, it is standard drafting practice to always refer back to the current section or subsection, as appropriate. For example, "…the dates set forth in section (2) of this section shall be…", or "…required under this subsection (5)…". In addition, these section numbers should always be included in parenthesis.
10. Given that existing law governs such topics as self-execution, severability, conflicting provisions, and the effective date of a proposed initiative, standard drafting practice would be to exclude these provisions in an initiative unless the proponents intend to do something not provided by existing law, as, for example, having the proposed initiative take effect before the proclamation of the governor rather than upon the proclamation of the governor.

# 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.
   1. What is the single subject of the proposed initiative?
   2. Because the proposed initiative relates to both congressional redistricting and state legislative reapportionment, does it encompass two distinct subjects?
2. Generally, and as compared to the current manner in which redistricting and reapportionment are handled:
   1. What are the benefits or advantages of the "nesting" approach embodied in the proposed initiative?
   2. Currently, the general assembly is not directly involved in the reapportionment of its own senate and house of representatives districts. Inasmuch as the proposed initiative alters this scenario (to place the state legislature in the position of approving or disapproving of its own district redrawing), is there a potential conflict of interest introduced?
3. Regarding the "statement of intent":
   1. How would nesting state representative districts within state senate districts, and state senate districts within congressional districts, achieve "political cohesion"?
   2. Is there an easier way to achieve "competitive" districts (i.e., could competitiveness be a factor to consider or a permissible objective within the current process for redistricting and reapportionment)?
4. Regarding article V, section 44 (Representatives in Congress):
   1. Why must current precinct boundaries be obeyed? Traditionally, redrawing precincts necessarily follows the redrawing of district lines. If precinct lines must be observed in this manner, does it affect the ability of boards of county commissioners to reorganize precincts pursuant to law?
   2. For what reason is a range of population specified? Does this comport with the requirement, derived from Article I, section 2 of the United States Constitution, to achieve mathematically precise numbers of equal population (especially given that 1% of a congressional district's population is thousands of persons)? Furthermore, when citing to the "average population of the districts", do the proponents mean the population as of the most recent Census, or the ideal population of redrawn districts as based on that data?
5. Regarding article V, section 47 (Composition of Districts):
   1. Subsection (1) requires districts to have, as nearly as possible, equal numbers of active and inactive registered voters from the two "largest political parties".
      1. How are the "largest" parties determined?
      2. Colorado has very high numbers of unaffiliated voters. If the proposed initiative takes into account only the two major political parties, how does the presence of independent (or third-party affiliated) voters affect the procedures for redrawing districts? If such voters are ignored, is true "competitiveness", one of the stated goals of the proposed initiative, truly achieved?
      3. Why use active *and* inactive registered voters in determining party apportionment? Wouldn't using active voters alone be more accurate in ensuring competitiveness?
   2. For what reason is the last sentence in subsection (2) repealed? Would it not continue to apply under the proposed initiative?
   3. Regarding the criteria that must be taken into account when redrawing districts:
      1. It seems like it would be very difficult to combine the nesting requirements, the equal split between major parties, the existing requirements regarding compactness, equal population, and preservation of county boundaries. Do the proponents want to address this?
      2. Are these constitutional criteria exclusive, or may other unlisted characteristics be used in redrawing districts? For example, compliance with the federal "Voting Rights Act" is required. Additionally, section 2-1-102, Colorado Revised Statutes, allows courts to consider whether a proposed redistricting plan minimizes disruption of prior district lines. Would this be a permissible consideration? What about cognizance of incumbents (i.e., not "drawing them out" of districts or drawing new districts so that multiple incumbents share a new district)?
6. Regarding article V, section 48 (Revision and Alteration of Districts):
   1. This section tasks the "legislative services agency" with a variety of new functions.
      1. There are several legislative services agencies in the general assembly (i.e., the office of legislative legal services, legislative council staff, staff of the joint budget committee, and the office of the state auditor). Can the proponents clarify the agency or agencies to which the proposed initiative refers?
      2. The new method of redistricting/reapportionment appears likely to require significant staff and other resources. How will the new duties of the legislative services agency be funded?
   2. Subsection (2) of section 48 requires the new method of redistricting/ reapportionment to begin by December 31, 2014 (so that the 2015 session will result in the first plans to redraw current districts).
      1. Why do the proponents want the new process to begin out of cycle (i.e., not in connection with a decennial census)?
      2. Because the governor has 30 days after the canvass of election results by which to issue a proclamation, is this timeline feasible?
   3. Subsection (2) of section 48 further instructs the legislative services agency to use the most recent United States census bureau information to redraw districts.
      1. Are there other sources of information on which the staff of the legislative services agency may rely?
      2. Relatedly, must the staff of the legislative services agency take public testimony regarding drawing of districts? Currently, public testimony from around Colorado is solicited (a particularly important endeavor for learning about "communities of interest").
      3. This role would put staff members in a sensitive and powerful position. Can they be lobbied on behalf of interested persons and other stakeholders? Are draft maps and other documents generated or relied upon by staff confidential, or does the public have a right to inspect this information?
   4. In subsection (3) of section 48:
      1. The staff of the legislative services agency must "formulate an act" containing its recommended plan for redistricting/ reapportionment.
         1. It appears, from the remainder of the text, that such "act" is a bill. Because bills do not become acts until passage, would the proponents consider clarifying this term?
         2. Why must identical bills be delivered to both the secretary of the senate and the chief clerk of the house of representatives? Who introduces the bill(s)? Must both chambers introduce the bills concurrently? If so, what happens if they are amended in different ways? How are prime sponsors assigned? Do the sponsors have any authority to direct the drafting or have any right to be informed of the bill's progress?
      2. What is a "topologically integrated geographic encoding and referencing data file"?
   5. Subsections (4), (5), and (6) set forth the process for the initially introduced redistricting/reapportionment bill.
      1. The proposed initiative requires the general assembly to "bring the bill to a vote" in either chamber "not less than three days after the plan is received and made available to the members" of the legislature.
         1. What satisfies the requirement for bringing the bill to a vote? Committee vote? Second reading? Third reading?
         2. What does being "made available" mean?
         3. Does the proposed initiative provide adequate time for the redistricting/reapportionment bill to be evaluated?
      2. Only "corrective" amendments are permitted by the proposed initiative. What constitutes corrective amendments? Who determines whether a proffered amendment is, in fact, corrective?
      3. What is a "constitutional majority" that must approve the bill?
      4. A gubernatorial veto is alluded to under subsections (5) and (6) (second and third bills, respectively), but no mention of veto is made pertaining to the original (first) bill. Would the proponents consider adding such provision? Furthermore, what is meant by a governor "fail[ing] to approve" the bill? Does this mean that the bill cannot take effect in absence of the governor’s signature? (If so, this provision appears to conflict with article IV, section 11 of the Colorado constitution.)
      5. In case the bill does not pass one of the chambers, the "senate or house may direct by resolution regarding reasons why the plan was not approved". Why require this formality? Is such resolution joint or simple, i.e., only constitutional in the house of origin? Who decides its contents? Is a member who voted "aye" on the original bill/plan entitled to opine on the reason for disapproval or to offer suggestions for the resubmission? How must staff reconcile conflicting comments?
   6. Do subsections (5) and (6), which require legislative action outside regular session, compel a special legislative session? If so, how does this correlate to the constitutional provision (article IV, section 9) vesting the governor with authority to call such sessions?
   7. Why grant the state Supreme Court original jurisdiction when the general assembly is unsuccessful in passing legislation to effect redistricting/reapportionment?
7. Article V, section 49 in the proposed initiative provides that the provisions of "this article" are self-executing and severable. Do the proponents intend to apply this statement to the entirety of article V (as opposed to solely those portions added or amended in the proposed initiative)?