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MEMORANDUM

March 14, 2014

TO: Caitlin Leahy, Gregory Diamond, and Martha Tierney

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measures 2013-2014 #90, 91, 92, and 93, concerning Oil and Gas Operations

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.

These initiatives were submitted as a series of initiatives including proposed initiatives 2013-2014 #90 to #93. The comments and questions raised in this memorandum will address proposed initiatives 2013-2014 #90 to #93 cumulatively.

Purposes

The major purpose of the proposed amendment to the Colorado constitution appears to be to expand local government's authority to regulate oil and gas

operations, including the ability to prohibit such operations and to enact requirements that are more protective of local health, safety, welfare, and the environment than state law.

Technical Comments

The following comments address technical issues raised by the form of proposed initiatives 90, 91, 92, and 93. 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 initiatives as suggested below.

1. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. See the example in technical comment 3.
2. The proposed initiative should be revised to indicate the number of the article being added to the Colorado constitution. The Colorado constitution currently has 29 articles, so you could make the proposed initiative article XXX of the Colorado constitution. Alternatively, article XVI deals with mining; you could reformulate the initiative to add the four proposed new sections as sections 9 through 11 or 12 of article XVI. If you choose the latter, references in the proposal to "this article" would need to be changed to "sections 9 through 11 [or 12] of this article".
3. It is standard drafting practice to number, before the amending clause, each section, part, etc. that is being amended or added with a section number (e.g., **SECTION 1.**, **SECTION 2.**). For example:

SECTION 1. In the constitution of the state of Colorado, add article XXX as follows:

4. Because the proposed initiative would add a new article to the Colorado constitution, the amending clause should use the standard format for amendments to the Colorado constitution. See the example in technical comment 3.
5. The language "LOCAL GOVERNMENT CONTROL OF OIL AND GAS OPERATIONS INCLUDING HYDRAULIC FRACTURING" appears to be a suggested ballot title. The title board will set the title for the proposed initiatives; therefore, this language is not a part of the proposed initiatives and should be removed.

6. Headnotes (e.g., "Purposes and findings.") should follow the section number and be in bold-faced type. Only the first letter in the first word in a headnote should be capitalized, and the headnote should not be in small capitals. See the example in technical comment 7.
7. It is standard drafting practice for the first word of text that immediately follows the headnote to be on the same line instead of appearing on the next line. For example:

Section 1. Purposes and findings. THE PEOPLE OF THE STATE OF
COLORADO FIND AND DECLARE ...

8. The preferred method for separating a series in a list of three or more items is to place a comma after the second-to-last item in the series followed by a conjunction. If an item in the list contains an internal comma, use semicolons instead of commas to separate the items.
 - a. In section 1, before the phrase "that to preserve the public's health, safety, ..." insert the word "and".
 - b. In section 2, in the first and third lines, insert a comma after "power", and, in the sixth line, insert a comma after "welfare".
9. The word "shall" indicates that a person has a duty; it should not be used as a future-tense verb. Use "must" to indicate that a person or thing is subject to a condition. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "must" and "shall." Simple present-tense verbs should be used when possible. So, for instance:
 - a. In section 2, write the last sentence as "This article applies to every Colorado city, ...".
 - b. In the takings section, you may want to consider writing "Any law ... enacted pursuant to this article is not a taking ...". This would specify a legal result; your proposed language would probably be construed as giving every person a duty to not construe the laws as a taking.
 - c. In the final section, write "All provisions of this article ... supersede conflicting ... regulations. Laws ... cannot in any way limit or restrict ... this article.... If any local law ... conflicts with a state law ..., the more restrictive ... law ... governs."
10. It is standard drafting practice to capitalize only proper nouns, for example "Colorado." The words "article," "section," and "constitution" should not be capitalized.

11. It is standard drafting practice to spell out words rather than using abbreviations. In the takings sections, the word "article" should be spelled out.

Substantive Comments and Questions

The substance of the proposed initiatives raise the following comments and questions:

Comments and Questions Common to All Four Initiatives

1. The constitution requires each initiative to contain only a single subject. What is the single subject for each of the four proposed initiatives?
2. Regarding section 2:
 - a. It does not use the term "land use", and the term is not used at all in proposed initiative #90.
 - i. Is a local government's land use authority currently established by the Colorado constitution? If so, where is it established?
 - ii. If not, by including section 2 in all of the proposed initiatives, do you intend to establish the land use authority of a local government as a matter of constitutional law?
 - iii. Or, does section 2 vest local governments with authority that is broader than what is currently generally thought of as land use authority, such as the authority to regulate what happens below the ground in an oil and gas well as opposed to where oil and gas facilities may be located?
 - iv. If so, what role would the Colorado oil and gas conservation commission have? Note that it currently has statutory authority to regulate oil and gas operations to protect public health, safety, and welfare, including protection of the environment and wildlife resources, and has promulgated rules to implement that authority.
 - b. The proposed definition of "oil and gas operations" ("exploration for and production of Colorado's oil, gas, other gaseous and liquid hydrocarbons, and carbon dioxide") seems narrower than, and is certainly less detailed than, the statutory definition ("exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores; the siting, drilling, deepening, recompletion, reworking, or abandonment of an oil and gas well, underground injection well, or gas

storage well; production operations related to any such well including the installation of flow lines and gathering systems; the generation, transportation, storage, treatment, or disposal of exploration and production wastes; and any construction, site preparation, or reclamation activities associated with such operations").

- i. Does this definition apply only to a local government's authority under this article?
 - ii. How do the differences between the statutory and the proposed constitutional definitions affect the ability of a local government and the Colorado oil and gas conservation commission to regulate oil and gas operations? Would you consider incorporating the statutory definition if it encompasses substantially the same activities that you intend to include?
 - iii. In two instances the proposed initiatives specifically refer to "hydraulic fracturing", but the definition of "oil and gas operations" does not specifically refer to hydraulic fracturing. What do you intend by not including hydraulic fracturing in the definition of "oil and gas operations", but specifically referring to hydraulic fracturing in two particular instances?
3. Regarding the last section ("Self executing, severability, conflicting provisions"), the last sentence specifies that "the more restrictive and protective law or regulation shall govern".
 - a. Who determines whether a law or regulation is more restrictive and protective?
 - b. How are restrictiveness and protectiveness determined?
 - i. Is the standard the protection of correlative rights or the minimization of waste?
 - ii. If neither of the above, is the standard the protection of a community's health, safety, welfare and environment as specified in section 2?

Comments and Questions Common to Initiatives 91, 92, and 93

4. What is the significance of including the following phrase in section 1 of three of the proposed initiatives but not the fourth, particularly with regard to comment and question 2.a. above: "the citizens of local communities have historically relied upon local governments to regulate local land uses and to

minimize potential land use conflicts between industrial development and residential development"?

Comments and Questions Common to Initiatives 92 and 93

5. Section 1 of the proposed initiatives declares that the conduct of oil and gas operations may impact "property value". Does the authority vested in local governments by the new article extend to protecting private property values?

Comments and Questions Common to Initiatives 90 and 93

6. Regarding section 3, "Not a taking":
 - a. If a local government enacts a limit on oil and gas operations pursuant to the proposed new article, is it legally impossible for a court to determine that the local limit nevertheless constitutes a taking under Colorado's constitution? Or would a Colorado court look to article II, sections 14 and 15 of the Colorado constitution to determine whether the limit amounts to a taking notwithstanding section 3?
 - b. Under applicable federal case law, states can adopt laws that are more protective of private property rights than the fifth amendment of the federal constitution. But any state law, including a provision in a constitution, that purports to be less protective of private property rights than the fifth amendment of the federal constitution is preempted by federal law. Could a local regulation enacted pursuant to the proposed new article (for example, a blanket prohibition on hydraulic fracturing) be a taking under the federal constitution because it deprives an oil and gas owner the right to develop the mineral deposit, notwithstanding section 3?