**MEMORANDUM**

February 19, 2014

**TO:** Phillip T. Doe and Barbara Mill-Bria

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

**SUBJECT:** Proposed initiative measure 2013-2014 #73, concerning the State’s Duties to Protect Natural Resources

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.

# Purpose

The major purpose of the proposed amendment to the Colorado constitutionappears to be to create a right to clean air, clean water, and the preservation of the environment and natural resources.

# 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. 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.
2. It is standard drafting practice to include an amending clause telling the reader what is being added to or amended in the Colorado constitution.  For example:

**SECTION 1.** In the constitution of the state of Colorado, **add** section 9 to article XVI as follows:

1. Headnotes should be in bold font, lower case letters in the format shown below. The article number should not be included. The text of the section should immediately follow the headnote.

**Section 9. The state’s duties under the public trust doctrine to secure the rights of the people to protect natural resources.** (1) The people of Colorado have an inalienable right …

1. Constitutional provisions should be divided into component parts as follows:  Subsections (for example, "(1)"), followed by paragraphs (for example, "(a)"), followed by subparagraphs (for example, "(I)"), ending with sub-subparagraphs (for example, "(A)"). The subsections of the proposed initiative should be numbered with a left tab as shown below.
2. The people of Colorado have an …
3. The state government and its agents …
4. Any Colorado citizen, as a beneficiary …
5. The fiduciary duty of the state …
6. This section shall be self-enacting …
7. Laws may be enacted to enhance …
8. It is standard drafting practice to use small capital letters to show the language being added to the Colorado constitution.
9. It is standard drafting practice to set off parenthetical phrases with commas rather than parentheses. For example:

(1) The people of Colorado have an inalienable right to clean air, clean water, including ground and surface water, and the preservation …

1. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive clause, meaning the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence and is not simply additional or descriptive information. For example:

(1) The people of Colorado have an inalienable right to clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources on which we all depend and that provide for …

1. It is standard drafting practice to capitalize only proper names such as “Colorado.” The phrase “public trust resources” should not be capitalized.
2. It is standard drafting practice to use the language and format shown below when defining a term for a section:

(1) The people of Colorado have an inalienable right to clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources, referred to in this section as “public trust resources”, on which we …

1. It is standard drafting practice to use commas to connect two independent clauses. As such, it is not necessary to include a comma after “public trust resources” in the last sentence of subsection (2) of the proposed initiative.
2. The word "shall" should be used to indicate that a person has a duty; it should not be used as a future tense verb. *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:
   1. In subsection (2), write "The state … shall protect …"; "the precautionary principle shall always be applied …"; "The state shall seek natural resource damages …."
   2. In subsection (3), write "Citizens are entitled …."
   3. In subsection (4), write "The fiduciary duty … requires it to …."
   4. In subsection (5), write "This section is self-enacting …."
3. The preferred method for separating a series of at least three items in a list is to use a comma after the second-to-last item in the series. As such, there should be a comma after “reports” in the second sentence of subsection (4) of the proposed initiative.
4. It is preferred to use the singular form whenever possible. In subsection (5), the proponents may want to consider substituting “apply to a public action or commercial dealing that …” in place of the phrase “apply to any and all public actions or commercial dealing that ….”
5. It is standard drafting practice to set off a parenthetical phrase with commas. As such, there should be a comma after “contrary to” in subsection (6) of the proposed initiative.
6. Because the proposed initiative is a new section, it should be referred to as “this section” rather than “this title” in subsection (6). Additionally, cross references to a title, section, or subdivision should not be capitalized.

# Substantive Comments and Questions

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

1. Article V, section (1) (5.5) requires every initiative to contain only a single subject. What is the single subject of the proposed initiative?
2. How does the proposed initiative's creation of the public's common property in clean water:
   1. Compare with the property right in the unappropriated waters of natural streams that is specified in section 5 of article XVI of the constitution?
   2. Affect the right to appropriate unappropriated waters of natural streams that is specified in section 6 of article XVI of the constitution?
3. What does "substantial impairment" mean?
   1. What is the baseline against which an impairment is measured? Who determines whether an impairment is substantial?
   2. Under federal and state air quality law, air quality in areas of the state that are in attainment with standards for so-called criteria pollutants (such as carbon monoxide, nitrogen oxides, particulate matter, and ozone) may deteriorate, but not significantly, and still be considered in attainment. How does "substantial impairment" compare with this "prevention of significant deterioration" standard?
   3. Under federal and state water quality law, people are allowed to discharge pollutants into both surface and ground waters at levels governed by permits, including (in the case of surface waters) total maximum daily loads ("TMDLs") that can be discharged into particular stream segments. Could discharging pollutants at permitted levels, including TMDLs, be a substantial impairment? If so, how is this conflict resolved?
   4. The prior appropriation doctrine specified in section 6 of article XVI of the constitution allows people to divert for beneficial use all surface water and tributary ground water that is available for appropriation. Could doing so be a substantial impairment? If so, how is this conflict resolved?
   5. Current law allows nontributary wells to divert water at a rate that contemplates draining the aquifer after 100 years of withdrawals. Could doing so be a substantial impairment? If so, how is this conflict resolved?
   6. Current law allows people to extract mineral resources from surface and underground mines and oil and gas wells pursuant to permits issued by the state; a consequence of this extraction is the temporary storage or permanent disposal of waste products. Could this storage or disposal be a substantial impairment? If so, how is this conflict resolved?
   7. Current law allows people to dispose of solid and hazardous wastes at properly permitted facilities. Could this storage or disposal be a substantial impairment? If so, how is this conflict resolved?
4. What is the "precautionary principle"?
   1. Does the second part of the second sentence in subsection (2) define this principle? If so, would the proponents consider clarifying the issue by using a definition?
   2. Who determines whether a scientific consensus exists?
   3. Who decides whether a party has carried the burden of proof regarding harm and what is the standard of proof applied?
5. Subsection (3) allows Colorado citizens to petition a court to defend and preserve public trust resources against substantial impairment and to require the state to act as trustee. If the state violates its duties as a trustee, what remedies, in law or equity, can the court impose?
6. Subsection (4) specifies that "manipulating data, reports or scientific information" regarding public trust resources for private profit must be criminally prosecuted.
   1. What does "manipulating" data, reports, or scientific information mean? For example, is it misrepresenting the data? Falsifying the data? In what contexts does manipulation matter, e.g. does it matter with regard only to establishing permitted levels of discharges to or withdrawals from the environment?
   2. Generally, it is helpful to specify whether a mental state must accompany conduct in order to make the conduct criminal, such as negligence, recklessness, willfulness, or knowing behavior. Does a person have to have some sort of intent to be liable for this manipulation, or is this a strict liability offense, for which no mental state is required and the conduct alone constitutes the offense?
7. Regarding subsection (5):
   1. What is a "public action" to which the proposed initiative applies? What is a "commercial dealing" to which the proposed initiative applies?
   2. This subsection specifies that the proposed initiative applies "regardless of the date of any applicable local, state, or federal permits."
      1. Does that mean that if a release of a pollutant to the environment is within currently permitted levels, but is nevertheless determined to be a substantial impairment, the permit holder could be held liable?
      2. Do you want to add a good faith defense, whereby the permit holder is not held liable because the permit holder reasonably relied on the permit in releasing the pollutant?
      3. Does that mean that releases of pollutants to the environment that occurred before the effective date of the proposed initiative could be held to violate the proposed initiative? Note that, with respect to criminal penalties, retroactive application violates the *ex post facto* clauses of section 9 of article I of the United States Constitution and section 11 of article II of the Colorado Constitution.
      4. What is included within the term "permit"? Does "permit" include a water right decree?