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MEMORANDUM

March 22, 2007

TO: Richard G. Hamilton and Phil Doe

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #8, concerning new state department and elected board for environmental conservation

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 amend the state constitution by the addition of a new article to create a department and elected board of commissioners for environmental conservation;
2. To specify the powers and duties of the board and the precedence of this proposed amendment over conflicting constitutional provisions;
3. To transfer particularly identified agencies, divisions, offices, programs, boards, commissions, and authorities to the new department;

4. To specify the election and vacancy procedures, term limits, and compensation for the board;
5. To specify the appointing authority for and the supervisory authority of the executive director of the department;
6. To specify a commencement date for the department;
7. To specify:
 - a. The department's trust responsibilities regarding a variety of public conservation resources;
 - b. The board's authority to:
 - i. Act regarding wildlife, parks, and outdoor recreation;
 - ii. Appoint members, officers, and program staff of a variety of boards, commissions, and programs without legislative confirmation; and
 - iii. Act regarding matters of state interest and activities of state concern;
8. To authorize the department to generate revenues to pay for its expenses, to utilize the general fund, and to exempt the department from the fiscal limits contained in Article X, section 20 of the state constitution;
9. To specify constitutional limits on the department's debt;
10. To integrate the Great Outdoors Colorado Program into the department; and
11. To specify that the proposed amendment is self-enacting and self-executing.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. To conform to standard drafting practices, would the proponents consider:
 - a. Using the enacting clause specified in section 1 (8) of article V of the state constitution: "Be it Enacted by the People of the State of Colorado:"?
 - b. Using an amending clause as follows: "The constitution of the state of Colorado is amended BY THE ADDITION OF A NEW ARTICLE to read:"?

- c. Changing the heading of the new article so that it is centered, in bold-faced type, and is broken up into two lines, with the first line in ALL CAPS and the second line initial capped, as follows:

ARTICLE XXVIII

Environmental Conservation

- d. Putting the new constitutional language in SMALL CAPS?
- e. Changing the headnotes to delete "**ARTICLE XXVIII**" in front of each section, indent the first line of the headnote, put the headnotes in lower case letters (but initial cap the first word), put a period after the section number, and have the constitutional language go directly after the headnote instead of being on a separate line? For example:

Section 1. Colorado department of environmental conservation created. THE COLORADO DEPARTMENT OF ENVIRONMENTAL CONSERVATION IS CREATED BY THE PEOPLE OF THE STATE . . .

- f. Capitalizing only the initial letter of words that are proper nouns or the first word of a sentence, i.e., "Colorado Department of Environmental Conservation" should be "Colorado department of environmental conservation"?
- g. Not using:
- i. A subsection "(1)" in sections that have no further subdivisions in them (as in sections 1, 2, 6, 9, 10, and 11);
 - ii. A paragraph "(a)" in subsections that have no further subdivisions in them (as in section 4 (1), 5 (1), and 8 (2)); or
 - iii. A subparagraph "(I)" in paragraphs that have no further subdivisions in them (as in section 7 (1) (a))?
- h. For references to statutes or the constitution, using the following format:
- i. "article 7 of title 2, Colorado Revised Statutes," (instead of "Article 7, Title 2"), or "section 1 of article V" (instead of "Article V, section 1")
 - ii. Including a reference to "Colorado Revised Statutes, or any analogous successor statute" when referring to a statute, i.e., "article 7 of title 2, Colorado Revised Statutes, or any analogous successor statutes,"?

- i. Placing a comma before the last item in a series of three or more items? For example, from section 2, "The supervision, management, and policy determinations . . ."; from section 8, "Fees, revenues, payments, and all monies generated within and under the Colorado department of environmental conservation as licenses, penalties, assessments, intergovernmental transfers from any sources, grants, or from revenues of any manner, shall be used . . .".
 - j. Not include the parenthetic "(s)" at the end of nouns, as the commonly accepted meaning of singular nouns includes the plural. (See section 2-4-102, C.R.S.)
2. Do the proponents intend the table of contents contained on the first page of the proposed amendment to be part of the constitution? If not, would the proponents consider deleting the table of contents?
 3. The proposed amendment codifies the new article as Article XXVIII, but the constitution already has an Article XXVIII regarding campaign and political finance as well as an Article XXIX regarding ethics in government. Would the proponents consider codifying the new article with the next available number, i.e., XXX?
 4. In section 3 (1) and (2) and section 7 (4), the proposed amendment lists a number of agencies, divisions, boards, etc., in the paragraphs that follow subsections (1), (2), and (4).
 - a. Would the proponents end each paragraph with a semicolon instead of a period, since these are not complete sentences?
 - b. Would the proponents end the second to the last paragraphs in each of those subsections with a "; and" and delete "AND," from the beginning of the last paragraphs?
 - c. Would the proponents list the correct names of each of the agencies, divisions, boards, etc., as they are created in statute or the constitution? For example, in paragraph (c) of subsection (1), "Colorado State Division of Forestry" should actually be "division of forestry", as it was created in section 24-33-201, C.R.S. In paragraph (f) of subsection (1), "Colorado Wildlife Division" should be "division of wildlife", as it was created in section 24-1-124, C.R.S. In paragraph (a) of subsection (2), "Great Outdoors Colorado Trust Fund Board" should be "State Board of the Great Outdoors Colorado Trust Fund", as it was created in section 6 of article XXVII of the constitution.
 - d. In section 7 (4) of the proposed amendment, there is a missing paragraph "(j)". Would the proponents reletter the paragraphs?
 5. "Colorado" is misspelled in the table of contents for section 10; "Counsel." should be "Council." at the end of section 4 (3); "**RESPONSIBILITIES**" is misspelled in the headnote in section 7 and the headnote contains the incorrect name of the new department; and "specie" should be "species" in section 7 (1) (a) (approximately line 22).

Substantive questions:

1. Section 1 (5.5) of article V of the state constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed amendment?
2. What do the proponents intend by the language in section 1 of the proposed amendment that specifies that the operation and management of the department shall be compliant with legislative oversight of principal departments "insofar as legislative oversight and review is needed"? What aspects of the department's operation and management would not need legislative oversight and review?
3. Given that the proposed amendment would, if approved, create the new department, what do the proponents intend by the following language in section 2: "Article V, section 1 Colorado constitutional authorities shall be the authorities used by the public in the formation of the Colorado Department of Environmental Conservation."? Does the proposed amendment need to refer to the means by which the department is created? If not, would the proponents consider deleting the reference?
4. What do the proponents intend by the following language in section 2: "Should conflict with other Colorado constitutional provisions arise, provisions within Article XXVIII shall supersede other, previous provisions."?
 - a. For example, could any of the rights specified in Article II of the constitution, the bill of rights, be superseded? Could the powers of home rule local governments be superseded?
 - b. Is the term "conflict" in the quoted passage intended to include both explicit and implicit conflicts? Who should decide whether a conflict exists?
5. Given that section 1 of the proposed amendment creates the department and section 3 does not relate to the creation of the department, what do the proponents intend by the following language in the heading of section 3: "**COLORADO DEPARTMENT OF ENVIRONMENTAL CONSERVATION IS CREATED;**"?
6. Regarding the transfers specified in proposed section 3:
 - a. Section 3 (1) and (2) of the proposed amendment grant the executive committee of the legislative council the authority to transfer state agencies, divisions, etc., to the new department, essentially granting a single legislative committee the authority to reorganize state government. Have the proponents considered whether it is appropriate to grant this level of authority to the six individual state legislators of the executive committee?
 - b. How do section 3 (1) (i) of the proposed amendment, which allows the executive committee of the legislative council to transfer additional agencies, divisions, etc.,

to the new department, and proposed section 3 (2) (o), which allows the executive committee to transfer additional boards, etc., to the new department, interact with section 17 of article V of the constitution, which specifies that no law shall be passed "except by bill", and section 39 of article V of the constitution, which specifies that bills that create law must be presented to the governor for signature? (Is this a "conflict" as discussed in question 4. above?)

- c. Note that, because existing agencies, divisions, etc., are created in statute, transferring them to the new department would typically require legislation. What action by the executive committee suffices for such a transfer? What procedural requirements, if any, would apply to the executive committee's action?
- d. What do the proponents intend by the reference in proposed section 3 (2) to the transfers being from the "discretion of the Office of the Governor of Colorado and from the Colorado General Assembly" to the "management and supervision of the elected Commissioners . . ." ? Would the governor and the general assembly no longer have any management or supervision over the transferred entities? Would the general assembly not be able to establish the transferred entities' appropriations? Would the governor not be able to prioritize the department's expenditures of appropriated moneys?
- e. How does proposed section 3 (2) (a), which transfers the "Great Outdoors Colorado Trust Fund Board" to the new department, interact with section 6 (3) of article XXVII of the constitution, which specifies that the "State Board of the Great Outdoors Colorado Trust Fund" is a political subdivision of the state that is not subject to direction by either the general assembly or any department?
- f. How does proposed section 3 (2) (c), which transfers the state board of land commissioners to the management and supervision of the new department, interact with section 9 of article IX of the constitution, which case law has construed to authorize the general assembly to regulate the state board of land commissioners' management of state lands as may be prescribed by law?
- g. What do the proponents intend by the reference in proposed section 3 (2) (i) to the "Colorado Environmental Control Commission"? Section 24-62-101, C.R.S., creates a "Southern Ute Indian Tribe/State of Colorado Environmental Control Commission", but that entity has been created by an intergovernmental agreement with the tribe in addition to statute and cannot be altered without impairing that contract.
- h. How does the transfer in proposed section 3 (2) (l) of the Colorado water resources and power development authority to the new department affect the fact that, by virtue of section 37-95-104, the authority is not "an agency of state government, nor shall it be subject to administrative direction by any department . . ." ? In particular, how would the authority's bonding authority be affected by the transfer, given the constitutional debt limits referenced in section 9 of the proposed amendment? What

would be the effect on the authority's existing bonds?

- i. What do the proponents intend by the reference in proposed section 3 (2) (m) to the "Wildlife and Urban Interface Working Group"?
 - j. What do the proponents intend by the following language in section 3 (1) (i) and 3 (2) (o) regarding which types of agencies, divisions, etc., may be transferred: Those that act in a "stewardship and trust capacity" for the public's interests in state or in "otherwise" state or federally-managed public lands, public resources, waters and wildlife?
 - i. What is a "stewardship and trust capacity"? Must the capacity include both stewardship and trust?
 - ii. What is an "otherwise" state or federally-managed interest?
 - iii. How would this provision affect the management of federal lands?
 - iv. Proposed section 3 (2) (o) does not mention commissions or authorities. Can the executive committee transfer additional commissions or authorities pursuant to section 3 (2) (o)?
 - k. Does the proposed amendment specify what happens to the statutory authority, powers, duties, functions, records, personnel, property, contractual obligations, and unexpended balances of appropriations, allocations, or other funds, of the governmental entities transferred pursuant to proposed section 3?
7. Regarding the election of commissioners pursuant to proposed section 4:
- a. How many commissioners would there be on the board? As many as there are congressional districts? If so, would the proponents consider adding an explicit statement to that effect?
 - b. Would the commissioner positions be statewide offices, or would commissioners represent the congressional district from which they were elected?
 - c. What happens if multiple candidates file sufficient petitions to be on the ballot and no candidate for a position receives a "a majority of all Colorado electors voting in a statewide election" as required by proposed section 4 (1)?
 - d. Proposed section 4 (1) states that commissioners are elected to the board at "regular statewide biennial general elections" and proposed section 4 (2) states that a statewide election "in November 2009" shall be held to elect the commissioners. However, section 1-1-104 (17), C.R.S., defines a "general election" as occurring in even-numbered years. Do the proponents intend to alter the statutory definition of a general election as occurring in even-numbered years?

- e. Proposed section 4 (1) states that commissioners elected from odd-numbered congressional districts shall serve "until January, 2013" for the initial term of office and commissioners from even-numbered congressional districts shall serve "until December, 2015". Do the proponents intend that commissioners serve until the first day of the months specified? The last day of the months specified? The last day of the preceding months?
 - f. A literal interpretation of proposed section 4 (1) (a) could be that eligible candidates for election to the board are limited to a registered voter who is "from one of the Congressional districts within Colorado". Do the proponents intend that candidates must reside within the various congressional districts from which they are elected? If so, would the proponents consider clarifying the proposal to reflect that intent?
 - g. An implication derived from a literal interpretation of proposed section 4 (4) could be that commissioners can be "elected for . . . two terms of office" at a single election. Do the proponents intend that commissioners are subject to term limits as specified in section 11 of article XVIII of the constitution and, if so, would the proponents consider clarifying the proposal to reflect that intent by including a reference to section 11 of article XVIII of the constitution?
 - h. Proposed section 4 (5) states that compensation for the commissioners is "commensurate with compensation paid to other executive directors" of other state departments.
 - i. The commissioners are not themselves executive directors, as is made clear by proposed section 5 (1), pursuant to which the commissioners appoint an executive director for the new department. Do the proponents intend that the commissioners earn the same compensation as the executive director?
 - ii. What do the proponents intend by "commensurate" compensation? Equal to a particular salary? An average of the salaries of executive directors of other state departments?
8. Proposed section 5 (1) (a) specifies that the executive director supervises the organization, operations, and management of the department, "with affirmative consultation" of a majority of the commissioners.
- a. What does "affirmative consultation" mean? Is it the same as an affirmative vote of a majority of the commission?
 - b. Do the proponents intend that the executive director cannot supervise the department independently of control by the commission? If not, what actions would the executive director be able to take in organizing and operating the department without the affirmative vote of the majority of the commissioners?

9. If the commissioners are elected in an election occurring in an even-numbered year, would the department still commence operations on January 1, 2010, pursuant to proposed section 6? If the commissioners are elected in an election occurring in November 2009, does commencing operations on January 1, 2010, provide sufficient time to make all the changes necessitated by the proposed amendment?
10. The heading of proposed section 7 (1) refers to "trust responsibilities" of the department. Except as specified in section 7 (4) (o), the operative text of section 7 does not refer to "trust responsibilities", but rather to the department's responsibility to "steward and protect the public ownership and the public's conservation values in the lands, waters, public resources, and wildlife of the people of Colorado" and "public ownerships and public values". Does the proposed amendment create a public trust in these public resources? If so, what consequences would result, for instance, from a public trust in water resources?
11. Proposed section 7 (1) (a) specifies that the department's stewardship responsibilities are not limited to the various listed resources. Does the proposed amendment limit the department's stewardship responsibilities, and if so, how?
12. Proposed section 7 (1) (a) (I) specifies that permitting requirements for resource development activities on federally managed public lands within Colorado are "retained by Colorado state . . . environmental permitting authorities". How does this affect the transfers effected by proposed section 3?
13. Proposed section 7 (4) specifies that the commissioners appoint a variety of boards and commissions, including the "Great Outdoors Colorado Trust Fund Board" and the "State of Colorado Board of Land Commissioners".
 - a. How does this interact with:
 - i. Section 6 (1) of article XXVII of the constitution, which specifies the appointing authority of the members of the "State Board of the Great Outdoors Colorado Trust Fund"?
 - ii. Section 9 of article IX of the constitution, which specifies that the governor appoints the state board of land commissioners?
 - iii. The intergovernmental agreement with the Southern Ute Indian Tribe, which specifies that the tribe appoints three members and the governor appoints three members to the Southern Ute Indian Tribe/State of Colorado Environmental Control Commission?
 - b. With regard to proposed section 7 (4) (o), which allows the executive committee of the legislative council to determine additional governmental entities that are subject to the commission's appointing authority:
 - i. How does this designation interact with section 17 of article V of the

constitution, which specifies that no law shall be passed "except by bill", and section 39 of article V of the constitution, which specifies that bills that create law must be presented to the governor for signature?

- ii. Note that, because existing agencies, divisions, etc., are created in statute, transferring them to the new department would typically require legislation. What action by the executive committee suffices for such a transfer? What procedural requirements, if any, would apply to the executive committee's action?

- 14. With regard to proposed section 7 (6) and 7 (7) concerning matters of state interest:
 - a. What do the proponents intend by the phrase "compliance permit directives contained within the Colorado Land Use Act . . ."?
 - b. Do the proponents intend to prevent local governments from determining matters of state interest as specified in that act if the board of commissioners acts pursuant to proposed section 7 (6) or 7 (7)?
 - c. What is an "eligible local government"?
- 15. What do the proponents intend by section 8 (3) regarding the interaction of section 20 of article X and section 1 of article V of the constitution?
- 16. What do the proponents intend by section 11 regarding the proposed amendment being "self-enacting and self-executing"? Is effectiveness of the proposed amendment subject to proclamation of the governor pursuant to section 1 (4) of article V of the constitution? May the general assembly enact implementing legislation?