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Colorado General Assembly

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MEMORANDUM

TO: John Brackney and Guillermo DeHerrera
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 4, 2018
SUBJECT: Proposed initiative measure 2017-2018 #178, concerning Regulation of Oil and Gas Development

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 directors of 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.

This initiative was submitted with a series of initiatives, including proposed initiatives 2017-2018 #179 to 181. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memoranda for proposed initiatives 2017-2018 #179 to 181, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To declare that:
 - a. The conduct of oil and natural gas development may impact public health, safety, and welfare and the environment;
 - b. Local governments have jurisdiction to protect public health, safety, and welfare and the environment; and
 - c. State and local governments should not unreasonably restrict a property owner's access to the owner's surface or mineral property;
2. To affirm that local governments have the authority to regulate certain surface aspects of oil and natural gas development that do not conflict with state law or regulations;
3. To specify that local governments may set nondiscriminatory fees for the inspection and monitoring of oil and natural gas development to ensure compliance with local permit conditions;
4. To specify that state and local government regulations cannot unreasonably restrict a property owner from accessing the owner's surface or mineral interests, be arbitrary or capricious, or otherwise impose conditions on access or development that are not technically feasible or economically practicable; and
5. To specify that the proposed initiative supersedes conflicting state or local laws.

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. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.

- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council Staff at BallotImpactEstimates.ga@state.co.us.
3. The following questions relate to Section 1:
- a. Subsection (b) appears to provide similar yet broader powers of local governments than that stated in section 29-20-104, Colorado Revised Statutes. What is the purpose of stating these powers more broadly here? How would this provision affect or modify section 29-20-104, Colorado Revised Statutes?
 - b. Subsection (c) is similar yet broader than section 34-60-127 (1)(c), Colorado Revised Statutes, which indicates that an oil and gas operator can enter upon and use the amount of surface "as is reasonable and necessary to explore for, develop, and produce oil and gas." What is the intent of rephrasing this statutory provision? How would this subsection affect or modify section 34-60-127 (1)(c), Colorado Revised Statutes? How is "not unreasonable" different from "reasonable and necessary?"
4. The following questions relate to Section 2:
- a. Subsection (a) again reiterates powers already possessed by local governments pursuant to section 29-20-104, Colorado Revised Statutes. This subsection also restates the doctrine of state preemption. How, specifically, does this subsection add to, detract from, or otherwise change these already settled principles of law? What is the intent of paraphrasing settled law here?
 - b. Local governments already have the authority to set fees for noncompliance. What is the purpose of stating this authority in subsection (b)? Who will assess and enforce whether the fees are a "fair and reasonable estimate of the costs of the impacts and the administration and enforcement of the local requirements" and whether the fees are nondiscriminatory?
 - c. Section 34-60-127, Colorado Revised Statutes, already requires surface and mineral owners to reasonably accommodate each other's rights. Is it your

intent to change that law with subsection (c)? How, specifically, would this subsection interact with the reasonable accommodation statute?

- d. Who will determine whether the state or a local government, in regulating oil and gas development, has unreasonably restricted the property owner's access, is arbitrary and capricious, or has imposed conditions that are not technically feasible or economically practicable?
 - e. "Local government" is already defined in section 29-20-103, Colorado Revised Statutes. Could continuity within the law be strengthened if the statutory definition were used instead of creating a new definition?
5. As a change to the Colorado constitution, the proposed initiative may be amended only by a subsequent amendment to the constitution. Is that your intention?
6. What will be the effective date of the proposed initiative?

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. Since article XXX does not currently exist in the Colorado constitution, the amending clause should **add** article XXX rather than adding sections to article XXX. The amending clause should read, "In the constitution of the state of Colorado, **add** article XXX as follows:."
- 2. Since you are proposing that a new article be added to the Colorado constitution, and all sections in the proposed initiative are in article XXX, only one amending clause and one bill section are needed.
- 3. When adding a new article to the Colorado constitution, an article heading is also needed before the first section, for example:

ARTICLE XXX
Heading Name

- 4. Each section in the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to Section 2 of the proposed initiative and be in bold-faced type.

5. While it is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado constitution, the headnotes should not be in small capitals. For example:

Section 1. Purposes and findings.

6. The Colorado constitution is divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

Section 1. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

7. If a section consists of only one paragraph, it does not need a subdivision number, but if a section is subdivided into more than one paragraph, each paragraph should have a number. In Section 1 of the proposed initiative, the first paragraph should be numbered "(1)."
8. Each new paragraph after the first subsection should begin on a new line.
9. The word "state" in the phrase "state of Colorado" in the first paragraphs of section 1 and section 2 should not be capitalized.
10. Please use commas consistently. In Sections 1 and 2 the following phrase is used, with commas in different places in each:
 - "public health, safety and welfare, and the environment"
 - "public health, safety and welfare and the environment"
 - "public health, safety, welfare, and the environment"
11. In Section 1, paragraph (c), the word "owner's" is singular and possessive but the word "their" is plural. A singular pronoun requires a singular antecedent and a plural pronoun requires a plural antecedent. For example, instead of "any property owner's access to their surface ..." use "any property *owner's* access to the owner's

surface ..." or make both plural, for example "the property *owners'* access to *their* surface"

12. In Section 3, the reference to "this article" should include the article number XXX to read "this article XXX."