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MEMORANDUM

TO: Bruce Mason, Karen Dike, and Martha Tierney
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 30, 2015
SUBJECT: Proposed initiative measure 2015-2016 #62, concerning a prohibition on the use of hydraulic fracturing

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.

Purposes

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

1. To prohibit hydraulic fracturing on all Colorado lands, except federal lands and Indian reservations;

2. To specify that the prohibition of hydraulic fracturing is not a taking under the Colorado constitution; and
3. To provide for enforcement by an action brought by any person in a court of law, including the remedies of declaratory relief, an injunction, damages, fees, and costs.

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. Do you want to specify an effective date for the proposed initiative?
3. As a change to the Colorado constitution, the proposed initiative may be amended only by a subsequent amendment to the constitution. Is this your intention?
4. Section 1 (b) declares that the protection of public health, safety, welfare, and environment has "priority over the rights of oil and gas development."
 - a. Does this declaration have any force of law? For instance, does it preclude any oil and gas development that has any impact on public health, safety, welfare, and environment, no matter how small? Can an operator develop oil and gas resources if the operator can show that the impacts can be mitigated, such as revegetating an area disturbed by a well?
 - b. Rights are owned by persons. Would the proponents consider altering this phrase to "priority over the rights of oil and gas developers"?
5. Regarding the definition of "hydraulic fracturing":
 - a. The definition applies to the extraction of "oil, gas, and other hydrocarbons," but the definition of "oil and gas development" applies to the production and processing of carbon dioxide. Does the proposed initiative prohibit the use of hydraulic fracturing to produce or process carbon dioxide?
 - b. Sand is not the only substance that is used to prop open fractures made in oil and gas-bearing formations to enhance the flow of the resource. Some oil and gas developers may use ceramic beads or aluminum balls to prop

open fractures in the rock. Do the proponents intend to exempt proppants that are not sand from the prohibition on hydraulic fracturing?

6. The definition of "environment" includes "health." But every time that this defined term is used, the phrase "public health" is also used. Is the word "health" redundant in the definition? If not, what kind of health is intended that is separate from public health?
7. In section 3:
 - a. What is the intent or effect of using the phrase "in all lands within *the geographic boundaries of the state of Colorado*"? (Emphasis added.) Would prohibiting hydraulic fracturing "in all lands within Colorado" achieve the same effect?
 - b. The asserted detrimental effects of hydraulic fracturing apply equally to federal and tribal lands within Colorado. Why have the proponents excluded federal and tribal lands from the proposed initiative?
8. Regarding section 4:
 - a. Is it legally impossible for a court to determine that the proposed initiative's ban on hydraulic fracturing 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 ban amounts to a taking, notwithstanding section 4 of this proposal?
 - 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 the proposed initiative be a taking under the federal constitution because it might deprive an oil and gas owner the right to develop the mineral deposit, notwithstanding section 4?
9. Regarding section 5:
 - a. The proposed initiative specifies that it may be enforced by any person or "governmental entity." The word "person" is typically construed as including not only individuals but also legal entities (*see* §2-4-401 (8), Colorado Revised Statutes). Is the use of the term "governmental entity" intended to exclude nongovernmental entities? If so, why are nongovernmental entities (including not only oil and gas operators who may suffer economic harm if

a competitor uses hydraulic fracturing, but also every other type of nongovernmental entity) prohibited from enforcing the initiative?

- b. The proposed initiative specifies that the court must distribute damages to the "local community where the violation(s) occurred."
 - i. If the plaintiff is not a governmental entity, presumably the damages are to compensate the plaintiff for a measurable, individual loss. How can the court award the damages to another person or group without depriving the plaintiff of a recovery to which the plaintiff is entitled?
 - ii. If the plaintiff is a governmental entity, why would the damages be distributed to a "local community" and not the governmental entity?
 - iii. What is the local community supposed to do with the damages that it receives?

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. In the amending clause, the phrase "SECTION 1." and the word "add" should be in bold-faced type. For example:

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

2. Because sections 1 to 4 of article XVI of the constitution apply to mining , you may want to consider codifying this initiative as a single new section 4.5 in that article rather than creating an entirely new article.
3. The first letter of the first word in a headnote for each section should be capitalized, and the remainder should be in lowercase type. The headnote should also be in bold-faced type and each concept should be separated with dashes rather than commas. In section 3, "hydraulic fracturing" should not be capitalized, and in section 5, "damages" should not be capitalized. In section 6, "self executing" should be hyphenated, and the commas in the headnote should be replaced with dashes.

4. When a paragraph has an introductory portion, such as in section 1 of the proposed initiative, each paragraph after the introductory portion must follow the introductory portion and form a complete sentence. In section 1, the paragraphs labeled "(a)," "(b)," and "(c)" form a complete sentence when read with the introductory portion. However, the paragraph labeled "(d)" does not form a complete sentence when read with the introductory portion. It actually appears to be closely related to the subject matter in paragraph (c) and could either be combined with paragraph (c) or further subdivided with the paragraph labeled "(c)" becoming "(c) (I)" and the paragraph labeled "(d)" becoming "(II)" as follows:

(c) (I) THAT TO SAFEGUARD AND DEFEND PUBLIC HEALTH, SAFETY,
WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO PROHIBIT ...;
AND

(II) SUCH PROHIBITION IS DEEMED NECESSARY ...

5. Although the text of new language in the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be capitalized:

- a. The first letter of the first word of each sentence;
- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
- c. The first letter of proper names.

6. In section 1 (1)(a), the comma after "fracturing" is unnecessary.
7. The words "constitution" and "court" in section 1 (1)(d) and section 5, respectively, do not need to be capitalized.
8. It is standard drafting practice to include the following introductory portion in a definition section:

AS USED IN THE ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

This introductory portion should follow the headnote and should not be numbered.

9. In a definition section, the words being defined should be in alphabetical order and should be numbered, rather than lettered, as "(1)," "(2)," "(3)," etc.
10. The definition of "environment" includes an extra "and" after the word "land."
11. Section 2-4-102, Colorado Revised Statutes, in the article concerning statutory construction, states:

2-4-102. Singular and plural. The singular includes the plural, and the plural includes the singular.

When using a word that could be either singular or plural, depending on the context, it is standard drafting practice to use the singular form of the word. In section 2 (1)(b), the phrase "into geologic formation(s)" should be "into a geologic formation." In section 5, "person(s)" should be "person" and "violation(s)" should be "violation."

12. It is preferable to be consistent in the use of discretionary commas. Section 5 contains the phrase "INCLUDING WITHOUT LIMITATION" in the second sentence, and "INCLUDING, WITHOUT LIMITATION," in the last sentence. The phrases are redundant either way (as Colorado case law is clear that the word "include" does not exclude things that are not listed), but the commas should either be used in both phrases or in neither.
13. Use of the phrase "and/or" is unnecessary, particularly when used in a list following the word "including." Please consider using only "and."
14. It is standard practice to refer to "attorney fees" rather than "attorneys' fees."