

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Thomas Williams and James Newell
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: September 21, 2020
SUBJECT: Proposed initiative measure 2021-2022 #2, concerning prohibiting 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 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 Revised Statutes appears to be, in order to preserve the public health, safety, welfare, and the environment, to prohibit all hydraulic fracturing not on federal land.

Substantive Comments and Questions

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

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. 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?
3. Under section 1-40-105.5, C.R.S., 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.
4. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
5. Have the proponents considered any fiscal impacts that may result from the enactment of the proposed initiative on the state, local governments within the state, oil and gas developers and their employees, or private mineral rights and royalty owners and lessees?
6. With regard to the proposed initiative's fiscal impact, have the proponents specifically considered that the enactment of the proposed initiative would eliminate the severance taxes collected on the production or extraction of oil

and gas derived from hydraulic fracturing? Pursuant to section 39-29-109 (1), C.R.S., those taxes are "held in trust as a replacement for depleted natural resources, for the development and conservation of the state's water resources ... for the use in funding programs that promote and encourage sound natural resource planning, management, and development related to minerals, energy, geology, and water and for the use in funding programs to reduce the burden of increasing home energy costs on low-income households." Have the proponents considered how these programs might be alternatively funded?

7. Similarly, have the proponents considered that the enactment of the proposed initiative would significantly reduce property taxes that local governments collect on oil and gas leaseholds and lands, which property taxes help fund school districts? Have the proponents considered how school districts might be alternatively funded?
8. Hydraulic fracturing is not defined in statute. The proponents may want to consider defining the term. Note the regulatory definition: "HYDRAULIC FRACTURING TREATMENT shall mean all stages of the treatment of a well by the application of hydraulic fracturing fluid under pressure that is expressly designed to initiate or propagate fractures in a target geologic formation to enhance production of oil and natural gas."
9. Section 34-60-102, C.R.S., sets forth a general legislative declaration regarding all oil and gas development in the state. Subsection (1)(a)(II) of that section indicates that it is declared to be in the public interest of the state to "[p]rotect the public and private interests against waste in the production and utilization of oil and gas" and subsection (1)(a)(IV) requires the oil and gas conservation commission created in section 34-60-104, C.R.S., to manage oil and gas operations "in a manner that balances development with wildlife conservation." Similarly, section 34-60-107, C.R.S., provides that "[t]he waste of oil and gas in the state of Colorado is prohibited by this article."
 - a. Do the proponents believe that the proposed initiative aligns with the statewide interests set forth in subsections (1)(a)(II) and (1)(a)(IV) of section 34-60-102, C.R.S., to protect against waste in the production and utilization of oil and gas and to balance development with wildlife conservation and the prohibition against waste set forth in section 34-60-107, C.R.S.?
 - b. If not, the proponents may consider amending the language in subsections (1)(a)(II) and (1)(a)(IV) of section 34-60-102 and section 34-

60-107, C.R.S., to better align with the purposes of the proposed initiative.

10. Subsections (1)(a) and (1)(b) of the proposed initiative reference "public health, safety, welfare, and the environment." Section 34-60-102 (1)(a)(I), C.R.S., similarly mentions protection of these interests but also refers to "wildlife resources." The proponents might consider adding "wildlife resources" to align with the references in section 34-60-102, C.R.S.
11. Subsection (1)(b) of the proposed initiative states that the people desire to prohibit **all** hydraulic fracturing. However, subsection (2) states that **all** hydraulic fracturing **not on federal land** is prohibited. The proponents may want to clarify this apparent contradiction.
12. Subsection (2) of the proposed initiative begins with the phrase "The people of the state of Colorado hereby establish that . . ." What do the proponents intend this phrase to accomplish? Would not the legal effect be the same if this subsection stated simply, *e.g.*, "(2) All hydraulic fracturing not on federal land is prohibited"?
13. With respect to subsection (3) of the proposed initiative:
 - a. What will be the effective date of the proposed initiative?
 - b. To conform with standard drafting language, the proponents may want to reword subsection (3) to read "This section takes effect on the official declaration **of the vote by** the governor and is self-executing.
14. In subsection (4) of the proposed initiative, the proponents refer to the "effective sale." Based on the context, it appears that the proponents instead mean "effective date."
15. Subsection (4) of the proposed initiative applies the hydraulic fracturing ban on oil and gas development permitted **before** the effective date of the proposed initiative, which means that the proposed initiative would deprive mineral rights owners the use of their property for hydraulic fracturing. Such regulation could effectuate a governmental taking of private property. Under Amendment V of the United States Constitution and Article II, section 15 of the Colorado Constitution, such taking of private property requires just compensation from the government.

- a. Do you believe that the proposed initiative would effectuate a governmental taking of private property under the United States and Colorado constitutions? If not, why not?
- b. If the proposed initiative is determined to be a governmental taking of private property, how should the state of Colorado pay the owners just compensation? In other words, what funding source or sources should be used to pay the owners?
- c. If the proponents would like to avoid a possible determination that the proposed initiative effectuates a governmental taking of private property, the proponents may consider amending subsection (4) to remove reference to oil and gas development permitted **before** 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. Each statutory section being amended, repealed, or added is preceded by an amending clause explaining how the law is being changed. In addition, before the amending clause, each statutory section that is being amended, repealed, or added should be numbered with a section number (e.g., SECTION 1., SECTION 2.). For example:

SECTION 1. In Colorado Revised Statutes, **add** 34-60-132 as follows:

2. Regarding the headnote and text of the proposed initiative:
 - a. The C.R.S. section number and the headnote should be in bold-faced type.
 - b. The headnote contains the phrase "legislative declaration," but the declaration in the proposed initiative is by the people of the state of Colorado and not the legislature. The proponents may want to shorten the phrase to "declaration."

- c. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado Revised Statutes. The headnote should remain in lower-case letters.
- d. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - i. The first letter of the first word of each sentence; and
 - ii. The first letter of the first word of each entry of an enumeration paragraphed after a colon.

For example:

34-60-132. Hydraulic fracturing prohibited - declaration. (1) THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT:

(a) HYDRAULIC FRACTURING (FRACKING) HAS DETRIMENTAL IMPACTS

- 3. Subsection (1)(a) contains the phrase "public health, safety, welfare, and the environment" and subsection (1)(b) contains the same phrase but does not include a comma after the word "welfare." If the word "public" is intended to modify the words "health," "safety," and "welfare" and not the word "environment," the proponents may want to reword the phrase as "public health, safety, and welfare and the environment."
- 4. It is standard drafting practice to avoid using archaic terms. In subsection (2), "hereby" may be deleted.