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MEMORANDUM

August 19, 2014

TO: Philip Doe and Barbara Mills-Bria

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2015-2016 #3, 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.

Purposes

The major purpose of the proposed amendment to the Colorado constitution appears 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. In subsection (1), after the phrase "referred to in this section as 'public trust resources'", a comma should be inserted.
2. In the second sentence of paragraph (2) of the submission, a colon would be more effective than a semicolon to separate the introductory first half of the sentence from the second half.

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:
 - a. Compare with the property right in the unappropriated waters of natural streams that is specified in section 5 of article XVI of the constitution?
 - b. 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?
 - a. What is the baseline against which an impairment is measured? Who determines whether an impairment is substantial?
 - b. 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?

- c. 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?
 - d. 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?
 - e. 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?
 - f. 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?
 - g. 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"?
- a. 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?
 - b. Who determines whether a scientific consensus exists?
 - c. 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.
 - a. 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?
 - b. 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):
 - a. What is a "public action" to which the proposed initiative applies? What is a "commercial dealing" to which the proposed initiative applies?
 - b. This subsection specifies that the proposed initiative applies "regardless of the date of any applicable local, state, or federal permits."
 - i. 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?
 - ii. 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?
 - iii. 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.
 - iv. What is included within the term "permit"? Does "permit" include a water right decree?