

STATE OF COLORADO

Colorado General Assembly

Charles S. Brown, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Douglas G. Brown, Director
Office of Legislative Legal Services

Office Of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: olls.ga@state.co.us

MEMORANDUM

March 3, 2003

TO: Brian Vogt
Tom Stone

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #30, concerning water infrastructure revenue bonds

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 authorize the Colorado Water Conservation Board ("Board") to issue revenue bonds for the construction of water infrastructure projects that:
 - a. Have a total project cost exceeding \$5,000,000 and are not otherwise eligible for financing through the Colorado Water Resources and Power Development Authority; and

- b. Have been approved by the governor and undertaken before the end of the year 2005 for the purpose of easing Colorado's vulnerability to drought.
2. To condition the issuance of such bonds on the approval of the governor and of Colorado voters.
3. To limit the total amount of bonds issued to \$2 billion.
4. To set aside \$100 million of bond proceeds to finance projects, or portions of projects, that use compact entitlement water and that augment or improve existing facilities or conserve existing water supplies without creating new storage facilities.
5. To exempt the bond proceeds, the interest and income thereon, and the proceeds of sales of water or power from facilities financed by the bonds, from all taxes and from the revenue and spending limits imposed by article X, section 20 of the state constitution (a/k/a "TABOR amendment").
6. To require the Board to recommend at least two, and the governor to approve at least one, of such water infrastructure projects with a start date during 2005.
7. To require the General Assembly and executive branch agencies to adopt any necessary statutes and rules, respectively, to enable the completion of projects financed through issuance of the bonds authorized by this measure.

Comments and Questions

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

Technical questions:

1. On page 3 of the initiative, the next-to-last line of subsection (3) contains a reference to "additional projects as described in section 37-60-201 (2) (c)". Section 37-60-201 (2) (c), at the top of page 2, mentions "water projects to ease Colorado's vulnerability to drought" but does not otherwise describe any projects. Paragraph (d), immediately below, does describe projects and lists a number of criteria for such projects. Should the cross-reference be to this paragraph (d) rather than (c)?
2. On page 4, the third line from the top contains the phrase "2 billion", using the numeral 2. The customary style in the Colorado Revised Statutes is to spell out numbers rather than use numerals. Would the proponents consider making this change so that the phrase would read "two billion"?
3. Also on page 4, second line of paragraph (a), replacement of "which" with "that" would be more grammatically correct. Would the proponents consider making this change?
4. On page 4, paragraph (e) is listed as part of a series of items to be included in each of the Board's recommendations, yet it does not follow the introductory portion to subsection (1) and appears to

be a substantive requirement in itself (i.e., a requirement that \$100 million in proceeds be devoted to projects involving compact entitlement water) rather than a component of the Board's recommendation. Would the proponents consider placing this requirement elsewhere or renumbering it, perhaps as its own subsection?

5. In that same paragraph, could the phrase "100 million dollars" be spelled out as "one hundred million dollars," in keeping with the customary style of the Colorado Revised Statutes?
6. Immediately following the paragraph (e) referenced above is a subsection (2), which:
 - a. In the third line, contains a reference to "subsection (2) of this section." Should the reference instead read, "subsection (1) of this section"?
 - b. In the third line, states that the governor "must" approve certain projects. Could "must" be changed to "shall", in keeping with the customary style of the Colorado Revised Statutes?
 - c. In the fourth line, contains the phrase, "at *lease* one project *which* has a start date of 2005." (Emphases added). Should "lease" be "least"? Could "which" change to "that"? Could "of" change to "no later than"?
7. At the bottom of page 4, subsection (2) calls on the legislative and executive branches to enact "legislation". Only the legislative branch is empowered to enact "legislation"; the corresponding power of executive-branch agencies is to adopt administrative rules. Would the proponents consider changing the reference from "legislation" to "legislation and rules" or "statutes and rules"?
8. On page 5, in the second line of §37-60-206 (2), should there be a comma after "bonds"?
9. The next-to-last line on page 5 contains the word "rivert" in reference to state funds. Should the word be "revert"?
10. At the bottom of page 6, the designation of new paragraph (s) is followed by a roman numeral (I). There appears to be no subparagraph (II). Could the "(I)" be omitted?
11. The last word of the last line on page 6 is "this", referring to "*this* section 37-60-203" (emphasis added). However, the quoted language appears to be part of §37-60-106, not §37-60-203. Could the word "this" be omitted?

Substantive questions:

1. This initiated measure appears similar, but not identical, to Senate Bill 02-236. Do you desire to identify the substantive differences between the two, and the rationale behind those differences?
2. In the 12th line of new section 37-60-202 (3), on page 3, what is meant by "peak flows"? Can you explain the "beneficial use" of "peak flows" as referenced in that subsection?
3. This proposal provides funding for projects that "use" compact entitlement water. However, interstate compacts speak in terms of "*consumptive* use" (emphasis added). For example, article III of the Colorado River Compact "apportion[s] ... in perpetuity" to the Upper and Lower Basins,

respectively, "the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum," Generally, "use" means "to apply to a legally recognized beneficial use" including irrigation, municipal, in-stream flow, and recreational in-channel diversions. In-stream flows and in-channel diversions use water but may not consume water. By contrast, "consumption" implies that water has been lost to the stream system due to evaporation, plant uptake, and other mechanisms. What does "use" mean in the context of this measure? Do the proponents intend to fund projects that "use", or only projects that "consume", compact entitlement water?

4. Proposed new section 37-60-203 (1) (d) requires the Board to list the projected costs of each project. Water development projects impose both economic costs, such as labor and materials, and non-economic costs, such as environmental and aesthetic costs. What kind of costs do the proponents intend the Board to estimate?
5. On page 4, new § 37-60-204 (1) states that the Board "may issue *voter-approved* revenue bonds ... " (emphasis added). This appears to be the only reference in the measure to voter approval. The definition section, on page 3, defines an "approved project" as one "recommended by the Board and approved by the governor pursuant to section 37-60-203" and "bonds" as "water infrastructure revenue bonds authorized by and issued in accordance with this part 2."

Is issuance of the bonds contingent on voter approval? If so:

- a. When would the election be held, and who would be eligible to vote? Do you anticipate placing the bond issue on a statewide ballot, or should the electorate be limited to those within the counties, water divisions, or water conservation districts that would be benefitted by a particular project?
 - b. What effect should be given to new section 37-60-203 (2) on page 4, requiring the governor to "approve" at least one project that has a start date of 2005?
 - c. How should the start date be determined? Should a project be deemed to "start" when dirt is first moved? When a water court grants a conditional water right? When a resolution is passed?
6. On page 4 of the measure, in what is identified as paragraph (e), there is a directive that "a minimum of 100 million dollars of bond proceeds shall be available" to finance projects involving "compact entitlement water".
 - a. When is the \$100 million required to be used for such projects? May the Board issue \$1.9 billion in bonds for other projects first, then use the final \$100 million of its bonding authority for this purpose?
 - b. Does "compact entitlement water" refer to water that Colorado is entitled to use, or that other states are entitled to use?
 - c. Does "compact" refer to the Colorado River Compact, the Arkansas River Compact, or any other compact? Would you desire to see the \$100 million apportioned in some way, or would expenditure of the entire amount on a project pertaining only to Colorado River Compact entitlement water, for example, comply with this directive?

- d. Colorado's water delivery obligation to downstream states is determined both by interstate compacts and by federal apportionment decrees (Kansas v. Colorado, Nebraska v Wyoming, Wyoming v Colorado). Do the proponents intend to fund projects that only use Colorado's compact entitlement waters, or also those that use waters subject to federal apportionment decrees?
 - e. Paragraph (e) makes no mention of the requirements for projects listed in paragraph (d) of new section 37-60-201 (1), on page 2, and appears to impose a different set of criteria for projects involving compact entitlement water. What criteria do you intend should apply to projects involving compact entitlement water, as described in paragraph (e) on page 4?
7. Are water infrastructure revenue bonds only available for projects that use Colorado's "compact entitlement?" Compacts only allocate Colorado's river waters. However, Colorado also has large nontributary and designated ground water resources that are vital to Colorado's farmers and growing residential communities. Do the proponents intend to exclude such projects from the proposed financing mechanism? What about conjunctive-use projects that would provide a combination of Denver Basin ground waters and surface waters? Would the bonds only be available to fund the portion of the project that uses stream waters?
8. On page 4, section 37-60-204 (2) requires the "legislative branch" to enact implementing legislation. Considering that this language is itself statutory, rather than constitutional, it will probably not be binding on the General Assembly as a practical matter. Could it be omitted?
9. On page 5, the 6th and 7th lines of §37-60-206 (2) refer to "payments made or revenues pledged to the Board ... pursuant to section 37-60-207". Section 37-60-207 (on page 6) is titled "Exemption from taxation" and appears to contain no provision for "payments made or revenues pledged." What is the intended meaning of the reference in §37-60-206 (2)?