

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Frank McNulty and Kathleen Curry

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: March 2, 2016

SUBJECT: Proposed initiative measure 2015-2016 #107, concerning the Colorado Redistricting Commission

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.

An earlier version of this proposed initiative, proposed initiative measure 2015-2016 #55, was the subject of a memorandum dated December 1, 2015. Proposed initiative 2015-2016 #55 was discussed at a public meeting on December 1, 2015. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and 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 prohibit political gerrymandering of Colorado congressional and state legislative districts.
2. To authorize the renamed Colorado redistricting commission ("Commission") to review and approve congressional redistricting plans.
3. To direct the nonpartisan staff of the Commission to divide the state into congressional and state legislative districts.
4. To change the number, appointment process, and qualifications of members of the Commission.
5. To require, and allow, only nonpartisan staff of the Commission to submit proposed plans for redistricting to the Commission and to establish a schedule for when plans are submitted to the Commission.
6. To require disclosure of communications of a commissioner concerning the mapping of districts outside of a Commission meeting.
7. To prohibit communications concerning mapping of districts:
 - a. Among four or more commissioners, unless proper notice of the meeting is given; or
 - b. Between commissioners and nonpartisan staff outside of a Commission meeting.
8. To establish priorities and limitations on the nonpartisan staff when drawing congressional and state legislative districts.
9. To require affirmative votes of eight commissioners to approve any motion, except motions to amend the initial plans.
10. If, after the submission of three plans, the Commission fails to approve any plan, to direct the Commission to submit to the Colorado Supreme Court for its approval the second plan submitted to the Commission.
11. To provide that, if, after return of a final state legislative plan by the Colorado Supreme Court, the Commission does not approve a new plan, the nonpartisan

staff is to submit a state legislative plan to the court to conform to the court's requirements.

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. What will be the effective date of the proposed initiative?
3. The amendments to section 44 in the proposed initiative direct the nonpartisan staff to divide the state into congressional districts. Who is ultimately responsible for dividing the state into congressional districts? Nonpartisan staff or the Commission with the assistance of the nonpartisan staff?
4. In interpreting section 46 and 47 of the Colorado Constitution, the Colorado Supreme Court has held that a plan must be consistent with six parameters in the following hierarchy from the most to the least important: (1) The Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment; (2) Section 2 of the Voting Rights Act; (3) Section 46 of the Colorado Constitution, requiring equality of population; (4) Section 47 (2) of the Colorado Constitution, requiring that districts not cross county lines except to meet equality of population requirements and that the number of cities and towns contained in more than one district are minimized; (5) Section 47 (1) of the Colorado Constitution, requiring each district to be as compact as possible and to consist of contiguous, whole general election precincts; and (6) Preservation of communities of interest within a district.¹

Except for contiguous, whole general election precincts, do proponents intend that this hierarchy be maintained?

5. The proposed initiative repeals current language in section 47 (1) of the Colorado Constitution requiring that each district consist of contiguous, whole general election precincts. Must districts still be contiguous? Must election precincts still be contiguous?

¹ *In re Reapportionment of the Colorado General Assembly*, 828 P.2d 185, 190 (1982).

6. Section 47 and the new section 47.5 of the proposed initiative contain the following language: "When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law." Does this language authorize the general assembly to redraw districts drawn by the Commission if local governmental boundaries are changed prior to the next federal census?
7. The new section 47 (4) directs nonpartisan staff to "maximize the number of fair and competitive senatorial districts and representative districts."
 - a. Maximizing the number of competitive districts is to be done after consideration of section 47 (1), (2), and (3), and "applicable law".
 - i. Does "after consideration" mean that districts must satisfy all of the other referenced law before competitiveness can be considered?
 - ii. What is the "applicable law"?
 - b. What is meant by "fair and competitive" districts?
 - c. Is the Commission to consider the number of fair and competitive districts when deciding to approve or disapprove of a plan?
 - d. Drawing a competitive district in some areas of the state often favors one political party over another. Would this conflict with the prohibition to purposefully draw districts to favor one political party contained in section 43.5? Which criteria has priority?
8. The new section 47.5 directs the nonpartisan staff to draw districts using the specified criteria. Are the Commission and the Colorado Supreme Court to use the same criteria?
9. In section 47.5 (1) (a) (II), proponents reference the "federal 'Voting Rights Act of 1965', in particular 42 U.S.C sec. 1973, and applicable law;".
 - a. Section 42 U.S.C. sec. 1973 was recently recodified as 52 U.S.C. sec. 10301. Would the proponents consider changing the reference or referring to "section 2 of the federal 'Voting Rights Act of 1965', as amended"?
 - b. What do proponents mean by "and applicable law"? Do proponents mean final judicial decisions interpreting the Voting Rights Act?
10. Must congressional districts be contiguous?

11. In section 48 (1) (c) (I), is it the proponents' intent that the officials identified in (A) and (B) are in different political parties? If so, would it be clearer if the third line of (B) read "parties other than *the party of* the official referenced in subsection (I) (A)"?
12. Section 48 (1) (c) (I) (C) describes the order of the highest ranking major party elected official by referencing article IV, section 13 (7) of the Colorado Constitution. Is it the proponents' intent that the governor be the "highest ranking major party elected official" if a member of the governor's party is already a member of the Commission?
13. The proposed initiative sometimes refers to "maps" and sometimes to "plans". For example, section 48 (1) (f) refers to "motions to amend initial maps" but section 48 (3) (a) directs staff to "submit initial plans". Is there a difference between a "map" and a "plan"?
14. Can the Commission, at a properly noticed public meeting, vote to amend the initial plan prior to the hearings throughout the state?
15. Under section 48 (1) (g) (I), is nonpartisan staff to document the rationale for changes that they make between plans?
16. If nonpartisan staff submits preliminary plans to the Supreme Court pursuant to section 48 (2) (a) (II):
 - a. Are public hearings held throughout the state on the preliminary plans?
 - b. May nonpartisan staff amend the preliminary plans based on public comments prior to submitting the plans to the Supreme Court?
 - c. May nonpartisan staff submit the plans prior to the last business day prior to October 7? If so, should the measure state "on or before" that date?
 - d. When the court is considering plans under this provision, should it also consider the criteria specified in the new section 43.5?
17. The earlier version of the measure provided that nonpartisan staff could only communicate with other nonpartisan staff. This requirement does not appear in the current proposed initiative. Is nonpartisan staff permitted to communicate with others about redistricting plans outside of a Commission meeting?
18. Under section 48 (2) (b) (II), what constitutes engaging in communication? Is, for example, the passive receipt of comments from the public with respect to mapping political districts engaging in communication?

19. Section 48 (2) (b) (IV) requires work product and communications between nonpartisan staff to be made available when a plan is presented to the Commission.
 - a. What is meant by "work product"? Are all previous drafts of a plan considered work product? If so, must staff retain copies of all such plans?
 - b. Nonpartisan staff will likely be working alongside one another in preparing plans. What communications between nonpartisan staff do the proponents intend to be made available?
 - c. How is such work product and communication to be made available?
20. Nonpartisan staff has been asked to explain the redistricting process at various meetings such as a chamber of commerce meeting. Would nonpartisan staff be allowed to speak about the process at such meetings, so long as they do not talk about specific plans?
21. Section 48 (2) (b) (VI) directs nonpartisan staff to report to the Commission on prohibited communications and attempts to exert influence over the drafting of plans. Is this limited to influencing or communicating with commissioners or to anyone?
22. Section 48 (2) (c) prohibits nonpartisan staff from drawing a district that favors a political party. If a competitive district is drawn, for example, in El Paso or Boulder County, does not that district favor one political party over another?
23. The previous version of this proposed initiative prohibited nonpartisan staff from using voter registration data. Under this proposed initiative, may nonpartisan staff use such data to draw fair and competitive districts?
24. Section 48 (3) (a) directs the Commission to hold public hearings on plans forty-five days after the date of publication.
 - a. Are the proponents referring to the preliminary plans referred to in section 48 (2) (a) (I)?
 - b. If so, the preliminary plans have different publication dates. On which date does the forty-five days commence?
 - c. If the preliminary plans can be amended, should the Commission be given some time to amend the plans before the time for the hearings commences?

- d. Do the proponents anticipate that the Commission will hold one public hearing in various locations where both congressional and state legislative districts are discussed?
25. Section 48 (1) (f) provides that motions to amend the initial plans require only seven votes.
- a. May the second and third plans be amended by the Commission with a vote of at least eight members?
 - b. How do the proponents envision the amendments being prepared? Can Commission members request that nonpartisan staff prepare specific amendments? If so, must this request be made at a public meeting? If so, is seven days after the submission of the plans enough time for commissioners to request amendments and nonpartisan staff to prepare them prior to the final vote on a plan?
26. Section 48 (3) (a) requires the Commission to conduct "at least three hearings in each of Colorado's congressional districts and at least two hearings west of the continental divide". Are the two meetings west of the continental divide *in addition* to the meetings in each congressional district, or may such meetings count toward satisfying the congressional district meeting requirement?
27. Sections 48 (3) (a) through (c) require the Commission to submit written reasons to the nonpartisan staff why the plan was not approved. Must each commissioner submit written reasons?
28. Section 48 (3) (d) specifies what the Commission shall do regarding senatorial or representative districts. What is the Commission to do regarding congressional districts?
29. Section 48 (3) (d) directs the Commission to submit the second plan to the Supreme Court if the third plan is not approved by the Commission. If the Commission approves an amendment to the second plan, is the amended second plan submitted to the court or the original second plan?
30. Substantial portions of the existing section 48 (1) (e) concerning when the Commission is to finalize its plan, when final submissions to the Supreme Court must be made, and when the court must approve a plan, are not shown in the proposed initiative. If such language does not appear in the proposed initiative in strike type, the revisor of statutes would be required to harmonize the existing language with the language of the proposed initiative. Is that your intent?

31. Section 48 (3) (g) (II) directs the Supreme Court to adopt rules for the production and presentation of supporting evidence, including the record maintained by the Commission. What do the proponents intend to be included in the record maintained by the Commission?
32. Should the Supreme Court consider the new section 43.5 when reviewing plans?
33. If the plans are to be finalized by October 6 and final submission is due to the Supreme Court on October 20, how would the proponents envision the schedule being established? Arguments and evidence in support and in opposition due on one day and responses to both due by October 20? Do proponents believe that this is sufficient time?
34. Section 48 (3) (h) concerns conforming plans if the court returns a plan.
 - a. The proposed initiative provides that the commissioners may request that nonpartisan staff make adjustments to the conforming plan. Do such requests require a vote and approval by eight or more commissioners before nonpartisan staff adjusts a conforming plan?
 - b. If the Commission votes to adjust a conforming plan but does not adopt the plan, does nonpartisan staff submit the adjusted conforming plan or the original conforming plan to the Supreme Court?

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. Headnotes are technically not part of the Colorado Constitution; therefore, the headnote for section 47 can contain new language without needing to show existing language in strike type.
2. In section 47.5 (1) (c), the reference to paragraphs (a) and (b) should be "THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (1)" and "THE PROVISIONS OF PARAGRAPH (b) OF THIS SUBSECTION (1)".

3. Standard drafting practice is to use the word "shall" to denote a duty. In section 48 (1) (a) "THE commission ~~consisting~~ SHALL CONSIST of" might be rewritten as be "THE commission ~~consisting~~ CONSISTS of".
4. The end of section 48 (1) (c) (I) (A) should end with a semicolon and the word "AND".
5. Section 48 (1) (c) does not contain a subparagraph (II). The "(A)" is not needed after "(I)"; "(B)" should be "(II)"; and "(C)" should be "(III)". The reference in the new (III) should be "IN THIS PARAGRAPH (c)".
6. The subparagraphs in section 48 (1) (g) on page 7 should be (I), (II), (III), and (IV) instead of (1), (2), (3), and (4).
7. In section 48 (3) (d) on page 11, the references should read "REPRESENTATIVE DISTRICTS PURSUANT TO PARAGRAPH (c) OF THIS SUBSECTION (3)" and "NOT DRAFTED PURSUANT TO PARAGRAPH (b) OR (c) OF THIS SUBSECTION (3)".
8. In section 48 (3) (e), the references should read, "THE COMMISSION MAY ADJUST THE DEADLINES OF PARAGRAPHS (a) to (c) OF THIS SUBSECTION 3" and "AS REQUIRED IN THIS PARAGRAPH (e)".
9. In the last line of the proposed initiative, the word "~~reapportionment~~" should appear prior to "REDISTRICTING".
10. It is unnecessary to capitalize "general assembly" in the proposed initiative.
11. Put each subsection (1) on the same line as and directly after the headnote in sections 47 and 47.5.