

STATE OF COLORADO

Colorado General Assembly

Kirk Mlinek, 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



Charles W. Pike, 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

February 15, 2008

TO: Daniel Hayes and Gregory DiLorenzo

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #66, concerning the Colorado water priorities and conservation act

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.

An earlier version of this initiative was the subject of a memorandum dated December 21, 2007. Proposal 2007-2008 #55 was discussed at a hearing on January 2, 2008. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment appear to be:

1. To require construction of new privately owned residential dwelling units to be classified as manufacturing, and to require the procurement of water for such units to be classified as having a manufacturing purpose;
2. To require, at the time a newly constructed privately owned residential housing unit is occupied, the water for the unit to be classified as having a domestic purpose;
3. To state that when the waters of any natural stream are not sufficient to supply all appropriators, the users will be classified by preferences in the order of domestic purposes, agricultural purposes, and manufacturing purposes;
4. To require water for irrigation purposes, including adjudicated water wells and water diversion rights, to be prioritized by the date such well or diversion right was placed into service and not necessarily when such adjudication was made or required;
5. To require irrigation wells for the purpose of food production to not be wasteful but otherwise to be unregulated unless there exists such a drought or water shortage that domestic in-household use of water is severely threatened;
6. To state that no law, ordinance, or covenant, past or present, shall prohibit the use of dry land or water-conserving grasses for lawns and greenways, public or private;
7. To allow households exclusively dependant on water wells existing before December 31, 2008, and where such wells are tested as safe and potable by a health department or agency, to continue such service, and to allow a well used exclusively for yard-watering purposes where testing is not required to continue such service;
8. To allow such wells to apply for and receive adjudication;
9. To require local governments to keep an accurate public record of water used annually for each classification or purpose and contain metered amounts as well as recovered water both actual and estimated, average use per household, and the annual amount of water procured for housing growth; and
10. To allow legislation to be enacted to facilitate the operation of the new constitutional section, but to prohibit such legislation from limiting or restricting the new constitutional section.

Comments and Questions

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

Technical questions:

1. The beginning of subsection (1) states: "ARTICLE XVI, SEC. 6, II APPROPRIATION, D. PREFERENCE FOR DOMESTIC PURPOSES IS AMENDED." This language appears to be the heading for a series of case law annotations that follow section 6 of article XVI of the state constitution. What is the proponents' intent in including such language?
2. It is standard drafting practice to use the term "SHALL" instead of "ARE" when directing a certain action or issuing a command. Would the proponents change "ARE" to "SHALL BE" on line 13?
3. It is standard drafting practice to place a comma before the last item in a series of three or more. It is suggested that the proponents add a comma:
 - a. On line 14, after the first "PURPOSES";
 - b. On line 22, after "ORDINANCE";
 - c. On line 41, after "KITCHEN".
4. It is standard drafting practice to set off introductory or parenthetical phrases with commas. It is suggested that the proponents add commas:
 - a. On line 15, after "PURPOSES" and on line 16, after "RIGHTS", to set off the phrase "INCLUDING ADJUDICATED WATER WELLS AND WATER DIVERSION RIGHTS";
 - b. On line 18, after "PRODUCTION" and on line 19, after "RANCH", to set off the phrase "WHETHER A FARM OR RANCH";
 - c. On line 26, after "2008" and on line 27, after "AGENCY", to set off the phrase "AND WHERE SUCH WELLS ARE TESTED AS SAFE AND POTABLE BY A HEALTH DEPARTMENT OR AGENCY". It is also standard drafting practice when referring to a date to set off the year with commas.
 - d. On line 32, after "WATER" to set off the phrase "BOTH ACTUAL AND ESTIMATED".
5. To correct misspellings, it is suggested the proponents:
 - a. On line 23, change "WATER CONSERVING" to "WATER-CONSERVING";
 - b. On line 28, change "YARD WATERING" to "YARD-WATERING".
 - c. On line 35, change "BUT-IN-NO-WAY" to "BUT IN NO WAY";
6. With regard to subsection (2), it is standard drafting practice to have a paragraph (a) only if there is a paragraph (b). It is suggested the proponents either eliminate "(a)" on line 22 so that subsection (2) is all one paragraph, or add "(a)" after "(2)" on line 15 and change the current "(a)" on line 22 to "(b)".
7. With regard to subsection (3), the sentence reads: "Households . . . shall be allowed to continue such service . . ." Do the proponents mean something like "Wells existing before

December 31, 2008, that have been tested as safe and potable by a health department or agency for households that are exclusively dependant on water wells shall be allowed . . .?"

8. With regard to subsection (6):
 - a. It is standard drafting practice to define terms for use in a particular section, exactly as defined.
 - i. The term "FARMS AND RANCHES" is defined, but that term is not used anywhere else in the proposal. However, the term "FARM OR RANCH" is used on line 19. Depending on the proponents' intent, would the proponents consider deleting the term "FARMS AND RANCHES" on line 43 and replacing it with the term "FARM OR RANCH"?
 - ii. The terms "DWELLING UNIT" and "PRIVATELY OWNED RESIDENTIAL HOUSING" are defined. However, on line 7, the term "PRIVATELY OWNED RESIDENTIAL DWELLING UNITS" is used. For consistent use of defined terms, do the proponents instead mean the term to be "DWELLING UNITS" or "PRIVATELY OWNED RESIDENTIAL HOUSING"? If so, would the proponents correct the term accordingly? Similarly, on line 10, the term "PRIVATELY OWNED RESIDENTIAL HOUSING UNIT" is used. For consistent use of defined terms, do the proponents instead mean the term to be "PRIVATELY OWNED RESIDENTIAL HOUSING"? If so, would the proponents correct the term accordingly?
 - b. On line 48, would the proponents change "WHICH" to "THAT" for proper use of the word?

Substantive 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. Regarding subsection (1), which creates a preference for water used for domestic purposes over water used for agricultural and manufacturing purposes:
 - a. What is the proponents' intent in specifying the different "classifications" of water use (domestic, agricultural, and manufacturing)? How does this differ from the existing "domestic preference" established by section 6 of article XVI of the state constitution? Does the proposed initiative affect the priority of persons using water for the same purpose?
 - b. Existing case law construing the state constitution's prior appropriation and just compensation provisions has specified that the "domestic preference" established by section 6 of article XVI of the state constitution does not give domestic users a senior right to take water over either agricultural or manufacturing users; either consent or just compensation is required. Do the proponents intend to effect a taking of senior water rights and thereby trigger the requirement of just compensation?
 - c. Section 6 of article XVI of the state constitution specifies that the right to divert unappropriated water of any natural stream for beneficial uses shall never be denied. Some streams in Colorado may include unappropriated water that would be available for new appropriations. Does this measure's limitation apply to unappropriated water

- that would otherwise be available for appropriation by new homeowners? If not, would the proponents consider adding language to explain how it affects the use of unappropriated water by domestic water users?
- d. What legal options are available for water users with a domestic preference when there isn't enough water to supply all appropriators? Would they have a right to make an enforceable call against agricultural users and manufacturers to cease diversions? If so, would the proponents consider adding language to explain the effect of a preference during water shortages?
 - e. What water demands will privately owned residential dwelling units have prior to being occupied? What is the intended effect of specifying that pre-occupation use for such dwelling units is a manufacturing use? Is it the proponents' intent to require construction activities to cease during water shortages? Would the proponents consider clarifying the purpose of the change in use classification?
 - f. With regard to the limitation of the domestic priority to "privately owned residential housing", why is such housing defined to exclude housing that is owned by governmental, educational, or medical entities? For instance, often low-income housing is owned by a governmental entity, but the exclusion would deny such housing the benefit of the domestic priority.
3. Regarding subsection (2):
 - a. Current law specifies that the priority of a water right is established according to the year of adjudication, and within such year, by the date when the water was put to beneficial use. This section states that water rights shall be prioritized by the date the water was placed into service and not "necessarily" when such adjudication was made. What is the effect of this change? If a right has not been adjudicated, how will the state engineer know how to administer priorities?
 - b. Current law integrates tributary wells into the prior appropriation system. If tributary wells used for food production are "unregulated" as specified in the second sentence, won't senior water rights be injured? Why is only domestic in-house use given the benefit of the exception to the lack of regulation of food production wells?
 4. Subsection 3 requires local governments to keep an accurate record of "recovered water". What is recovered water? Would the proponents consider adding a definition of recovered water?
 5. How will local governments get the information required by subsection (4) from individual wells? Do the record-keeping and metering requirements apply only to water used through a local government's own public water supply?