

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

December 21, 2007

TO: Daniel Hayes and Gregory DiLorenzo

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #55, concerning the Colorado water 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.

Purposes

The major purposes of the proposed amendment appear to be:

1. To amend article XVIII of the state constitution by the addition of a new section;
2. To allow county electors to elect to limit the annual growth in the amount of water available for new privately owned residential housing units uniformly in every city, town, city and county, and county, whether statutory or home rule, within such county and in any city and county by initiative and referendum;
3. To specify that the annual amount of water allotted for newly constructed privately owned

residential housing units in the counties or cities and counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, El Paso, Jefferson, Larimer, and Weld or any city and county created therein shall not exceed one percent of the total amount used by privately owned residential housing units within such entities in the previous year for each of the years 2009, 2010, 2011, and 2012;

4. To require the local governments of each county and city and county to allot water taps and well permits to comply with the one percent mandate based on the water used and the average annual use per housing unit in the previous year in the local government;
5. To prohibit the issuance of permits to build new privately owned residential housing units between November 4, 2008, and January 1, 2009;
6. To prohibit the banking, borrowing, buying, or trading of water between local governments;
7. To require the proposed initiative to be called for the 2012 November general election for countywide electors in each of the said counties and city and counties to enact or repeal beginning in 2013;
8. To prohibit water allocated for farm and ranch use from being sold or transferred for any other purpose or deferred to another use without deed or adjudication of record made before January 1, 2009, without approval on an individual basis by both the general assembly and signed by the governor;
9. To require approval by voters of publicly funded water projects in their entirety as completed, including but not limited to storage, diversion, transportation, and purification of water, that are estimated to cost more than five million dollars in a local government or twenty-five million dollars at the state level;
10. To require cost estimates of such projects to be open for public inspection and total project expenditures to be limited to that approved by voters;
11. To require all new lawns and greenways planted on state and local government property and all private property to be dry land or water-conserving grass varieties or landscaping techniques that use little or no filtered, treated, and potable water supplies;
12. To require that all lawns, parks, and greenways owned by state or local governments not conforming with the new constitutional section to be replaced or modified to conform within five years, and to authorize and encourage water districts to offer credits or reduced water charges to residents conforming with such changes; and
13. To provide definitions for purposes of the new constitutional section.

Comments and Questions

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

Technical questions:

1. It is standard drafting practice to put only the text of the language of a new constitutional section in SMALL CAPS. Would the proponents consider putting the enacting clause, the amending clause, and the section number and headnote in regular type?
2. Would the proponents consider adding a section number before the amending clause so that the amending clause reads: "**SECTION 1.** Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:"?
3. Since section 15 of article XVIII of the Colorado constitution already exists, would the proponents consider adding a new section 16 instead? Alternatively, because article XVI already relates to water rights, would the proponents consider adding the new section as part of article XVI?
4. With regard to the headnote:
 - a. It is standard drafting practice to end the headnote of a section with a period. Would the proponents add a period to the headnote after the word "**act**"?
 - b. It is standard drafting practice that the first subsection of a section follows the headnote on the same line, rather than on a separate line. Would the proponents move subsection (1) so that it immediately follows the headnote? For example:

Section 16. Colorado water conservation act. (1) COUNTY
ELECTORS MAY ELECT TO LIMIT . . .

5. It is standard drafting practice to indent the first line of a section, subsection, paragraph, etc. Would the proponents add a "Tab" at the beginning of the following lines: On page 1, lines 5, 13, 31, 36, 44, 53, and 54; on page 2, lines 1, 4, 6, and 10.
6. It is standard drafting practice to not have blank lines between paragraphs. Would the proponents remove the blank lines between the subsections?
7. 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 page 1, line 15, after the word "LARIMER";
 - b. On page 1, line 26, after the word "BOUGHT";
 - c. On page 1, line 37, after the word "TRANSPORTATION";
 - d. On page 1, line 47, after the word "TREATED" and after the word "PARKS";
 - e. On page 2, line 1, after the word "FEEDING";
 - f. On page 2, line 8, after the word "STATE";
 - g. On page 2, line 13, after the word "KITCHEN".

8. To correct spellings, it is suggested the proponents:
 - a. On page 1, lines 14 and 25, change "CITY AND COUNTIES" to "CITIES AND COUNTIES";
 - b. On page 1, line 26, change "BARROWED" to "BORROWED";
 - c. On page 1, line 40, change "STATE-WIDE" to "STATEWIDE";
 - d. On page 1, line 45, change "WATER CONSERVING" to "WATER-CONSERVING".

9. It is standard drafting practice to capitalize only proper names. Would the proponents change "CITY AND COUNTY" to "CITY AND COUNTY" on page 1, line 16?

10. It is standard drafting practice to set off a prepositional phrase with commas. Would the proponents add a comma after the word "COUNTIES" on page 1, line 19?

11. It is standard drafting practice when referring to a date to set off the year with commas. Would the proponents add a comma after "2009" on page 1, line 33?

12. In subsection (4), it is unclear where the "including" phrase ends. For reader-friendly purposes, and so the meaning intended by the proponents is clear, would the proponents consider adding commas to set off the "including" phrase? For example, depending on the proponents' intent:

. . . COMPLETED, INCLUDING BUT NOT LIMITED TO STORAGE, DIVERSION, TRANSPORTATION, AND PURIFICATION OF WATER, ESTIMATED TO COST . . .

OR

. . . COMPLETED, INCLUDING BUT NOT LIMITED TO STORAGE, DIVERSION, TRANSPORTATION, AND PURIFICATION OF WATER ESTIMATED TO COST MORE THAN FIVE MILLION DOLLARS IN A LOCAL GOVERNMENT OR TWENTY-FIVE MILLION DOLLARS AT THE STATE LEVEL, SHALL REQUIRE . . .

13. With regard to subsection (6):
 - a. The usual numbering convention for the Colorado constitution is to number or letter all paragraphs, beginning with the subsection number in Arabic numerals: (1), (2), etc., followed by the paragraph letter in lower case letters: (a), (b), (c), etc. Therefore, would the proponents consider relettering the paragraph letters in subsection (6) with lower case letters?
 - b. On page 2, line 8, the comma after the word "ENTITY" seems unnecessary. Would the proponents remove that comma?
 - c. It is standard drafting practice to define terms that are used in a particular section. In paragraph (e), "RESIDENTIAL DWELLING UNIT" is defined, but that term is not used anywhere in the proposed initiative. Would the proponents remove that definition?

14. When do the proponents intend the proposed initiative to take effect? Would the proponents consider adding an effective date to the proposed initiative? For example:

SECTION 2. Effective date. This measure shall take effect upon

proclamation of the governor.

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. The following questions pertain to subsection (2) of this measure, which limits the annual amount of water allotted for newly constructed privately owned residential housing units to "one percent of the total amount *used* by privately owned residential housing units...." (emphasis added).
 - a. According to Section 6 of article XVI of the Colorado constitution, 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 under the Colorado constitution. Does this measure limit the appropriation of unappropriated water? If not, would the proponents consider adding language to explain how it affects the use of unappropriated water by domestic water users?
 - b. Some residences in Colorado obtain their water from ground water that is often not owned by a public water supplier. Does this measure's limitation apply to all ground water, including ground water not owned by a public water provider? If not, would the proponents consider adding language to explain which sources of water are affected?
 - c. Colorado water law typically distinguishes between the amount of water *applied* to a beneficial use and the amount of water *consumed* by that use. Consumption is the amount of water that does not return to a stream after it has been applied to a beneficial use due to plant or animal uptake, evaporation, and other loss mechanisms. What does "use" mean under this measure? May consumption by residential housing increase by more than one percent if the amount that is "used" remains under one percent?
 - d. Water conservation and reuse help extend existing water supplies and reduce demand for new water sources. Water conservation measures include preventing leaks in pipes, replacing high-water-using appliances, pricing water to encourage wise water use, public education, and landscaping with lower-water-consuming plants. Some types of water may be reused by capturing effluent from municipal sewage treatment plants, agricultural runoff, or other sources and applying it to another use such as irrigation. How does the one percent limit affect water that is made available for new residences through increased conservation and reuse? May a local government approve building permits that would exceed the one percent limit if the new housing units are supplied by "saved" water?

- e. What do the proponents intend by stating, in subsection (2), that "[t]his section shall be called for the 2012 November general election . . ."? Does subsection (2) not take effect unless approved at the 2012 November general election? Does subsection (2) have any effect after 2012?
3. The following questions pertain to subsection (3) of this measure, which prohibits "[w]ater allocated for farm and ranch use" from being sold or transferred "without approval *on an individual basis* by both the general assembly and signed by the governor." (emphasis added).
- a. What do the proponents intend by the description "water allocated for farm and ranch use"? Typically, water is decreed for one or more particular uses. Would water that has been decreed for both irrigation and municipal use be limited by the proposed measure? Is water used domestically at farms or ranches limited by the proposed measure?
 - b. What legislative mechanism would be used to obtain the necessary approval? For example, bills are typically used to create or amend laws, and joint resolutions are used to express the will of both houses on a particular matter.
 - c. Would special requirements or limits apply to this approval mechanism? For example, would the governor be allowed to veto such measures? If so, would the general assembly be allowed to repass a vetoed measure if it is approved by two-thirds of both houses? Would the proponents consider adding language to clarify this issue?
 - d. Is there a limit on the number of such approvals that may be sponsored by a legislator?
 - e. Does this measure require approval by the general assembly and the governor for the sale or transfer of agricultural water rights to *all* other beneficial uses, including irrigation by other farmers, instream flows for environmental purposes, and recreational in-channel diversions? If not, would the proponents consider adding language to clarify which type of sales or transfers must be approved by the general assembly and the governor?
 - f. Some public water providers have obtained temporary transfers of agricultural water for use during droughts. Does this measure require such approval for both permanent and temporary transfers of agricultural water rights? Would the proponents consider adding language to clarify this issue?
4. Subsection (4) of this measure requires voter approval of local government projects that are estimated to cost more than five million dollars and statewide projects that are estimated to cost more than twenty-five million dollars. Under current law, water conservancy districts and other public entities are required to obtain voter approval prior to imposing a property tax or other tax to pay for the project. They may also be required to obtain voter approval

if they seek to pay for projects by issuing debt with repayment obligations that exceed annual income from fees and other sources.

- a. Does this measure require a separate ballot question for water projects if the governmental entity planning the project is also required to obtain voter approval for the project's financing?
 - b. If separate ballot questions are required by this measure, may the questions be addressed at the same election? Would the proponents consider adding language to clarify these issues?
 - c. Would the additional cost of the election be included in the calculation of a water project's cost?
5. When does the five-year deadline in subsection (5) end? After the election? After the proclamation of the results?