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MEMORANDUM

March 4, 2008

TO: Daniel Hayes and Gregory DiLorenzo

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #72, 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.

Earlier versions of this initiative were the subject of memorandums dated December 21, 2007, and February 15, 2008. Proposal 2007-2008 #55 was discussed at a hearing on January 2, 2008, and proposal 2007-2008 #66 was discussed at a hearing on February 19, 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, as altered from proposal 2007-2008 #66, appear to be:

1. To state that when the waters of any natural stream are not sufficient to supply all appropriators, the users shall be prioritized in the order of any existing priority of a water right, including such as defined in the proposed amendment, followed by the intended purpose of such water prioritized in the order of domestic, agricultural, or manufacturing purpose;
2. To require the proof of the first date of use of water for irrigation purposes to be demonstrated "beyond a reasonable doubt";
3. To specify that irrigation wells for the purpose of food production will be unregulated unless a drought or water shortage causes domestic in-household water use to be "necessarily limited"; and
4. To require water rights purchased for a nonagricultural purpose beginning on the date the secretary of state calls the election for the proposed amendment to be prioritized by the date such water right was purchased and not when such water right originated.

Comments and Questions

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

Technical questions:

1. On line 13, would the proponents consider changing "PART (2)" to "SUBSECTION (2)" for proper citation format?
2. It is standard drafting practice to set off introductory or parenthetical phrases with commas. It is suggested that the proponents add commas on line 12, after "RIGHT" and on line 13, after "SECTION", to set off the phrase "INCLUDING SUCH AS DEFINED IN SUBSECTION (2) OF THIS SECTION".
3. To correct a misspelling on line 26, it is suggested the proponents change "NON AGRICULTURAL" to "NONAGRICULTURAL" to make it one word.
4. The standard drafting practice is to capitalize only the initial letter of words that are proper nouns or the first word of a sentence. On line 27, would the proponents consider changing "SECRETARY OF STATE" to "Secretary of State"?

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):
 - a. "Users" are prioritized; under existing law, water rights are prioritized irrespective of the user. What is the proponents' intent with regard to this change?
 - b. How will water rights be prioritized using the proposal's two-step process: 1. in the order of any existing priority of a water right, including such as defined in subsection (2), followed by 2. the intended purpose of such water prioritized in the order of domestic, agricultural, or manufacturing purpose? For instance, if a manufacturing right is senior to an irrigation right under an existing priority under the first step, how does the intended purpose of the water affect the priority under the second step?
3. Regarding subsection (3):
 - a. What is the proponents' intent in referring to "the date the secretary of state calls the election of this section"? How does this date compare with the date referred to in section 1 (4) of article V of the state constitution: "the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed"?
 - b. Would specifying that water sold for nonagricultural purposes after the date specified will be prioritized by the date of sale decrease the value of the water rights? Would this devaluation be a taking that requires the state to pay just compensation? If not, would the devaluation inhibit agricultural water right owners' ability to finance either their operations or their retirement or to sell their water rights?
 - c. Does this provision apply to all types of water rights that are purchased or only to agricultural water rights that are purchased and changed to another use? For example, could a developer purchase water rights for mining and change it to a residential use while maintaining the priority of the original mining right?