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Proposed Ballot Initiatives Pose Risk to Colorado Water Rights

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Several citizen-proposed ballot initiatives have drawn attention from Colorado water users so far in the 2014 election cycle. Two initiatives in particular, however, could cause significant disruption to Colorado's well-established water rights adjudication and administration system if they ultimately are placed on the state-wide ballot, and pass by popular vote in the November 2014 election. A goal of the initiatives, at least in part, is to amend the Colorado Constitution to subject Colorado's water rights system to the amorphous "public trust doctrine." Many Colorado water rights owners, water suppliers, state administrators, and others involved in the water rights community have long been concerned with the potential for loss of private property rights, defeated commercial expectations, protracted litigation proceedings, and the general chaos and uncertainty which could result if Colorado's nearly 150 years of awarding and administering water rights under the "prior appropriation system" (first in time, first in right) is made subject to, and potentially unwound by, application of this public trust doctrine.

The public trust doctrine has been applied in several different contexts over the years and is difficult to define in concrete terms. Traditionally, the doctrine was applied as a restriction on government actions that prevent access to navigable waterways. The use and application of the doctrine has expanded over time in many states, where certain public resources may be viewed as being held in trust by the government for the enjoyment of the public, such that private use of these resources should not be allowed to impair the public's interest. State courts in Colorado, however, have not recognized the doctrine.

The two 2014 proposed ballot initiatives that have the most potential to impact Colorado's water rights system, if successful, are Initiative 89 and Initiative 103. Key aspects of these Initiatives include the following:

1. Initiative 89:
    a. Declares that "Colorado's environment is the common property of all Coloradans . . . including its clean air, pure water, natural, and scenic values . . . and should be protected and be preserved for all Coloradans, including generations yet to come."
    b. Appoints the state and local governments as trustees to "conserve Colorado's environment, including its clean air, pure water, natural, and scenic values for the benefit of all the people."

   c. Authorizes local governments to enact laws, regulations, and ordinances "that are more restrictive and protective of the environment than laws or regulations enacted or adopted by the state government."

2. Initiative 103:
   a. Would create "an inalienable right to clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources . . .."
   b. Provides that "the State government and its agents, as trustees, shall protect these public trust resources against substantial impairment . . .."
   c. Would apply to "a public action or commercial dealing that would violate it, regardless of the date of any applicable local, state or federal permits . . .."

The supporters of Initiatives 89 and 103 must next complete the "ballot titling process" with Colorado's Title Board, which is currently in progress. Once the ballot title and submission clause are set, and the form of the ballot petition is approved by the Secretary of State, petitions for the proposals may be printed and circulated throughout the state and proponents must obtain the required number of signatures. To be placed on the November 2014 ballot, 86,105 signatures of registered electors will be required.

Please contact Chris Thorne (303-295-8488) or Bill Caile (303-295-8403), of Holland & Hart's Water Rights Practice Group in Denver, with any questions you may have concerning the proposed 2014 ballot initiatives, or water rights matters in general.

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