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SENATE BILL 08-159

BY SENATOR(S) Tupa and Gibbs, Bacon, Isgar, Morse, Penry, Renfroe, Sandoval, Schultheis, Schwartz, Veiga, Williams, Windels, Boyd, Groff, and Shaffer;

also REPRESENTATIVE(S) Scanlan, Casso, Curry, Ferrandino, Fischer, Green, Kefalas, King, Lambert, Liston, Lundberg, Marostica, Massey, McGihon, Merrifield, Rose, Stephens, Summers, Todd, Borodkin, Carroll T., Mitchell V., and Romanoff.

CONCERNING A REDUCTION OF THE LIMIT AT WHICH PERSONS OPERATING VESSELS ARE CONSIDERED UNDER THE INFLUENCE, AND, IN CONNECTION THEREWITH, ELIMINATING THE DISTINCTION BETWEEN TYPES OF WATERCRAFT FOR PURPOSES OF PUNISHING PERSONS WHO OPERATE VESSELS WHILE IMPAIRED BY DRUG OR ALCOHOL USE.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1. Repeal.** 33-13-108 (4), Colorado Revised Statutes, is repealed as follows:

**33-13-108. Prohibited vessel operations.** (4) ~~No person shall operate a vessel other than a motorboat or a sailboat covered by the provisions of section 33-13-108.1 or be in actual physical control of such a vessel while under the influence of alcohol, a controlled substance as~~

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

~~defined in section 12-22-303 (7), C.R.S., or any other drug, or any combination of such drugs or alcohol, that renders such person incapable of safely operating such a vessel, nor shall the owner or operator of such a vessel knowingly authorize or permit such vessel to be operated by or under the actual physical control of any other person if such person is under the influence of alcohol, a controlled substance, or any other drug, or any combination of such drugs or alcohol, that renders such person incapable of safely operating such a vessel. Any person who violates this subsection (4) is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.~~

**SECTION 2.** 33-13-108.1, Colorado Revised Statutes, is amended to read:

**33-13-108.1. Operating a vessel while under the influence.**

(1)(a) It is a misdemeanor for any person to operate a ~~motorboat or sailboat~~ or be in actual physical control of a ~~motorboat or sailboat~~ VESSEL in this state while:

(I) Under the influence of alcohol;

(II) The amount of alcohol, as shown by analysis of ~~such~~ THE person's blood or breath, in ~~such~~ THE person's blood is ~~0.10~~ 0.08 or more grams of alcohol per one hundred milliliters of blood or ~~0.10~~ 0.08 or more grams of alcohol per two hundred ten liters of breath at the time of the commission of the alleged offense or within two hours after operating a ~~motorboat or sailboat~~ VESSEL, if the evidence establishes beyond a reasonable doubt that ~~such~~ THE person did not consume any alcohol between the time of operation and the time of testing;

(III) Under the influence of any controlled substance as defined in section 12-22-303, ~~(7)~~, C.R.S., or any other drug ~~which~~ THAT renders ~~him~~ THE PERSON incapable of safely operating a ~~motorboat or sailboat~~ VESSEL;

(IV) Under the influence of any combination of alcohol and any controlled substance as defined in section 12-22-303, ~~(7)~~, C.R.S., or any other drug, when ~~such~~ THE combination of alcohol and controlled substance or any other drug renders ~~him~~ THE PERSON incapable of safely operating a

~~motorboat or sailboat~~ VESSEL.

(b) For the purposes of this subsection (1), "under the influence of any controlled substance or any other drug" shall include the use of glue-sniffing, aerosol inhalation, or the inhalation of any other toxic vapor.

(2) (a) In any prosecution of a violation of paragraph (a) of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged offense or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, shall give rise to the following presumption: If there was at ~~such~~ THAT time ~~0.10~~ 0.08 or more grams of alcohol per one hundred milliliters of blood as shown by analysis of ~~such~~ THE person's blood or ~~0.10~~ 0.08 or more grams of alcohol per two hundred ten liters of breath as shown by analysis of ~~such~~ THE person's breath, it shall be presumed that the defendant was under the influence of alcohol.

(b) The limitation of this subsection (2) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol.

(3) In any prosecution for a violation of subsection (1) of this section, the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what the tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.

(4) (a) ~~On and after July 1, 1989, any~~ A person who operates a ~~motorboat or sailboat~~ VESSEL or who is in actual physical control of a ~~motorboat or sailboat~~ VESSEL on the waters of this state shall be deemed to have expressed ~~his~~ consent to the provisions of this subsection (4).

(b) Any person who operates a ~~motorboat or sailboat~~ or who is in actual physical control of a ~~motorboat or sailboat~~ VESSEL on the waters of this state may be required to submit to a test or tests of ~~his~~ breath or blood for the purpose of determining the alcoholic content of ~~his~~ THE PERSON'S

blood or breath if arrested for any misdemeanor offense arising out of acts alleged to have been committed while the person was operating a ~~motorboat or sailboat~~ VESSEL in violation of subsection (1) of this section. If ~~such~~ THE person requests that ~~said~~ THE test be a blood test, then the test shall be of ~~his~~ THE PERSON'S blood; but, if ~~such~~ THE person requests that a specimen of ~~his~~ THE PERSON'S breath shall be obtained and tested.

(c) Any person who operates a ~~motorboat or sailboat~~ or who is in actual physical control of a ~~motorboat or sailboat~~ VESSEL on the waters of this state may be required to submit to a test or tests of ~~his~~ THE PERSON'S blood, saliva, and urine for the purpose of determining the drug content within ~~his~~ THE PERSON'S system if arrested for any misdemeanor offense arising out of acts alleged to have been committed while the person was operating a ~~motorboat or sailboat~~ VESSEL in violation of subsection (1) of this section.

(5) Any person who is required to submit to TESTING, or who requests that a specimen of ~~his~~ blood, breath, saliva, or urine be taken or drawn for testing shall cooperate with the person authorized to obtain ~~such~~ THE specimens, including the signing of any release forms required by any person who is authorized to take or withdraw such specimens. If ~~such~~ THE person refuses to sign any release forms, ~~such~~ THE refusal shall be considered a refusal to take the tests, provided said forms conform to subsection (6) of this section. No peace officer shall physically restrain any person for the purpose of obtaining a specimen of his blood, breath, saliva, or urine for testing.

(6) The tests shall be administered at the direction of the arresting officer having reasonable grounds to believe that the person had been operating a ~~motorboat or sailboat~~ VESSEL in violation of subsection (1) of this section and in accordance with rules ~~and regulations~~ prescribed by the state board of health, with utmost respect for the constitutional rights, dignity of the person, and health of the person being tested. No person except a physician, a registered nurse, a paramedic as certified in part 2 of article 3.5 of title 25, C.R.S., an emergency medical technician as defined in part 1 of article 3.5 of title 25, C.R.S., or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall be entitled to withdraw blood for the purpose of determining the alcoholic or drug content ~~therein~~ OF THE BLOOD. No civil

liability shall attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital in which ~~such~~ THE specimens are obtained as provided in subsection (4) of this section as a result of the act of obtaining ~~such~~ THE specimens from any person submitting thereto if ~~such~~ THE specimens were obtained according to the rules ~~and regulations~~ prescribed by the state board of health; except that ~~such~~ THIS provision shall not relieve any such person from liability for negligence in ~~the~~ obtaining of ~~any~~ A specimen sample.

(7) Any person who is dead or unconscious shall be tested to determine the alcoholic content of ~~his~~ THE PERSON'S blood as provided in subsection (4) of this section. ~~Any person who is dead;~~ In addition to the tests prescribed, ~~shall also have his~~ THE BLOOD OF A DEAD PERSON SHALL BE checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. ~~Such~~ ALL information obtained will be made a part of the accident report.

(8) If a person refuses to submit to tests as provided for in subsection (4) of this section and ~~such~~ THE person subsequently stands trial for a violation of subsection (1) of this section, the refusal to submit to ~~such~~ THE tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to submit to any tests.

(9) The fact that any person charged with a violation of subparagraph (II) or (III) of paragraph (a) of subsection (1) of this section is or has been entitled to use ~~such~~ THE controlled substance or drug under the laws of this state shall not constitute a defense against any person charged with ~~such~~ THE violation.

(10) No court shall accept a plea of guilty to ~~a violation of section 33-13-108 (4)~~ or a non-alcohol-related or non-drug-related boating offense from a person charged with a violation of subsection (1) of this section ~~except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related boating offense upon~~ UNLESS THE PROSECUTING ATTORNEY MAKES a good faith representation ~~by the prosecuting attorney that he could not establish~~ THAT a prima facie case COULD NOT BE ESTABLISHED if the defendant were brought to trial on the original alcohol-related or drug-related offense.

(11) When a peace officer has reasonable grounds to believe that a person is operating a ~~motorboat or sailboat~~ VESSEL while under the influence of alcohol or that the operator has been involved in a boating accident resulting in injury or death, the peace officer may request the operator to provide a sample of the operator's breath for a preliminary screening test. THE TEST SHALL BE GIVEN using a device approved by the executive director of the department of public health and environment as being accurate to within ten percent of the actual reading obtained by the officer upon administering the test. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to administer a test pursuant to paragraph (b) of subsection (4) of this section but shall not be used in any court action except to prove that a test was properly authorized pursuant to this section. The results of ~~such~~ THE test shall be made available to the operator or ~~his~~ THE OPERATOR'S attorney upon request. The preliminary screening test shall not constitute the test for the purposes of subsection (4) of this section.

(12) (a) Every person who is convicted of a violation of subsection (1) of this section shall be punished by imprisonment in the county jail for not less than five days nor more than one year, and, in addition, the court may impose a fine of not less than two hundred dollars nor more than one thousand dollars. Except as provided in paragraph (c) of this subsection (12), the minimum period of imprisonment provided for ~~such~~ THE violation shall be mandatory. In addition to any other penalty that is imposed, every person who is convicted of a violation to which this paragraph (a) applies shall perform no more than ninety-six hours of useful public service.

(b) Upon a conviction of a ~~second or~~ subsequent violation of subsection (1) of this section ~~which~~ THAT occurred within five years of the date of a previous violation of subsection (1) of this section, the offender shall be punished by imprisonment in the county jail for not less than sixty days nor more than one year, and, in addition, the court may impose a fine of not less than five hundred dollars nor more than one thousand five hundred dollars. The minimum period of imprisonment as provided for ~~such~~ THE violation shall be mandatory, but the court may suspend up to fifty-five days of the period of imprisonment if the offender complies with ~~the provisions of~~ paragraph (c) of this subsection (12). In addition to any other penalty ~~which~~ THAT is imposed, every person ~~who is~~ convicted of a violation to which this paragraph (b) applies shall perform not less than sixty hours nor more than one hundred twenty hours of useful public

service. The performance of the minimum period of service shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of ~~such~~ THE service.

(c) The sentence of any person subject to ~~the provisions of~~ paragraph (a) or (b) of this subsection (12) may be suspended to the extent provided for in said paragraphs if the offender receives a presentence alcohol and drug evaluation and, based on that evaluation, if ~~such~~ THE offender satisfactorily completes an appropriate level I or level II alcohol and drug driving safety education or treatment program and abstains from the use of alcohol for a period of one year from the date of sentencing. ~~Such~~ THE abstinence shall be monitored by the treatment facility by the administration of disulfiram or by any other means that the director of the treatment facility deems appropriate. If, at any time during the one-year period, the offender does not satisfactorily comply with the conditions of the suspension, that sentence shall be reimposed, and the offender shall spend that portion of ~~his~~ THE sentence ~~which~~ THAT was suspended in the county jail.

(d) In addition to any other penalty provided by law, the court may sentence a defendant who is convicted pursuant to this section to a period of probation for the purposes of treatment not to exceed two years.

(e) For the purposes of this subsection (12), "useful public service" ~~shall have the same meaning as that~~ HAS THE MEANING set forth in section 42-4-1301.4, ~~(2)(a)~~, C.R.S., and the useful public service program authorized therein shall be utilized for the purposes of this subsection (12). An offender sentenced to ~~such~~ A useful public service program ~~or to such work assignments~~ shall complete the same within the time established by the court. In addition to any other penalties, fines, fees, or costs prescribed in this section, the court shall assess an amount not to exceed the amount established in section 42-4-1301.4, C.R.S., upon any person required to perform useful public service. ~~Such~~ THE amount shall be used only to pay for the costs authorized in section 42-4-1301.4, C.R.S.

(f) For the purposes of this subsection (12), "alcohol and drug driving safety education or treatment" ~~shall have the same meaning as that~~ HAS THE MEANING set forth in section 42-4-1301.3, ~~(3)(c)(IV)~~, C.R.S., and the alcohol and drug driving safety program and the presentence alcohol and drug evaluations authorized ~~therein~~ IN SAID SECTION shall be utilized for

the purposes of this subsection (12). The presentence alcohol and drug evaluation shall be conducted on all persons convicted of a violation of subsection (1) of this section; except that this requirement shall not apply to persons who are not residents of Colorado at the time of sentencing. Any defendant sentenced to level I or level II education or treatment programs shall be instructed by the court to meet all financial obligations of ~~such~~ THE programs. If ~~such~~ THE financial obligations are not met, the sentencing court shall be notified for the purpose of collection or review and further action on the defendant's sentence. In addition to any other penalties, fines, fees, or costs prescribed in this section, the court shall assess an amount, not to exceed the amount established in section 42-4-1301.3, C.R.S., upon any person convicted of a violation of subsection (1) of this section. ~~Such~~ THE amount shall be used only to pay for the costs authorized in section 42-4-1301.3, C.R.S. The court shall consider the alcohol and drug evaluation prior to sentencing. ~~The provisions of This paragraph (f) are~~ IS also applicable to any defendant who receives a deferred prosecution in accordance with section 18-1.3-101, C.R.S., or who receives a deferred sentence in accordance with section 18-1.3-102, C.R.S.

(g) Upon a conviction for a first offense FOR A VIOLATION OF SUBSECTION (1) OF THIS SECTION, in addition to any other penalties, fines, fees, or costs imposed, ~~for a violation of subsection (1) of this section~~ the court shall order the person to not operate a ~~motorboat or sailboat~~ VESSEL for a three-month period. Upon a conviction for a ~~second or subsequent~~ offense FOR A VIOLATION OF SUBSECTION (1) OF THIS SECTION, in addition to any other penalties, fines, fees, or costs imposed, ~~for a violation of subsection (1) of this section~~, the court shall order the person to not operate a ~~motorboat or sailboat~~ VESSEL for a one-year period. For the purposes of this paragraph (g), "conviction" includes a conviction in any court of record or municipal court, a plea of no contest accepted by the court, or the forfeiture of any bail or collateral deposited to secure a defendant's appearance in court or the failure to appear in court by a defendant charged with a violation of subsection (1) of this section who has been issued a summons and complaint to appear pursuant to section 33-15-102 (2).

(h) Upon a plea of guilty or a verdict of guilty by the court or a jury to any offense specified in subsection (1) of this section, the court shall order the defendant to immediately report to the sheriff's department in the county where the defendant was convicted. ~~at which~~ AT THAT time, the defendant's fingerprints and photographs shall be taken and returned to the

court, which fingerprints and photographs shall become a part of the court's official documents and records pertaining to the defendant's conviction and the defendant's identification in association with ~~such~~ THE conviction. In any trial for a violation of any of the offenses specified in subsection (1) of this section, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be prima facie evidence of ~~such~~ THE convictions and may be used in evidence against ~~such~~ THE party. Identification photographs and fingerprints that are part of the record of such former convictions and judgments of any court of record or are part of the record at the place of ~~such~~ THE party's incarceration after sentencing for any of such former convictions and judgments shall be prima facie evidence of the identity of ~~such~~ THE party and may be used in evidence against ~~him~~ THE PARTY. Any person who fails to immediately comply with the court's order to report to the sheriff's department, to furnish fingerprints, or to have ~~his~~ photographs taken may be held in contempt of court.

(13) (a) No owner or operator of a ~~motorboat or sailboat~~ VESSEL shall knowingly authorize ~~such motorboat or sailboat~~ THE VESSEL to be operated by or come under the actual physical control of any other person if ~~such~~ THE person is under the influence of alcohol, a controlled substance or any other drug, or any combination ~~thereof~~ OF ALCOHOL, CONTROLLED SUBSTANCE, OR DRUG.

(b) Any person who is convicted of a violation of paragraph (a) of this subsection (13) is guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not less than two hundred dollars nor more than one thousand dollars, or by both ~~such~~ fine and imprisonment.

(14) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related ~~boating~~ VESSEL offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine the alcohol or drug level. This subsection (14) shall not prevent the necessity of establishing during a trial that the testing devices used were in proper working order and that ~~such~~ THE testing devices were properly operated. Nothing in this subsection (14) shall preclude a defendant from offering evidence of the accuracy of the

testing device.

(15) As used in this section, "convicted" includes a plea of no contest accepted by the court.

(16) (a) Upon conviction of or plea of no contest to a violation of this section, the court shall forward a certified copy of ~~such~~ THE conviction or plea to the division.

(b) When a peace officer requests a person to submit to tests as required by subsection (4) of this section and ~~such~~ THE person refuses to submit to ~~such~~ THE tests, the officer shall forward to the division a verified report of all relevant information, including information ~~which~~ THAT adequately identifies ~~such~~ THE person and a statement of the officer's probable cause for requesting ~~such~~ THE person to submit to the tests.

**SECTION 3.** 33-13-108.2, Colorado Revised Statutes, is amended to read:

**33-13-108.2. Operating a vessel while the privilege to operate is suspended.** (1) Any person who operates a ~~motorboat or sailboat~~ VESSEL in this state at a time when a court-ordered suspension of ~~his motorboat or sailboat~~ THE OPERATOR'S VESSEL operating privilege is in effect for a conviction of an alcohol- or drug-related operating offense pursuant to section 33-13-108.1 (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than three days nor more than one hundred eighty days and, in the discretion of the court, by a fine of not less than three hundred dollars nor more than one thousand dollars. Upon a ~~second or~~ subsequent conviction, ~~such~~ THE person shall be punished by imprisonment in the county jail for not less than ninety days nor more than one year and, in the discretion of the court, by a fine of not less than five hundred dollars nor more than three thousand dollars. The minimum jail sentence imposed by this subsection (1) shall be mandatory, and the court shall not grant probation or a suspended sentence. ~~thereof; but~~ HOWEVER, in a case where the defendant is convicted ~~although he established that he had to operate the motorboat or sailboat~~ AND IT IS ESTABLISHED THAT IT WAS NECESSARY TO OPERATE THE VESSEL in violation of this subsection (1) because of an emergency, the mandatory jail sentence shall not apply, and, for a conviction, the court may impose a sentence of imprisonment in the county jail for a period of not more than one year and,

in the discretion of the court, a fine of not more than one thousand dollars, and, for a ~~second~~ or subsequent conviction, the court may impose a sentence of imprisonment in the county jail for a period of not more than two years and, in the discretion of the court, a fine of not more than three thousand dollars.

(2) In any trial in which a person is charged with a violation of subsection (1) of this section, a duly authenticated copy of the record of former convictions and judgments of any court of record against the party indicted or informed against for an alcohol- or drug-related ~~motorboat or sailboat~~ VESSEL operating offense pursuant to section 33-13-108.1 shall be prima facie evidence of ~~such~~ THE convictions and judgments and may be used in evidence against ~~such~~ THE party. Identification photographs and fingerprints that are part of the record of such former convictions and judgments and ~~such~~ THE party's incarceration after sentencing for any of such former convictions and judgments shall be prima facie evidence of the identity of ~~such~~ THE party and may be used in evidence against ~~him~~ THE PARTY.

(3) Upon a ~~second~~ or subsequent conviction under subsection (1) of this section within five years after the first conviction, ~~thereunder~~, in addition to the penalty prescribed in said subsection (1), the court shall order the defendant to not operate a ~~motorboat or sailboat~~ VESSEL in this state for a period of two years after ~~such second~~ or THE subsequent conviction.

(4) Upon conviction of or a plea of no contest to a violation of this section, the court shall forward a certified copy of ~~such~~ THE conviction or plea to the division.

**SECTION 4.** 42-4-1304 (1), Colorado Revised Statutes, is amended to read:

**42-4-1304. Samples of blood or other bodily substance - duties of department of public health and environment.** (1) The department of public health and environment shall establish a system for obtaining samples of blood or other bodily substance from the bodies of all pilots in command, ~~motorboat or sailboat~~ VESSEL operators in command, or drivers and pedestrians fifteen years of age or older who die within four hours after involvement in a crash involving a motor vehicle, ~~a motorboat, a sailboat~~

A VESSEL, or an aircraft. FOR PURPOSES OF THIS SECTION, "VESSEL" HAS THE MEANING SET FORTH IN SECTION 33-13-102, C.R.S. No person having custody of the body of ~~such~~ THE deceased shall perform any internal embalming procedure until a blood and urine specimen to be tested for alcohol, drug, and carbon monoxide concentrations has been taken by an appropriately trained person certified by the department of public health and environment. Whenever the driver of the vehicle cannot be immediately determined, ~~such~~ THE samples shall be obtained from all deceased occupants of the vehicle.

**SECTION 5. Effective date - applicability.** (1) This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, (August 6, 2008, if adjournment sine die is on May 7, 2008); except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

(2) The provisions of this act shall apply to offenses committed on or after the applicable effective date of this act.

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Peter C. Groff  
PRESIDENT OF  
THE SENATE

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Andrew Romanoff  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

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Karen Goldman  
SECRETARY OF  
THE SENATE

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Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

APPROVED \_\_\_\_\_

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Bill Ritter, Jr.  
GOVERNOR OF THE STATE OF COLORADO