

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 11, 2004

TO: Rutt Bridges
Peggy Lamm

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #86, concerning rainy day funds - TABOR refund - education funding.

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 your proposed amendment, a copy of which is attached.

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 drafting the language of their proposal and to make the public aware of the contents of the proposal. Our first objective is to be sure we understand your intent and objective in proposing the amendment. We hope that the statements and questions in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed initiative appear to be:

1. To add a new section 21 titled "State and local rainy day funds" to article X of the Colorado constitution;
2. To prohibit the use of tax rate increases to fund rainy day funds;
3. To prohibit the new section 21 from being interpreted to increase tax rates without the permission of the voters;

4. Effective January 1, 2005, to require the state to annually deposit at least one percent of its annual tax revenue into a newly created state rainy day fund until a reserve equal to ten percent of the state's most recent general fund budget has been accumulated, and to require the state rainy day fund to consist of cash and bonds with a maturity of two years or less so that state rainy day fund revenues are available when needed;
5. To eliminate the state emergency reserve currently required by section 20 (5) of article X of the Colorado constitution and transfer its cash funds to the state rainy day fund;
6. To require revenues in excess of the constitutional limitation on state fiscal year spending that would otherwise be refunded to be allocated first to provide the required annual funding for the state rainy day fund and then to provide general fund support to local public schools and higher education and to exempt those allocations from existing revenue and spending limits;
7. In any fiscal year in which state tax revenues, after adjustment for population growth and inflation, decline from the prior fiscal year:
 - a. To allow moneys to be allocated from the state rainy day fund to address a revenue shortfall in any fiscal year in which state tax revenues, after adjustment for population growth and inflation, decline from the prior fiscal year as follows:
 - i. To allow up to one-half of the state rainy day fund to be allocated to address the revenue shortfall;
 - ii. To count any use of state rainy day fund moneys to address the revenue shortfall against existing spending limits;
 - b. To defer the expenditure of up to one-half of the increase in revenue to be allocated as required by section 17 (1) of article IX of the Colorado constitution, but to require its full restoration within the following three fiscal years; and
 - c. To suspend the requirement that revenues be allocated to the state rainy day fund;
8. To allow a two-thirds majority of both houses of the general assembly to allocate moneys from the state rainy day fund to mitigate expenses resulting from a natural or manmade disaster, and to exclude moneys allocated from existing spending limits;
9. To require the submission of a ballot question titled "Shall the state indefinitely suspend the allocation of excess tax revenue for the state Rainy Day Fund, local school districts and higher education, so that tax refunds under Article X, section 20 (7) of the Colorado constitution may be resumed?" after ten years of rainy day fund deposits are made so that voters can reconsider the allocation of excess tax revenues required by the new section 21;

10. To authorize any local district government to propose a local rainy day fund that is tailored to meet the needs of the citizens of the district, to allow such a proposal to exclude the district from any provisions of section 20 of article X of the state constitution that affect district revenues, spending, or debt, and to require such a proposal to be approved by a majority of the voters of the district before becoming effective.

Comments and Questions

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

Technical questions:

1. Would the proponents capitalize the words "enacted" and "people" in the enacting clause of the proposed amendment so that the clause is formatted as specified in section 1 (8) of article V of the Colorado constitution?
2. To conform to standard drafting practices regarding the form of proposed amendments to the Colorado constitution, would the proponents:
 - a. Show all of the substantive text of the proposed initiative (everything except the enacting clause, the amending clause, and the bold-faced type head notes) in "LARGE AND SMALL CAPITAL LETTERS" to indicate that the text is new constitutional language?
 - b. Replace the amending clause of the proposed initiative so that it states: "Article X of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:"?
 - c. Remove the capitalization from the phrases "Rainy Day Fund" and "Rainy Day Funds" throughout the proposed initiative?
 - d. Add a period at the end of the main head note for the initiative?
 - e. In subsection (2) of the proposed initiative:
 - i. Replace the reference to "article X, section 20 (5)" with a reference to "section 20 (5) of this article"?
 - ii. On the last line, replace the word "must" with the word "shall"?
 - f. In subsection (3) of the proposed initiative, replace the reference to "article X, section 20 (7)" with a reference to "section 20 (7) of this article"?

- g. In subsection (4) of the proposed initiative:
 - i. Replace the reference to "article IX, section 17 (1)" with a reference to "section 17(1) of article IX of this constitution"?
 - ii. On the sixth line, remove the hyphen from the term "per-pupil"?
 - iii. On the seventh line, replace the word "must" with the word "shall"?
 - h. In subsection (6) of the proposed initiative, replace the reference to "article X, section (20) (7)" with a reference to "section 20 (7) of article X"?
 - i. In subsection (7) of the proposed initiative, replace the reference to "article X, section 20" with a reference to "section 20 of this article"?
 - j. In subsections (2) and (4) of the proposed initiative, replace the word "must" with the word "shall"?
3. To conform to standard punctuation rules, would the proponents:
- a. On the seventh line of subsection (4) of the proposed initiative, remove the comma after the word "and"?
 - b. On the fifth line of subsection (6) of the proposed initiative, remove the comma after the word "education"?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. The proposed initiative, however, would, among other things: prohibit the use of tax rate increases to fund rainy day funds; require the state to make deposits to a state rainy day fund; eliminate the state emergency reserve required by section 20 of article X of the Colorado constitution (TABOR); require the retention and allocation of excess state revenues; specify the circumstances under which rainy day fund moneys may be used and in which certain constitutional education funding requirements may be partly suspended; authorize the establishment of local rainy day funds and the exclusion of local districts from TABOR provisions that affect district revenues, debt, or spending; and require the referral of a ballot question to the voters in the future. Taking into account the numerous requirements of and other matters addressed by the proposed initiative, what is the single subject of the proposed initiative?
2. Subsection (1) of the proposed initiative prohibits the use of a tax rate increase to fund rainy day funds, but subsection (2) of the proposed initiative requires the state to annually deposit at least one percent of its annual tax revenue into the state rainy day fund. Do these provisions conflict with

each other in any way? If the voters of the state approve a tax rate increase, would the state be required to deposit one percent of its revenues attributable to the tax rate increase into the state rainy day fund even though subsection (1) of the proposed initiative prohibits the use of a tax rate increase to fund rainy day funds? If the voters of the state approve a tax rate increase, would the state be prohibited from annually depositing one percent of its annual revenues attributable to the tax rate increase to the state rainy day fund even though subsection (2) of the proposed initiative requires the state to annually deposit at least one percent of its annual tax revenue into a state rainy day fund?

3. With respect to subsection (1) of the proposed initiative, does the phrase "tax rate increase" apply only to increases in the rate of an existing tax (e.g., a state or local sales tax or the state income tax) so that other types of tax increases could be used to fund rainy day funds or does it also apply to:
 - a. The imposition of a new kind of tax?
 - b. The broadening of the base to which a particular tax is applied (e.g., the elimination of a state or local sales tax exemption or a state income tax modification)?
4. Subsection (2) of the proposed initiative requires the state to annually deposit "at least one percent of its annual tax revenue" into the state rainy day fund, which raises the following questions:
 - a. Does the phrase "its annual tax revenue":
 - i. Include all revenues generated by taxes imposed by the state including:
 - A. Revenues in excess of the TABOR state fiscal year spending limit that are required to be refunded under current law?
 - B. Revenues of taxes imposed by the state that are not used for state purposes such as gasoline and special fuel tax revenues that are credited to the highway users tax fund and allocated to counties and municipalities?
 - ii. Include state revenues from sources other than taxes such as fees, interest on the investment of state moneys, property sales, and gifts?
 - iii. Include federal moneys received by the state that the federal government originally obtained through the imposition of federal taxes?
 - b. Does the requirement to "annually deposit" moneys apply to calendar years or state fiscal years? If it applies to fiscal years, to which fiscal year would it first apply?
5. Subsection (2) of the proposed initiative requires the state to annually deposit moneys into the state rainy day fund "until a reserve equal to ten percent of the state's most recent general fund budget

has been accumulated", which raises the following questions:

- a. What is included in the general fund budget?
 - b. Which general fund budget is considered the most recent general fund budget and at what point in time is that determination made? For example, if the long appropriations bill is enacted in April of any given fiscal year and specifies all or most of the general fund budget for the next fiscal year, is the most recent budget at the time the long appropriations bill is enacted the budget for the current fiscal year or the new budget specified in the long appropriations bill? How do supplemental general fund appropriations, either positive or negative, affect the amount of "the state's most recent general fund budget"?
6. Subsection (2) of the proposed initiative requires the elimination of the state emergency reserve required by TABOR and the transfer of the cash funds of the reserve to the state rainy day fund. However, the state emergency reserve is not a single fund, but rather is annually designated by the General Assembly as consisting of state properties and moneys in different funds (e.g., for the 2003-2004 fiscal year some of the funds designated as constituting the state emergency reserve are up to \$100,000,000 of the tobacco litigation settlement trust fund, the controlled maintenance trust fund, the Colorado river recovery program loan fund, the fish and wildlife resources fund, the perpetual base account of the severance tax trust fund, the species conservation trust fund, the wild life cash fund and fund equity, and up to \$87,400,000 of state properties designated by the Governor), which raises the following questions:
- a. If the total balances of all cash funds designated as the state emergency reserve exceed the amount of the reserve that must be transferred to the state rainy day fund, how is the amount of moneys to be taken from each designated cash fund determined?
 - b. How would the transfer of moneys from cash funds designated as the state emergency reserve affect programs funded by moneys from those cash funds? Would the proposed initiative override any existing constitutional or statutory provisions that specify the manner in which money in a cash fund designated as the state emergency reserve is to be used?
7. Subsection (2) of the proposed initiative requires the state rainy day fund to consist of cash and bonds with a maturity of two years or less "to ensure that state Rainy Day Fund revenues are available when needed," which raises the following questions:
- a. If a sudden economic downturn results in an unanticipated revenue shortfall or a disaster occurs that allows the expenditure of state rainy day fund moneys pursuant to subsection (4) or (5) of the proposed initiative, is even the two-year maturity limit short enough to ensure the availability of state rainy day fund moneys?
 - b. If not, should the maturity limit be shortened to ensure the availability of state rainy day fund moneys or lengthened to allow greater returns on the investment of state rainy day

fund moneys?

8. With respect to subsection (3) of the proposed initiative:
- a. Does the phrase "excess state revenues that would otherwise be refunded under article X, section 20 (7)" apply only to revenues that actually would be refunded but for the proposed initiative, or does it also apply to excess state revenues that the voters of the state have authorized the state to retain through approval of any other ballot question and thereby supersede any other use of excess state revenues approved by the voters of the state?
 - b. Because excess state revenues remaining after the state makes required annual deposits to the state rainy day fund are to be "applied to general fund support" for public schools and higher education:
 - i. Would the appropriation of those revenues from the general fund be subject to the statutory limitation on annual general fund appropriations specified in section 24-75-201.1, Colorado Revised Statutes?
 - ii. Would the appropriation of those revenues from the general fund count towards the "maintenance of effort" requirement of section 17 (4) of article IX of the Colorado constitution, which requires annual general fund appropriations for total program education funding to increase by at least five percent annually through state fiscal year 2010-11?
 - c. Not all excess state revenues are tax revenues (e.g., the state also receives revenues from the imposition of fees and the investment of state moneys). Accordingly, do the proponents intend that the phrase "excess tax revenues" have a different meaning than the phrase "excess state revenues", and, if so, what are "excess tax revenues" as distinguished from "excess state revenues"?
 - d. What are the "existing revenue or spending limits" against which allocations of excess tax revenues do not count?
 - e. How would funding be prioritized between local public schools and higher education? Could all excess state revenues not deposited to the state rainy day fund be allocated only for local public schools or only for higher education or must both public schools and higher education be funded? Could any excess state revenues be used for other purposes?
9. Subsection (4) of the proposed initiative states:

In any fiscal year in which there occurs a decrease from the prior fiscal year in state tax revenues after adjustment for population growth and

inflation: 1) up to but not more than half of the state Rainy Day Fund may be allocated to address the revenue shortfall; 2) such use of state Rainy Day Fund revenues shall count against existing spending limits; 3) up to half of the increase in revenue to be allocated as mandated by article IX, section 17 (1) may be deferred, but the required per-pupil spending must be fully restored within the following three fiscal years; and, 4) no revenues need to be allocated to the state Rainy Day Fund.

The language of subsection (4) of the proposed initiative raises the following questions:

- a. It would appear to be impossible to determine the amount, and in some instances even the existence, of a decrease in state tax revenues for any given fiscal year from the prior fiscal year until after the fiscal year ends, but subsection (4) appears to allow the allocation of state rainy day fund moneys to the extent necessary to address the decrease, the suspension of a portion of specified constitutional education funding growth requirements, and the suspension of annual deposits to the state rainy day fund in any fiscal year in which such a decrease occurs. How does this timing work? Do the proponents actually intend that a decrease in state tax revenues allow the allocations of state rainy day fund moneys and suspensions of requirements authorized by subsection (4) in the next fiscal year after state tax revenues decrease?
- b. Do the proponents intend that the allocations of state rainy day fund moneys and suspensions of requirements authorized by subsection (4) take effect if state tax revenues decline but overall state revenues do not decline (e.g., if an increase in state fee revenues exceeds a decrease in state tax revenues, or if the state sells an asset such as its right to receive tobacco litigation settlement payments and the amount generated by the sale exceeds the amount of the decrease in state tax revenues)? If not, should something other than a decline in state tax revenues be the triggering event for the allocations of state rainy day fund moneys and suspensions of requirements authorized by subsection (4)?
- c. With respect to the phrase "adjustment for population growth and inflation":
 - i. What is the meaning of the terms "population growth" and "inflation"?
 - ii. How and for what period are population growth and inflation to be calculated for purposes of making an adjustment?
 - iii. Could revisions in measurements of population growth and inflation affect implementation of the proposed initiative or the state's powers or obligations as specified in the proposed initiative?
 - iv. How does "adjustment for population growth and inflation" affect the determination of whether there is a decrease in state tax revenues? Would state tax revenues be

deemed to have decreased in any fiscal year in which they did not increase by a percentage equal to population growth plus inflation? Would population growth and inflation be used to calculate state tax revenues on a per capita basis to determine whether there is a decrease?

- d. With respect to the authorization to allocate state rainy day fund moneys to "address the revenue shortfall":
 - i. Is a "revenue shortfall" the amount of a decrease in state tax revenues from the prior fiscal year?
 - ii. If state tax revenues decline, but overall state revenues increase, would there be a "revenue shortfall" to address, and, if so, how would the General Assembly know what needed to be addressed?
 - iii. How would state rainy day fund moneys be allocated to address a "revenue shortfall"? Would the General Assembly appropriate moneys from the state rainy day fund? Would moneys from the state rainy day fund be transferred to the general fund and then appropriated from the general fund?
 - e. What "existing spending limits" would the use of state rainy day funds "count against"?
 - f. With respect to the authorization to defer "up to half of the increase in revenue to be allocated as mandated by article IX, section 17 (1)" with "the required per-pupil spending [to] be fully restored within the following three fiscal years":
 - i. Section 17 (1) of article IX of the Colorado constitution does not refer to any "increase in revenue", but instead mandates increased spending for specified education-related purposes. What "increase in revenue" does the proposed initiative reference? Would the proponents consider changing the phrase "increase in revenue to be allocated" to "annual growth in funding required for the fiscal year" in order to more closely match the language of section 17 (1) of article X?
 - ii. What does it mean for "required per-pupil spending" to be "fully restored"?
 - iii. For any fiscal year in which state tax revenues decline from the prior fiscal year, could the categorical program funding requirements of section 17 (1) of article IX of the Colorado constitution be deferred indefinitely?
 - iv. How does this authorization relate to the other provisions of the proposed initiative?
10. With respect to subsection (5) of the proposed initiative:

- a. What does it mean for the General Assembly to "allocate" state rainy day fund reserves? Would the General Assembly appropriate moneys from the fund? Would the General Assembly transfer moneys from the fund to the general fund or some other fund and then appropriate it? If this provision gives the General Assembly the authority to allocate the reserves, would the governor have the authority to veto a bill providing for such allocation?
 - b. What are the "existing spending limits" against which the use of state rainy day fund moneys "shall not count"?
 - c. Do the phrases "Rainy Day Fund reserves" and "Rainy Day Fund revenues" have the same meaning? If not, how are they different?
11. With respect to subsection (6) of the proposed initiative:
- a. Does the phrase "After ten years of state Rainy Day Fund deposits" refer to:
 - i. The point in time after the state has actually made ten annual deposits to the state rainy day fund?
 - ii. The point in time ten years following the first annual deposit to the state rainy day fund, regardless of whether the state made annual deposits to the state rainy day fund in each intervening year?
 - iii. The point in time after the accumulated state rainy day fund balance reaches ten percent of the state's most recent general fund budget, regardless of whether the state must make more than ten annual deposits for the fund balance to reach that amount?
 - b. Subsection (6) refers to the "allocation of excess tax revenues" and "tax refunds under article X, section 20 (7) of the Colorado constitution", but not all excess state revenues are derived from taxes, and not all refunds of excess state revenues are tax refunds. Is subsection (6) intended to address only excess tax revenues and tax refunds? If not, should the references be changed to "the allocation of excess state revenues" and "refunds of excess state revenues under section 20 (7) of article X of the Colorado constitution"?
 - c. Would approval of the ballot question in any way affect the ability of the General Assembly to seek future voter-approved revenue changes?
 - d. How does the referral of the ballot question set forth in subsection (6) relate to the other provisions of the proposed initiative?
12. With respect to subsection (7) of the proposed initiative:

- a. What is the meaning of the phrase "local district" government? Does it include counties, cities and counties, municipalities, school districts, and special districts? Any other governmental entities? Does the term "district" have the same meaning for purposes of the proposed initiative as it does for purposes of TABOR?

- b. Subsection (7) allows the exclusion of a district from "any provisions of article x, section 20 that affect district revenues, debt or spending." Which of the following provisions of TABOR "affect district revenues, debt or spending":
 - i. The provision of subsection (1) of TABOR that states: "Other limits on district revenue, spending, and debt may be weakened only by future voter approval"?
 - ii. The provisions of subsection (3) of TABOR that require specified language for ballot questions that increase taxes or debt?
 - iii. The provisions of subsection (4) of TABOR that require "voter approval in advance" for any:
 - A. New tax?
 - B. Tax rate increase?
 - C. Mill levy above that for the prior year?
 - D. Extension of an expiring tax?
 - E. Tax policy change directly causing a net tax revenue gain to any district?
 - F. Creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years?
 - iv. The emergency reserve requirements specified in subsection (5) of TABOR?
 - v. The provisions regarding emergency taxes in subsection (6) of TABOR?
 - vi. The provisions of subsection (7) of TABOR that:
 - A. Limit local district fiscal year spending?
 - B. Limit local district property tax revenue?
 - C. Specify the manner in which local district fiscal year spending and

property tax revenue are calculated?

- vii. The provisions of subsection (8) of TABOR that:
 - A. Prohibit new or increased transfer taxes on real property?
 - B. Prohibit the imposition of local district income tax?
 - C. Prohibit any presumption in favor of any pending property tax valuation?
 - D. Require past or future sales by a lender or government to be considered as comparable market sales and the sales prices to be kept as public records?
 - E. Require actual value for residential real property to be determined solely by the market approach to appraisal?
- c. When may a local district propose a local rainy day fund? At a general election only? At a general or November odd-year election? At a special election?
- d. How do the local rainy day fund provisions of subsection (7) relate to the other provisions of the proposed initiative?