

STATE OF COLORADO

Colorado General Assembly

Mike Mauer, 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



Dan L. Cartin, 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: ols.ga@state.co.us

MEMORANDUM

April 1, 2014

TO: Jerry Sonnenberg and Frank McNulty

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #121, concerning distribution of oil and gas revenue

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 purpose of the proposed amendment to the Colorado Revised Statutes appears to be to prohibit a local government that in any way affects oil and gas production or development from receiving public revenue related to oil and gas production or development and to redistribute that revenue to other local governments.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. To show language being added to the Colorado Revised Statutes, it is standard drafting practice to use SMALL CAPITAL LETTERS.
2. The amending clause for the proposed initiative should read: "In Colorado Revised Statutes, **add** article 116 to title 24 as follows:".
3. The new article title should be bold and initial-capped, excluding words like "and" and "of", not all capital letters.
4. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section and subsection, including amending clauses and section headings.
5. It is standard drafting practice to use lowercase type in a headnote, and it is standard drafting practice to use a capital letter only in the first word of a headnote.
6. It is standard drafting practice to only capitalize proper nouns. For example, in the proposed initiative "Permanent" and "Article" should be not be capitalized.
7. It is standard drafting practice to cite statutory provisions by listing the word "section", then the statutory number followed by "C.R.S.". For example, in section 24-116-102 (2) of the proposed initiative, the list of statutory citations should read: "sections 22-43.7-104, 39-29-109, and 39-29-110, C.R.S.,".

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Is section 24-116-101 intended to have any legal affect?
2. Section 24-116-101 (1) only refers to a local government receiving "tax revenues," which is narrower than the types of distributions that a local

government is prohibited from receiving under section 24-116-102. If a court uses the purpose in section 24-116-101 to interpret an ambiguity in the rest of the article, could this limit a substantive portion of the article?

3. The following questions and comments relate to section 24-116-102 (1):
 - a. Does a special district have the authority to suspend or ban oil and gas development?
 - b. What is an example of an "other district"?
 - c. Does the phrase "having a suspension, moratorium, or ban on," modify "oil and gas development"?
 - d. As written, it appears that the following local governments are ineligible to receive oil and gas funds administered by the state: (1) A local government that suspends oil and gas development, (2) a local government that creates a moratorium on oil and gas development, (3) a local government that bans oil and gas development, and (4) a local government that effectively prohibits the production or permitting of oil and gas development. With respect to this list:
 - i. Is this accurate?
 - ii. Is a suspension different from a moratorium?
 - iii. The last criterion reads "the production . . . of oil and gas development." Does this mean "the production of oil and gas" or "the production of the development"? Is development different from production?
 - iv. Would a local government that limits current production but that does not affect new oil and gas development be ineligible for state oil and gas revenue?
 - e. What are examples of a local government effectively prohibiting the production or permitting of oil and gas development? Does it include how a local government administers an ordinance or resolution, such as a delay in permitting? If so, how will state officials who administer state oil and gas revenues know that the local government has effectively prohibited production or permitting?

- f. Currently, the measure reads that a limitation on any type of production (such as fracking, for example) is a limitation on production in general. Is this accurate?
- g. If the consequence of failing to meet a local government requirement is to deny a permit or the ability to produce oil and gas, can a local government enact any new requirements? Could a city, for example, enact a new environmental or safety requirement without losing its eligibility to receive oil and gas funds from the state? At what point do such regulations effectively prohibit the production or permitting of oil and gas development? Is it limiting any production or all production?
- h. Does the measure apply both to restrictions enacted by a local government (through an ordinance) and through a vote of the people?
- i. Does subsection (1) apply to any ordinance or resolution that was passed prior to July 1, 2015, that is in effect on that date?
- j. If the activities are prohibited, how does the state derive any revenue to administer?¹ Do you mean that the local government may not receive any revenue related to oil and gas development and production that occurs elsewhere in the state?
- k. How does this subsection (1) apply to a local government that is partially or wholly located within the boundaries of another local government that bans or suspends oil and gas development or production? For example, if a county enacted a ban, would a school district located within the county still be eligible to receive oil and gas funds administered by the state?
- l. If a local government that received a loan under section 39-29-110 (1) (b), C.R.S., then enacts a ban on oil and gas development, will this ban impact the local government's obligation to repay the loan?
- m. Standard drafting practice is to use the word "fund" to refer to an account into which "moneys" or "revenues" are placed, and the word "fund" or "funds" is not typically used to refer to the moneys or revenues themselves.

¹ The phrase "prohibited activities" also appears in section 24-116-102 (2).

- n. Does this measure apply only to revenues that are directly "derived"? For example, does it include additional income tax revenue that the state receives from an operator?
4. The following questions and comments relate to section 24-116-102 (2):
- a. Is "this restriction" the restriction set forth in subsection (1) of the section? Does subsection (2) describe the types of revenue that the state administers that certain local governments are ineligible to receive?
 - b. The phrase "include, but are not limited to" is used in subsection (2), while subsection (1) of the same section uses "including". Does the inclusion of the additional language in subsection (2) change the meaning of the similar term in subsection (1)? If not, and given that the term "include" only introduces a non-exhaustive list, you might consider removing the additional language here.
 - c. Does a school district have the authority to ban or suspend oil and gas development? If not, why include section 22-43.7-104, C.R.S., and revenues from state lands, which generally only benefit school districts and charter schools?
 - d. Would subsection (2) prohibit a municipality from receiving a grant or loan from the water supply reserve fund under section 39-29-109 (2) (c), C.R.S.?
 - e. Are "federal leasing revenues" those distributed under article 63 of title 34, C.R.S.? Is there a reason that these revenues are described generally, while the other distributions are identified by the statutory citation?
 - f. If the prohibition on receiving oil and gas revenue applies to a local government that allows current oil and gas production to continue while banning new development, could the prohibition on the local government receiving oil and gas funds cause the state to violate 30 U.S.C. sec. 191, which requires the state to give priority to those subdivisions of the State socially or economically impacted by development of minerals when distributing federal lease and bonus money?
 - g. Are there any other state administered funds?
 - h. What is a "benefit" derived from oil and gas production or development? Would it prohibit the department of natural resources

from undertaking a project that is funded from the severance tax operational fund within a county that has banned oil and gas production?

- i. Should the referenced sections under which a local government may be ineligible to receive moneys be amended to include the prohibition directly, or at least have a cross-reference to section 24-116-102 (2)? Is it your intention that the General Assembly would enact these conforming changes if the initiative is approved by the voters?

5. The following questions and comments apply to section 24-116-102 (3):

- a. Would eligibility for state revenue begin on the day that the local government passed an ordinance or resolution to lift a ban or the date that the activity is no longer banned?
 - b. Would the phrase "otherwise allows the production or permitting of oil and gas development to resume" include the partial elimination of a ban or suspension?
 - c. How is a local government's share of tax revenue restored? For example, if a local government lifts its ban in the middle of the fiscal year, would it be eligible to receive all of the direct distributions under section 39-29-110 (1) (c), C.R.S., that are required for the fiscal year, including those payments that had been previously redistributed to other local governments? Does restoration only apply prospectively?
 - d. How does restoring a share of revenue or benefits apply to section 39-29-110 (1) (b), C.R.S., under which the local government may receive a grant or loan at the discretion of the executive director of the department of local government?
6. Are there any current examples of an offset to circumvent the restrictions that are contemplated under section 24-116-102 (4)? If the General Assembly enacts a future offset, wouldn't that supersede this section?
7. How would an appropriation (or allocation) of money to an offending local government be determined to be offsetting or be circumventing the restrictions in this measure? Who would make that determination?
8. With respect to section 24-116-102 (5), are special districts currently eligible for any of the non-discretionary distributions? Stated differently, which distributions would potentially need to "be reduced proportionally?"

9. A special district is formed for one of the purposes listed in the "Special District Act." How would a state official know that the purpose of forming a special district is not legitimate and that it was really formed to circumvent the funding restrictions?
10. What are examples of oil and gas revenue that is currently comingled with other revenue sources?
11. The last sentence in section 24-116-102 (6) requires the funds to "be distributed to all other eligible local governments." For distributions that are made pursuant to a formula, should the revenue be proportionally redistributed to other local governments? How would this apply to distributions that are discretionary?
12. As the initiative is statutory, what does it mean that the article is self-executing?