

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

April 5, 2006

TO: Liane Morrison and Bruce Broderius

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measures 2005-2006 #101, concerning Tax on Oil and Gas an Other Revenue for Public School Buildings and Programs

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.

This proposed initiative was submitted along with proposed initiative measures 2005-2006 #97, #98, #99, and #100. The language of this proposed initiative is similar and, in some cases, identical to language from these other proposed initiatives. As such, many of the comments or questions that are raised in this memorandum are identical to questions or comments that are also raised in the memoranda for these other proposed initiatives. Unless proponents indicate otherwise, it will be presumed that the proponents will have the same answers for identical or very similar questions. The number of the question or comment that also appears in other memoranda will be highlighted (for example, "2") and the location of its first occurrence will be identified after the question or comment (for example, "{#97-2.a}"). If the only change to the question or comment was to the name of the fund referenced, such change is noted (for example, "#97-2.a - fund name change).

Purposes

The major purposes of the proposed initiative, which amends article IX of the Colorado constitution by adding a new section, appear to be:

1. To create a tax of one percent on the proceeds attributable to the sale of oil and natural gas from large wells located in the state that will be imposed on producers who receive more than three hundred thousand dollars in such proceeds;
2. To require the revenue from the proposed oil and natural gas tax to be deposited into the permanent school fund;
3. To exempt the revenue from the proposed oil and natural gas tax from state and local spending limits;
4. To modify the current distribution of the moneys that the state receives from the federal government pursuant to the "Mineral Lands Leasing Act" of February 25, 1920, as amended, by requiring a portion of the moneys to be deposited into the permanent school fund;
5. To require portion of the revenues in the permanent school fund to be used for public school renovations or construction, prioritizing certain uses; and
6. To require interest generated from the permanent school fund be used to fund preschool through twelfth grade educational programs.

Comments and Questions

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

Technical questions and comments:

The following comments are technical changes that we would recommend you make in order to conform the proposed initiative to standard drafting practices.

1. Remove the draft stamp superimposed on the proposed initiative. {#99-2}
2. While it is acceptable to break (1) (a), (2) (a), and (2) (b), into subparagraphs, the introductory paragraph should likewise be given a subparagraph number because the paragraphs are not being used as introductory paragraphs.
3. In the first sentence of paragraph (b) of subsection (1) of the proposed initiative, commas should be added after the years; for example, "in fiscal year 2008-09,".
4. Is there any reason that all of the years addressed in paragraph (b) of subsection (1) of the proposed initiative were lumped into a single sentence? It might read better if it was broken

into separate sentences.

5. "Fiscal year" should be "state fiscal year".
6. In the second sentence of paragraph (b) of subsection (1) of the proposed initiative, there should be a semicolon after "January 1, 2006".
7. "Article IX Section 17" is properly written as "section 17 of article IX". {#99-11}
8. In the definitions, it is unnecessary to cite the section number, so it may read "As used in this section, unless"
9. The definitions should be in alphabetical order. {#97-12}

Substantive comments and questions:

1. The following comments and questions relate to the one percent tax on the proceeds from the sale of oil and natural gas set forth in paragraph (a) of subsection (1) of section 18 of the proposed initiative:
 - a. Is this a new tax? Is it possible that the language could be read as not creating a new tax? (For the sake of this memorandum, we assume that it is a new tax or tax rate increase and shall refer to it as "the proposed oil and natural gas tax".)
 - b. When will the proposed oil and natural gas tax begin? {#97-1.b}
 - c. Section 39-29-105, Colorado Revised Statutes, levies a severance tax on oil and gas, which includes crude oil, natural gas, carbon dioxide, and oil and gas, and section 39-29-107, Colorado Revised Statutes, levies a severance tax on oil shale. Which of these are included in oil and natural gas? {#97-1.c}
 - d. Aside from the natural resources being taxed, is there any difference between the calculation of the proposed oil and natural gas tax and the severance tax levied pursuant to section 39-29-105, Colorado Revised Statutes? If so, what is the difference? {#97-1.d}
 - e. What are "proceeds attributable to the sale of oil and natural gas"?
 - f. Who will administer the proposed oil and natural gas tax? Will it be administered in the same fashion as the current oil and gas severance tax? The proponents might consider adding language that clarifies that this is a state tax to be administered by the department of revenue as opposed to a local tax that is to be collected by a school district, or vice versa. {#97-1.e}
 - g. The proposed oil and natural gas tax is limited as to the type of well it applies to and the producers who are required to pay it, correct? {#97-1.f}

- h.** Why is "producer" defined in this proposed initiative and not in others that were submitted simultaneous with the proposed initiative? Does the definition change the common meaning of the term? If so, how? {#99-2.h}
- i. It appears that proceeds from all wells, both large wells and wells that do not qualify as "large wells" will be added to determine whether the a producer has received less than three hundred thousand dollars. Is this your intention?
- j. What does "annually" mean in the context of the tax exemption? Is it based on the proceeds on the year that the tax is collected or a prior year? Is it based on a tax year fiscal year, or calendar year? Is it a single year calculation or an average? How will the person administering this tax determine whether the producer has annually received more than thousand dollars from such proceeds?
- k. The following questions relate to the definition of the term "proceeds":

 - i.** What does the phrase "amount realized" mean? Is it equal to gross lease revenues? {#97-1.i.i}
 - ii. Are deductions for transportation, manufacturing, and processing deducted from the "net amount realized"? If so, "net amount realized" appears to be a misnomer. ("Net" in this context appears to mean "free from all charges or deductions.")
 - iii.** Since not every person who receives proceeds from the sale of oil and natural gas will not necessarily be a taxpayer, is it more accurate to use the term "producer" instead of "taxpayer" in the definition? {#97-1.i.ii}
 - iv. Are there any limitations on the general assembly in addressing the situation where the parties to the sale are related parties?
 - v.** Are the transportation, manufacturing, and processing costs only related to the oil and natural gas extracted in the state of Colorado? {#97-1.i.v}
 - vi.** As it used in the context of the current severance tax on oil and gas, the term "transportation" is defined in section 39-29-102 (7), Colorado Revised Statutes. Does transportation have the same meaning in the proposed initiative? {#97-1.i.vi}
- l. Oil and natural gas wells that produce less than the amount needed to qualify as a large well are exempt from the proposed oil and natural gas tax, correct? As such, an oil well that averages ten barrels per day will be used to determine whether a taxpayer has three hundred thousand dollars of proceeds, but the proceeds related to this well will be exempt. Is this correct?
- m.** With respect to the definition of the term "large wells", are the daily thresholds based

on average production for all producing days? If not, what are they based on? In either case, you may want to clarify your intention. {#97-1.k}

- n. The following questions relate to subparagraph (II):
 - i. "Revenues received through the operation of this paragraph (a)" would seem to be limited to the revenue from the proposed oil and natural gas tax. It would not seem to include interest or income earned from of such revenue. Is this your intention?
 - ii. What state and local spending limits are being referring to in this subparagraph?
 - iii. Section 20 of article X of the Colorado constitution (TABOR) establishes a limit on fiscal year spending. How will the revenue from the tax be exempt from the TABOR spending limit? Is it excluded from the definition of "fiscal year spending" as such term is used in TABOR? Is it a voter approved revenue change or offset under TABOR? Is it some other type of an exception to TABOR? (This may matter because the way it is exempt from the TABOR fiscal year spending limit may affect whether the revenues from the proposed oil and natural gas are to be used to determine the amount of revenues in excess of the TABOR fiscal year spending limit that the state is permitted to keep for state fiscal years commencing on and after July 1, 2010.)
- o.** How will the passage of a concurrent or subsequent tax on oil and natural gas affect the proposed oil and natural gas tax? {#98-9.e}

- 2. The following questions relate to paragraph (b) of subsection (1) of section 18 of the proposed initiative:
 - a. What are "state public school fund moneys received from the federal government pursuant to the 'Mineral Lands Leasing Act' of February 25, 1920, as amended"? Are they moneys from the mineral lease fund, created in section 34-63-102 (1) (a), Colorado Revised Statutes that are then transferred to the state public school fund pursuant to section 34-63-102 (2) (a) and (3) (b) (I), Colorado Revised Statutes?
 - b. Is the permanent school fund the one referenced in section 14 of the enabling act of the state of Colorado? Is the permanent school fund the same as the public school fund of the state, which is created in section 3 of article IX of the Colorado constitution? Was it your intention to modify the composition of the public school fund, which is currently set forth in section 5 of article IX of the Colorado constitution?
 - c. Does this paragraph (b) require moneys to be transferred from the state public school fund to the permanent school fund?

- d. Does "such moneys" refer to the "moneys received by the state public school fund from the federal government pursuant to the 'Mineral Lands Leasing Act' of February 25, 1920, as amended" (hereafter referred to as "federal mineral moneys")?
 - e. May the general assembly modify the statutory distribution at any time?
 - f. With respect to the exception that "at least forty-eight percent shall be deposited into the state public school fund":
 - i. This exception does not modify the requirement that a certain percentage of moneys in the state public school fund shall be transferred to the permanent school fund, correct?
 - ii. The current statutory language does not require at least forty-eight percent of the mineral leasing moneys to be deposited in the state public school fund. Based on the formula currently in place, it seems mathematically possible that less than forty-eight percent could be deposited into the state public school fund. In this case, would the exception language override the current statutory distribution method?
 - iii. Would the forty-eight percent exception, preclude the state from adopting a cascading distribution formula, like the one that currently exists?
 - g. The requirements of the proposed initiative are contrary to the requirements set forth section 34-63-102, Colorado Revised Statutes, for the distribution of the federal mineral moneys. Is it your intention that the general assembly amend section 34-63-102, Colorado Revised Statutes, to conform with the constitutional amendment?
3. The following questions relate to paragraph (a) of subsection (2) of the section 18 of the proposed initiative:
- a. Because you specify how interest from the permanent school fund is to be used in paragraph (b) of subsection (2), can it be inferred that paragraph (a) requires principal from the permanent school fund to be used for the specified purposes?
 - b. Assuming that the permanent school fund is the public school fund created in section 3 of article IX of the Colorado constitution, is it your intention to modify the current constitutional requirement that the principal in the public school fund remain inviolate? Have the proponents considered the long-term fiscal impact of the proposed measure on the permanent school fund and the ability of the state to meet future obligations from the fund?
 - c. As written, it is possible that principal in the permanent school fund from sources other than the proposed constitutional amendment may be needed to meet the expenditure requirements of this paragraph (a). (For example, the augmentation

- deposited into the permanent school fund less is less than one hundred twenty million dollars and is declining in consecutive years). Was this your intention?
- d. What happens if the amount deposited into the permanent school fund by operation of the proposed initiative exceeds the maximum expenditure amount? Would other revenue in the fund be required to be used for the purposes set forth in paragraph (a)?
- e. It would seem that the state receives the money, rather than the public school improvement fund. Would "deposited" or "credited" be more appropriate than "received" in the first sentence of subsection (1) of this proposed section? {#99-3.a}
- f. What does "adjusted annually for inflation" mean? How will "inflation" be defined? Inflation for what period? What corresponding calendar year or fiscal year will be adjusted by the value of inflation? {#98-4.e}
- g. What does "dedicated" mean in this context?
- h. This proposed section requires a certain amount of moneys to be "dedicated annually". Do you intend this to be done once a fiscal year? If so, you should clarify this language? If not, then you may want to specify what calendar year relates to a given state fiscal year for determining how much must be transferred.
- i. In light of the requirement that the expenditures from the permanent school fund be based, in part, on the amount received by the permanent school fund for the prior year, no moneys will be expended for the 2006-07 fiscal year. Is this your intention? What will happen to these moneys?
- j. What does "preschool" mean? How is it different from using the term "kindergarten"? {#98-4.f}
- k. What is "adequate technology"? Who will decide what is adequate? {#99-3.i}
- l. What "programs" will be administered? {#99-3.j}
- m. Who is responsible for determining which schools and districts should receive moneys from the permanent school fund? {#97-3.f}
- n. As used in the proposed initiative, what does the term "priority" mean? {#97-3.g}
- o. There are five priorities established related to the moneys in the permanent school fund. These priorities can be divided into two categories: Those that relate to schools and districts (a rural priority and inability to address needs priority); and those that relate to the buildings themselves (a student health and safety priority, a code, law, and standard priority, and a forty-year-old buildings priority). How do the priorities rank within each category? How do the priorities rank between categories? (For example, what should be given priority: a rural school or an urban school that has a forty-three-year-old building?) {#97-3.h - fund name change}

- p.** Can money from the permanent school fund be used for schools and districts that do not fit within a priority? {#97-3.i - fund name change}
- q.** With respect to the inability to address needs priority, what are "school building needs"? Who decides whether there is sufficient revenue to address such needs? {#97-3.j}
- r.** What does it mean to use the moneys from the permanent school fund "to address immediate student health and safety needs in school buildings"? What are examples of using money for this priority? {#97-3.k - fund name change}
- s.** The following questions relate to the code, law, and standard priority: {#97-3.l}
- i.** What is a standard?
- ii.** What are federal, state, and local laws, codes, and standards that apply to school buildings?
- iii.** Are there currently school buildings that do not meet federal, state, and local laws, codes, and standards?
- iv.** How will a person know whether a school meets such codes, laws, and standards?
- t.** If the moneys from the permanent school fund are used to construct a building, who will own the building? Who is responsible for the maintenance of the building? {#97-3.m - fund name change}
- u.** How will the expenditures from the permanent school fund correspond with the school district capital construction assistance program established in article 43.7 of title 22, Colorado Revised Statutes, as well as the assistance provided from the capital construction expenditures reserve in the state public school fund that is established in section 22-54-117, Colorado Revised Statutes? {#97-3.n - fund name change}
- v.** Can the moneys in the permanent school fund be invested while they sit in the permanent school fund? What happens to any interest or income earned from the investment and deposit of such moneys? Currently, it would appear that the interest and income is not required to stay in the permanent school fund. {#97-3.o - fund name change}
- w.** Can moneys in the permanent school fund be transferred to another fund and used for another purpose? What language in the proposed initiative would prohibit this? {#97-3.p - fund name change}

- x. The following questions relate to the use of moneys in the permanent school fund for administrative costs:
 - i. What are administrative expenses? Would any costs related to the general assembly's report qualify as administrative expenses?
 - ii. Is the one percent limit an annual or fiscal year spending limit? Is it one percent limit over the life of the permanent school fund?
 - iii. Are the moneys used for administrative expenses part of the required expenditures set forth in this paragraph (a), or are they on top of such amounts?

- 4. The following questions relate to paragraph (b) of subsection (2) of section 18 of the proposed initiative:
 - a. Is it your intention to address all interest in the permanent school fund?
 - b. Assuming that the permanent school fund and the public school fund of the state are the same fund:
 - i. Are the uses for the permanent fund consistent with the prescribed uses in the public school fund of the state set forth in section 3 of article IX of the Colorado constitution? If not, is it your intention to amend the current requirements?
 - ii. The proposed initiative prescribes uses of the interest generated from the permanent school fund without limitation. Accordingly, it appears it will apply to all interest in such fund regardless of whether it is deposited in the fund as a result of the proposed initiative? Is this your intention? If it is not your intention, then you need to add language of limitation.
 - iii. Does the proposed initiative modify statutory restrictions on the use of interest in the permanent school fund that are set forth in article 41 of title 22, Colorado Revised Statutes?
 - iv. Section 3 of article IX of the Colorado constitution requires that interest in the public school fund of the state "shall be expended in the maintenance of the schools of the state". Are the interest uses set forth in the proposed initiative consistent with this constitutional mandate?
 - c. The list of allowable uses of the interest is not exhaustive, correct? {#98-6.f}
 - d. What are examples of programs to lower the drop out rate? {#98-6.g}
 - e. Is the state required to use the interest to fund educational programs or will the state

give the money to school districts so that it may use the moneys to fund educational programs? {#98-6.h}

- f.** Is funding to provide low income children the opportunity to attend voluntary quality preschool programs really an exception to the requirement the interest be allocated annually to fund preschool through twelfth grade? {#98-6.i}
- g.** How will the priority work? Does this mean that the interest must first be used for providing low income children the opportunity to attend voluntary quality preschool programs before it can be used for any other use? {#98-6.j}
- h. The following questions relate to subparagraph (I) of paragraph (b):
 - i. What does education spending include?
 - ii. What definition of "entailed" are you using? What are examples of "education funding entailed by any other requirement of law"?
 - iii. Will this limit the general assembly's ability to limit education spending that is required by other provisions of law?
 - iv. What does the exception mean?
 - v. Is the transfer to the state public school fund one of the allowable uses pursuant to paragraph (b)?
 - vi. Is the general assembly prohibited from transferring money to the state public school fund after the state fiscal year 2010-2011?

5. The following questions relate to the report that the general assembly is required to annually publish?

- a.** How is a "report" different from an "accounting" which was the term used in proposed initiatives #97 and #100? {#98-7.a}
- b.** Was it your intention to actually require the general assembly, as opposed to a staff agency, to prepare the report? Does the general assembly have the ability to complete this report? {#98-7.b}
- c.** How detailed will the report be? Will it only include the appropriations made by the general assembly? Will it include expenditures made by school districts? {#98-7.c}
- d. When will it be prepared? What period will it include? It should be noted that if the language is strictly construed, it would require all prior years revenues and expenditures to be included in the document?

6. As a constitutional change, the proposed tax could only be amended by an amendment to the

constitution. Is this your intention? {#100-8.d}