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MEMORANDUM

February 28, 2006

TO: Liane Morrison and Bruce Broderius

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #87, concerning Taxes and Bonding for Public Schools

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

1. To impose a tax of one percent on producer's proceeds from the sale of oil and natural gas extracted in the state to be used for specified educational purposes;
2. 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, and require such monies to be used for specified educational purposes;

3. To require the state to issue a limited amount of bonds and to use bonds for specified educational purposes; and
4. To modify the permissible uses for moneys in the public school fund, including interest therein.

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. The phrase "Section 22 of" in the enacting clause can be stricken.
2. A roman numeral should be used for the article number, so that it would read "Article X".
3. Subsection "(1)" can go directly after the headnote. (E.g., "**funding.** (1)")
4. While it is not incorrect to use the phrase "hereby find that:" in the declaration in subsection (1) of the proposed initiative, it is more common to use the phrase "hereby find and declare that:".
5. The state auditor's office is not usually preceded by "Colorado" in Colorado law.
6. The preferred method for separating a series in a list is to use a comma after the second to last item in the series. For example in subsection (1) of the proposed initiative, it would be "education, health, and lives".
7. The format for subsections (2), (4), (5), and (6) of the proposed initiative are similar insofar as there is an introductory portion followed by one or more paragraphs. These introductory paragraphs seem to stand alone and are not being used to introduce the subsequent paragraphs. Accordingly, it would be appropriate to make each of introductory paragraphs into their own paragraphs within the subsection. For example, introductory portion in subsection (2), which begins "Producers of oil ...", would become (2) (a), and then subsection (2) would have paragraphs (a) to (e). Similar changes should be made for subsections (4), (5), and (6).
8. It is preferred to use the singular form whenever possible. For example, the introductory portion to subsection (2) of the proposed initiative would read "A producer of oil and gas shall pay one percent of its proceeds...".
9. To the extent that you are defining the term "proceeds", standard drafting practice would be

to use the following language, "As used in this subsection (2), unless the context otherwise requires, 'proceeds' means ...".

10. Parenthetical remarks are not usually used in Colorado law. We suggest that you rewrite paragraph (c) of subsection (2) of the proposed initiative to avoid using them. For example, "Wells producing less than fifteen barrels per day shall be exempt...".
11. The correct form for the reference in paragraph (d) of subsection (2) of the proposed initiative to another section of the Colorado constitution would be "section 20 of article X of this constitution". A similar change should be made to the constitutional reference in paragraph (a) of subsection (6) of the proposed initiative.
12. While section 20 of article X of the Colorado constitution is commonly referred to as TABOR, this term does not appear in the Colorado constitution. We recommend that you do not use it in the proposed initiative.
13. It is unnecessary to capitalize "general assembly" in subsection (3) of the proposed initiative.
14. In the introductory portion to subsection (2) of the proposed initiative you refer to the "public school fund of Colorado", but in subsection (3) of the proposed initiative you refer to the "public school fund". If these are the same funds, then we recommend that you be consistent in your terminology.
15. "Moneys", as opposed to "monies", is more commonly used in Colorado law.
16. It is unnecessary to separate a dollar amount with the conjunction "and". For instance, in the introductory portion to subsection (4) of the proposed initiative the amount \$120,000,000 would be "one hundred twenty million dollars". A similar change should also be made in the introductory portion to subsection (5) of the proposed initiative.
17. In subsection (4) of the proposed initiative you refer to "this amendment". Standard drafting practice would be to instead refer to "this section".
18. In the introductory portion to subsection (5) of the proposed initiative, the phrase "of this section" should be added after the phrase "in subsection (4)".
19. In subsection (7) of the proposed initiative, the first letter of the first word of the subsection should be capitalized, so that it reads "(7) The general assembly".

Substantive comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires each initiative to have a single subject. What is the single subject of the proposed initiative?
2. The following comments and questions relate to the introductory portion to subsection (2) of the proposed initiative:

- a. The first sentence requires producers of oil and natural gas "to pay one percent of their proceeds from the sale of oil and natural gas extracted in the state of Colorado to help fund education". Which of the following summarizes your intention for this language: It creates a new tax; it requires an increase in the rate of an existing tax; it does not require a new tax or tax rate increase, but rather requires a portion of revenues that are currently received from the tax on the severance of oil and gas to be used to help fund education; or, it does something else? 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", but, other interpretations are possible. Accordingly, you might consider adding language to clarify your intention. (E.g., section 21 (2) of article X of the Colorado constitution reads as follows: "There are hereby imposed the following additional cigarette and tobacco taxes:").
 - b. Would the proposed oil and natural gas tax restrict the general assembly from modifying the existing tax on the severance of oil and gas?
 - c. By placing the proposed oil and natural gas tax in the Colorado constitution, it can only be modified by a constitutional amendment. Is this your intention?
 - d. Section 39-29-105, Colorado Revised Statutes, levies a severance tax on "oil and gas", while the proposed initiative refers to "oil and natural gas". Is "oil and natural gas" the same as "oil and gas"? Would it include oil shale, which is currently taxed in section 39-29-107, Colorado Revised Statutes?
 - e. 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?
 - f. What is the "public school fund of Colorado"? Is it a newly created fund? Is it the public school fund created in the Colorado constitution?
 - g. If the "public school fund of Colorado" is the public school fund created in the Colorado constitution, would the proposed initiative require the revenues from the proposed oil and natural gas tax to be accounted for separately from moneys that currently go in the fund?
3. The following questions relate to paragraph (a) of subsection (2) of the proposed initiative:
- a. What does the phrase "amount realized" mean?
 - b. What is a "producer"?
 - c. For purposes of the proposed oil and natural gas tax, does it matter whether the sale of oil and natural gas occurs at the wellhead or after transportation, manufacturing, and processing of the product?

- d. What happens if the oil or natural gas is sold to a related party for a price that is lower than the price at which the oil or natural gas could otherwise have been sold on the open market? Will the proceeds be based on the depressed price?
4. The following questions relate to paragraph (b) of subsection (2) of the proposed initiative:
 - a. How would another tax "offset this tax"?
 - b. How would the offset work if the concurrent or subsequent tax is earmarked for another use?
 - c. Regarding the offset provision, would a subsequent oil and natural gas tax of one and a half percent completely offset the tax created by the proposed initiative?
 - d. Does "concurrent with or subsequent to this amendment" mean concurrent with or subsequent to the effective date of the proposed initiative? If so, then you might consider clarifying this language. For example, it could be expressed as "concurrent with or subsequent to the effective date of this section". (See technical comment (17)).
 5. With respect to the wells that are exempted from the proposed oil and natural gas tax in paragraph (c) of subsection (2) of the proposed initiative, is it your intention that the thresholds be based on average production for all producing days? If so, you may want to clarify this intention.
 6. The following questions relate to paragraph (d) of subsection (2) of the proposed initiative:
 - a. What are the "corresponding spending limits"?
 - b. Would any local governments other than school districts receive moneys from the proposed oil and natural gas tax?
 - c. How, if at all, would the moneys from proposed oil and natural gas tax be counted against a local government's fiscal year spending limit?
 - d. Referendum C, approved by the voters of the state at the November 2005 statewide election, specifies that the calculation of future caps on retained revenue after the 2009-10 fiscal year is based on the highest amount of revenue attained during the previous five years. Will this measure increase the highest amount of revenue during the five-year period?
 7. The following questions relate to subsection (3) of the proposed initiative:
 - a. Does "currently" mean as of the date of the 2006 general election? The term may have different meaning ten years from now than it does on the date of the 2006 general election. To avoid ambiguity, you may want to pick a specific date. (E.g.,

"that were required as of January 1, 200_, shall be deposited into...").

- b. Does "required" mean "required by law"?
 - c. Is it your intention that only the state share of the moneys received from the federal government pursuant to the "Mineral Lands Leasing Act" (hereafter referred to as "federal mineral moneys") be deposited into the public school fund?
 - d. The following questions relate to the interaction of the first clause of the first sentence, which requires federal mineral moneys to be deposited into the public school fund, and the exception to this requirement:
 - i. In the absence of action by the general assembly, would all of the federal mineral moneys be deposited into the public school fund?
 - ii. Is it your intention that the general assembly be authorized to deposit up to forty-eight percent of federal mineral moneys in a fund other than public school fund?
 - iii. If the answer to the preceding question was yes, it might be beneficial to expressly state that the general assembly has authority to change the distribution from the public school fund, instead of implying it.
 - e. As used in the second sentence of subsection (3), which of the following describes the phrase "monies from this source": Federal mineral moneys that are currently required to be deposited into the state public school fund, any moneys in the public school fund, or something else?
 - f. Does the five year phase out affect the requirement that federal mineral moneys be deposited in the public school fund?
 - g. When will the five years begin?
 - h. As the state makes appropriations for public school finance on a fiscal year basis, what will be the last state fiscal year in which the general assembly is permitted to use "monies from this source" to fund the school finance act?
 - i. To avoid confusion related to when the five year phase out ends, would it be more clear to simply pick a date after which the general assembly is no longer permitted to use the "monies from this source" to fund the school finance act?
 - j. Are there any limitations on how the general assembly implements the phase out? For example, could the general assembly reduce the appropriation to the general fund by one dollar for each of the first four years and then eliminate it in the final year?
8. The following questions and comments relate to the introductory portion to subsection (4)

of the proposed initiative:

- a. Does the "One hundred and twenty million dollars per year collected pursuant to this amendment" include the revenues from the proposed oil and natural gas tax? Does it include federal mineral moneys?
- b. Does the term "public school buildings" include public higher education buildings? Would anything prohibit the general assembly from using moneys for capital construction related to public higher education?
- c. What is "adequate technology"?
- d. Is the one hundred twenty million dollars that is to be used each year for the uses set forth in subsection (4) going to be appropriated from the public school fund created in section 3 of article IX of the Colorado constitution? If so, is it your intention to modify the requirement set forth in section 3 of article IX of the Colorado constitution that the public school fund remain inviolate and intact?
- e. By connecting the proposed uses by the conjunction "and", it appears that the state will be required to use the moneys for each of the purposes. Is this your intention? (In contrast, the uses for interest in subsection (6) of the proposed initiative are connected by the conjunction "or".)
- f. It appears that anything above one hundred twenty million dollars would be required to remain in the public school fund pursuant to section 3 of article IX of the Colorado constitution. Is this your intention?
- g. What is the "critical needs fund"?
- h. Are the "bonds for school capital construction" limited to those bonds that are required pursuant to subsection (5) of the proposed initiative? If so, you may want to specify this fact.
- i. Because the requirement to deposit moneys in the critical needs fund is only triggered if there is less than one hundred twenty million dollars, it does not appear that the state would be required to deposit any moneys in the critical needs fund if the amount of revenue that the state collects from the proposed oil and natural gas tax is greater than or equal to one hundred twenty million dollars. Is this your intention?
- j. In certain circumstances, it appears that the state will be required to deposit moneys in the critical needs fund irrespective of the amount of bonds that are sold. It also appears that the state will be required to continue to make this deposit even after the state has issued and repaid the maximum amount of bonds that it is permitted to issue pursuant to subsection (5) of the proposed initiative. What will the moneys in the critical needs fund be used for at that point?

- k. There appears to be a potential conflict regarding where the moneys collected from the proposed oil and natural gas tax will be deposited. The introductory portion to subsection (2) of the proposed initiative requires the moneys to be deposited into the public school fund of Colorado. The introductory portion to subsection (4) requires some of the moneys to be deposited into the critical needs funds. How will these two requirements work together?
 - l. How will the money be allocated from the proposed oil and natural gas tax for school capital construction projects? How does this allocation relate to the existing process used by the capital development committee to prioritize capital construction projects?
9. The following comments and questions relate to paragraph (a) of subsection (4) of the proposed initiative:
- a. By "measures", do you mean laws?
 - b. The accountability and public disclosure of spending on the state's school buildings does not appear to be limited to moneys that are received from the proposed oil and natural gas tax. Is this your intention?
 - c. It does not appear that the state will be permitted to use any revenues from the proposed oil and natural gas tax or federal mineral moneys for the accountability and disclosure measures. Is this your intention?
10. The following questions and comments relate to the introductory portion to subsection (5) of the proposed initiative:
- a. There does not appear to be a deadline for selling the bonds. Is it your intention that the bonds be sold by a certain date?
 - b. Could the bonds be sold in multiple issues? Could the bonds be sold in more than one year?
 - c. Who will be responsible for issuing the bonds on behalf of the state?
 - d. Is any further legislation required before the state could issue bonds? If so, you might want to expressly authorize the general assembly to enact any laws necessary for the state to sell the bonds.
11. The following questions and comments relate to the introductory portion to subsection (6) of the proposed initiative:
- a. The required uses for interest from the public school fund set forth in subsection (6) appears to directly conflict with the use permitted in section 3 of article IX of the Colorado constitution. Is it your intention that the new required uses supersede the existing constitutional provision?

- b. Must the amount of interest be used annually?
 - c. Is it your intention that after the expiration of the five year phase out, no interest from the public school fund shall be used in the school finance act?
 - d. The issues related to the phase out in subsection (6) are similar to the phase out in subsection (3) of the proposed initiative. Accordingly, substantive questions (7) (f) through (7) (j) would likewise apply to subsection (6).
 - e. Is the list of programs exclusive or could interest be used for other education-related programs?
12. The following comments and questions relate to subsection (7) of the proposed initiative:
- a. What is "revenue generated under this section"? Is it revenue from the proposed oil and natural gas tax, interest, both, or something else entirely?
 - b. Subsection (7) allows the general assembly to use revenue generated for "any education related purpose". What does "any education related purpose" include?
 - c. Does subsection (7) create an exception to the mandatory uses set forth in subsections (4) and (6) of the proposed initiative? In other words, upon a declaration of a state fiscal emergency, is the general assembly no longer bound to use any generated revenues as otherwise required?
 - d. It appears that the declaration of a state fiscal emergency would trump the requirement that certain moneys be transferred to the critical needs fund, which could affect the state's ability to repay bonds it has issued. Is this your intention?
 - e. Are there any criteria that constitute a state fiscal emergency or is it solely up to the discretion of the general assembly and the governor?
 - f. Joint resolutions do not generally need to be presented to the governor. Is it your intention to create a new type of joint resolution?
 - g. May the revenue only be used during the fiscal year in which a state fiscal emergency is declared or may it also be used in subsequent fiscal years?
 - h. While a declaration of a state fiscal emergency only applies to a single fiscal year, is there an limitation on the number of declarations that may be adopted and approved?