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MEMORANDUM

April 5, 2006

TO: Liane Morrison and Bruce Broderius

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #99, concerning Tax on Oil and Gas and 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, #100, and #101. 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 creates a new article 51.5 in title 22, Colorado Revised Statutes, appear to be:

1. To create a tax of one percent on the proceeds from 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 public school improvement 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 public school improvement fund;
5. To require a portion of the revenues in the public school improvement fund to be transferred to the capital construction expenditures reserve in the state public school fund used for specified purposes related to preschool through twelfth grade public education, prioritizing certain uses, and the remaining revenues to be transferred to the public school fund; and
6. To require interest generated from the public school fund be used annually 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. There should be spaces before and after the hyphens in the headnotes. {#97-1}
2. Remove the draft stamp superimposed on the proposed initiative.
3. Proposed section 22-51.5-101 and reenacted section 22-41-106, should be renumbered so there are two subsections, instead of two paragraphs.
4. In light of the fact that you are creating a new article with multiple sections, you might

consider creating a separate section for definitions, which could include the definitions contained in the proposed section 22-51.5-102, as well as any additional definitions that you determine are necessary.

5. The following rules apply to referencing the Colorado Revised Statutes:
 - a. When referencing a section of the Colorado Revised Statutes, the number should be preceded by the word "section". Also, there should be spaces between the subsection numbers and paragraph letters. For example, reference to "39-29-102 (3) (a)" in proposed section 22-51.5-102, Colorado Revised Statutes, should read "section 39-29-102 (3) (a), C.R.S."
 - b. When referencing a section of the Colorado Revised Statutes that is in the same title, it is unnecessary to follow the number with the abbreviation "C.R.S." For example, the reference to "22-51.5-102" in the first paragraph of the proposed initiative should simply read "section 22-51-102".
6. "Notwithstanding" should be written as one word.
7. In proposed section 22-51.5-102 (2), Colorado Revised Statutes, paragraph (a) should be on a separate line from the introductory portion.
8. When describing the state's fiscal year it should be written as "state fiscal year" rather than just "fiscal year."
9. Commas need to be used in series before the conjunction. (For example, the phrase "federal state and local laws, codes and standards for school buildings" would read as "federal, state, and local laws, codes, and standards for school buildings".) {#97-5}
10. Instead of referring to "this amendment", proposed section 22-51.5-105, Colorado Revised Statutes, should refer to "this section".
11. Section 2 of the proposed initiative is written as a repeal and reenactment. It would be preferable to make this change by simply amending the section because amending the section shows the language that is being repealed or deleted. This would be done by using an amending clause that is similar to the one used in section 3 of the proposed initiative.
12. "Article IX Section 17" is properly written as "section 17 of article IX".
13. As it is currently written, the amending clause makes it appear that all of section 34-63-102, Colorado Revised Statutes, is being amended. An amending clause should only address the specific provisions that are being amended; for example "**SECTION 3.** 34-63-102 (2), (3) (a), and (3) (b) (I), Colorado Revised Statutes, are amended to read:".
14. When substituting the "public school improvement fund" for the "state public school fund" in section 3 of the proposed initiative, the only word that needs to be deleted is state. So that

the phrase would appear as follows "the ~~state~~ public school IMPROVEMENT fund".

Substantive comments and questions:

1. The following questions and comments relate to proposed section 22-51.5-101, Colorado Revised Statutes:
 - a. What does "moneys received from the federal government pursuant to the provisions of section 34-63-102, C.R.S.," mean? Does that section actually require the state to receive the moneys or are they received by operation of the federal "Mineral Lands Leasing Act" of February 25, 1920, as amended? Are you describing all the moneys that are addressed in section 34-63-102, Colorado Revised Statutes, or only those revenues that are required to be paid to the public school improvement fund by operation of the amendment that you made to section 34-63-102, Colorado Revised Statutes, in section 3 of the proposed initiative. If it is the latter, you may want to be more precise in your description, such as "moneys received from the federal government that are credited to the public school improvement fund pursuant to the provisions of section 34-63-102, C.R.S." Any clarifications should be made to both subsections of proposed section 22-51.5-101, Colorado Revised Statutes.
 - b. Do the moneys received from the federal government pursuant to the provisions of section 34-63-102, Colorado Revised Statutes, (hereafter referred to as "federal mineral moneys") include revenue from leases of federal lands for production of minerals other than oil and natural gas? If so, what other minerals?
 - c. Will moneys received from the federal mineral moneys be deposited first into the mineral leasing fund, as required pursuant to section 34-63-102 (1) (a), Colorado Revised Statutes, and then transferred to the public school improvement fund?
 - d. Is the general assembly required to appropriate additional moneys to the public school improvement fund? If not, would it be more appropriate to say "may be appropriated" as opposed to "shall be appropriated"?
 - e. With respect to the exception set forth in proposed section 22-51.5-101 (a), Colorado Revised Statutes, which should be renumbered as section 22-51.5-101 (2), Colorado Revised Statutes:
 - i. How do you intend the exception to work?
 - ii. Section 34-63-102 (2), Colorado Revised Statutes, as amended in section 3 of the proposed initiative, requires moneys to be deposited into the public school improvement fund. To the extent that this subsection is intended to be exception to the requirement that the moneys be deposited into the public school improvement fund, you will need to make a conforming amendment to that section.

- iii. In the alternative, if it is your intention to require the specified federal moneys to be deposited into the public school improvement fund and then transferred to the state public school fund, then is paragraph (a) an exception to the permissible distributions rather than an exception to the requirement that certain moneys be deposited into such fund? If so, the exception may be more appropriately placed in proposed section 22-51.5-103, Colorado Revised Statutes, which pertains to distribution.

2. The following comments and questions relate to proposed section 22-51.5-102, Colorado Revised Statutes:

- a. The term "tax" is not used in the first sentence of this section. Is this intended to be a tax? Who will the money be paid to?
- b. If this is a tax, is it 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".)
- c. Is the proposed tax only on gross income above three hundred thousand dollars?
- d. 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}
- e. Given that article 29 of title 39, Colorado Revised Statutes, relates to severance taxes, would it make more sense to locate this section in that article?
- 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?
- i. With respect to the requirement that producers receive more than three hundred thousand dollars in proceeds: {#97-1.h}
- i. Would proceeds from oil and natural gas wells that do not qualify as large wells be included in the total to determine whether there are more than three

hundred thousand dollars in proceeds? What is meant by the phrase "such proceeds"? Is it an attempt to ensure that only large wells are included in the calculation to determine whether the three hundred thousand dollars threshold is reached?

ii. In this context, what does "annually" mean? Is it based on the proceeds in the year that the proposed oil and natural gas 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 the proposed oil and natural gas tax determine whether the producer has annually received more than three hundred thousand dollars from such proceeds?

iii. A producer who receives three hundred thousand dollars or less is exempt from the proposed oil and natural gas tax, but a producer who receives three hundred thousand dollars and one cent is subject to the proposed oil and natural gas tax, correct?

iv. In determining whether the three hundred thousand dollars threshold is met, would you add proceeds from both oil and natural gas wells for a single producer? (For example, two hundred thousand dollars from oil and two hundred thousands dollars from natural gas).

j. 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? {#97-1.j}

k. 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}

l. The following questions and comments relate to the requirement that "[r]evenue from this tax shall be exempt from state and local spending limits.":

i. What state and local spending limits are being referred to?

ii. Section 20 of article X of the Colorado constitution (TABOR) establishes a limit on fiscal year spending. The revenue from the proposed oil and natural gas tax would seem to clearly qualify as state fiscal year spending under the definition of "fiscal year spending" set forth in section 20 (2) (e) of TABOR. How can a statute exempt revenue from the proposed oil and natural gas tax from the TABOR fiscal year spending limit, which is constitutionally required? {#97-8.d.i}

iii. Under referendum C, the amount of state revenues in excess of the limitation on state fiscal year spending that the state is permitted to keep in state fiscal years commencing on and after July 1, 2010, is based on the maximum annual state revenues that the state receives during the state fiscal years

2005-06 through 2009-10. These state revenues are defined to include all revenues that qualify as fiscal year spending. Accordingly, if the revenue from the proposed oil and natural gas tax meets the definition of "fiscal year spending" set forth in section 20 (2) (e) of TABOR, such revenue will still have the effect of increasing the amount of revenues that the state is permitted to keep in future fiscal years under referendum C, even if these revenues are not subject to the fiscal year spending limit. Is this your intention? {#97-8.d.ii}

m. 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}

3. The following questions and comments relate to proposed section 22-51.5-103, Colorado Revised Statutes:

a. 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?

b. 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}

c. This proposed section requires a certain amount of moneys to be "transferred 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.

d. Section 34-63-102 (3) (b) (I), Colorado Revised Statutes, as amended by the proposed initiative, requires the federal mineral moneys to be transferred to the public school improvement fund on or before the last day of December of each year. Assuming that the transfer does occur on December 31, how will this impact the requirement that the moneys be used annually?

e. In light of the requirement that the transfer to the capital construction expenditures reserve be based, in part, on the amount received into the public school improvement fund for the prior year, no moneys will be transferred to the capital construction expenditures reserve for the state fiscal year 2006-07 and instead the balance of the public school improvement fund will be transferred to the public school fund pursuant to subsection (3) of this section. Is this your intention?

f. Is the "capital construction expenditures reserve" the reserve in the state public school fund that is created in section 22-54-117 (1.5), Colorado Revised Statutes? If so, it would be standard drafting practice to cite the fund as follows: the "capital construction expenditures reserve created in section 22-54-117 (1.5)".

- g. The capital construction expenditures reserve created in section 22-54-117 (1.5), Colorado Revised Statutes, currently includes moneys appropriated to it by the general assembly for the state board of education to provide supplemental assistance to school districts in certain circumstances. The following questions relate to how section 22-54-117 (1.5), Colorado Revised Statutes, will work with the new requirements of the proposed initiative:
- i. Is it your intention that the state board of education be responsible for providing funding for preschool through twelfth grade public school as required by the proposed section? If not, you will need to amend the existing language of section 22-54-117 (1.5), Colorado Revised Statutes.
 - ii. The proposed uses of moneys in the capital construction expenditures reserve is different from the current permitted uses. Was it your intention to supplement or supplant the existing uses? In either case, it would be helpful to add an amendment to the language of section 22-54-117 (1.5), Colorado Revised Statutes, so that it is clear how your new proposed uses will interact with existing law.
- h.** What does "preschool" mean? How is it different from using the term "kindergarten"? {#98-4.f}
- i. What is "adequate technology"? Who will decide what is adequate?
- j. What "programs" will be administered?
- k.** Who is responsible for determining which schools and districts should receive moneys from the public school improvement fund? {#97-3.f - fund name change}
- l.** As used in the proposed initiative, what does the term "priority" mean? {#97-3.g}
- m.** There are five priorities established related to the moneys in the public school improvement 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}
- n.** Can money from the public school improvement fund be used for schools and districts that do not fit within a priority? {#97-3.i - fund name change}
- o.** 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}

- p.** What does it mean to use the moneys from the public school improvement "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}
- q.** 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?
- r.** If the moneys from the public school improvement 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}
- s.** How will the expenditures from the public school improvement 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}
- t.** Can the moneys in the public school improvement fund be invested while they sit in the public school improvement 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 public school improvement fund. {#97-3.o - fund name change}
- u.** Can moneys in the public school improvement 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}
- v.** The following questions relate to the use of moneys in the public school improvement fund for administrative expenses:
- i.** What are administrative expenses?
 - ii.** Would any costs related to the general assembly's report qualify as administrative expenses?

- iii. Are the moneys used for administrative expenses part of the amount that is required to be transferred to the capital construction expenditures reserve, or are they on top of such amount?
 - w. The following comments and questions relate to the requirement that moneys remaining in the public improvement fund be transferred to the public school fund?
 - i. What is the public school fund?
 - ii. As section 5 of article IX of the Colorado constitution specifies the revenues that comprise the public school fund of the state, can the composition of the public school fund be statutorily modified? {#98-6.d.i}
 - iii. Does subsection (3) of this proposed section create a timing requirement so that moneys can only be physically transferred after the moneys are transferred to the capital construction expenditures reserve in subsection (1) of this proposed section?
 - iv. Section 2 of the proposed initiative addresses the disposition of interest and income earned on the moneys that are transferred to the public school fund. What will happen to the principal that is transferred to the public school fund? Is it your intention that moneys that are transferred to the permanent school fund shall remain there inviolate and intact, as required by section 3 of article IX of the Colorado constitution?
- 4. The following questions relate to proposed section 22-51.5-104, Colorado Revises Statutes, which requires the general assembly to annually publish a report (hereafter referred to as "document"):
 - 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 document? Does the general assembly have the ability to complete this document? {97-5.a}
 - c. How detailed will the document be? Will it only include the appropriations made by the general assembly? Will it include expenditures made by school districts? {#98-7.c}
 - d. Does "all moneys received" mean all moneys deposited or credited to the public school improvement fund? Was it your intention to cover a particular state fiscal year in the annual report? If so, you should clarify this language.
 - e. What would satisfy the requirement that the general assembly "make public" the

report?

5. The following questions relate to proposed section 22-51.5-105, Colorado Revised Statutes:
 - a. What conforming amendments are needed? If anything needs to be done to implement the proposed initiative, then you might consider including such implementation statutes in the proposed initiative because unlike a constitutional change, a statute generally cannot bind the general assembly to enact future legislation.
 - b. As a statutory change, the proposed tax could be amended by subsequent legislation. For instance, it could be eliminated altogether or the allowable uses of the revenues could be modified. Is this your intention? {#97-8.c}
6. The following questions relate to section 2 of the proposed initiative:
 - a. The proposed initiative modifies the uses of the interest generated from the public school fund, regardless of whether the revenue is deposited in the fund as a result of your proposed initiative? Is this your intention?
 - b. 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? {#98-6.d.v.}
 - c. What does the requirement that interest "shall be used annually" mean? Who will be using it? If it is the general assembly, will the moneys be appropriated? Is it your intention that all interest and income earned of the moneys required to be spent in the year that it is earned?
 - d. The list of allowable uses of the interest is not exhaustive, correct? {#98-6.f}
 - e. What are examples of programs to lower the drop out rate? {#98-6.g}
 - f. Is the state required to use the interest for programs 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}
 - g. 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}
 - h. 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}

- i. The following questions relate to paragraph (a) of this section:
 - i. What is the purpose of this paragraph (a)?
 - ii. What is education spending?
 - iii. What does "entailed" mean in this context? What are examples of "education spending entailed by any other requirement of law"?
 - iv. What are some other requirements of law that require education spending?
 - v. The exception permits a portion of the interest to go to the state public school fund. What will this money be used for? Is this really an exception to allowable uses set forth in the first paragraph of this section?
 - vi. Could the general assembly authorize transfers in years after the state fiscal year 2010-11, so long as the authorization for the transfer occurred during the state fiscal year 2010-11?

7. The following questions relate to section 3 of the proposed initiative.
 - a. Is it your intention that two streams of revenue related to the federal lease moneys be transferred to the public school improvement fund: twenty-five percent of all moneys received from the federal "Mineral Lands Leasing Act" of February 25, 1920, and fifty percent of the overflow moneys from the county split that are in excess of ten million one hundred thousand dollars?

 - b. It is our understanding that the repayment of the state education fund required in section 34-63-102, Colorado Revised Statutes, has occurred. As such, the changes to section 34-63-102 (2) (b), Colorado Revised Statutes, are unnecessary.