

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

March 9, 2006

TO: John Gorman and Jack Real

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #92, concerning damages to the surface estate

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 initiative appears to be to require mineral estate extractors to pay surface estate owners the fair value of actual damages caused by the development, pursuit, or extraction of mineral resources from the mineral estate.

#### Comments and Questions

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

Technical comments:

1. Article V, section 1 (8) of the Colorado constitution requires each initiative to contain an enacting clause in the following format: "Be it Enacted by the People of the State of Colorado". Would the proponents consider following this requirement?
2. Would the proponents consider specifying which portion of the constitution is to be amended? For example, sections 1 through 4 of Article XVI relate to mining. Would the proposed initiative be a new article, a new section within an existing article, or an amendment to an existing section? An amending clause would normally be used following the enacting clause to clarify how the constitution is to be amended, for example:

"The constitution of the state of Colorado is amended BY THE ADDITION OF A NEW ARTICLE to read:"

or

"Article XVI of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:"

or

"Section 1 of Article XVI of the constitution of the state of Colorado is amended to read:"

3. It is standard drafting practice to use small capital letters to show the language being added to the Colorado constitution. For example:

A MINERAL ESTATE EXTRACTOR SHALL PAY THE FAIR VALUE OF ACTUAL DAMAGES CAUSED TO SURFACE ESTATE OWNERS FOR DAMAGE BROUGHT ABOUT IN THE DEVELOPMENT, PURSUIT AND/OR EXTRACTION OF A MINERAL ESTATE.

4. Standard drafting practice includes a heading—a short description of the substance of the proposed initiative—that, along with the citation, precedes the body of the amendment and is shown in bold type. For example, "**Section \_\_. Surface damages compensation. A MINERAL ESTATE . . .**". Would the proponents consider following this convention?
5. Standard drafting practice in Colorado uses a comma after the second-to-last item in a series of items. For instance, "development, pursuit, and/or extraction". Would the proponents consider following this convention?
6. Standard drafting practice in Colorado avoids use of the term "and/or". The disjunctive "or" includes the conjunctive "and" and should be used instead. Would the proponents consider following this convention?

Substantive comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed measures to have a single subject. What is the single subject of the proposed initiative?
2. The general assembly is currently considering House Bill 1185, "CONCERNING THE

PROVISION OF COMPENSATION TO A SURFACE OWNER FOR A DECREASE IN FAIR MARKET VALUE OF A SURFACE ESTATE REASONABLY EXPECTED TO RESULT FROM OIL AND GAS OPERATIONS, AND, IN CONNECTION THEREWITH, MODIFYING NOTIFICATION PROCEDURES FOR APPLICATIONS FOR SURFACE DEVELOPMENT." If the general assembly enacts House Bill 1185, what is your intent regarding any potential conflict between the proposed initiative and this bill?

3. Currently, the Colorado Oil and Gas Conservation Commission (COGCC) is charged with protecting surface land owners from unreasonable damage caused by oil and gas development and ensuring that surface landowners are consulted about the location of drill pads, roads, and other impacts. The COGCC is also authorized to deny a well permit for development that threatens human safety. The proposed initiative raises the following questions with regards to the COGCC:
  - a. Does this measure affect the role of the COGCC to address these issues? If not, would the proponents consider adding language to clarify the effect of this measure on the COGCC?
  - b. Would the COGCC be allowed to issue a permit to drill a well if a mineral extractor fails to pay for damages caused to the surface estate? If not, would the proponents consider adding language to clarify the role of the COGCC in enforcing this measure?
  - c. Does this measure impose any new responsibilities on the COGCC? If so, would the proponents consider identifying these duties?
4. The state's Mined Land Reclamation Board and the Office of Mined Land Reclamation regulate mining operations to ensure that they are conducted in an environmentally sound manner and that affected lands are available for beneficial use after mining is completed. Does this measure affect the existing responsibilities of these entities to protect surface lands from mining operations? Does this measure impose any new responsibilities on these entities? If not, would the proponents consider adding language to clarify the effect of this measure on these entities?
5. The proposed initiative requires a mineral estate extractor to pay for "damage brought about in the development, pursuit, and/or extraction of a mineral estate." These provisions raise the following questions:
  - a. What is meant by the term "mineral estate extractor"?
    - i. For comparison, Colorado statutes contain the following definitions of "mineral estate":
      - (1) For title insurance companies:

**10-11-123. Notification of severed mineral estates.** (1) For purposes of this section:

(a) "Mineral estate" means a mineral interest in real property.

(2) For applications for surface development:

**24-65.5-102. Definitions - legislative declaration.** As used in this article, unless the context otherwise requires:

(4) "Mineral estate" means a mineral interest in real property that is shown by the real estate records of the county in which the real property is situated and that is not owned as part of the full fee title to the real property.

ii. For comparison, Colorado statutes contain the following definitions of a developer of a mineral estate:

(1) For coal:

**34-20-102. Definitions.** As used in articles 20 to 25 of this title, unless the context otherwise requires:

(11) "Operator" means any owner, lessee, or other person who operates, controls, or supervises a mine or an independent contractor performing services or construction at such [coal] mine.

(2) For mineral other than coal, sand and gravel, or oil and gas:

**34-32-103. Definitions.** As used in this article, unless the context otherwise requires:

(10) "Operator" means any person, firm, partnership, association, or corporation, or any department, division, or agency of federal, state, county, or municipal government engaged in or controlling a mining operation.

(3) For sand and gravel ("construction materials"):

**34-32.5-103. Definitions.** As used in this article, unless the context otherwise requires:

(16) "Operator" means a person, firm, general or limited partnership, association, or corporation or any department, division, or agency of federal, state, county, or municipal government engaged in or controlling a mining operation.

(4) For oil and gas:

**34-60-103. Definitions.** As used in this article, unless the context otherwise requires:

(6.8) "Operator" means any person who exercises the right to

control the conduct of oil and gas operations.

- b. What is the relationship of the phrase "mineral estate" (as used in the term "mineral estate extractor") to these statutory definitions of "mineral estate"?
  - c. What is the relationship of the phrase "mineral estate extractor" to the statutory definitions of "operator"?
  - d. Are public entities liable for payment for damages caused by mineral extraction?
6. What is a "surface estate owner?" Would the proponents consider adding language to define "surface estate owner?"

- a. For comparison, Colorado statutes contain the following definitions of a "surface estate":

- i. For title insurance companies:

**10-11-123. Notification of severed mineral estates.** (1) For purposes of this section:

(c) "Surface estate" means an interest in real property that does not include the full mineral estate as shown by recorded documents that impart constructive notice in the office of the clerk and recorder of the county in which the real property is situated.

- ii. For applications for surface development:

**24-65.5-102. Definitions - legislative declaration.** As used in this article, unless the context otherwise requires:

(6) "Surface estate" means an interest in real property that is less than full fee title and that does not include mineral rights as shown by the real estate records of the county in which the real property is situated.

- b. For comparison, Colorado statutes contain the following definitions of a "surface owner":

- i. For title insurance companies:

**10-11-123. Notification of severed mineral estates.** (1) For purposes of this section:

(d) "Surface owner" means the owner of the surface estate and any purchaser with rights under a contract to purchase all of part of the surface estate.

- ii. For applications for surface development:

**24-65.5-102. Definitions - legislative declaration.** As used in this article, unless the context otherwise requires:

(7) "Surface owner" means the owner of the surface estate and any person with rights under a contract to purchase all or part of the surface estate.

- c. Are public entities eligible for payment for damages caused by mineral extraction?
7. Under applicable Colorado case law, the mineral estate is the dominant estate and the surface estate is the servient estate, yet the mineral and surface estate owners must have due regard for each other's rights and the mineral estate owner must accommodate the surface owner to the fullest extent possible consistent with the right to develop the mineral estate. Does the proposed initiative alter this balance of interests, and if so, how?
  8. The proposed initiative requires a mineral estate extractor to "pay the fair value of actual damages caused to surface estate owners . . ." This provision raises the following questions:
    - a. What does "fair value" mean? How does it relate to "fair market value"? Does fair value take into account only current uses of the surface, or does it consider potential future uses or the highest and best use of the surface? Is fair value based on the current market value of a parcel of land? What if a parcel of land is currently being used to grow hay but the owner has obtained approval to subdivide the land and sell it for residential housing? Would the mineral extractor owe compensation for damage caused to the lower-value agricultural land or the higher-value residential land? Would the proponents consider adding language to specify if "fair value" is based on the land's current market value or some other value or standard?
    - b. Damage from mineral development typically occurs to lands and not owners. Would the proponents consider adding language to clarify the types of damages addressed by this measure?
    - c. What if a mineral extractor and surface estate owner disagree on the "fair value" of damages? Does the surface owner or mineral extractor make the final determination? Would the proponents consider adding language to clarify how "fair value" is determined when the extractor and the surface landowner disagree?
    - d. Some mineral extraction may take years to complete. For example, a gas well or mine may take 20 or more years to deplete the resource. May a mineral extractor make one payment at the beginning of an operation based on an estimate of the probable damage? Would the extractor owe subsequent surface estate owners compensation for damage for on-going operations?
    - e. What if a surface owner refuses to accept a damage payment and seeks to permanently deny access to the mineral extractor? Would the mineral extractor be due any compensation from the surface owner? Would the proponents consider

adding language to clarify the rights of the surface estate owner to limit access by a mineral extractor? Also, would you consider adding language to clarify the right of access for a mineral extractor if the surface owner attempts to deny or greatly delay access to the mineral estate?

- f. Occasionally, a surface owner cannot be identified or contacted. For example, a surface owner may be deceased without heirs or the property may be in bankruptcy. How long must a mineral extractor attempt to make payment to a surface owner prior to gaining access to the mineral resources? Would the proponents consider adding language to address situations where there is not an identifiable surface owner to receive payments?
  - g. What constitutes "payment" under this proposal? Must mineral extractors provide monetary compensation or may they provide a service to the landowners, such as improving a road or bridge?
9. Are the damages caused to surface estate owners limited to only that area of the surface physically disturbed by the mineral development, or does the proposed initiative require compensation for an overall decrease in the fair value of an entire parcel of land, including areas not directly disturbed by the mineral development?