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MEMORANDUM

May 1, 2007

TO: Matt Samelson and Megan Ferland

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #22, concerning the imposition and distribution of severance tax on oil and gas

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 initiative was submitted along with proposed initiative 2007-2008 #23, and both of these proposals have some similarities to a series of initiatives that were previously submitted and included proposals 2007-2008 #13 through #16. Proposals 2007-2008 #13 through 16 were the subject of memoranda, dated April 17, 2007, that were discussed at a meeting on April 19, 2007. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier meeting unless it is necessary to fully address the issues in the proposed initiative. All comments and questions from the earlier memoranda and meetings are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment appear to be:

1. To modify the state severance tax on oil and gas that was collected both before and after January 1, 2008, as follows:
 - a. Eliminating an exemption for oil and gas wells that have minimal production;
 - b. Exempting the first three hundred thousand dollars of oil and gas gross income; and
 - c. Eliminating the tax credit for property taxes assessed;
2. To exclude the revenues received from the modified tax on the severance of oil and gas from the definition of fiscal year spending and from all spending limits; and
3. To modify the current distribution of severance tax revenues by exempting the oil and gas tax revenues from that distribution and instead to require the revenues to be used in specified percentages for district or charter school capital expenditures, the state education fund, the capital construction fund, energy-impacted communities, and as determined by the General Assembly.

Comments and Questions

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

Technical 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 "Initiative 1" should be removed from the beginning of the proposed initiative (page 1, line 1).
2. Section 1 of the proposed initiative should refer to section 39-29-101 (3), Colorado Revised Statutes, not section 39-29-101 (c), both in the amending clause and the statutory language (page 1, lines 5 and 8).
3. The statutory language should directly follow the headnote instead of being on a separate line.
4. The term "K-12" should be written out as "kindergarten through twelfth grade" (page 1, line 13).
5. The preferred style is to use a comma after the last item in a series before the conjunction (page 1, line 13).

6. Standard drafting practices would be to combine sections 2 to 4 of the proposed initiative into one section with an amending clause to read as follows: "**SECTION 2.** 39-29-105, Colorado Revised Statutes, is amended to read:".
7. In section 3 of the proposed initiative, (2) should not be stricken through (page 2, line 9).
8. In section 4 of the proposed initiative, the word "collected" is misspelled (page 2, line 40).
9. Use "state constitution," rather than "Colorado constitution," when referring to a constitutional section (page 2, line 43, and page 3, lines 20 and 21).
10. Use "C.R.S." rather than "Colorado Revised Statutes" after an internal reference to a statutory section if that statutory section is outside of the title that is being amended (page 3, lines 2, 14, and 23).
11. The amending clause for section 5 should read as follows: "**SECTION 5.** 39-29-108 (2), Colorado Revised Statutes, is amended to read:".
12. A colon should be used at the end of an introductory portion (page 3, line 14).
13. The "(2)" after the statutory section number in the headnote for section 5 should be removed (page 3, line 7).
14. When referring to a statutory section that is in the same title that is being amended, do not use "Colorado Revised Statutes" after the internal reference (page 3, line 29).
15. In section 5 of the proposed initiative, references to paragraphs should appear in regular type, not in small caps (page 3, lines 10, 14, and 29).

Substantive questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed amendment?
2. Was it your intention to modify the amount of state severance tax that is levied, collected, and paid each year?
3. The following questions relate to the changes made to section 39-29-105 (1) (a), Colorado Revised Statutes:
 - a. Prior to your changes, paragraph (a) only had historical relevance because it applied to taxable years prior to January 1, 2000. You changed the tax and made the paragraph apply to all taxable years prior to January 1, 2008. Thus, as written, paragraph (a) arguably changes the amount of taxes that have been levied, collected, and paid for all past taxable years. Was this your intention? If not, you might consider clarifying your intent.

- b. If it was your intention to modify the amount of taxes that are owed for past taxable years:
- i. Is a taxpayer who paid taxes in those years required to file an amended return, and, if so, for how many years?
 - ii. Would the taxpayer have to calculate the tax without an exemption for property tax payments in light of the fact that you repealed the exemptions set forth in section 39-29-105 (2), Colorado Revised Statutes? If as a result of not being able to claim the exemption, a taxpayer owes taxes to the state for past years, would this change violate the prohibition against ex post facto laws in section 11 of article II of the Colorado constitution?
- c. Was it your intention that the changes to paragraph (a) should only apply to a taxable year commencing during the 2007 calendar year, which pursuant to section 39-29-112, Colorado Revised Statutes, have not been collected yet?
- d. In 2000, the General Assembly amended section 39-29-105 (1), Colorado Revised Statutes, to limit the tax set forth in paragraph (a) to apply only to years taxable years commencing prior to January 1, 2000, and then created a new paragraph (b) to establish the changes to the severance tax on oil and gas for taxable years commencing on or after January 1, 2000. In this way, it was clear that the General Assembly was not trying to modify how the tax was collected in prior years and it modified how the tax was to be collected in the future. Was this what you intended with your changes?
- e. What would be the result of striking the language that begins "except that oil . . ."? For what years is this change supposed to apply?
- f. Is there any limit on the General Assembly's authority to reestablish an exemption for oil and gas wells that produce less than a certain amount oil and gas?
- g. Currently, the tax rate for oil and gas is graduated. So, for example, if a taxpayer had two hundred thousand dollars in gross income, some of the income would be taxed at two percent, some at three percent, and some at four percent. By striking the rates that exist for under three hundred thousand dollars in paragraph (a) and substituting zero percent, it would seem that the same graduated rate would apply so that every taxpayer would have the first three hundred thousand dollars exempt. Was this your intention?
- h. Why tax up to three hundred thousand dollars if the rate is zero? Is this the same thing as exempting the first three hundred thousand dollars for each taxpayer?
- i. For what years is the change in the rates supposed to apply?
- j. For a taxpayer whose gross income is less than three hundred thousand dollars of

gross income for a taxable year commencing in 2007, if the taxpayer made any estimated tax payments, made a withholding payment, or had money withheld on the taxpayer's behalf, would the taxpayer be entitled to receive a refund of all estimated tax payments or withholdings?

- k. How will the change in paragraph (a) and the repeal of 39-29-105 (2) (b), Colorado Revised Statutes, modify the estimated payments that are calculated in section 39-22-606 (5), Colorado Revised Statutes, and owed for a taxable year commencing on or after January 1, 2007, but prior to January 1, 2008? To the extent that it changes that amount that is owed, will the taxpayer have to recalculate any quarterly payments made for the taxable year?
4. The following questions relate to the changes made to section 39-29-105 (1) (b), Colorado Revised Statutes:
- a. By changing paragraph (b), was it your intention to change the exemptions and tax rate on the oil and gas severance tax for taxable years commencing on or after January 1, 2008?
 - b. For a tax year commencing in 2008, the tax will actually be owed in 2009. (Though there will be estimated payments and withholdings made during 2008.) Was this your intention?
 - c. Are your answers to questions 4.e to 4.h of this memorandum the same for paragraph (b)?
 - d. Insofar as the first three hundred thousand dollars of gross income will not be exempt, does it make sense to continue the current system for withholding income? For example, a large number of taxpayers who own a working interest receive less than three hundred thousand dollars in gross income, yet the state will continue to collect withholding payments on their behalf and require them to file a tax return to receive the money back.
5. Did you intend the repeal of section 39-29-105 (2) (a), Colorado Revised Statutes, to have any effect upon current law? Was this simply repealing an obsolete provision of law?
6. The following questions relate to the changes made to section 39-29-105 (2) (b), Colorado Revised Statutes:
- a. By repealing paragraph (b), was it your intention to eliminate the current credit for property tax payments against the severance tax on oil and gas?
 - b. For what years is the change supposed to apply? In light of the changes to section 39-29-105 (1) (a), Colorado Revised Statutes, was it your intention for the change to apply retroactively?
 - c. Could the General Assembly recreate the credit?

7. The following questions relate to the new subsection (3) that was added to section 39-29-105, Colorado Revised Statutes:
- a. What is a "voter-approved revenue change"?
 - b. What does it mean that the revenue shall be collected and spent "without regard to any spending limitation . . . "?
 - c. What is the first year that subsection (3) applies? Is it any revenue collected after the proposed initiative becomes law? Is it for the 2008 tax year? Is it clear from subsection (3) when the revenue will be excluded?
 - d. Assuming that the changes you have made to section 39-29-105, Colorado Revised Statutes, will result in more tax income for tax years commencing on and after January 1, 2008, is all revenue collected pursuant to this section to be treated as a voter-approved revenue change or just the increased revenue that results from your changes?
 - e. How would the collection of the severance tax otherwise limit "the amount of other revenue that may be collected and spent by the state or any district"?
 - f. Why does the last clause begin "except that"? What part of the rest of the subsection is this an exception to?
 - g. Section 24-77-103.6 (1) (b), Colorado Revised Statutes, which was approved by voters as Referendum C 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 fiscal years.
 - i. What tax is to be "not included in the excess state revenues cap": all tax revenue pursuant to section 39-29-105, Colorado Revised Statutes, or just the revenue that results from your change?
 - ii. By excluding this revenue from the "excess state revenues cap," it will reduce the amount of revenue that the state is permitted to retain and spend for fiscal years beginning on or after July 1, 2010. Was this your intention?
8. The following questions relate to section 39-29-108 (2), Colorado Revised Statutes:
- a. Was it your intention that revenue from the oil and gas severance tax should no longer be treated the same as other severance tax revenue?
 - b. Section 39-29-109, Colorado Revised Statutes, establishes uses for the moneys in the severance tax trust fund. After your change to subsection (2), will there be enough to cover all of those uses? What happens if there is not enough?

- c. An appropriation is spending authority. Are the moneys to be credited or deposited in the various funds that you have identified?
- d. Insofar as your change is statutory, why mention the successor reserve, fund, or act? If the sections that include the reserve, fund, or act are changed at a later date, the General Assembly could make a conforming amendment to reflect the correct citation in subsection (2).
- e. The following questions relate to section 39-29-108 (2) (b) (IV), Colorado Revised Statutes:
 - i. What would be a "successor act" to section 39-29-110 (1) (c), Colorado Revised Statutes? How similar would it have to be?
 - ii. Pursuant to section 39-29-110 (1) (c), Colorado Revised Statutes, moneys from the local government severance tax fund are distributed by the executive director of the department of local affairs based on the proportion of oil and gas employees living in the municipality or county. If the moneys are to be distributed "pursuant to section 39-29-110 (1) (c)," does that mean the moneys are to be deposited into the local government severance tax fund and distributed pursuant to this same formula? If not, what does subparagraph (IV) mean?
 - iii. If the moneys are to be deposited into the local government severance tax fund and used for this specific purpose you established, it will modify the proportions that are to be used. For example, more than fifteen percent of the moneys in the fund would be used for the purposes set forth in section 39-29-110 (1) (c), Colorado Revised Statutes. Accordingly, you might need to modify this section.
 - iv. If the moneys are not to be deposited into the local government severance tax fund, from what fund will the moneys be appropriated? Unless you want the moneys to go to the state general fund, you may need to establish a specific cash fund for the moneys to be deposited into.
- f. The following questions relate to section 39-29-108 (2) (b) (V), Colorado Revised Statutes:
 - i. In what fund are these moneys to be deposited?
 - ii. In the absence of establishing a fund and in light of the broad purposes of the uses of the moneys, it seems likely that these moneys would be deposited in the general fund. If the moneys do go to the general fund, would the general fund spending limit specified in section 24-75-201.1, Colorado Revised Statutes, apply or would they be exempt pursuant to your new language in section 39-29-105 (3), Colorado Revised Statutes?

- g. Whatever your intentions, it would probably be helpful if you clarified your intent for the flow of the moneys in section 39-29-108 (2) (b) (IV) and (2) (b) (V), Colorado Revised Statutes.