

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

February 28, 2008

TO: Joe Neuhof and Gary Nakarado

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #68, concerning severance tax

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 amendment appear to be:

1. To modify the state severance tax on oil and gas that was collected before, on, and after January 1, 2009, as follows:
  - a. Eliminating an exemption for oil and gas wells that have minimal production; and
  - b. Eliminating the tax credit for property taxes assessed;
2. To permit the state to retain and spend all the revenues received from the modified tax on the

severance of oil and gas notwithstanding the constitutional limitation on fiscal year spending or any other spending limit; and

3. To modify the distribution of oil and gas tax revenues.

### Comments and Questions

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

#### Technical questions:

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 first line of an amending clause or a statutory subdivision (section, subsection, paragraph, subparagraph, or sub-subparagraph) should be indented (page 1, lines 3, 5, 15, 17 33, etc.).
2. Punctuation in stricken language may be moved forward but not backward. As such, there should be a period after the word "state" on page 1, line 21, and the period on line 23 of that page should be stricken. Additionally, the semicolon after the word "state" on line 21 of that page should be omitted.
3. In section 2 of the proposed initiative, the section headnotes (i.e., **39-29-105. Tax on severance of oil and gas.**) found on page 2, lines 2 and 32, should not be repeated.
4. When deleted, stricken language appears adjacent to new, small capped language, the stricken language come first (page 2, lines 12 through 17).
5.
  - a. The section headnote for section 39-29-108, Colorado Revised Statutes, as it currently exists in statute reads "**Allocation of severance tax revenues - definitions - repeal.**" The proposed initiative does not include the portions of the headnote regarding the definitions or the repeal reflected in that section. Is it your intent to remove those terms from the headnote?
  - b. Similarly, the headnote for section 39-29-110, Colorado Revised Statutes, as it currently exists reads "**Local government severance tax fund - creation - administration - energy impact assistance advisory committee created - definitions - repeal.**" The proposed initiative does not include the portions of the headnote regarding the definitions or the repeal reflected in that section. Is it your intent to remove those terms from the headnote?
6. The word "section" should precede references to statutory section 39-29-105 (1) (b),

Colorado Revised Statutes (page 2, line 45, and page 3, line 3).

7. Generally, a comma should be used after the penultimate item in a series of terms (page 3, line 7, after the word "management").
8. A paragraph, subparagraph, or sub-subparagraph containing more than one sentence should end in a period, regardless of whether that paragraph, subparagraph, or sub-subparagraph is an item in a list of provisions (page 3, lines 11 and 19).
9. References to paragraphs in new, small capped language should appear in lowercase, regular type (page 3, line 14).
10. Terms such as "clean energy fund", "land conservation fund", and "Colorado division of wildlife" are not capitalized in statute (page 3, lines 19 and 20, and page 4, line 11).
11. Use "C.R.S." after an internal reference when referring to a statutory section outside of the title that is being amended (page 3, line 19).
12. The amending clause to section 4 of the proposed initiative should read as follows:

**"SECTION 4.** 39-29-110 (1) (c.5), Colorado Revised Statutes, is amended, and the said 39-29-110 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:"
13. The internal reference to subsection (5) on page 3, line 33, should read as follows: "SUBSECTION (5) OF THIS SECTION".
14. On page 3, line 35, the word "follow" is missing an "s".
15. The first word of a sentence should be capitalized (page 3, line 40).
16. In the reference to section 39-29-108 (2) (b) (V), Colorado Revised Statutes, the "(V)" is a subparagraph rather than a subsection as you have indicated on page 3, line 42.
17. A statutory provision currently exists at section 39-29-108.5, Colorado Revised Statutes. Is it your intent to place the language contained in section 5 of the proposed initiative in that section, thereby repealing and reenacting the existing language, or do you wish to add the proposed language for the land conservation fund in a different, unoccupied section, such as section 39-29-108.7, Colorado Revised Statutes? Traditionally when a section of law is repealed, its section number is not reused, so as to preserve legislative history.
18. "Colorado" should be capitalized (page 4, line 7).
19. Constitutional internal references should be spaced properly. For example, on page 4, line 8, "5(1)(a)" should be written as "5 (1) (a)".

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. Why did you amend section 39-29-105 (1) (a) and (1) (b), Colorado Revised Statutes, so that they are basically the same with the exception of the years to which they apply? Please explain how you intend these paragraphs to work.
4. 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, 2009. 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. If as a result of changes to the tax 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 2008 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. If it was your intention to make paragraph (a) only applicable to the tax on the sale of oil and gas, is there any reason that the reference to "crude oil, natural gas, carbon dioxide," on line 25 of page 1 was not changed?
  - h. How will the change in paragraph (a) and the repeal of section 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, 2008, but prior to January 1, 2009? To the extent that it changes the amount that is owed, will the taxpayer have to recalculate any monthly payments made for the taxable year?
5. 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 on the oil and gas severance tax for taxable years commencing on or after January 1, 2009?
  - b. For a tax year commencing in 2009, the tax will actually be owed in 2010. (Though there will be estimated payments and withholdings made during 2009.) Was this your intention?
  - c. Are your answers to questions 3.e and 3.f of this memorandum the same for paragraph (b)?
6. Was it your intention to completely eliminate the exemption from taxation of low-production oil and gas wells found in section 39-29-105 (1), Colorado Revised Statutes? If so, consider adding to the proposed initiative a conforming statutory amendment as follows:

**"SECTION 6.** 39-29-111 (1) (a), Colorado Revised Statutes, is amended to read:

**39-29-111. Withholding of income from oil and gas interest.**  
(1) (a) Every producer or purchaser who disburses funds that are owed to any person owning a working interest, a royalty interest, a production payment, or any other interest in any oil or gas produced in Colorado shall ~~unless such production is exempt under section 39-29-105 (1) and the producer or purchaser has registered such exempt production with the department of revenue in accordance with rules promulgated by the department,~~ withhold from the amount owed to such person an amount equal to one percent of the gross income from such interest, except for income accruing to the United

States or the state of Colorado or to any political subdivision of the state of Colorado. The amount withheld shall be based on gross income as defined in section 39-29-102 (3) (a). On or before each March 1, June 1, September 1, and December 1 prior to July 1, 2007, the aggregate of all such amounts withheld during the prior calendar quarter shall be paid to the department; and, no later than such dates, a report covering the withholding of such amounts shall be filed with the department upon forms prescribed by the executive director. On the first day of each month beginning with July 1, 2007, the aggregate of all such amounts withheld during the calendar month that was three months prior thereto shall be paid to the department in the manner set forth in paragraph (b) of this subsection (1). Nothing in this section shall be so construed as to reduce the tax imposed by this article."

7. Any gross income from the severance of oil and gas from a marginal well that was previously exempt will be added to a taxpayer's other taxable gross income, and therefore, will often be taxed at the highest ratio. Was this your intention?
8. Could taxation of production from marginal wells that were previously exempt provide an disincentive for a producer to continue production at such wells, and in turn lead to more new drilling permits?
9. The following questions relate to the changes made to section 39-29-105 (2) (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 credit and made the paragraph apply to all taxable years prior to January 1, 2009. Thus, by operation of the changes to the exemption in section 39-29-105 (1) and the reference to such subsection, paragraph (a) arguably changes the amount of the credit 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 credit 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. If as a result of changes to the amount of the allowable credit, 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 2008 calendar year, which pursuant to section 39-29-112, Colorado Revised Statutes, have not been collected yet?

- d. Assuming it is your intention that the tax credit specified in paragraph (a) only applies to the 2008 tax year, what is the result when combined with your changes to section 39-29-105 (1) (a), Colorado Revised Statutes, which eliminates the exemption for low-producing wells?
  - e. In 2000, the general assembly amended section 39-29-105 (2), Colorado Revised Statutes, to limit the credit set forth in paragraph (a) to apply only to taxable years commencing prior to January 1, 2000, and then created a new paragraph (b) to establish the changes to the credit 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?
  - f. You have added language that no credit shall be allowed for oil and gas production that is exempt from the "tax pursuant to subsection (1) of this section"; however, your changes to (1) removed all of the exemptions that are allowed under the current subsection (1). What is your intention with this additional language in subsection (2)?
10. 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 credit for property tax payments against the severance tax on oil and gas for all taxable years commencing on or after January 1, 2009?
  - b. Could the general assembly recreate the credit?
11. 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. Subsection (3) applies only to the revenue received by operation of section 39-29-105 (1) (b), Colorado Revised Statutes, which applies to the taxable years commencing January 1, 2009. Accordingly, does subsection (3) then first apply to any revenue collected for the 2009 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, 2009, 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? If it is the increased revenue, would it include the revenue attributed to the elimination of the tax credit?

- 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"? What does this phrase mean?
- f. How will the tax revenue impact the revenue that the state is permitted to retain and spend pursuant to Referendum C, approved by the voters in 2005?

12. 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? Will the reduction in the percentages distributed to the state severance tax trust fund and the local government severance tax fund be made up by an estimated increase in total revenues? If not, would that leave current programs unfunded?
- c. An appropriation is spending authority. Are the moneys to be credited or deposited in the various funds that you have identified? Please note that existing statutory language specifies that revenue is to be "credited to" a fund. See, for example, the current version of section 39-29-108 (2), Colorado Revised Statutes.
- d. The following questions relate to subparagraph (I) of paragraph (b):
  - i. You specify that 25% of the revenues resulting from the tax specified in section 39-29-105 (1) (b), Colorado Revised Statutes, are to be used for specific conservation, renewable energy resource, and natural resource planning. You further specify that the revenues are to be appropriated through the state severance tax trust fund. Assuming you intended to specify that such revenues are to be credited to the severance tax trust fund, is it your intention that such revenue is to be distributed in accordance with an existing provision of section 39-29-109, Colorado Revised Statutes, or is it to have a different distribution than specified in such section. In either case, is a conforming amendment needed to clarify your intent regarding section 39-29-109, Colorado Revised Statutes.
  - ii. Are you intending for the general assembly to determine how best to distribute the 25% for the purposes you describe?
  - iii. What do you mean by "natural resource renewable energy sources"?



- iv. What do you mean by "development related to minerals, energy, geology, and water."?
- e. The following question relates to subparagraph (II) of paragraph (2):
  - i. Assuming you mean for this particular portion of the revenues to be credited to the local government severance tax trust fund as set forth in section 39-29-110 (1) (c.5) Colorado Revised Statutes, is it your intention that this particular twenty five percent of the revenues be split 70% as set forth in section 39-29-110 (1) (c.5) (I), Colorado Revised Statutes, and 30% as set forth in section 39-29-110 (1) (c.5) (II), Colorado Revised Statutes?
- f. The following questions relate to subparagraph (III) of paragraph (2):
  - i. Assuming you mean for this particular portion of the revenues to be credited to the clean energy fund, could you specify that the fund is created in section 24-75-1201, Colorado Revised Statutes, rather than cite to article 75 of title 24?
  - ii. You specify what this particular portion of the revenues is to be used for in subparagraph (III). However, section 24-75-1201, Colorado Revised Statutes, specifies that any moneys in the fund are continuously appropriated to the governor's energy office, or any successor office, and specifies what those moneys may be expended for. Insofar as any of your suggested purposes for that particular portion of the revenues are different from the allowable expenditures of the fund as set forth in 24-75-1201 (2), Colorado Revised Statutes, is it your intention that this particular revenue stream have a different distribution?
  - iii. Would you consider including a conforming amendment to subsection (1) of section 24-75-1201, Colorado Revised Statutes, that would include this particular revenue stream in the list of revenues intended to be credited to the clean energy fund?
  - iv. How would this revenue fund a tax credit?
  - v. Does "incentives" mean grants?
  - vi. Who would make loans from a revolving loan fund? Who decides the terms of the loan? What is a large or community based project? Is it your intention that those large or community based projects are for renewable energy projects?
  - vii. How much revenue should go to each of these uses?
- g. The following question relates to subparagraph (IV) of paragraph (2):

- i. Do you intend for this particular portion of the revenues to be credited to the land conservation fund that you create in this initiative?
- h. The following questions relate to subparagraph (V) of paragraph (2):
  - i. Is it correct that all of this particular portion of the revenues is to be deposited into the local government severance tax fund and distributed as required in section 39-29-110 (1) (b), Colorado Revised Statutes, but that such revenue will not be part of the 70/30 split for the fund set forth in section 39-29-110 (1) (c.5), Colorado Revised Statutes? How will this work?
  - ii. What are examples of communities that are socially or economically impacted by the development, processing, or energy conversion of oil and gas? To the extent it is similar to the phrasing in section 39-29-110 (1) (b) (I), Colorado Revised Statutes, should it be interpreted in the same manner as the statute?
  - iii. Does it matter when the community was impacted by the extraction of oil and gas? For example, is it limited to the severance of oil and gas that is subject to the new tax in the proposed initiative or does it apply to any community that has been impacted historically?
- i. Would you consider changing "counties or municipalities" to "political subdivisions" to be consistent with section 39-29-110 (1) (c.5) (I), Colorado Revised Statutes?
  - j. 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), Colorado Revised Statutes.
- 13. The following questions relate to section 39-29-110 (1) (c.5), Colorado Revised Statutes:
  - a. Would you consider saying "shall be distributed to political subdivisions in the manner specified in paragraph (b) of this subsection (1)"?
- 14. The following questions relate to section 39-29-108.5, Colorado Revised Statutes:
  - a. You have created this fund in article 29 of title 39, Colorado Revised Statutes. This particular title is reserved specifically for taxation issues, and article 29 specifically for the severance tax. Since you intend for the fund to be administered and overseen by the state board of the great outdoors Colorado trust fund, would you consider creating the land conservation fund in article 60 of title 33, Colorado Revised Statutes, which relates specifically to the great outdoors Colorado program?
  - b. Would you consider stating "revenues credited to" the land conservation fund rather than "deposited in" to be consistent with the notion of crediting moneys to funds as discussed above?

- c. Your new section does not specify how the moneys in the fund are to be distributed to the particular uses described. Is it your intention that the state board of the great outdoors Colorado trust fund make those distribution decisions? Insofar as the purposes delineated in your new statutory section conflict with any of the powers of the board as established by the state constitution or statutory provisions, how do you intend for those differences to be considered?
- d. Subsection (2) of section 6 of article XXVII of the Colorado constitution specifies the responsibilities and powers of the great outdoors Colorado board. Section 33-60-107, Colorado Revised Statutes, further specifies additional powers of the board. Is it your intention to provide the board with additional powers over your newly created land conservation fund? Should you make a conforming amendment to provide for that power in section 33-60-107, Colorado Revised Statutes? Is it your intention that the board have the same powers over your newly created fund as are specified in subsection (2) of section 6 of article XXVII of the Colorado constitution?
- e. Is it your intention that your newly created fund should be kept separate from the great outdoors Colorado trust fund?
- f. You specify that the state board of the great outdoors Colorado trust fund is to administer and oversee the land conservation fund. The board is constitutionally tasked to oversee the expenditures from the great outdoors Colorado trust fund but the actual fund is held by the state treasurer. Do you intend for your fund to be held in the same manner?
- g. Do you intend for the state board of the great outdoors Colorado trust fund to have a fiduciary responsibility over this fund? If so, does your statutory language accomplish that intent?
- h. Is it correct that you intend the money in this fund to be used for grants to the political subdivisions listed in the new statutory section and nonprofit land conservation organizations for use by those subdivisions and organizations to acquire land or interests in land for the purposes of preserving native wildlife habitat, river corridors, working farms or ranches, urban parks and open lands, and open space and natural areas of statewide significance? Is it also your intent that those grants may be used to assist with the stewardship of land or interests in land acquired by those entities for those purposes?
- i. What are "nonprofit land conservation organizations"?
- j. What are "working farms or ranches"?
- k. Could you be more specific with your reference to "Colorado state parks"? Are you referring to the division of parks and outdoor recreation under the department of natural resources or the board of parks and outdoor recreation? See, for example, section 33-10-103, Colorado Revised Statutes.

1. What is your intent with the language "The land conservation fund shall not be subject to the substantial equality restriction of section 5 (1) (a) of article xxvii or the limitations of section 3 (1) (b) (III) of article XXVII of the state constitution"? Does this mean that 5 (1) (b) and 5 (2) do apply? Does this mean that 3 (1) (b) (I) and (3) (I) (b) do apply?
15. How much additional revenue is estimated to be generated from this proposed initiative? How was such estimate derived?
16. If the proposed initiative is passed by the voters at the November 2008 general election, does this give enough time for the general assembly, the department of revenue, and private entities to implement, administer, and comply with its provisions? Initiated measures are effective upon proclamation of the governor unless a later effective date is specified. Would you care to specify a later effective date?