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MEMORANDUM

TO: Andrew O'Connor and Mary Henry
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: August 15, 2018
SUBJECT: Proposed initiative measure 2019-2020 #2, concerning Severance Taxes 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 directors of 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 to the Colorado Revised Statutes appear to be:

1. For tax years that begin on and after January 1, 2019, to make the following changes to the oil and gas severance tax:

- a. To increase the severance tax rate for each income band by 5 percentage points;
 - b. To halve the production amounts that qualify for the stripper well exemption; and
 - c. To eliminate the tax credit allowed against the severance tax for property taxes paid.
2. To require a portion of the oil and gas severance tax revenue, which may be equal to the amount of the tax revenue attributable to the tax changes in the proposed initiative, to be used exclusively for establishing all-day kindergarten and public school funding and for a new program that provides medical care and treatment for people suffering negative health impacts caused by oil and gas production in those communities impacted by oil and gas production.
3. To require 50 percent of the severance tax revenue from the severance tax on minerals and mineral fuels other than oil and gas to be deposited in the general fund.
4. To allow the state to retain an amount equal to all of the oil and gas severance tax revenue as a voter-approved revenue change to fiscal year spending limit.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Under article V, section 1 (4)(a) of the Colorado constitution, if approved by voters, the proposed initiative will "take effect from and after the date of the official declaration of the vote by proclamation of the governor, but not later than thirty days after the vote has been canvassed." Is that the date you intend for the proposed initiative to take effect?
3. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
4. The proposed initiative appears to qualify as a state matter arising under section 20 of article X of the state constitution under section 1-41-102 (4)(a), C.R.S., and therefore, could qualify for submission to the voters at the November 2019

election. Is it your intention that the measure be submitted at the election in 2019?

5. The following questions and comments relate to the legislative declaration in section 1 of the proposed initiative:
 - a. What is the purpose of the declaration?
 - b. What is an effective severance tax rate?
 - c. How did you calculate the effective severance tax rate for Colorado?
 - d. What is your source for the effective severance tax rate for Wyoming and New Mexico, which appear to be greater than the statutory rates in those states?
 - e. You twice reference the 2018 general election, which is incorrect. Please identify the appropriate election.
 - f. The legislative declaration states that "changing the severance tax structure is approved by a vote of the people...." Should it be "the severance tax structure as approved by a vote of the people...?"
 - g. Are you attempting to establish minimum amounts of funding for public education by stating that the revenue should supplement and not supplant existing funding?
 - h. How are "current appropriations" defined? Are they for a specific fiscal year, and, if so, which fiscal year?
 - i. As a statement of intent for a statutory change, does the legislative declaration really limit the General Assembly from using the new severance tax revenue from supplanting current appropriations?
 - j. Does the General Assembly currently appropriate money for "medical care and treatment for people suffering negative health impacts caused by oil and gas production in those communities impacted by oil and gas production?" If not, does it matter whether the new severance tax supplements or supplants the existing appropriations?
 - k. If it is determined that existing programs receive less revenue than they would have without the proposed initiative, then, based on the second sentence of the legislative declaration, should the General Assembly decrease the amount that is allocated to the severance tax stabilization trust fund and increase the amounts to the existing cash funds?

6. The following questions and comments relate to amendments to section 39-29-105 (1)(b), C.R.S., in the proposed initiative:
 - a. By adding a period after "2000" you have created a sentence fragment. What is the purpose of this language? What does it mean?
 - b. The first full sentence of the proposed initiative, which begins "For the taxable years prior to January 1, 2019," does not include the introductory phrase "In addition to any other tax," which accompanies the original language of section 39-29-105 (1)(b), C.R.S., and your new section 39-29-105 (1)(c). Was that omission intentional? What effect does it have?
 - c. Is it your intent that the tax described in the current version of subsection (1)(b) should apply for each taxable year commencing on or after January 1, 2000, but prior to January 1, 2019? If so, it may be easier to simply insert that phrase into subsection (1)(b) instead of the changes that you have made.
 - d. Is there a reason you struck "fifteen" and "ninety thousand" and replaced them with the digits? Why use digits in subsection (1)(b), but not in subsection (1)(c)?
 - e. Under section 39-29-111 (1), C.R.S., a producer is required to withhold one percent of an interest owners' gross income. Will withholding one percent be sufficient for the increased severance tax rates in subsection (1)(c)?
 - f. Why is there highlighting in section 39-29-105 (1)(b) and (1)(c), C.R.S.?
7. Under section 39-29-105 (2)(b), C.R.S., a taxpayer may claim a credit against severance taxes that is equal to 87.5% of the ad valorem taxes assessed or paid during a taxable year "against the tax computed in accordance with the provisions of paragraph (b) of subsection (1) of this section for each taxable year...." Is it your intention that the credit under subsection (2)(b) does not apply to the tax computed in accordance with section 39-29-105 (1)(c), C.R.S., and therefore, no property tax credit is allowed against the severance taxes paid on the oil and gas for any taxable years beginning January 1, 2019?
8. If the answer to the prior question is yes, then your intention would be clearer if you amended section 39-29-105 (2)(b), C.R.S., which currently applies "for each taxable year commencing on and after January 1, 2000," to make it clear that it does not apply to taxable years after January 1, 2019.

9. The following questions and comments relate to section 39-29-105 (1)(c), C.R.S., as added in the proposed initiative:
 - a. Does this provision establish the severance tax imposed on oil and gas for all taxable years commencing on and after January 1, 2019?
 - b. If voters approve the measure in November 2019 and it becomes effective after January 1, 2020, then subsection (1)(c) retroactively change the taxes for 2019. Is that your intent? If so, could this provision be challenged as being retrospective legislation prohibited by article II, section 11 of the state constitution?
 - c. The stripper well exemption, which applies to oil and gas wells that are under a minimum production amount, is halved from current law. Is that your intention?
 - d. The second sentence, which relates to the production employee report, was repealed from section 39-29-105 (1)(b), C.R.S., in 2008 by the passage of House Bill 08-1083. What is the effect of adding this language back?
10. The following questions and comments relate to section 39-29-105 (3), C.R.S., as added in the proposed initiative:
 - a. Subsection (3) appears to permit the state to retain all of the oil and gas severance tax revenue that is collected for tax years after January 1, 2018, as a voter-approved revenue change to the fiscal year spending limit in section 20 (7) of article X of the state constitution (TABOR). It is not limited to revenue attributable to the tax changes in the proposed initiative. Is that your intention?
 - b. What "other law" does the subsection refer to in the phrase "without regard to any spending limitation contained within section 20 of article X of the state constitution, or any other law"?
 - c. The first clause of the sentence in section 39-29-105 (3) relates just to the state, but second clause refers to the state "or any district." What district?
 - d. What does "and without limiting in any year the amount of other revenue that may be collected and spent by the state or any district" mean? What is your intention in including this language?
 - e. With respect to the state, what does the second clause add to the first clause?

- f. With respect to any district other than the state, can the voters from the state, which is one district for purposes of TABOR, approve a voter-approved revenue change for other districts?

11. The current language of section 39-29-108, C.R.S., which the proponents are amending in section 3 of the proposed initiative, is:

39-29-108. Allocation of severance tax revenues - definitions. (2) (b)

Of the total gross receipts realized from the severance taxes imposed on minerals and mineral fuels under the provisions of this article after June 30, 2017, fifty percent shall be credited to the state severance tax trust fund created by section 39-29-109, and fifty percent shall be credited to the local government severance tax fund created by section 39-29-110.

- a. You have omitted the phrase "fifty percent shall be credited to the state severance tax trust fund created by section 39-29-109" from the version of section 39-29-108, C.R.S., included in the proposed initiative. In the absence of a specified cash fund, fifty percent of non-oil and gas severance tax revenue will be deposited in the general fund under the proposed initiative.¹ Was this inadvertent or did you intend to eliminate this distribution?
- b. If you intend to eliminate this distribution, then you should amend the existing provision to make this change explicit, with additions shown in SMALL CAPS and deletions in ~~strike type~~ to the current language of the statute.
- c. If the omission was inadvertent and you have no other changes, why did you include subsection (2)(b)? If you did not intend to make any changes, then you should remove subsection (2)(b) from the proposed initiative.

12. The distribution required by section 39-29-108 (2), C.R.S., applies to "total gross receipts realized from the severance taxes imposed on minerals and mineral fuels," while the new subsection (2.3) in the same section refers to "the total revenues levied, collected, and paid by operation of section 39-29-105 (1)(c)." For oil and gas collections, are "total revenues levied, collected, and

¹ The third purpose in the Purposes section on page 2 of this memorandum is based on the assumption that this omission was intentional.

paid" the same or different from "total gross receipts realized"? If they are the same, would you consider using the same language as in the existing statute?

13. Do you intend the distribution under subsection (2.3), which only applies to oil and gas severance tax under section 39-29-105 (1)(c), C.R.S., to be an exception to allocation required under section 39-29-108 (2)(b), C.R.S.?
14. Based on the legislative declaration, is it your intent that the 22% allocations to the local government severance tax fund and the severance tax trust fund would approximate the amounts that would have been credited to those funds if the oil and gas severance tax was not changed by the initiative?
15. Is it your intent that the General Assembly should not change the allocation set forth in section 39-29-108 (2.3), C.R.S., though it may have the power to do so?
16. The following questions relate to section 39-29-110.5, C.R.S., as added in the proposed initiative:
 - a. What happens to the revenues in the perpetual base account of the severance tax stabilization trust fund?
 - b. Does the limit on the 125 percent of the revenue in the perpetual base account apply beginning in the second fiscal year? And if so, what year is that fiscal year?
 - c. Is the General Assembly required to appropriate a specific percentage of the money in the operational account of the severance tax stabilization trust fund for all-day kindergarten and for funding schools?
 - d. Subsection (2) states that the funds for all-day kindergarten and increased funding for schools "shall be distributed through the state's existing method for funding public schools." Does this refer to the funding formula established in the School Finance Act of 1994, or does it refer to something else?
 - e. Does establishing all-day kindergarten take priority over increasing funding to public schools generally?
 - f. Does the Department of Public Health and Environment (CDPHE) have an existing program like the one described in section 39-29-110.5, C.R.S.?
 - g. Do you expect CDPHE to provide health care or pay for some portion of the treatment?

- h. Are the negative health impacts caused by oil and gas production well documented so that CDPHE will be able to administer this program? The measure describes increases in asthma, cancer, immune system diseases, cognitive deficiencies, miscarriages, and birth defects. Do you intend CDPHE to provide medical care for these conditions generally or limit funding to people suffering negative health impacts?
 - i. Does the measure allow CDPHE to use money appropriated for medical care and treatment to administer the new program?
 - j. What happens if CDPHE cannot use all of the money appropriated for the purposes described?
17. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. It is standard drafting practice to use SMALL CAPITAL LETTERS to show language being added and ~~stricken type~~ to show language being removed from the Colorado constitution or the Colorado Revised Statutes.

2. Please capitalize the first word in every sentence.
3. It is standard drafting practice to avoid using archaic terms. For example, in section 39-29-110.5 (1)(a), instead of using "THEREIN", use "IN THE FUND".
4. The phrase "all-day-kindergarten" should be hyphenated as "all-day kindergarten."
5. When referencing a statutory cite, please note that our office no longer uses the paragraph, sub-paragraph, and sub-subparagraph designations, only subsection. For example, rather than saying "paragraph (c) of this section" you would say "subsection (1)(c) of this section" or, if within the subsection being referenced, "this subsection (1)(c)."
6. The highlighting on pages 1 and 2 of the proposed initiative has no known legal effect and should be removed.
7. On page 2 of the proposed initiative, the subsection "1(c)" should be relettered as "(c)" – the "1" preceding the "(c)" is unnecessary.
8. The phrase "seven and one half" should be hyphenated as "seven and one-half".
9. Sections 2 and 3 of the proposed initiative, both amending section 39-29-105, can be combined because they amend the same section. The amending clause would read as follows:

SECTION 2. In Colorado Revised Statutes, 39-29-105, **amend** (1)(b); and **add** (1)(c) and (3) as follows:

Then, after the new (c), insert the new (3).

10. If section 3 of the proposed initiative is not combined with section 2, then section 3 needs a headnote. Headnotes briefly describe the content of the section. A headnote should be added to each section of the proposed initiative and be in bold-face type. The proper headnote for section 3 should be the same as section 2:

39-29-105. Tax on severance of oil and gas.

11. The amending clause for section 4 of the proposed initiative is incorrect: The actual section being amended is 39-29-108, not 39-29-105, and the introductory portion being amended is (1), not (2). Additionally, (2)(b) is shown in the section but is not shown in the amending clause. To include (2)(b) and fix the amending clause, it should read as follows:

SECTION 4. In Colorado Revised Statutes, 39-29-108, **amend** (1) introductory portion and (2)(b); and **add** (2.3) as follows:

12. It is standard drafting practice to omit the "and" when writing out numerals over one hundred. For example, the number "one hundred and twenty-five" should instead be written as "one hundred twenty-five."
13. On page 5 of the proposed initiative, in section 5, the following changes should be made:
 - a. Subsections "(I)" and "(II)" should be relettered as subsections "(a)" and "(b)" since they are paragraphs that follow the subsection directly; and
 - b. At the end of the current subsection "(2)(II)," since it is the last subsection in the section, it should end with a period instead of a semicolon.