

Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO

REREVISED

*This Version Includes All Amendments
Adopted in the Second House*

LLS NO. 10-0451.01 Thomas Morris

SENATE BILL 10-174

SENATE SPONSORSHIP

Schwartz, Gibbs, Whitehead

HOUSE SPONSORSHIP

Massey and Scanlan,

Senate Committees

Local Government and Energy

House Committees

Local Government

A BILL FOR AN ACT

101 **CONCERNING THE REGULATION OF THE DEVELOPMENT OF**
102 **GEOTHERMAL RESOURCES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

Section 5 of the bill defines "direct use" as the utilization of geothermal resources for commercial, residential, agricultural, public facilities, or other energy needs other than the commercial production of electricity. **Sections 1 and 2** of the bill allow municipalities and counties to designate geothermal development as an activity of state interest under

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

HOUSE
3rd Reading Unam ended
April 12, 2010

HOUSE
2nd Reading Unam ended
April 9, 2010

SENATE
Am ended 3rd Reading
March 18, 2010

SENATE
Am ended 2nd Reading
March 16, 2010

House Bill 74-1041, except for the direct use of such resources. **Sections 3 and 4** allocate federal mineral lease revenues derived from geothermal resource development to the geothermal resource leasing fund and authorize the executive director of the department of local affairs to distribute the revenues:

! To state agencies, school districts, and political subdivisions of the state affected by the development and production of geothermal resources primarily for use by such entities in planning for and providing facilities and services necessitated by such development and production; and

! Secondly to such entities, in consultation with the governor's energy office, for the promotion of the development of geothermal energy resources.

Section 6 specifies that the property right to the following types of geothermal resources are an incident of the ownership of the overlying surface:

! Nontributary groundwater; and

! Not nontributary groundwater.

Section 7 adopts the reasonable accommodation doctrine regarding relations between surface owners and geothermal resource developers. **Section 8** specifies that a permit from the state engineer is not required for the direct use of a horizontal, closed-loop geoexchange system that does not use a geothermal fluid, as established by the state engineer by rule. **Section 9** specifies that "material injury" includes an alteration in the temperature of water only if the alteration adversely affects a valid, prior geothermal right. **Sections 10 through 12** require geothermal energy facilities to be valued for the purpose of property taxation in the same manner in which wind or solar energy facilities are valued.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** 24-65.1-202 (1) (d), Colorado Revised Statutes, is
3 amended to read:

4 **24-65.1-202. Criteria for administration of areas of state**
5 **interest.** (1) (d) Unless an activity of state interest has been designated
6 or identified or unless it includes part or all of another area of state
7 interest, an area of oil and gas ~~or geothermal resource~~ development shall
8 not be designated as an area of state interest unless the state oil and gas

1 conservation commission identifies such area for designation.

2 **SECTION 2.** 24-65.1-203 (1), Colorado Revised Statutes, is
3 amended BY THE ADDITION OF A NEW PARAGRAPH to read:

4 **24-65.1-203. Activities of state interest as determined by local**
5 **governments.** (1) Subject to the procedures set forth in part 4 of this
6 article, a local government may designate certain activities of state
7 interest from among the following:

8 (j) THE USE OF GEOTHERMAL RESOURCES FOR THE COMMERCIAL
9 PRODUCTION OF ELECTRICITY.

10 **SECTION 3.** Article 63 of title 34, Colorado Revised Statutes, is
11 amended BY THE ADDITION OF A NEW SECTION to read:

12 **34-63-105. Geothermal resource leasing fund.** (1) THE STATE
13 TREASURER SHALL DEPOSIT ALL REVENUES FROM SALES, BONUSES,
14 ROYALTIES, LEASES, AND RENTALS RELATED TO GEOTHERMAL RESOURCES,
15 AS THAT TERM IS DEFINED IN SECTION 37-90.5-103, C.R.S., RECEIVED BY
16 THE STATE PURSUANT TO 30 U.S.C. SEC. 1019, AS AMENDED, AND ALL
17 MONEYS EARNED FROM THE INVESTMENT OF SUCH REVENUES, INTO THE
18 GEOTHERMAL RESOURCE LEASING FUND, WHICH FUND IS HEREBY CREATED
19 IN THE STATE TREASURY, FOR APPROPRIATION BY THE GENERAL ASSEMBLY
20 TO THE DEPARTMENT OF LOCAL AFFAIRS FOR GRANTS TO STATE AGENCIES,
21 SCHOOL DISTRICTS, AND POLITICAL SUBDIVISIONS OF THE STATE AFFECTED
22 BY THE DEVELOPMENT AND PRODUCTION OF GEOTHERMAL RESOURCES OR
23 OTHER ENTITIES AUTHORIZED BY FEDERAL LAW:

24 (a) PRIMARILY FOR USE BY SUCH ENTITIES IN PLANNING FOR AND
25 PROVIDING FACILITIES AND SERVICES NECESSITATED BY SUCH
26 DEVELOPMENT AND PRODUCTION; AND

27 (b) SECONDARILY TO THE ENTITIES LISTED IN THE INTRODUCTORY

1 PORTION TO THIS SUBSECTION (1) FOR OTHER STATE PURPOSES AS
2 SPECIFIED IN SUBSECTION (2) OF THIS SECTION.

3 (2) AFTER THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF
4 LOCAL AFFAIRS HAS ALLOCATED SUFFICIENT REVENUES FROM THE FUND
5 TO ADEQUATELY ADDRESS THE NEEDS SPECIFIED IN PARAGRAPH (a) OF
6 SUBSECTION (1) OF THIS SECTION, THE EXECUTIVE DIRECTOR SHALL, IN
7 CONSULTATION WITH THE GOVERNOR'S ENERGY OFFICE CREATED IN
8 SECTION 24-38.5-101, C.R.S., ALLOCATE REVENUES FROM THE FUND BY
9 COMPETITIVE GRANTS FOR THE PROMOTION OF THE DEVELOPMENT OF
10 GEOTHERMAL ENERGY RESOURCES.

11 **SECTION 4.** 24-38.5-102 (1), Colorado Revised Statutes, is
12 amended BY THE ADDITION OF A NEW PARAGRAPH to read:

13 **24-38.5-102. Governor's energy office - duties and powers.**

14 (1) The governor's energy office shall:

15 (t) ASSIST THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF
16 LOCAL AFFAIRS IN ALLOCATING REVENUES FROM THE GEOTHERMAL
17 RESOURCE LEASING FUND TO ELIGIBLE ENTITIES PURSUANT TO SECTION
18 34-63-105, C.R.S.

19 **SECTION 5.** 37-90.5-103 (1), Colorado Revised Statutes, is
20 amended, and the said 37-90.5-103 is further amended BY THE
21 ADDITION OF A NEW SUBSECTION, to read:

22 **37-90.5-103. Definitions.** As used in this article, unless the
23 context otherwise requires:

24 (1) ~~"Geothermal by-products" means dissolved or entrained~~
25 ~~minerals and gases that may be obtained from the material medium,~~
26 ~~excluding hydrocarbon substances and carbon dioxide~~ "DIRECT USE"
27 MEANS THE UTILIZATION OF GEOTHERMAL RESOURCES FOR COMMERCIAL,

1 RESIDENTIAL, AGRICULTURAL, PUBLIC FACILITIES, OR OTHER ENERGY
2 NEEDS OTHER THAN THE COMMERCIAL PRODUCTION OF ELECTRICITY.

3 (1.5) "GEOTHERMAL BY-PRODUCTS" MEANS DISSOLVED OR
4 ENTRAINED MINERALS AND GASES THAT MAY BE OBTAINED FROM THE
5 MATERIAL MEDIUM, EXCLUDING HYDROCARBON SUBSTANCES AND
6 CARBON DIOXIDE.

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8 **SECTION 6.** 37-90.5-105 (2), Colorado Revised Statutes, is
9 amended, and the said 37-90.5-105 is further amended BY THE
10 ADDITION OF A NEW SUBSECTION, to read:

11 **37-90.5-105. Access - reasonable accommodation.** (2) Where
12 the property right to a ~~hot dry rock~~ SEVERABLE GEOTHERMAL resource has
13 been severed, reserved, or transferred with the subsurface estate, its
14 owner may enter upon the overlying surface parcel at reasonable times
15 and in a reasonable manner to prospect for and produce the energy from
16 such resource, if adequate compensation is paid to the owner of the
17 surface parcel for damages and disturbance IN ACCORDANCE WITH
18 SUBSECTION (3) OF THIS SECTION. This right of entry shall not include the
19 right to construct surface utilization facilities, and such facilities may be
20 constructed only upon agreement with the surface owner IN ACCORDANCE
21 WITH SUBSECTION (3) OF THIS SECTION.

22 (3) (a) (I) A DEVELOPER OF ANY TYPE OF GEOTHERMAL RESOURCE
23 SHALL DEVELOP THE RESOURCE IN A MANNER THAT ACCOMMODATES THE
24 SURFACE OWNER BY MINIMIZING INTRUSION UPON AND DAMAGE TO THE
25 SURFACE OF THE LAND.

26 (II) AS USED IN THIS SECTION, "MINIMIZING INTRUSION UPON AND
27 DAMAGE TO THE SURFACE" MEANS SELECTING ALTERNATIVE LOCATIONS

1 FOR WELLS, ROADS, PIPELINES, OR HEAT EXCHANGE OR GENERATION
2 FACILITIES, OR EMPLOYING ALTERNATIVE MEANS OF OPERATION, THAT
3 PREVENT, REDUCE, OR MITIGATE THE IMPACTS OF THE GEOTHERMAL
4 DEVELOPMENT ON THE SURFACE, WHERE SUCH ALTERNATIVES ARE
5 TECHNOLOGICALLY SOUND, ECONOMICALLY PRACTICABLE, AND
6 REASONABLY AVAILABLE TO THE DEVELOPER.

7 (III) THE STANDARD OF CONDUCT SET FORTH IN THIS SUBSECTION
8 (3) DOES NOT PREVENT A DEVELOPER FROM ENTERING UPON AND USING
9 THAT AMOUNT OF THE SURFACE AS IS REASONABLE AND NECESSARY TO
10 EXPLORE FOR AND DEVELOP THE GEOTHERMAL RESOURCE.

11 (IV) THE STANDARD OF CONDUCT SET FORTH IN THIS SUBSECTION
12 (3) DOES NOT ABROGATE OR IMPAIR A CONTRACTUAL PROVISION THAT IS
13 BINDING ON THE PARTIES AND THAT EXPRESSLY PROVIDES FOR THE USE OF
14 THE SURFACE FOR THE DEVELOPMENT OF GEOTHERMAL RESOURCES OR
15 THAT RELEASES THE DEVELOPER FROM LIABILITY FOR THE USE OF THE
16 SURFACE.

17 (b) A GEOTHERMAL RESOURCE DEVELOPER'S FAILURE TO MEET THE
18 REQUIREMENTS SET FORTH IN THIS SUBSECTION (3) OR, IF APPLICABLE,
19 SUBSECTION (2) OF THIS SECTION, GIVES RISE TO A CAUSE OF ACTION BY
20 THE SURFACE OWNER. UPON A DETERMINATION BY THE TRIER OF FACT
21 THAT SUCH FAILURE HAS OCCURRED, A SURFACE OWNER MAY SEEK
22 COMPENSATORY DAMAGES OR SUCH EQUITABLE RELIEF AS IS CONSISTENT
23 WITH PARAGRAPH (a) OF THIS SUBSECTION (3) OR, IF APPLICABLE,
24 SUBSECTION (2) OF THIS SECTION.

25 (c) (I) IN ANY LITIGATION OR ARBITRATION BASED UPON
26 SUBSECTION (2) OF THIS SECTION OR PARAGRAPH (a) OF THIS SUBSECTION
27 (3), THE SURFACE OWNER SHALL PRESENT EVIDENCE THAT THE

1 DEVELOPER'S USE OF THE SURFACE MATERIALLY INTERFERED WITH THE
2 SURFACE OWNER'S USE OF THE SURFACE OF THE LAND. AFTER SUCH
3 SHOWING, THE DEVELOPER BEARS THE BURDEN OF PROOF OF SHOWING
4 THAT IT MET THE STANDARD SET OUT IN PARAGRAPH (a) OF THIS
5 SUBSECTION (3) AND, IF APPLICABLE, SUBSECTION (2) OF THIS SECTION. IF
6 A DEVELOPER MAKES THAT SHOWING, THE SURFACE OWNER MAY PRESENT
7 REBUTTAL EVIDENCE.

8 (II) AN OPERATOR MAY ASSERT, AS AN AFFIRMATIVE DEFENSE,
9 THAT IT HAS CONDUCTED GEOTHERMAL RESOURCE DEVELOPMENT IN
10 ACCORDANCE WITH A REGULATORY REQUIREMENT, CONTRACTUAL
11 OBLIGATION, OR LAND USE PLAN PROVISION THAT SPECIFICALLY APPLIES
12 TO THE ALLEGED INTRUSION OR DAMAGE.

13 (d) NOTHING IN THIS SECTION:

14 (I) PRECLUDES OR IMPAIRS ANY PERSON FROM OBTAINING ANY
15 AND ALL OTHER REMEDIES ALLOWED BY LAW;

16 (II) PREVENTS A DEVELOPER AND A SURFACE OWNER FROM
17 ADDRESSING THE USE OF THE SURFACE FOR GEOTHERMAL RESOURCE
18 DEVELOPMENT IN A LEASE, SURFACE USE AGREEMENT, OR OTHER WRITTEN
19 CONTRACT; OR

20 (III) ESTABLISHES, ALTERS, IMPAIRS, OR NEGATES THE AUTHORITY
21 OF LOCAL AND COUNTY GOVERNMENTS TO REGULATE LAND USE RELATED
22 TO GEOTHERMAL RESOURCE DEVELOPMENT.

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24 **SECTION 7.** 37-90.5-107 (8), Colorado Revised Statutes, is
25 amended to read:

26 **37-90.5-107. Relationship to water - when permit required.**

27 (8) For purposes of this section, "materially injure" and "material injury"

1 shall include any diminution or alteration in the quantity, temperature, or
2 quality of any valid, prior water or geothermal right; EXCEPT THAT, WITH
3 REGARD TO A GEOTHERMAL RIGHT, "MATERIALLY INJURE" AND "MATERIAL
4 INJURY" INCLUDE A DIMINUTION OR ALTERATION IN THE TEMPERATURE OF
5 WATER ONLY IF THE DIMINUTION OR ALTERATION ADVERSELY AFFECTS
6 THE VALID, PRIOR GEOTHERMAL RIGHT.

7 **SECTION 8.** 39-4-101 (3), Colorado Revised Statutes, is
8 amended, and the said 39-4-101 is further amended BY THE ADDITION
9 OF A NEW SUBSECTION, to read:

10 **39-4-101. Definitions.** As used in this article, unless the context
11 otherwise requires:

12 (2.4) "GEOTHERMAL ENERGY FACILITY" MEANS A NEW FACILITY
13 FIRST PLACED IN PRODUCTION ON OR AFTER JANUARY 1, 2010, THAT USES
14 REAL AND PERSONAL PROPERTY, INCLUDING BUT NOT LIMITED TO
15 LEASEHOLDS AND EASEMENTS, TO GENERATE AND DELIVER TO THE
16 INTERCONNECTION METER ANY SOURCE OF ELECTRICAL OR MECHANICAL
17 ENERGY BY HARNESSING THE HEAT ENERGY OF GROUNDWATER OR THE
18 GROUND AND THAT IS NOT PRIMARILY DESIGNED TO SUPPLY ELECTRICITY
19 FOR CONSUMPTION ON SITE.

20 (3) (a) "Public utility" means, for property tax years commencing
21 on or after January 1, 1987, every sole proprietorship, firm, limited
22 liability company, partnership, association, company, or corporation, and
23 the trustees or receivers thereof, whether elected or appointed, that does
24 business in this state as a railroad company, airline company, electric
25 company, GEOTHERMAL ENERGY FACILITY, wind energy facility, solar
26 energy facility, rural electric company, telephone company, telegraph
27 company, gas company, gas pipeline carrier company, domestic water

1 company selling at retail except nonprofit domestic water companies,
2 pipeline company, coal slurry pipeline, or private car line company.

3 (b) On and after January 1, ~~2000~~ 2010, for purposes of this article,
4 "public utility" shall not include any affiliate or subsidiary of a sole
5 proprietorship, firm, limited liability company, partnership, association,
6 company, or corporation of any type of company described in paragraph
7 (a) of this subsection (3) that is not doing business in the state primarily
8 as a railroad company, airline company, electric company, GEOTHERMAL
9 ENERGY FACILITY, wind energy facility, solar energy facility, rural electric
10 company, telephone company, telegraph company, gas company, gas
11 pipeline carrier company, domestic water company selling at retail except
12 nonprofit domestic water companies, pipeline company, coal slurry
13 pipeline, or private car line company. Valuation and taxation of any such
14 affiliate or subsidiary of a public utility as defined in paragraph (a) of this
15 subsection (3) shall be assessed pursuant to article 5 of this title.

16 **SECTION 9.** 39-4-102 (1) (e) (II), the introductory portion to
17 39-4-102 (1.5), and 39-4-102 (1.5) (a), (1.5) (b) (I), (1.5) (b) (V), (1.5)
18 (c), and (1.5) (d), Colorado Revised Statutes, are amended to read:

19 **39-4-102. Valuation of public utilities.** (1) The administrator
20 shall determine the actual value of the operating property and plant of
21 each public utility as a unit, giving consideration to the following factors
22 and assigning such weight to each of such factors as in the administrator's
23 judgment will secure a just value of such public utility as a unit:

24 (e) (II) For purposes of this paragraph (e), "renewable energy" has
25 the meaning provided in section 40-1-102 (11), C.R.S., but shall not
26 include energy generated from a GEOTHERMAL ENERGY FACILITY, A wind
27 energy facility, or a solar energy facility.

1 (1.5) The administrator shall determine the actual value of a
2 GEOTHERMAL ENERGY FACILITY, A wind energy facility, or a solar energy
3 facility as follows:

4 (a) The general assembly hereby declares that consideration by the
5 administrator of the cost approach and market approach to the appraisal
6 of a wind energy facility or a solar energy facility results in valuations
7 that are neither uniform nor just and equal because of wide variations in
8 the production of energy from wind turbines and solar energy devices, as
9 defined in section 38-32.5-100.3 (2), C.R.S., because of the uncertainty
10 of wind and sunlight available for energy production, and because
11 constructing a wind energy facility or a solar energy facility is
12 significantly more expensive than constructing any other utility
13 production facility. THE GENERAL ASSEMBLY FURTHER DECLARES THAT
14 IT IS ALSO APPROPRIATE TO VALUE GEOTHERMAL ENERGY FACILITIES,
15 WHICH ALSO HAVE HIGH CONSTRUCTION COSTS RELATIVE TO THEIR
16 ONGOING OPERATIONAL COSTS, USING THE INCOME APPROACH. Therefore,
17 in the absence of preponderant evidence shown by the administrator that
18 the use of the cost approach and market approach results in uniform and
19 just and equal valuation, a GEOTHERMAL ENERGY FACILITY, A wind energy
20 facility, or a solar energy facility shall be valued based solely upon the
21 income approach.

22 (b) (I) The actual value of a GEOTHERMAL ENERGY FACILITY, A
23 wind energy facility, or a solar energy facility shall be at an amount equal
24 to a tax factor times the selling price at the interconnection meter.

25 (V) For purposes of calculating the tax factor as required in
26 subparagraph (IV) of this paragraph (b), an owner or operator of a
27 GEOTHERMAL ENERGY FACILITY, A wind energy facility, or a solar energy

1 facility shall provide a copy of the GEOTHERMAL ENERGY FACILITY'S,
2 wind energy facility's, or solar energy facility's current power purchase
3 agreement to the administrator by April 1 of each assessment year. The
4 administrator shall also have the authority to request a copy of the current
5 power purchase agreement from the purchaser of power generated at a
6 GEOTHERMAL ENERGY FACILITY, A wind energy facility, or a solar energy
7 facility. All agreements provided to the administrator pursuant to this
8 subparagraph (V) shall be considered private documents and shall be
9 available only to the administrator and the employees of the division of
10 property taxation in the department of local affairs.

11 (c) The location of a GEOTHERMAL ENERGY FACILITY, A wind
12 energy facility, or a solar energy facility on real property shall not affect
13 the classification of that real property for purposes of determining the
14 actual value of that real property as provided in section 39-1-103.

15 (d) Pursuant to section 39-3-118.5, no actual value for any
16 personal property used in a GEOTHERMAL ENERGY FACILITY, A wind
17 energy facility, or a solar energy facility shall be assigned until the
18 personal property is first put into use by the facility. If any item of
19 personal property is used in the facility and is subsequently taken out of
20 service so that no GEOTHERMAL ENERGY, wind energy, or solar energy is
21 produced from that facility for the preceding calendar year, no actual
22 value shall be assigned to that item of more than five percent of the
23 installed cost of the item for that assessment year.

24 **SECTION 10.** 39-5-104.7 (1) (b), Colorado Revised Statutes, is
25 amended to read:

26 **39-5-104.7. Valuation of real and personal property that**
27 **produces alternating current electricity from a renewable energy**

1 **source.** (1) (b) The valuation requirements specified in paragraph (a) of
2 this subsection (1) shall not apply to GEOTHERMAL ENERGY FACILITIES,
3 solar energy facilities, ~~as defined in section 39-4-101 (3.5);~~ or wind
4 energy facilities, as THOSE TERMS ARE defined in section 39-4-101. (4):

5 **SECTION 11.** 40-2-123, Colorado Revised Statutes, is amended
6 **BY THE ADDITION OF A NEW SUBSECTION** to read:

7 **40-2-123. New energy technologies - consideration by**
8 **commission - incentives - demonstration projects - definitions -**
9 **legislative declaration - repeal.** (3.2) IN ITS CONSIDERATION OF
10 GENERATION ACQUISITIONS FOR ELECTRIC UTILITIES, THE COMMISSION
11 MAY GIVE THE FULLEST POSSIBLE CONSIDERATION, AT A UTILITY'S
12 REQUEST, TO THE COST-EFFECTIVE IMPLEMENTATION OF NEW ENERGY
13 TECHNOLOGIES FOR THE GENERATION OF ELECTRICITY FROM GEOTHERMAL
14 ENERGY.

15 **SECTION 12.** **Act subject to petition - effective date -**
16 **applicability.** (1) This act shall take effect at 12:01 a.m. on the day
17 following the expiration of the ninety-day period after final adjournment
18 of the general assembly (August 11, 2010, if adjournment sine die is on
19 May 12, 2010); except that, if a referendum petition is filed pursuant to
20 section 1 (3) of article V of the state constitution against this act or an
21 item, section, or part of this act within such period, then the act, item,
22 section, or part shall not take effect unless approved by the people at the
23 general election to be held in November 2010 and shall take effect on the
24 date of the official declaration of the vote thereon by the governor.

25 (2) The provisions of this act shall apply to conduct occurring on
26 or after the applicable effective date of this act.