HOUSE
RESEARCH
ORGANIZATION bill analysis 5/10/2011

HJR 109
Orr, et al.
(CSHJR 109 by Pitts)

SUBJECT: Constitutional amendment to direct the GLO to transfer funds to the ASF

COMMITTEE: Appropriations — committee substitute recommended

VOTE: 24 ayes — Pitts, Turner, Aycock, Button, Chisum, Crownover, Darby, Dukes, Eiland, Giddings, Gooden, Johnson, S. King, Margo, Martinez, D. Miller, Morrison, Otto, Patrick, Riddle, Schwertner, Shelton, Torres, Zerwas

1 nay — Villarreal

2 absent — Hochberg, McClendon

WITNESSES: For — None

Against — Jerry Patterson, General Land Office

On — Rusty Martin, Texas General Land Office

BACKGROUND: The School Land Board (SLB) — housed within the General Land Office (GLO) — supervises the management, leasing, and sale of the public school lands. The board comprises the land commissioner and two citizen members. One citizen member is appointed by the governor, while the other is appointed by the attorney general. Citizen members serve two-year terms and may be reappointed, while the commissioner serves for the duration of his or her term of office.

Established under Texas Constitution, Art. 7, sec. 5, the Permanent School Fund (PSF) is a trust that holds the proceeds from state land and mineral rights dedicated to the support of the public schools and investment returns from the corpus of the fund. Sec. 51.401, Natural Resources Code, permits the SLB to designate funds received from any land, mineral, or royalty interest or real estate investment or other interest to the PSF, with the mineral estate deposits in the real estate special fund account to be used for investments to benefit the PSF. The market value of the investments in real estate made by the SLB may not exceed 15 percent of the market value of the PSF.

The PSF's investment returns are constitutionally dedicated to the benefit of Texas public schools. The State Board of Education (SBOE) manages the investment of the PSF, and if the fund's investment performance permits, the SBOE makes distributions to the Available School Fund (ASF). The ASF consists of distributions from the PSF and revenue from one-fourth of motor fuels taxes and one-fourth of occupations taxes. Distributions to the ASF are used to fund instructional materials and technology for classrooms and can provide funding to school districts on a per-student basis in a distribution known as the per-capita distribution. To preserve the principal of the PSF, Art. 7, sec. 5 not only caps the percentage of PSF investment returns that may be distributed to the ASF, but also prohibits any distribution in years when the PSF value falls below a certain level.

Sec. 51.413, Natural Resources Code, permits the SLB to release investment funds directly to the ASF or to the SBOE for investment in the PSF. Atty. Gen. Opinion, GA-0617, issued April 9, 2008, determined that sec. 51.413(1), which permits the SLB to send funds directly to the ASF, likely is unconstitutional. The opinion concluded that the statute is inconsistent with constitutional provisions requiring land sale proceeds to be used to acquire other land for the PSF or invested. The opinion found that the authority to transfer state land and property proceeds directly to the ASF was unconstitutional because such proceeds were not listed as components of the ASF by the Texas Constitution.

DIGEST:

CSHJR 109 would amend Art. 7, sec. 5 of the Texas Constitution to authorize the Legislature to enact a law to direct the GLO or an entity other than the SBOE responsible for the management of PSF land or other properties to distribute to the ASF each year no more than 50 percent of the net revenue derived during that year from the land or properties.

CSHJR 109 also would amend various sections of the Texas Constitution by replacing "perpetual public school fund," "public free school fund," and "free public school fund" with "permanent school fund."

The proposal would be presented to the voters at an election on Tuesday, November 8, 2011. The ballot proposal would read: "The constitutional amendment clarifying references to the permanent school fund and allowing the legislature by general law to direct the General Land Office to distribute revenue from permanent school fund land or other properties to the available school fund."

SUPPORTERS SAY:

CSHJR 109 is necessary because an attorney general's opinion has clouded the constitutionality of the SLB's statutory authority to transfer proceeds from PSF land and property directly to the ASF. The SLB should have this authority to ensure that public schools benefit directly from the investment returns realized by the board. CSHJR 109 would amend the Texas Constitution to permit a direct transfer from the SLB to the ASF. This could add millions of dollars in revenue for the public schools that is badly needed.

Atty. Gen. Opinion, GA-0617, April 9, 2008, concluded that sec. 51.413(1), Natural Resources Code, allowing the SLB to send funds directly to the ASF, was likely unconstitutional. CSHJR 109 would permit legislation that would ensure that public schools benefited directly from the investment returns earned by the GLO from PSF lands. The proposed amendment also would ensure that the corpus of the PSF would remain secure by capping the distribution at no more than 50 percent per year.

While the corpuses of the real estate special fund account and the PSF have grown, the SLB has transferred less money in recent biennia compared to 10 years ago. Despite the claim that the SLB's having the discretion to retain a portion of the returns ensures the fund's ability to perform well in the future, this fails to appreciate the detriment of hoarding money meant for the public school finance system when the need for additional funding is so pressing.

CSHJR 109 would promote transparency by permitting legislation that would allow a traceable path between the net revenue earned by the GLO and the ASF. There is no reason why funds transferred from the GLO must go first to the PSF and then possibly to ASF.

While some claim that the SLB uses a specific methodology to determine a payout to the PSF, their actions do not demonstrate this. In fact, the SLB previously has transferred additional amounts to the PSF, contradicting its supposed methodology.

CSHJR 109 also would not change substantively the Texas Constitution by replacing "perpetual public school fund" and "free public school fund" with "permanent school fund." These three terms are used interchangeably throughout the Texas Constitution — in practice, there is not a perpetual public school fund or a free public school fund. Attorney general opinion GA-0617 concluded that all three funds refer to the PSF. Conforming all references to the "permanent school fund" title simply would provide uniformity and prevent confusion.

OPPONENTS SAY:

CSHJR 109 is neither necessary nor appropriate. The SLB already acts in the best interest of the fund by fulfilling its duty to manage the land and mineral rights held by the PSF. Funds generated by SLB investments are used for what they were intended. The ability to transfer proceeds from PSF land and property directly to the ASF is not necessary. The SLB can transfer funds to the PSF, then the SBOE can ensure that the proceeds directly benefit public schools through the annual distributions to the ASF. Alternately, the SLB is able to use the net revenue to invest, which ultimately benefits the public schools by increasing the total returns available for transfer to the PSF. It is not wise to spend directly funds that would otherwise be better invested as fund corpus to generate future income.

CSHJR 109 effectively would allow the Legislature to raid the corpus of the PSF. The proposal would afford a short-term solution to the budget crisis, but would harm public schools in the long term.

Some claim that the SLB has stored money in the corpus of the PSF that should benefit public schools, but the claim is unfounded. The corpus of the fund has grown due to increased royalties earned from oil and gas on PSF lands. The royalties are PSF mineral rights and as such are dedicated constitutionally to the corpus of the PSF.

The SLB has not stored money. It has acted in accord with the Texas Constitution and its adopted disbursement formula, which permits a distribution of 6 percent of total assets or $100 million each year, whichever is greater. The SLB adopted the same disbursement mechanism used by the SBOE because it had been vetted by the Legislature and the voters.

The SLB should not be bound to a certain transfer amount set by the Legislature. A predetermined transfer amount would force the board to divert funds from the PSF, regardless of its fiduciary duty. To protect the permanence of the PSF, the SLB's highest priority should be its fiduciary role. The SLB, not a one-size-fits-all edict, is better equipped to determine the distribution of available funds based on the market and investment returns.

To protect the checks and balances system, the PSF investment and the ASF appropriation duties should be kept separate. The investment power to manage a fund and determine payout amounts should remain with the executive branch of government.

OTHER OPPONENTS SAY:

CSHJR 109 should define the term “net revenue” to clarify concerns about whether or not royalties earned on the mineral rights controlled by the PSF are net revenue. Atty. Gen. Opinion, M-347, March 3, 1969, concluded that proposed legislation that would have transferred the royalties (thought by some to be net revenue) on certain leases of the PSF to the ASF would be unconstitutional by attempting to place the proceeds of land sales in the ASF and not the PSF.

NOTES:

The author intends to offer an amendment that would grant sole discretion to the SLB to determine any portion of the total revenue each year to be deposited to the ASF.

HB 2646 by Orr, the enabling legislation for HJR 109, which would require the SLB to distribute to the ASF 50 percent of the net revenue derived from PSF land or other PSF properties each year, was reported favorably, without amendment, by the House Appropriations Committee on April 14. The fiscal note for HB 2646 indicates that the state could receive an additional $200 million each year in annual revenue for fiscal years 2012-2016 as a result of the changes proposed by the bill.