



SENATE RESOLUTION 02S-002

BY SENATOR(S) Tate, Thiebaut, Fitz-Gerald, Gordon, Hagedorn, Hanna, Hernandez, Isgar, Linkhart, Matsunaka, Nichol, Pascoe, Perlmutter, Phillips, Reeves, Takis, Tupa, and Windels.

CONCERNING A REQUEST TO THE SUPREME COURT OF THE STATE OF COLORADO TO RENDER ITS OPINION UPON QUESTIONS RELATING TO RECENT GUBERNATORIAL ACTION AFFECTING STATE BUDGETARY MATTERS.

WHEREAS, As more specifically set forth herein, H.B. 02-1420 and H.B. 02-1246, passed by the General Assembly during the 2002 regular legislative session, were the subject of gubernatorial vetoes of doubtful constitutional validity; and

WHEREAS, Certain action taken by the Governor to address a general fund revenue shortfall for the 2002-03 fiscal year appears not to comply with statutory provisions governing the budget reduction process; and

WHEREAS, The Governor's partial vetoes of H.B. 02-1420 and H.B. 02-1246 raise substantial questions as to the state of the law in Colorado regarding the constitutional powers and duties of the executive and legislative branches in the area of appropriations in regular or special sessions as well as the Governor's statutory responsibilities when attempting to address the difficult matter of a general fund revenue shortfall, and the important nature of these questions makes appropriate urgent clarification on these matters from the Colorado Supreme Court; and

Facts Related to Interrogatory No. 1:

WHEREAS, The General Assembly enacted H.B. 02-1420, the general appropriations bill, or "long bill", for the 2002-03 fiscal year; and

WHEREAS, Historically, section 1 of the long bill has contained definitions of certain line items, or "headnotes", as they are commonly referred to, that are common items of appropriation to each of the departments of state government, and each headnote definition effectively describes the purposes and parameters of a particular item for which an appropriation is made by the General Assembly; and

WHEREAS, By letter to the House of Representatives dated May 31, 2002, the Governor indicated that he was filing H.B. 02-1420 with the Secretary of State and that he approved the bill in part and disapproved the bill in part; and

WHEREAS, The Governor purported to veto thirteen of the sixteen headnote definitions in section 1 of the bill by lining through such definitions, and, in total, the Governor lined through fifteen of the twenty headnotes contained in section 1 of the bill; and

WHEREAS, The Governor's alleged basis for lining through eleven of the sixteen headnote definitions in section 1 of the bill is that "[i]n order to provide flexibility for departments so that impacts in services to citizens are minimized, [the Governor is] vetoing this headnote." and, although the Governor will direct departments to comply with the lined-through headnote, "to the extent that this headnote might hinder the ability of departments to meet the needs of citizens, they will be allowed to spend outside of these parameters."; and

WHEREAS, The "flexibility" explanation serves as the basis for lining through the headnote definitions of "capital outlay", "health, life, and dental", "lease purchase", "leased space", "operating expenses", "personal services", "purchase of services from computer center", "short-term disability", "utilities", "vehicle lease payments", and "Multiuse Network Payments"; and

WHEREAS, Article III of the state constitution recognizes the three distinct branches of state government and prohibits any one branch from infringing on the powers granted to the other branches, section 1 of article V of the state constitution vests the legislative power of the state in the General Assembly, and part of the legislative power vested in the General Assembly is the authority to appropriate state revenues for the expenses of state government; and

WHEREAS, In cases such as *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620 (1978) ("*Lamm I*"), the Colorado Supreme Court has long recognized the plenary power of the legislature to determine the amount of state funds to be spent for particular purposes; and

WHEREAS, *Lamm I* further held that, although the Governor has the responsibility to administer the executive branch of government, which includes the authority to control how state money is to be allocated, the Governor's flexibility is ultimately limited by the power vested in the legislature to determine the amount of state funds to spend and for what purpose the funds should be spent; and

WHEREAS, The language in the Governor's May 31, 2002, veto message on H.B. 02-1420 appears to allow a department to utilize a particular appropriation for a broader purpose than that specified by the General Assembly in the headnote definition, and such language may authorize departments to transfer moneys appropriated between particular line items; and

WHEREAS, By removing the definitions of certain line items, as expressed in the headnotes, the Governor has essentially expanded or removed the purpose behind the appropriated amount of state funds, thereby freeing up those dollars to be used for any purpose determined appropriate by the particular agency receiving the appropriation; and

WHEREAS, Removal of the purpose for the appropriation appears to give a department the "flexibility" to spend those funds for purposes that are outside the scope of the headnote definition, thereby negating the decision of the General Assembly to authorize the spending of those funds only for that purpose; and

WHEREAS, If the purported veto and message is also construed to authorize transfers of appropriated funds between line items within the department, any such transfer would further result in an expenditure of funds on a purpose other than that designated by the General Assembly; and

WHEREAS, This executive branch "flexibility" infringes upon the General Assembly's plenary power of appropriation as set forth in the state constitution and as interpreted by the Colorado Supreme Court; and

WHEREAS, By vetoing the purpose of an appropriation, the Governor cannot thereby authorize either the expenditure of appropriated funds for another purpose or a transfer of the funds between lines of appropriation within the department; and

WHEREAS, Any such action by the Governor amounts to an appropriation by means other than a law enacted by bill, by a branch of government not specifically vested with legislative powers, all in contravention of article III and sections 1, 17, 32, and 33 of article V of the state constitution; and

Facts Related to Interrogatory No. 2:

WHEREAS, In *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985) ("*Lamm II*"), the Colorado Supreme Court held that the line item veto power under section 12 of article IV of the state constitution authorizes the Governor to nullify and not create statutes, and this power must be strictly construed; and

WHEREAS, The *Lamm II* Court further held that an item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose and that a funding source "is as much a part of an item of appropriation as the amount of money appropriated and the purpose to which it is devoted...", is "integral to and legally interdependent with the other portions of the items of which they are a part...", and is not a separate item that can be vetoed without vetoing the remainder of the items; and

WHEREAS, Based upon *Lamm II* and other case authority, each headnote in the long bill, which contains the purpose and parameters of the appropriation, is as much a part of the particular line item as the amount of money appropriated, and cannot be lined through or removed without affecting the General Assembly's intent in enacting the long bill; and

WHEREAS, The purpose of the appropriation, as defined in the headnote, is a part of the appropriation and cannot be vetoed without vetoing the entire line item; and

WHEREAS, The effect of such a purported veto is for the Governor to change the purpose of the appropriation, thereby creating legislation inconsistent with the will of the General Assembly as evidenced by H.B. 02-1420, as enacted, a result that is beyond the scope of the Governor's line item veto power under section 12 of article IV of the state constitution; and

Facts Related to Interrogatory No. 3:

WHEREAS, H.B. 02-1246 is entitled "Concerning the creation of the eligible facilities education task force, and making an appropriation therefor."; and

WHEREAS, Section 1 of H.B. 02-1246 contains a nonstatutory legislative declaration, section 2 creates a task force to examine issues surrounding the placement of disabled students in certain facilities, section 3 contains an appropriation for \$10,000 for payment of compensation of legislative members, which appropriation was added to the bill by amendment after introduction, section 4 contains an effective date clause, and section 5 contains a safety clause; and

WHEREAS, On May 31, 2002, the Governor signed H.B. 02-1246 into law, but indicated that he was exercising his line item veto authority to disapprove section 3 of the bill containing the appropriation clause, thereby purporting to veto section 3 in its entirety; and

WHEREAS, In *Lamm II*, the Colorado Supreme Court held that all bills other than general appropriation bills must encompass a single subject, with the exception of general appropriation bills, the Governor must approve or disapprove a bill in its entirety, and the selective power of the line item veto was designed to prevent abuses such as log rolling, riders, and omnibus appropriation bills by enabling the Governor to disapprove some items in a general appropriation bill while giving approval to others; and

WHEREAS, Based upon the substantive contents of H.B. 02-1246, including its legislative declaration and the substantive provisions creating the task force, and its single-subject title, it is reasonable to conclude that the bill is still a general legislation bill, notwithstanding the addition of the appropriation clause; and

WHEREAS, Because the purpose of the Governor's line item veto power is to prevent appropriation bills from containing more than one subject, the Governor's use of the line item veto with respect to this bill was not appropriate in that the bill title already effectively limited the bill to a single subject; and

WHEREAS, Allowing the Governor to use his line item veto power in these circumstances is inconsistent with the narrow, or strict, construction of such powers adopted by the Court; and

Facts Related to Interrogatory No. 4:

WHEREAS, Section 24-75-201.5, Colorado Revised Statutes, was enacted in 1988 to specify the process for the Governor to reduce the state budget in the event of a revenue shortfall, and this section was amended at the 2002 regular legislative session in H.B. 02-1445 to establish a procedure that must be followed by the Governor in the event of a revenue shortfall in the 2002-03 fiscal year; and

WHEREAS, The Governor's authority under section 24-75-201.5, Colorado Revised Statutes, is triggered if the quarterly revenue estimate prepared in June, September, or December of 2002 indicates that general fund expenditures for the 2002-03 fiscal year, based on appropriations then in effect, will result in the use of one-half or more of the statutorily required 4% general fund reserve; and

WHEREAS, In the event that one of these quarterly revenue estimates in 2002 indicate such a revenue shortfall, section 24-75-201.5 (1) (d), Colorado Revised Statutes, requires the Governor to take certain specified steps, including the formulation and implementation of a plan for reducing general fund expenditures or transferring certain moneys to the general fund in specified circumstances, or both; and

WHEREAS, In his May 31, 2002, letter to the House of Representatives that was filed with the 2002 long bill, the Governor, *inter alia*, ordered all state agencies to restrict approximately \$140 million, or 4%, of their 2002-03 fiscal year appropriations, delayed increases in provider rates, and imposed a freeze on capital construction expenditures to meet any revenue shortfalls; and

WHEREAS, The June 2002 Revenue Forecast prepared by the Office of State Planning and Budgeting ("OSPB") additionally references the 4% budget restriction, the delay in provider rates, and the freeze on capital construction expenditures; and

WHEREAS, It appears the May 31 letter and the OSPB revenue forecast are the only orders or documents that currently reference the Governor's 2002-03 fiscal year budget restrictions; and

WHEREAS, In the absence of further direction from the Governor, the determination of the item and amount of 2002-03 fiscal year appropriations to be restricted has been left to each agency on an agency-by-agency basis, so long as a 4% restriction is carried out; and

WHEREAS, The OSPB's June 20 forecast indicates a revenue shortfall that triggers the Governor's authority under section 24-75-201.5 (1) (d), Colorado Revised Statutes; and

WHEREAS, The plan to be formulated by the Governor pursuant to section 24-75-201.5, Colorado Revised Statutes, is an essential and critical component for implementing budget reductions that requires more detail than a general directive delegating the responsibility for making restrictions to each agency; and

WHEREAS, It appears that neither the Governor's May 31 letter nor OSPB's June 19 memorandum is a "plan" within the plain meaning of section 24-75-201.5 (1) (a), Colorado Revised Statutes, and, since it does not appear that a plan within the meaning of the statute has been formulated to date, it also does not appear that the Governor's letter constitutes notification of a plan in accordance with the requirements of said section 24-75-201.5 (1) (a); and

WHEREAS, In the alternative to or in conjunction with a budget reduction plan, section 24-75-201.5 (1) (d) (I) (B), Colorado Revised Statutes, authorizes the Governor to issue a written order directing the transfer of certain moneys to maintain a required reserve, and it does not appear that such an order has been issued to date; and

WHEREAS, Although section 24-75-201.5 (1) (a), Colorado Revised Statutes, specifies that the Governor shall promptly implement the plan by utilizing the power to suspend or discontinue the functions or services of any state agency by executive order pursuant to section 24-2-102 (4), Colorado Revised Statutes, or by reducing state personnel expenditures upon declaration of a fiscal emergency pursuant to section 24-50-109.5, Colorado Revised Statutes, or by other "lawful means", to date the Governor has issued no executive order pursuant to said section 24-2-102 (4) in connection with the May 31 letter, the General Assembly has not declared a fiscal emergency that would enable the Governor to reduce personnel expenditures pursuant to said section 24-50-109.5, and any such authority drawn from the phrase "other lawful means" should be narrowly construed and consistent with the General Assembly's plenary power over appropriations; and

WHEREAS, The delegation by the Governor to the state agencies to determine which general fund expenditures must be restricted conflicts with the plain meaning of section 24-75-201.5, Colorado Revised Statutes, with the limited statutory authority granted to the Governor to make such restrictions, and with the plenary power of the General Assembly to designate the amount and purpose of such appropriations; and

WHEREAS, Section 24-75-201.5, Colorado Revised Statutes, represents a limited delegation by the General Assembly to the Governor of its plenary power over the amount and purpose of general fund appropriations to address the extraordinary event of a general fund revenue shortfall and, consistent with the nature of such delegation, must be narrowly construed as a limited exception to the General Assembly's powers in this area; and

WHEREAS, Any action taken by the Governor pursuant to this statute must be consistent with this limited delegation and thereby in accordance with the basic constitutional framework of this state that recognizes three distinct branches of government and prohibits any one branch from infringing on the powers granted to any other branch; and

WHEREAS, In the absence of clarity and direction from the Colorado Supreme Court, the state of the law in Colorado governing the respective powers and duties of the legislative and executive branches with respect to the power to appropriate public moneys is extremely unclear in that, at the present time, and as a result of the Governor's actions, the General Assembly is unable to meaningfully draft or even consider any piece of legislation that may come before it because it is not at all clear how the General Assembly may effectively appropriate public moneys without gubernatorial interference that far exceeds the Governor's limited powers in determining how public moneys are to be spent; and

WHEREAS, The ability to effectively appropriate moneys is an inherent aspect of every bill that comes before the General Assembly and, in the absence of clarification from the Colorado Supreme Court on the appropriateness of the Governor's vetoes with respect to H.B. 02-1420 and H.B. 02-1246, confusion as to the proper roles and responsibilities of the legislative and executive branches with respect to these issues will cloud the General Assembly's consideration of every pending bill that may come before it in any regular or extraordinary session, whether or not the particular bill aims to appropriate money; and

WHEREAS, The expectation that the state will continue to experience significant revenue shortfalls in the near future means that the procedures specified in section 24-75-201.5, Colorado Revised Statutes, may need to be used on a frequent basis, which magnifies the need to ensure that the Governor is fully compliant with governing statutory procedures and constitutional principles when undertaking the serious action of addressing a revenue shortfall; now, therefore,

Be It Resolved by the Senate of the Sixty-third General Assembly of the State of Colorado:

That, in view of the premises, there are important questions as to the constitutionality of the Governor's vetoes of H.B. 02-1420 and H.B. 02-1246 and the action that must be taken by the Governor to be compliant with statutory procedures when addressing a general fund revenue shortfall, and it is the judgment of the Senate that these questions are matters of extreme importance and public interest; that it is essential that an immediate determination be secured; that a solemn occasion within the meaning and intent of section 3 of article VI of the state constitution has arisen; and the Senate accordingly requests the Supreme Court of the state of Colorado to render its opinion upon the following questions:

1. Whether the Governor's purported veto of headnotes (1), (4), (6), (7), (10), (11), (12), (13), (14), (15), and (16) contained in section 1 of H.B. 02-1420 is violative of constitutional provisions governing the General Assembly's plenary powers of appropriation as specified in article III and sections 1, 17, 32, and 33 of article V of the state constitution?

2. Whether the Governor's purported veto of headnotes (1), (4), (6), (7), (10), (11), (12), (13), (14), (15), and (16) contained in section 1 of H.B. 02-1420 is beyond the scope of the Governor's line item veto power under section 12 of article IV of the state constitution?

3. Whether the Governor's purported veto of the appropriation clause contained in section 3 of H.B. 02-1246 is beyond the scope of the Governor's line item veto power under section 12 of article IV of the state constitution?

4. Whether action taken by the Governor in purported compliance with section 25-75-201.5, Colorado Revised Statutes, is violative of constitutional provisions governing the General Assembly's plenary powers of appropriation, as specified in article III and sections 1, 17, 32, and 33 of article V of the state constitution, and what steps must the Governor take to be in compliance with the requirements of section 24-75-201.5, Colorado Revised Statutes, and the state constitution when taking action to address a general fund revenue shortfall?

Be It Further Resolved, That the President of the Senate, immediately upon passage of this Resolution, shall transmit to the Clerk of the Supreme Court a certified copy thereof and copies of H.B. 02-1420, H.B. 02-1246, H.B. 02-1445, and H.B. 02-1478, as printed in the Session of Colorado, Second Regular Session 2002, Volume 3, and a copy of the June 2002 Revenue Forecast as prepared by the Office of State Planning and Budgeting, and that the Committee on Legal Services shall be directed to furnish said Court with an adequate number of copies of this Resolution and said bills and revenue forecast, and shall submit to said Court such further documents and briefs as the Court may require to expedite its procedure in the premises.

Stan Matsunaka
PRESIDENT OF
THE SENATE

Karen Goldman
SECRETARY OF
THE SENATE