

Richard W. Daily LLC
ATTORNEY AT LAW

MEMORANDUM

TO: Colorado General Assembly
FROM: Richard W. Daily
DATE: March 17, 2010
SUBJECT: Constitutionality of Senate Bill 2010-098

Senate Bill 2010-098 proposes to use portions of the net revenues from the Colorado Lottery that are dedicated to the Conservation Trust Fund to fill a budgetary shortfall in the funding of noxious weed control by counties and weed control districts.

There are two major constitutional problems with this bill.

1. Unless the bill restricts the use of net lottery revenues to the management of *natural areas*, the bill violates the limitation on the use of these revenues the management of the State's "open space heritage."
2. Because the bill is clearly meant to replace prior general fund appropriations for the control of noxious weeds, the use of Conservation Trust Fund revenues to replace a previous appropriation appears to violate Section 8 of Article XXVII of the Colorado Constitution.

1. **Use limitation.**

In Article XXVII, Section 1, "the net proceeds of every state-supervised lottery game operated under the authority of Article XVIII, Section 2 shall be guaranteed and permanently dedicated to the preservation, protection, enhancement and management of the state's wildlife, park, river, trail and open space heritage, except as specifically provided in this article."

The term "heritage" means, in this context, "something transmitted by or acquired from a predecessor." *Webster's Third New International Dictionary, Unabridged Edition* (2002 ed.). This means that, unless a contrary use for the revenues is specified in *Article XXVII*, lottery revenues are limited to the preservation, protection, enhancement and management of *natural areas*, before people began developing them.

Article XXVII, Section 3 allocates net lottery revenues among the Great Outdoors Colorado Trust Fund, the Division of Parks and Outdoor Recreation and the Conservation Trust Fund. Section 3(b)(I) allocates 40% of those net revenues to "municipalities and counties and

Richard W. Daily LLC
ATTORNEY AT LAW

March 17, 2010

Page 2

other eligible entities for parks, recreation and open space purposes.” It does not make any additional provisions for how the funds are to be spent.

Thus, Article XXVII is narrower than the then-existing Conservation Trust Fund statute. As it was in effect in 1993, the Conservation Trust Fund statute allowed Conservation Trust Fund distributions to be spent on “conservation sites.” This term was defined, at C.R.S. § 29-21-101(1)(e) (1993) as:

interests in land and water . . . for park or recreation purposes, for all types of open space, including but not limited to flood plains, green belts, agricultural lands, or scenic areas, or for any scientific, historic, scenic, recreational, aesthetic, or similar purpose.”

The statute also provided that Conservation Trust Fund funds shall be “expended only for the acquisition, development, and maintenance of new conservation sites or for capital improvements or maintenance for recreational purposes on any public site.” C.R.S. § 29-21-101(4) (1993).

SB98 proposes to use lottery revenues for noxious weed control on *any* public open space. By its sweeping provisions, this would allow the funding of median strips along streets, roads and highways, around public buildings, and a myriad of other uses unrelated to the State’s open space heritage. To the extent that it proposes to authorize such unrelated expenditures, it is unconstitutional.

Conclusion: Under the Colorado Constitution, Conservation Trust Fund appropriations can only be spent for weed control on public *natural areas*.

2. Substitution.

An essential goal of the Great Outdoors Colorado Amendment was to prevent the General Assembly from cutting appropriations to the recipients of lottery revenues, with the expectation that lottery revenues would be used in substitution for the prior appropriations. This goal was embodied in Section 8 of Article XXVII, which states:

Section 8. No substitution allowed

The people intend that the allocation of lottery funds required by this article of the constitution be in addition to and not a substitute for funds otherwise appropriated from the General Assembly to the Colorado Department of Natural Resources and its divisions.

Richard W. Daily LLC
ATTORNEY AT LAW

March 17, 2010

Page 3

Although the drafters assumed that only Department of Natural Resources funds were in jeopardy of being cut as a result of the availability of additional lottery funds, the underlying principle applies to the reduction of funds to the Department of Agriculture: The lottery revenues were intended to be *new money*, available to meet the overall purposes of the lottery, and not to substitute for the State's existing efforts.

Conclusion: There is a substantial likelihood that a court could determine that the use of lottery revenues to replace the funds previously appropriated for noxious weed control could violate the "No Substitution" clause, Article XXVII, Section 8 of the Colorado Constitution.