



REPORT OF
THE
STATE AUDITOR

**Conservation Trust Fund
Department of Local Affairs**

**Performance Audit
January 2004**

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January 15, 2004

Members of the Legislative Audit Committee:

This report contains the results of a performance audit of the Conservation Trust Fund. The audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The report presents our findings, conclusions, and recommendations, and the responses of the Department of Local Affairs.

A handwritten signature in cursive script that reads "Joanne Hill".

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JOANNE HILL, CPA
State Auditor

Conservation Trust Fund Performance Audit, January 2004

Authority, Purpose, and Scope

This performance audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the Office of the State Auditor to conduct performance audits of all departments, institutions, and agencies of the state government. The audit work, performed in December 2003 and January 2004, was conducted in accordance with generally accepted governmental audit standards.

The Department of Local Affairs (Department) and the Legislative Audit Committee (LAC) requested that our Office review Conservation Trust Fund expenditures. We focused our efforts on systems and controls in place to ensure that funds are spent in compliance with the Colorado Constitution and statutes. During our audit we interviewed staff from the Department of Local Affairs and met with representatives of local government interest groups, including Colorado Counties, Inc.; the Colorado Municipal League; and the Colorado Parks and Recreation Association. Additionally, we contacted 10 local governments with specific questions about their Conservation Trust Fund expenditures and accounting practices. We also reviewed the statutory authority granted to the Department related to the oversight, monitoring, and enforcement of spending requirements for the Fund. Finally, we confirmed our interpretation of the statutes by requesting an informal opinion from the Attorney General's Office concerning appropriate uses of Conservation Trust Fund monies under the Colorado Constitution and statutes.

We gratefully acknowledge the assistance and cooperation extended by staff at the Department of Local Affairs and representatives from the local governments and interest groups we contacted.

Overview

The Colorado Constitution requires that 40 percent of net lottery proceeds be allocated to the Conservation Trust Fund "for distribution to municipalities and counties and other eligible entities for parks, recreation and open space." By statute, the Department of Local Affairs' Division of Local Government is responsible for determining the local governments that are eligible to receive Fund revenues. Fund distribution is based on population. In Calendar Year 2002 the Department distributed more than \$42.3 million to 452 local government entities, including counties, municipalities, and special districts. Statutes require Fund revenues be expended for the following purposes: (1) acquisition, development, or maintenance of new conservation sites (defined in statutes); (2) capital improvements for recreation purposes on any public site; and (3) maintenance for recreation purposes on any public site.

For more information on this report, contact the Office of the State Auditor at 303.869.2800.

Key Findings

A summary of our findings related to the Conservation Trust Fund is as follows:

- **Fund uses.** Of the \$41.1 million in self-reported Fund expenditures reviewed during the audit, we estimate that more than \$1.2 million (about 3 percent) were spent for purposes not allowed by statute. These expenditures do not necessarily relate to the \$42.3 million in distributions because reported expenditures in any year may be paid from a combination of rollovers from prior years, current year distributions, or funds derived from other sources. Unallowable expenditures included payments for athletic teams, fireworks, public associations and clubs, and recreation programs. Additionally, we identified more than \$574,000 in questionable expenditures. These expenditures were questioned because local governments did not include sufficient information in their reports to determine whether the expenditures were appropriate. Currently the Department does not have the statutory authority to monitor Fund expenditures or to promulgate rules pertaining to the administration of the Fund. As a result, the Department has no ability to provide local governments with guidance to correct misuse of funds.
- **Monitoring.** No statutory provisions exist related to oversight of Fund expenditures, and consequently the Department does not monitor how local governments spend Fund monies. Pursuant to the Colorado Constitution and state statutes, Conservation Trust Fund monies are to be spent for: (1) acquisition, development, or maintenance of new conservation sites; (2) capital improvements for recreation purposes on any public site; and (3) maintenance for recreation purposes on any public site. As a result, monitoring of Fund expenditures is key to ensuring that the Fund is used as voters intended.
- **Resources.** The Department indicates it needs funding to carry out monitoring and oversight activities. Currently statutes prohibit the Department from charging fees for administration. There are differing informal opinions from Legislative Legal Services and the Attorney General's Office regarding whether a statutory amendment authorizing the Department to use Fund monies for administration is constitutional. Therefore our Office, in conjunction with the Department, is requesting a formal opinion from the Attorney General's Office on this issue. Depending on the result of the opinion, the Department should consider either proposing statutory revisions authorizing use of Conservation Trust Fund monies for oversight and administration or seeking funding for administration from state and local sources.
- **Enforcement.** One of the primary barriers to providing adequate oversight of local governments' uses of Fund monies is the lack of statutory enforcement authority.

Currently no provisions exist within statutes that allow the Department to recover misused funds, withhold future funds, or pursue other appropriate sanctions against local governments that do not comply with the Fund's spending requirements.

- **Fund commingling.** Our review of reporting forms submitted by local government entities indicates that some local entities may be commingling Conservation Trust Fund monies with other local government funds. Statutes permit commingling when accounting procedures are in place to separately track and account for the State's money. However, it is not practical for local governments to track Fund monies separately over time.
- **Interest payments.** Our review of the Department's reporting form determined that there is no assurance that local governments are applying interest earned on Conservation Trust Fund monies to their Fund account balances. Currently statutes do not include any provisions addressing interest earned on Fund balances.
- **Reporting process.** Our audit identified problems with the form used by the Department to collect self-reported Fund expenditures from local governments. In particular, we found that forms submitted by local governments contained incomplete information and inaccuracies. Further, we found that the Department's form included project codes that do not fit within the limitations of the statutes.
- **Unused funds.** Unused Conservation Trust Fund expenditures are retained by some local governments and rolled forward for future projects. We reviewed year-end Fund balances for 329 local governments and found that, in total, the unused Fund balances equaled \$36 million as of the end of Calendar Year 2002. It should be noted that because of the limitations of the current reporting form and the commingling of Fund monies discussed previously, unused Fund balances could include other local government revenue rolled over from prior years, in addition to Fund monies. Currently statutes do not require local governments to report to the Department how they plan to spend unused funds in the future. Further, statutes do not include provisions granting the Department the authority to redistribute unused funds when local entities retain funds year after year without submitting an acceptable plan for future use.

Our recommendations and the Department's responses can be found in the Recommendation Locator on the following page.

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
1	10	Propose statutory revisions to provide the Department with authority to review Conservation Trust Fund expenditures by local governments and to promulgate rules to carry out its oversight responsibilities.	Department of Local Affairs	Agree	September 1, 2004
2	12	Upon receiving statutory authority to oversee Fund expenditures, develop and implement a process for monitoring the use of monies by local governments.	Department of Local Affairs	Agree	September 1, 2004
3	13	Following the issuance of an opinion from the Attorney General's Office, propose statutory revisions authorizing use of Fund monies for oversight and administration or seek funding for administration from state and local sources.	Department of Local Affairs	Agree	July 1, 2004
4	14	Propose changes to state statutes to establish enforcement provisions related to Fund expenditures.	Department of Local Affairs	Agree	September 1, 2004
5	16	Propose statutory changes that would disallow the commingling of Fund monies with other revenue.	Department of Local Affairs	Agree	July 1, 2004
6	17	Propose statutory changes to require local governments to apply interest earned on Fund monies to their Fund balances to be expended for allowable purposes.	Department of Local Affairs	Agree	July 1, 2004
7	19	Improve the current process for local governments to report on Conservation Trust Funds.	Department of Local Affairs	Agree	September 1, 2004
8	20	Propose statutory revisions requiring local governments to report annually on how unused funds will be spent in the future and grant the Department authority to redistribute unused funds when local governments retain funds year after year without providing an acceptable plan for future use.	Department of Local Affairs	Agree	September 1, 2004

Conservation Trust Fund

Background

The Conservation Trust Fund (the Fund) is the single largest fund administered by the Department of Local Affairs (the Department). In Calendar Year 2002 the Department distributed more than \$42.3 million to 452 local government entities, including counties, municipalities, and special districts. The Colorado Constitution requires that 40 percent of net lottery proceeds are to be allocated to the Conservation Trust Fund “for distribution to municipalities and counties and other eligible entities for parks, recreation and open space.” By statute, the Department of Local Affairs’ Division of Local Government is responsible for determining the local governments that are eligible to receive Fund revenues and collecting annual reports submitted by these local governments detailing Fund expenditures. Fund distribution is based on population. Statutes require Fund revenues to be expended for the following purposes:

- **Acquisition, development, or maintenance of new conservation sites.**
Statutes define new conservation sites as:
 - . . . interests in land and water, acquired after establishment of a conservation trust fund . . . for park or recreation purposes, for all types of open space, including but not limited to floodplains, greenbelts, agricultural lands, or scenic areas, or for any scientific, historic, scenic, recreational, aesthetic, or similar purpose.
- **Capital improvements for recreation purposes on any public site.**
- **Maintenance for recreation purposes on any public site.**

Scope of Report

At the request of the Department of Local Affairs and the Legislative Audit Committee (LAC), we reviewed the systems and controls in place to ensure that Conservation Trust Fund monies are spent in compliance with the Constitution and statutes. Overall, we determined that local governments are not consistently using Conservation Trust Fund monies in accordance with statutes. Further, we concluded the Department lacks authority to monitor Fund expenditures or enforce statutory

requirements. These issues must be addressed to ensure Conservation Trust Fund expenditures are used to benefit Coloradans as intended by voters.

Clarification of Fund Uses

As noted previously, local governments self-report their Conservation Trust Fund expenditures annually to the Division of Local Government within the Department of Local Affairs. We reviewed more than \$41.1 million in self-reported expenditures during Calendar Year 2002. These expenditures do not necessarily relate to the \$42.3 million in distributions because reported expenditures in any year may be paid from a combination of rollovers from prior years, current year distributions, or funds derived from other sources. In addition, the Department was unable to provide us with expenditure information for 10 of the 452 local governments, representing distributions totaling nearly \$330,000 for Calendar Year 2002.

Although our review indicated that approximately \$39.3 million (about 96 percent) of Fund expenditures appeared to be allowable, we estimate that, on the basis of self-reported data, more than \$1.2 million (about 3 percent) was spent for purposes not allowed by statutes. We also found that more than \$574,000 (about 1 percent) of total self-reported Fund expenditures were questionable; i.e., the local governments did not include sufficient information in their reports to determine whether the expenditures were appropriate. Our analysis of unallowable expenditures identified payments for athletic teams, fireworks, public associations and clubs, and recreation programs in amounts displayed in the table on the following page.

Total Unallowable Expenditures by Project in Calendar Year 2002		
Project	Amount of Expenditure	Percent of Total Unallowable
Athletic Teams (e.g., baseball, basketball, swimming, and wrestling programs, uniforms, and sporting equipment).	\$ 24,800	2
Fireworks (i.e., for local fireworks displays).	24,900	2
Public Associations and Clubs (e.g., 4-H programs, prizes for post-prom parties, art shows, dances, and crafts).	76,600	6
Recreation Programs (e.g., booster clubs, county fair expenses, youth activities, and rodeo activities).	688,500	56
Other (e.g., holiday lighting and decorations, sporting goods, and administrative costs).	411,900	34
TOTAL	\$1,226,700	100
Source: Office of the State Auditor's analysis of self-reported data provided by local governments receiving Conservation Trust Fund monies.		

As stated previously, statutes limit Conservation Trust Fund expenditures to (1) acquisition, development, or maintenance of new conservation sites; (2) capital improvements for recreation purposes on any public site; and (3) maintenance for recreation purposes on any public site. As the table indicates, reported Fund expenditures totaling more than \$1.2 million were not in accordance with these statutorily intended uses. We confirmed our interpretation of the Colorado Constitution and Colorado Revised Statutes by requesting an informal opinion from the Attorney General's Office concerning appropriate uses of Conservation Trust Fund monies. (The complete informal opinion from the Attorney General's Office can be found in Appendix A). The opinion stated:

Section 29-21-101(4) limits use of moneys from the Fund to "acquisition, development, and maintenance of new conservation sites or for capital improvements or maintenance for recreational purposes on any public site." Items such as athletic teams, fireworks, recreational programs, and public associations and clubs do not fit within these limitations and are therefore not allowed.

We identified these same types of unallowable expenditures in our 1995 performance audit of the Department's Conservation Trust Fund. At that time, we recommended the Department clarify appropriate Fund expenditures on its reporting form provided to local governments. The reporting form still contains four project codes, such as athletic teams and recreation programs, that are not allowable under statutes.

Department Authority

Currently the Department does not have the statutory authority to monitor Fund expenditures and enforce statutory provisions. (Monitoring and enforcement are discussed in more detail later in this report.) The Department also lacks the authority to promulgate rules pertaining to the administration of the Conservation Trust Fund. As a result, local governments receive little guidance for interpreting the statute and defining appropriate Fund uses. Further, the Department has no ability to correct misuse of funds by local governments when it occurs. Consequently, there are no controls in place at the state level to ensure compliance with the Colorado Constitution and statutory mandates.

Recommendation No. 1:

The Department of Local Affairs should propose statutory revisions to provide the Department with authority to review Conservation Trust Fund expenditures by local governments and to promulgate rules to carry out its oversight responsibilities. The Department should then promulgate rules that provide clear guidance to local governments on the types of expenditures that are allowable and unallowable under the statutes.

Department of Local Affairs Response:

Agree. Implementation: September 1, 2004. The Department's ability to implement this recommendation, and the recommendations that follow in the remainder of this audit report, will be dependent upon enabling authority, funding, and timelines to be created in any legislation put forward to implement these recommendations. It will also be dependent upon the possible necessity of a favorable opinion from the Office of the Attorney General and necessary rulemaking in association with legislative directives.

These constraints notwithstanding, it is the intention of the Department to implement the recommendations of the audit in as timely a manner as possible, and we anticipate that by September 1, 2004, all recommendations will be implemented.

Monitoring

Currently the Department of Local Affairs does not monitor how local governments spend Conservation Trust Fund monies and no statutory provisions exist related to the oversight of Fund expenditures. Because of the lack of oversight authority and resources, the Department does not review, verify, or evaluate the data reported by local governments to determine how entities spent their Conservation Trust Fund monies. Over time, expenditures of Conservation Trust Fund monies for unallowable purposes could represent a substantial loss of funds intended for: (1) acquisition, development, or maintenance of new conservation sites; (2) capital improvements for recreation purposes on any public site; and (3) maintenance for recreation purposes on any public site. Consequently, ongoing monitoring of Conservation Trust Fund expenditures is key to ensuring Fund monies are used as voters intended.

The Department needs to establish an effective process to monitor Fund expenditures by local governments. An effective monitoring process would first include a review and certification by the local government confirming that Conservation Trust Fund monies were spent in compliance with the law. To accomplish this step, the Department should propose statutory revisions requiring each local government's Treasurer, or person of similar authority, to certify annually that all Fund expenditures have been reviewed and are in compliance with statutes and rules promulgated by the Department.

Second, the Department should review and verify data in all annual reports submitted by local governments. The review should provide assurance that the information self-reported by local governments is accurate and complete, and identify unallowable or questionable expenditures for follow-up. When concerns are noted during the review process, staff should obtain documentation to verify the local government's expenditures.

Finally, the Department should use a risk-based schedule to conduct audits of local governments' Conservation Trust Fund expenditures. By selecting a sample of local governments for audit each year, the Department could ensure that Fund expenditures comply with statutory requirements and Department rules. The risk-based selection process should consider factors such as high dollar expenditures, frequency of errors, and coverage to ensure that, over time, local governments of all sizes are audited.

To fulfill its monitoring responsibilities, the Department of Local Affairs could assign its own staff or contract with a qualified consultant to complete some or all of its monitoring activities related to the Conservation Trust Fund. One advantage to contracting is that a consultant may render a level of expertise that cannot be provided within the Department. The cost of such a contract would depend on the extent of monitoring activities performed by the consultant.

Recommendation No. 2:

Conditional upon receiving the statutory authority to oversee expenditures of Conservation Trust Fund monies, the Department of Local Affairs should develop and implement a process for monitoring the use of monies by local governments. The monitoring process should, at a minimum, include:

- a. Proposing statutory language requiring each local government's Treasurer, or an official with similar authority, to review and certify that self-reported Fund expenditures comply with statutory requirements and Department rules.
- b. Reviewing the reports submitted by local governments annually for accuracy and reasonableness and verifying underlying data when the review identifies errors or questionable expenditures.
- c. Reviewing a risk-based sample of local government Conservation Trust Fund expenditures annually. The Department could consider contracting with an independent firm for this purpose, subject to available resources.

Department of Local Affairs Response:

Agree. Implementation: September 1, 2004.

Resources

Currently the Department has minimal resources to carry out monitoring and oversight responsibilities related to the Conservation Trust Fund. According to Department staff, approximately 20 percent of one full-time equivalent (FTE) position is used to distribute funds and to ensure that all local governments submit the required annual report.

The Department indicates it needs funding to carry out monitoring and oversight activities. Currently statutes prohibit the Department from charging fees for this purpose. Further, the Colorado Constitution does not explicitly authorize use of Conservation Trust Fund monies for administration. Due to the importance of monitoring and oversight and the differing informal opinions on this issue provided by representatives from Legislative Legal Services and the Attorney General's Office, additional legal guidance is needed. Therefore our Office, in conjunction with the Department, is requesting a formal opinion from the Attorney General's Office on the

constitutionality of using Conservation Trust Fund monies for administration. If the opinion concludes that Fund monies can be used for oversight, the Department could consider proposing legislation authorizing the use of Conservation Trust Fund monies for administration. However, if the Department decides not to pursue legislation or the opinion concludes that the use of Fund monies for oversight is unconstitutional, the Department should seek funding from state and local sources.

Recommendation No. 3:

Depending on the result of the opinion from the Attorney General's Office, the Department of Local Affairs should consider:

- a. Proposing statutory revisions authorizing use of Conservation Trust Fund monies for oversight and administration.
- b. Seeking funding for administration from state and local sources.

Department of Local Affairs Response:

Agree. Implementation: July 1, 2004.

Enforcement

As discussed earlier, one of the primary barriers to providing adequate oversight of local governments' uses of funds is the lack of statutory enforcement authority. Currently no provisions exist within the statutes that allow the Department to recover misused funds, withhold future funds, or pursue other appropriate sanctions against local governments that do not comply with the Fund's spending requirements. In other words, there is no recourse when local governments use funds for purposes other than those specified in statutes. We identified this concern in our 1995 performance audit of the Conservation Trust Fund. This lack of authority was reiterated in the informal opinion of the Attorney General's Office issued in December 2003. The opinion stated:

There is presently nothing in either the statutes nor the constitution that would authorize or empower the Department of Local Affairs (the "Department") to take enforcement action against a recipient who misuses money disbursed out of the Fund. The Department is legally unable to act without such authority.

To better ensure that local governments comply with the spending requirements, the General Assembly should consider modifying statutes to include enforcement provisions. Such provisions could grant the Department the authority to impose sanctions against local entities failing to comply with the requirements and provide mechanisms for enforcing the laws. At a minimum, the statutes could allow for the recovery of misused funds and the withholding of future funds when it is determined that local entities are not complying with spending requirements. In addition, the General Assembly could consider modifying the statutes to include criminal penalties or sanctions (e.g., withholding the entities' property taxes) against local government officials or entities for willfully violating the law.

Recommendation No. 4:

The Department of Local Affairs should propose changes to state statutes to establish enforcement provisions related to Conservation Trust Fund expenditures. Such revisions could include:

- a. Granting the Department authority to enforce the Conservation Trust Fund statutes.
- b. Authorizing the Department to recover misused funds and withhold future funds when it is determined that a local government has not complied with statutes.
- c. Providing the Department with the ability to authorize the County Treasurer to prohibit release of property tax revenues until misused Conservation Trust Fund monies have been fully repaid.
- d. Proposing legislation to establish criminal penalties to be taken against local government officials for willful violation of the law.

Department of Local Affairs Response:

Agree. Implementation: September 1, 2004.

Fund Commingling

We reviewed the forms submitted to the Department by local government entities. Our review indicates that some local governments may be commingling Conservation Trust Fund monies with other local government funds. Local government entities include other local government revenue on their Fund reporting form submitted to the Department. For example, the Department asks local entities to list Great Outdoors Colorado funds, or Lottery dollars received from other sources, under an "other revenue" category on the Fund reporting form. Additionally, local government entities include other types of revenue, such as general fund monies, other local government grants, recreational licenses, donations, and property taxes, on their Fund reporting forms.

Section 29-21-101(4), C.R.S., allows a local government to deposit other monies appropriated for similar purposes in its Conservation Trust Fund. Section 29-21-101(2)(V), C.R.S., states that "all [Conservation Trust Fund] monies received from the State by an eligible entity shall be accounted for separately from any other sources of monies available to the entity." However, our review determined that the reporting forms do not provide assurance that local governments are accounting for their other funds separately from their Conservation Trust Fund monies as required by statutes.

We determined that statutes are not as clear as they could be in ensuring separate accounting for Conservation Trust Fund monies. The informal opinion of the Attorney General's Office issued in December 2003 concurred. The informal opinion harmonized the statutory provisions and interpreted them as follows:

"Commingling" within a local government's trust fund is acceptable, but only if accounting procedures are in place to separately track the State's money.

Although statutes state that commingling is acceptable when accounting procedures are in place to separately track and account for the State's money, local government representatives report that it is not practical for entities to track Fund monies separately over time. Local governments are able to track Fund monies separately from other monies in a current accounting year, but when remaining monies are rolled over at the end of the year, it becomes increasingly difficult to distinguish rollover funds from new funds in subsequent years and to identify the sources and amount of funds commingled for spending on specific projects.

We believe the General Assembly should consider amending the language in the statute to ensure that Conservation Trust Fund expenditures are tracked and

accounted for separately. Revised statutory language should make it clear that local governments cannot deposit other funds appropriated for similar purposes in their Conservation Trust Fund.

Recommendation No. 5:

The Department of Local Affairs should propose statutory changes that disallow the commingling of Conservation Trust Fund monies with other revenue.

Department of Local Affairs Response:

Agree. Implementation: July 1, 2004.

Interest Payments

Our review of the Department's reporting form determined that there is no assurance that local governments are applying interest earned on Conservation Trust Fund monies to their Fund account balances. The Department's reporting form does include a line for local governments to record any interest earned on their Funds. However, the reporting form does not require local governments to report interest earned, and local governments do not consistently include interest earned on these self-reported forms.

Department staff report that local governments often contact them to ask whether interest earned should be included as Fund revenue. Staff report that they are unsure how to respond to this question. We reviewed the statutes and found that there are no provisions addressing interest earned on Conservation Trust Fund balances. We reviewed statutes related to interest earnings for similar funds, such as bonds issued to the Department of Transportation for road construction, and found that interest derived from the investment of funds can be applied to the purposes for which the funds are issued and must be credited to the fund.

To ensure that local governments apply interest earned from Conservation Trust Fund monies to the Fund balance, the General Assembly should consider modifying statutes to include provisions that address interest earnings specifically. Statutory provisions could clarify that interest earned is part of the local government's Conservation Trust Fund balance and must be used in accordance with statutes and Department rules.

Recommendation No. 6:

The Department of Local Affairs should propose changes to state statutes to establish provisions regarding interest earnings on Conservation Trust Fund balances. Such revisions should include requiring local governments to apply interest earned on Fund monies to their Fund balances to be expended for allowable purposes as set forth in the statutes and the Department's rules.

Department of Local Affairs Response:

Agree. Implementation: July 1, 2004

Reporting Process

As discussed previously, our audit identified problems with the form used by the Department to collect self-reported Conservation Trust Fund expenditures from local governments. By statute, the form is to contain information for each local government entity on:

... the total amount of state moneys in its local Conservation Trust Fund, the amount of any state moneys encumbered or expended from such fund since the previous year's report, and the purpose of the encumbrance or expenditure.

We reviewed the forms from local governments receiving Conservation Trust Fund monies in Calendar Year 2002. We provide an example of a hypothetical reporting form in Appendix B. The example illustrates the following problems identified during our review:

- **Incomplete information.** As discussed previously, local governments did not consistently provide sufficient information to determine whether Conservation Trust Fund expenditures were allowable. We found that forms were missing project codes, project costs, project addresses, descriptions of the work performed, and the amount of Fund monies spent. Consequently, as noted earlier, we identified more than \$574,000 in Fund expenditures that were questionable.

- **Unallowable and duplicative project codes.** As noted previously, the Department's reporting form includes project codes that do not fit within the limitations of the statute. Project codes for athletic teams, fireworks, public associations and clubs, and recreation programs should be removed from the form. Additionally, project codes that are duplicative or unclear need to be eliminated or clarified. To facilitate assurance that reported expenditures are allowable, the Department should redesign its reporting form to ensure Fund expenditures are categorized and reported according to the three classifications outlined in statutes: (1) acquisition, development, and maintenance of new conservation sites; (2) capital improvements for recreation purposes on any public site; and (3) maintenance for recreation purposes on any public site. The Department should provide guidance to local governments to assist them with completing forms.
- **Inaccuracies.** We found that reporting forms submitted by 50 local governments (or 11 percent) contained math errors in one or more areas. We identified errors in reported revenues and expenditures. As a result, it is difficult to ensure that Fund monies expended and remaining Fund balances reported are accurate. These calculation errors could easily be remedied if the reporting form were automated as we recommend later in this section.

The Department should take the following steps to improve the information reported by local governments. First, the Department should redesign the reporting form as discussed above, removing all unallowable and duplicative project codes, clarifying project codes that are unclear, and ensuring all expenditures are reported in the three categories allowed by statutes. Second, the Department should provide local governments with written guidance and technical assistance, as needed, to assist them with completing the forms as required. Guidance should specifically address (1) categorization of expenditures according to the three purposes allowed in statutes and (2) definitions for and examples of the types of allowable expenditures for each expenditure category. For example, salary expenditures for maintenance would not be allowable unless the expenditures were specifically connected to "maintenance for recreational purposes on any public site," as set forth in Section 29-21-101(4), C.R.S. Third, the Department should fully automate the reporting process, allowing local governments to submit the reporting form to the Department electronically. Further, the Department should explore purchase or development of software that would populate an internal database with the electronic information submitted by local governments. Automation would not only save the local governments time and money but would also allow the Department to more easily import information into a database for further analysis.

Recommendation No. 7:

The Department of Local Affairs should improve the current process for reporting on Conservation Trust Fund expenditures by:

- a. Redesigning the reporting form to remove unallowable project codes and to require expenditures to be reported according to the three allowable categories set forth in statutes.
- b. Providing additional guidance and technical assistance to local governments. Such guidance should include, but not be limited to, providing further descriptions and examples of allowable and unallowable Fund uses.
- c. Automating the reporting process.

Department of Local Affairs Response:

Agree. Implementation: September 1, 2004.

Plans for Unused Funds

During the audit we found that local governments often do not spend all of the Conservation Trust Fund monies they received during the year. Unused funds are retained by local governments and rolled forward for future projects.

Our audit evaluated the reported year-end Fund balances for 329 local governments during Calendar Year 2002. Due to problems with the reporting form discussed earlier, we excluded 123 local governments from this review. We found that the 329 local governments included in our analysis retained a total of \$36 million in unused Conservation Trust Fund monies at the end of Calendar Year 2002. Of these, there were 66 local governments that did not spend any Conservation Trust Fund monies during the year. Fund balances for these 66 entities totaled about \$4.7 million. It should be noted that because of the limitations of the current reporting form and the commingling of Fund monies discussed previously, unused Fund balances could include other local government revenue rolled over from prior years, in addition to Conservation Trust Fund monies.

The total unused Conservation Trust Fund monies for Calendar Year 2002 is substantial and was intended for: (1) acquisition, development, or maintenance of new conservation sites; (2) capital improvements for recreational purposes on any public site; and (3) maintenance for recreation purposes on any public site. We recognize that local governments may be retaining funds at year-end for future projects. However, this information is not reported consistently to the Department. Since the amount of unused funds is significant, controls are needed to ensure that local governments have plans for using their retained Conservation Trust Fund monies. The General Assembly should consider statutory amendments requiring local governments to report their plans for spending unused funds to the Department annually. Additionally, the General Assembly should consider granting the Department with authority to redistribute unused funds when local governments retain funds year after year without submitting an acceptable plan for future use. The Department should define criteria for reporting Conservation Trust Fund plans and establish the conditions triggering Fund redistribution through its rule-making process.

Recommendation No. 8:

The Department of Local Affairs should propose statutory revisions related to unused Conservation Trust Fund monies, to include:

- a. Requiring local government entities to report to the Department on an annual basis how they plan to spend unused Conservation Trust Fund monies in the future.
- b. Granting the Department authority to redistribute unused funds when local government entities retain funds year after year without providing an acceptable plan for future use.

In addition, the Department should define, through its rules, criteria for reporting Conservation Trust Fund plans and establish the conditions activating Fund redistribution.

Department of Local Affairs Response:

Agree. Implementation: September 1, 2004.



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December 18, 2003

C O N F I D E N T I A L M E M O R A N D U M

PRIVILEGED ATTORNEY-CLIENT MEMORANDUM

TO: Joanne Hill, State Auditor

FROM: Bradley W. Cameron
Assistant Attorney General
Natural Resources and Environment Section

RE: Conservation Trust Fund

INTRODUCTION

On 11/20/03 the State Auditor forwarded to the Office of the Attorney General a memorandum requesting an informal Attorney General's opinion concerning four questions related to the Conservation Trust Fund (the "Fund"). On 12/8/03 that request was supplemented by a memorandum that added three additional questions. Because of the impending legislative session and the perceived possibility that legislation touching on the Fund might be introduced, an expedited response to the questions was also requested by the State Auditor.

The Fund was established in 1974 by the enactment of H. B. 1084, and the statute governing it can be found today at § 29-21-101, C.R.S. The Fund was mentioned by name in Referred Amendment No. 2, which was adopted by the voters in 1980 and which authorized the establishment of a state-supervised lottery. That amendment added Section 2 to Article XVIII of the Colorado Constitution. The Fund was also mentioned by name in Initiated Amendment No. 8, which was adopted in 1992 and which, among other things, established the Great Outdoors Colorado Trust Fund. That amendment added Article XXVII to the Colorado Constitution.

It should be noted that the Fund was the subject of Formal Opinion No. 95-5 issued by the Office of the Attorney General on 11/30/1995, a copy of which is attached hereto for your information.

EXECUTIVE SUMMARY

The seven questions posed by the State Auditor and a short answer for each one are listed below. A general discussion concerning the Fund and its statutory and constitutional framework follows, with a longer discussion of the answers following that. The order in which the questions are answered has been re-arranged from that in which they were presented to assist with the flow of discussion.

QUESTION #1: Can the Department of Local Affairs use Trust Fund monies for purposes of overseeing the distribution and use of the Fund?

SHORT ANSWER: No.

QUESTION #2: Does the Department of Local Affairs have any authority to enforce the provisions of the Fund?

SHORT ANSWER: No.

QUESTION #3: Can Fund monies be commingled with local monies of a similar nature?

SHORT ANSWER: Yes and no. "Commingling" within a local government's trust fund is acceptable, but only if accounting procedures are in place to separately track the State's moneys within the local trust fund.

QUESTION #4 (a collage): Do the statutes provide school districts with more latitude (than other entities) in their use of Trust Fund monies? According to Section 29-21-101(1)(g)(1.5), C.R.S., school districts which are special districts are authorized to create conservation trust funds and any moneys, collected and separately accounted for and devoted exclusively to the operation of *a system of public recreation and playgrounds* prior to January 1, 1987, are deemed to be conservation trust funds. Does a *system of public recreation and playgrounds* include financial support for athletic teams, clubs, and recreation programs? Are school districts the only entities permitted to use Trust Fund dollars for playgrounds? (Emphasis in original.)

SHORT ANSWER: School districts do NOT have more latitude than do other local governments regarding their use of moneys from the Fund.

QUESTION #5: Can local government entities other than schools use Conservation Trust Fund monies for such items as athletic teams, fireworks, recreational programs, television translators, public associations or club projects?

SHORT ANSWER: Section 29-21-101(4) limits use of moneys from the Fund to “*acquisition, development, and maintenance of new conservation sites or for capital improvements or maintenance for recreational purposes on any public site.*” Items such as athletic teams, fireworks, recreational programs, and public associations and clubs do not fit within these limitations and are therefore not allowed. Television translators were the subject of a Formal Opinion of the Office of the Attorney General issued on 10/30/1995, which should be consulted regarding use of moneys from the Fund for such purposes.

QUESTION #6 (a collage): Can local government entities use Fund monies for salaries? If so, are Fund expenditures limited to salaries for maintenance activities, or are other salary expenditures, such as salary expenditures for lifeguards, permissible?

SHORT ANSWER: Pursuant to § 29-31-101(4), maintenance is the only type of “activity” that can be paid for out of the Fund. Maintenance is obviously performed by individuals, and therefore the Fund can be used to pay that portion of the salaries of individuals associated with maintenance for recreational purposes on any public site. Payment of other salaries, such as for lifeguards, would not be permissible, except to the extent of any maintenance duties assigned to and performed by lifeguards or other salaried personnel.

QUESTION #7: Your recommendations for statutory revisions to clarify appropriate fund expenditures and strengthen the monitoring and enforcement capabilities for the Department of Local Affairs. This may include authority for the Department to a) promulgate rules and regulations; b) monitor and establish criteria for Fund expenditures; and c) develop enforcement mechanisms such as sanctions and penalties.

While I and other personnel here at the Office of the Attorney General are available to assist with reviewing and editing proposed legislation, at this point in time I will decline from making any recommendations.

STATUTORY AND CONSTITUTION HISTORY

The Conservation Trust Fund was established in 1974 by the enactment of H.B.1084. It empowered the State Treasurer – not the Dept. of Local Affairs - as the branch of government responsible for disbursement of the subject funds to the designated recipients, who were limited then to only counties and municipalities. Moreover, at that time the allowable use of the funds was limited “...*only for the acquisition, development, and maintenance of new conservation sites.*” Also of significance was the following sentence, the essence of which is still in statute and states “*An eligible county or municipality may deposit other moneys appropriated for similar purposes in its conservation trust fund to be expended as authorized in this subsection (4).*”

Between 1974 and 1989 the statutory provisions governing the Fund were amended a total of six times. The first was in 1977 with the enactment of H.B. 1081, which replaced the State Treasurer with the Department of Local Affairs as the entity responsible for disbursement of money from the Fund and expanded the list of allowable expenditures to include “*capital improvements for recreational purposes on any public site.*”

Before any additional statutory amendments to the Fund were made, in 1980 the voters passed Amendment 2, which amended Section 2 of Article XVIII of Colorado’s Constitution to permit the General Assembly to establish a lottery. The stated beneficiary of the moneys to be generated by the lottery was to be the Fund, which, according to the “blue book” that explained Amendment 2 to the voters, had theretofore “*always lacked a viable revenue base.*”

Amendment 2 contained an important loophole that subsequently resulted in a considerable amount of the lottery proceeds going elsewhere. That loophole can be found at the beginning of the very last sentence of the amendment, which states “**(U)unless otherwise provided by statute, all proceeds from the lottery, after deduction of prizes and expenses, shall be allocated to the conservation trust fund of the state for disbursement to municipalities and counties for park, recreation, and open space purposes.**” (Emphasis added.) The Legislature’s utilization of this loophole to fund prisons and other capitol construction projects of the State ultimately gave rise to the enactment in 1992 of Amendment 8 to Colorado’s Constitution, which can be found today at Article XXVII.

With the enactment in 1980 of Amendment 2, the Conservation Trust Fund had now been “officially” named in Colorado’s Constitution, and it had also found a new funding stream. Despite this new prominence, however, it was not long before the Legislature continued the process of modifying the statutory provisions governing the Fund.

The first post-1980 amendment to the statute occurred in 1982 under S.B. 119. Despite the fact that the Constitution now explicitly identified only municipalities and counties as eligible recipients of moneys to be disbursed out of the Fund, S.B. 119 expanded the list to include special districts that provide park or recreational services. And, while the phrase “*park, recreation, and open space purposes*” had now been listed in the Constitution as the appropriate uses for money disbursed out of the Fund, S.B. 119 seemed not to notice when it tinkered with the more restrictive list that already existed in the statute to include “*maintenance*” for recreational purposes.¹

The next two amendments to the statute both occurred in 1987. That year H.B. 1252 amended the definition of “*special districts*” to explicitly include school districts, and also

¹ Arguably the loophole associated with the phrase “(U)unless otherwise provided by statute...” found in Amendment 2 allows sufficient leeway for these changes.

apparently added a new subprovision that likewise addresses school districts.² H.B. 1355, which was likewise enacted in 1987, made a very minor change to the then-brand new language concerning school districts.

The most recent amendment to the statute governing the Fund occurred in 1989 with the enactment of S. B. 191, which made an extremely minor adjustment to the timing of when disbursements from the Fund would be made.

In 1992 the voters approved Amendment 8, which added Article XXVII to Colorado's Constitution. As was discussed in the "blue book" for Amendment 8, its primary intent was to direct those lottery proceeds that had over time been used by the Legislature for prisons and other capital improvements to the Great Outdoors Colorado Trust Fund. Other than specifying that 40% of the net proceeds from the lottery would continue to be allocated to the Conservation Trust Fund, very little mention of the Fund was made in the blue book. As of this date, the sole reference in Article XXVII to the Conservation Trust Fund is to be found in Section 3(1)(b)(I), which addresses distribution of lottery proceeds as follows:

*"Forty percent to the Conservation Trust Fund for distribution to municipalities and counties **and other eligible entities for parks, recreation and open space purposes.**"*

(Emphasis added.)

NOTE: A basic resource for determination of Legislative intent is the discussion that takes place in hearings before Legislative committees concerning the enactment of legislation. *People in Interest of G.W.R.*, 943 P.2d 466 (Colo. App.). We therefore reviewed the audiotape recordings of certain proceedings that typically provide information concerning Legislative intent, in particular Legislative hearings for the 1977 bill (H.B. 1081) and the proceedings held by the directors of the Legislative Council and the Office of Legislative Legal Services regarding the 1992 Constitutional Amendment.

² It should be noted that the published session law for H.B. 1252 appears to contain a typographical error. While it denotes in all capital letters the language of § 29-21-101(1)(g)(II) as new material being added to the existing statute, it does not likewise do so for the language of § 29-21-101(1.5). Yet, after careful review, the language of subsection (1.5) does not appear to have previously been included in the statute. Consequently, the assumption is that an error was made when publishing the bill in the session laws.

DISCUSSION AND LONG ANSWERS

QUESTION #1: Can the Department of Local Affairs use Trust Fund monies for purposes of overseeing the distribution and use of the Fund?

LONG ANSWER: Section 29-21-101(3), C.R.S., states in its entirety that “*(N)o fee shall be charged by the state for the administration of moneys pursuant to this section.*” This provision was in the original bill enacted in 1974, and has not been modified since. The intent of the Legislature seems clear and unambiguous from this provision. Therefore, the answer to Question #1 is “no.”

QUESTION #2: Does the Department of Local Affairs have any authority to enforce the provisions of the Fund?

LONG ANSWER: There is presently nothing in either the statutes nor the constitution that would authorize or empower the Department of Local Affairs (the “Department”) to take enforcement action against a recipient who misuses money disbursed out of the Fund. The Department is legally unable to act without such authority. Moreover, the fact that the State Treasurer was initially the branch of State government tasked with disbursing money from the Fund reinforces the conclusion that administration of the Fund is to be relatively passive. Similarly, the fact that the statute is clear that a fee can not be charged out of the Fund to pay for administrative costs also reinforces the conclusion that the Legislature intended the Department’s role to be minimal. Therefore, the answer to Question #2 is “no.”

QUESTION #3: Can Fund monies be commingled with local monies of a similar nature?

LONG ANSWER: The statute is potentially ambiguous on this issue, although a harmonious interpretation of the pertinent provisions is possible.

One of the pertinent provisions is § 29-21-101(4), C.R.S., the last sentence of which states “*(A)n eligible entity may deposit other moneys appropriated for similar purposes in its conservation trust fund to be expended as authorized in this subsection (4).*” This language has been in the statute ever since the creation of the Fund back in 1974, and would seem to imply that other local moneys can be commingled in with moneys disbursed from the Fund – provided that those other moneys are expended in conformance with the same requirements that attached to the Fund moneys.

However, in 1982 the Legislature added the following language to the statute: “*(A)ll moneys received from the state by an eligible entity pursuant to this section shall be accounted for separately from any other source of moneys available to the entity for the*

acquisition of new conservation sites or recreational facilities as defined in this article.” (SEE § 29-21-101(2)(b)(V), C.R.S.) At first reading this provision would appear to be the exact opposite of the earlier language. It seems to say that other moneys should NOT be included in the individual funds established by each recipient of money from the larger Fund. (SEE the definition of “*eligible entity*” at § 29-21-101(1)(b), which requires the creation of a “*fund*” by the local entity in order to receive money from the State.)

It is presumed that when the Legislature enacts a statute, that the entire statute is intended to be effective. § 2-4-201, C.R.S. If a statute is ambiguous, however, then it is important to consider the object sought to be obtained by the statute, and the consequence of a particular construction. § 2-4-203, C.R.S. But if statutes are enacted by the Legislature that are irreconcilable, then the last enacted statute is the one that prevails. § 2-4-206, C.R.S.

The two provisions quoted above can be reconciled if a distinction is made between “*depositing*” other moneys in a local government’s trust fund versus “*accounting*” of the money received from the State. Section 29-21-101(4) seems to say it is OK for other moneys to be “*commingled*” to the extent that they are placed in the local entity’s trust fund, but § 29-21-101(2)(b)(V) requires that within said trust fund there must be adequate accounting established so that the money from the State’s Fund can be tracked and accounted for separately.

Moreover, if the two statutory provisions can not be reconciled in this manner, then the most recently enacted provision should be followed, which is the provision that requires the State’s moneys to be accounted for separately.

Given the inclusion of these two provisions in the statute, it is understandable how local governments might be confused on this point. Nevertheless, a careful reading of the statute leads to the conclusion that “*commingling*” within a local government’s trust fund is only acceptable if accounting procedures are in place to separately track the State’s moneys.

QUESTION #4 (a collage): Do the statutes provide school districts with more latitude (than other entities) in their use of Trust Fund monies? According to Section 29-21-101(1)(g)(1.5), C.R.S., school districts which are special districts are authorized to create conservation trust funds and any moneys, collected and separately accounted for and devoted exclusively to the operation of *a system of public recreation and playgrounds* prior to January 1, 1987, are deemed to be conservation trust funds. Does a *system of public recreation and playgrounds* include financial support for athletic teams, clubs, and recreation programs? Are school districts the only entities permitted to use Trust Fund dollars for playgrounds? (Emphasis in original.)

LONG ANSWER:

(A) Taking the above in reverse order, the first question to be discussed is this: Are school districts the only entities permitted to use moneys from the Fund for playgrounds?³

The term “*playground*” is not defined in the statute or elsewhere by the Legislature, but Webster’s Seventh New Collegiate Dictionary defines it as a noun that means “*a piece of ground used for and usually having facilities for recreation, especially by children.*”

Pursuant to § 29-21-101(4), all moneys disbursed from the Fund are to 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.”*

The term “*new conservation sites*” is defined very broadly at § 29-21-101(1)(e) to include interests in land and water for all sorts of purposes, including recreation.

The term “*recreation*” is not defined by the Legislature, but Webster’s Seventh New Collegiate Dictionary defines it as a noun that means “*refreshment of strength and spirits after toil; diversion; also a means of refreshment or diversion.*” While perhaps implicit, it should be noted that the statute does not qualify the term “*recreational*” with the additional adjective “*outdoor.*”

Likewise the term “*capital improvements*” is not defined. While not directly on point, Webster’s Seventh defines the term “*capital assets*” to mean “*long-term assets.*” Consequently, it would appear that the phrase “*capital improvements*” is intended to mean improvements of a physical nature that are long lasting, as compared to short term.

Given the plain meaning of the above words, the intent of the Legislature seems clear that *any* entity eligible to receive moneys from the Fund - be it either a school district, a municipality, a county, or a special district - would be at liberty to legitimately expend such moneys on public playgrounds. If the expenditure was for land or water associated with a playground, then it constitutes a “*new conservation site.*” And, if the expenditure was for the purchase or maintenance of equipment or some other long lasting item used in association with a playground, then it constitutes “*capital improvement or maintenance for recreational purposes.*”

In either case, it seems clear that *any* eligible entity – not just school districts - can legitimately use money out of the Fund for playgrounds.

³ It should be noted that the term “playgrounds” appears in both § 29-21-101(1)(g)(II) and § 29-21-202(1.5), C.R.S.

(B) Moving backward, the next question is this: Can school districts spend Fund moneys on athletic teams, clubs, and recreational programs?

While the two provisions in the statute that specifically mention school districts use the phrase “*operation of a system of public recreation and playgrounds*,” the language of § 29-21-101(4) should not be lost sight of. That provision starts off stating “(A)ll moneys received from the state by each eligible entity pursuant to this section...” and then goes on to limit the use of such moneys as discussed above.

As previously mentioned, the presumption is that the entire statute is intended to be effective. § 2-4-201(1)(b), C.R.S. Given the clear direction provided in subsection (4) of the statute that all of the moneys from the Fund are subject to the limitations established in that provision, it is logical to conclude that school districts must conform to these limitations the same as any other local governmental entity. To interpret the language any other way would be to violate the meaning of the word “*all*.”

However, as will be discussed below, there is a question of whether the direction provided in the constitution through the phrase “*for parks, recreation and open space purposes*” overrides the statutory limitations imposed on the use of moneys from the Fund. In light of the discussion on that larger issue, the answer to the above question must be that school districts can spend moneys from the Fund on athletic teams, clubs, and recreational programs only to the extent that all eligible entities can do so.

(C) Finally, the last question to be discussed in regard to school districts is this: Do school districts have more latitude than do other eligible entities in their use of moneys from the Fund?

The answer to this has already been discussed above. In summary, the intent of the Legislature seems clear. Pursuant to subsection (4) of the statute, ALL eligible entities are to comply with the same requirements. Whether or not those statutory requirements are perhaps in conflict with the language of the constitution is a question that will be discussed at length below, but there seems to be no “special status” under the statute for school districts.

QUESTION #5: Can local government entities other than schools use Conservation Trust Fund monies for such items as athletic teams, fireworks, recreational programs, television translators, public associations or club projects?

LONG ANSWER: First, it should be noted that the issue of use of Fund moneys for television translators was touched upon by the Formal Opinion of the Attorney General issued on 11/30/95. This informal memorandum is not intended to replace or otherwise overrule that Formal Opinion, and therefore consideration of the issue in regard to television translators will be deferred to the Formal Opinion.

As for the general question presented, if the statute were the only legal authority involved and the constitutional provisions were ignored, then the clear answer would be that direct use of moneys from the Fund for “activities” such as athletic teams, fireworks, recreational programs and public associations or clubs would be prohibited by the plain meaning of the restrictions put in place by subsection (4) of the statute. As has already been discussed at length, that provision limits the use of “**all**” moneys from the Fund to “*the acquisition, development, and maintenance of new conservation sites or for capital improvements or maintenance for recreational purposes on any public site.*” Other than maintenance, “activities” are NOT included.

But, left unresolved by the above analysis is whether the broader language used by the Colorado Constitution in both Article XXVII, Section 3(1)(b)(I), and Article XVIII, Section 2(7) (i.e. “*for parks, recreation and open space purposes*”), would override the more narrow statutory language.

Why is the constitutional language considered to be broader than that found in the statute? Primarily because use of the word “*recreation*” as it appears in the Constitution could arguably imply not merely a *place* to engage in recreation or *things* to facilitate recreation, but also the *act of recreation*. Following this logic, the Constitutional language could be interpreted as allowing use of moneys from the Fund for not only the acquisition of the land for use as a baseball field and the purchase and maintenance of capital improvements associated with the baseball field (such as bleachers, restrooms, etc.), but also directly funding the actual *activity of playing baseball* by paying for such things as the salary of the coach for the baseball team.

Simply put, the question is whether the broader language of Colorado’s Constitution overrides the more narrow language of the statute. If the circumstances were such that the statute had been enacted after the constitutional provisions were in place (and ignoring for the moment the maxim that all statutes are presumed to be constitutional until found by a court to be otherwise), then a serious question might exist as to whether or not the more narrowly drawn statutory language was constitutional.

Here, however, the situation is somewhat reversed. The statute that created the Conservation Trust Fund pre-dates by six years the enactment in 1980 of the first constitutional provision that uses the broader terminology. At the time voters were asked to consider Amendment 2 in 1980, the statute only permitted the use of Fund moneys for the acquisition of “*new conservation sites*” and for “*capital improvements for recreational purposes.*”⁴

Considerable legal research has been undertaken to date in an attempt to locate any case law that deals with this type of situation where a statutory provision is more-or-less

⁴ “Maintenance” was not added to the statute until the enactment of S.B. 119 in 1982.

incorporated by reference in the constitution, but nothing has yet been found. While it is difficult to believe that litigation over this point would be one of first impression, at this point in time that would appear to be the case.

In the absence of legal precedence, the appropriate course of action is to fall back on the assumption that statutes are presumed to be in compliance with the constitutions of the state of Colorado and the United States. SEE § 2-4-201(1)(a), C.R.S.

Relying on this presumption, the most logical analysis to follow would be that when the voters approved the two pertinent amendments to the Colorado Constitution, they were endorsing the statutory limitations then in-place governing the use of moneys disbursed from the Conservation Trust Fund. While this theory is somewhat strained by the Legislature's enactment of S.B. 119 in 1982 (which had the effect of adding "maintenance" to the list of allowable uses, and which was done *after* the enactment of the first subject constitutional amendment), the voters approval of Amendment 8 in 1992 served to once again endorse the statutory scheme then in-place. And, since the pertinent statute has not been amended since 1992, there is currently no inconsistency.

But this analysis does little to provide an explanation for how future legislative changes to the statutory limits governing the Fund can be accommodated under the constitution. Minor modifications, such as those envisioned in the questions presented by the State Auditor, would appear to be constitutionally permissible. On the other hand, major changes to the Conservation Trust Fund, for example such as diverting moneys to build prisons, would present more of a constitutional challenge.

QUESTION #6 (a collage): Can local government entities use Fund monies for salaries? If so, are Fund expenditures limited to salaries for maintenance activities, or are other salary expenditures, such as salary expenditures for lifeguards, permissible?

LONG ANSWER: Section 29-21-101(4) clearly provides that "*maintenance for recreational purposes on any public site*" is an acceptable use of moneys from the Fund. Maintenance in this context is clearly an "*activity*." It would include such work as painting picnic benches, repairing bleachers at baseball fields, and similar endeavors.

Individuals generally do not perform such work for free. Therefore, payment of that portion of their salaries associated with such maintenance out of moneys disbursed from the Fund is clearly permissible.

Payment of other salaries, for example those of lifeguards, would not be permissible. While lifeguards are clearly included within the meaning of the term "*recreation*," they are not included within the list of permissible uses established in statute.

Keep in mind, however, that the answer to this question would change if the broader language used in the Constitution (“*for parks, recreation and open space purposes*”) were to be interpreted as overriding the more narrow language found in § 29-21-101.

CONCLUSION

This memorandum reflects the legal opinions of the authoring attorney and is not to be construed as an official opinion of the Attorney General.

Please feel at liberty to call me at 303/866-5006 if you have any questions, or if additional research or assistance is desired.

cc: Felicity Hannay - OAG

Appendix B

Sample Conservation Trust Fund Reporting Form

This appendix provides a hypothetical copy of the reporting form that local governments submit annually to the Division of Local Government at the Department of Local Affairs. We included actual examples of problem expenditures identified during our review.

Hypothetical Form
STATUS OF CONSERVATION TRUST FUNDS
(Local Lottery Funds)
JANUARY 1 TO DECEMBER 31, 2002

IMPORTANT: THIS FORM MUST BE COMPLETED AND RETURNED BY 1/31/2003

Please **TYPE** or **PRINT** and **MAIL** to:

Conservation Trust Fund Administrator

1313 Sherman Street, Room 521

Denver, CO 80203

Name of Local Government: Any Town

Choose One: City Town County Special District

County in which you are located: Any County

Contact Person: John Doe **Phone:** (303) 555-1234

Title: Finance Director **FAX:** (303) 555-5678

Address: 123 Main Street, Any Town, CO

Signature: (John Doe's Signature)

Beginning Conservation Trust Fund Balance: (1/1/02) \$95,263.30

2002 Conservation Trust (Lottery) Funds Received:

March 2002	<u>\$29,389.98</u>
June 2002	<u>\$33,331.58</u>
September 2002	<u>\$24,391.57</u>
December 2002	<u>\$27,371.42</u>
Interest Earned:	<u>\$ 2,720.52</u>

Total Conservation Trust Funds: \$117,205.07

Other Revenue: (Specify Sources) _____ \$ 75,263.82
GOCO Grants, donations

Total Available Resources: \$287,732.19

Total 2002 Expenditures or Encumbrance
(From Schedule A): \$ 16,000.00

Ending Balance: (12/31/02) \$271,732.19

IMPORTANT



RECERTIFICATION FORM



IMPORTANT

The Any Town wishes to continue receiving proceeds from the Colorado
(Name of Local Government)
Lottery and hereby certifies that a Conservation Trust Fund has been established for this local government entity.

Name (please print) John Doe **Signature** (John Doe's Signature)

Title Finance Director **Date** January 9, 2003

Instructions: Describe completely your agency's 2002 expenditures of Conservation Trust (local Lottery) Funds on the following page(s). Be sure to name the facility or project, and give an address or directions, so that we can locate the facility. Below, you will find numerical "project codes." Please find the most appropriate code for each project you list. In the Conservation Trust Fund column, **include the amount of your agency's local Lottery funds only. List Great Outdoors Colorado funds, or Lottery dollars received from other sources under "other revenue."**

Copy additional pages as needed

PROJECT CODES

On the following page(s), mark the code number that best describes your use of Conservation Trust (Lottery) Funds. **Remember: all projects must be in accordance with C.R.S. 29-21-101. If necessary, consult with your agency's attorney.**

- | | |
|---|--|
| 01-Athletic Field/Court Purchase | 36-Paths and Trails Maintenance |
| 02-Athletic Field/Court Maintenance | 37-Paving |
| 03-Athletic Equipment Purchase | 38-Picnic Area Purchase/Development |
| 04-Athletic Teams | 39-Picnic Area Furnishings |
| 05-Buildings and Shelters | 40-Playground Purchase/Development |
| 06-Campground Maintenance | 41-Playground Equipment Purchase |
| 07-Compliance with A.D.A. | 42-Playground Maintenance |
| 08-Drinking Fountain Purchase | 43-Public Associations or Club Projects |
| 09-Drinking Fountain Maintenance | 44-Recreation Buildings/Materials |
| 10-Equipment Acquisition | 45-Recreation Programs |
| 11-Equipment Maintenance | 46-Reservoir/Lake Purchase/Development |
| 12-Fairground Improvement/Maintenance | 47-Restroom Construction |
| 13-Fence Purchase | 48-Restroom Equipment/Supplies |
| 14-Fence Maintenance | 49-Restroom Maintenance |
| 15-Fireworks Purchase | 50-Salaries |
| 16-Golf Course Purchase | 51-Scientific Use |
| 17-Golf Course Maintenance | 52-Skateboard Facility Purchase |
| 18-Historic Use | 53-Skateboard Facility Maintenance |
| 19-Investment for Future Projects | 54-Skateboard Facility Equipment |
| 20-Irrigation | 55-Skating Rinks and Ponds Purchase |
| 21-Land Purchase/Acquisition | 56-Skating Rinks and Ponds Maintenance |
| 22-Landscaping/Plants/Sod/Soil/Trees Purchase | 57-Sprinkler System Purchase |
| 23-Landscaping Upkeep | 58-Sprinkler System Maintenance |
| 24-Lease Agreements | 59-Swimming Pool Purchase |
| 25-Library Buildings/Materials | 60-Swimming Pool Maintenance |
| 26-Lighting Purchase | 61-Swimming Pool Equipment |
| 27-Lighting Maintenance | 62-Supplies (Miscellaneous) |
| 28-Misc. Improvements/Maint./Development | 63-Television Translator |
| 29-Motor Vehicle Purchase | 64-Unclassified (Holding funds for future expenditure) |
| 30-Motor Vehicle Maintenance | 65-Waterslide Purchase |
| 31-No Expenditures | 66-Waterslide Maintenance |
| 32-Open Space Purchase/Development | 67-Zoo Purchase |
| 33-Park Purchase/Development | 68-Zoo Maintenance |
| 34-Park Maintenance | 69-Other (Please Specify:) |
| 35-Paths and Trails Purchase/Development | _____ |

Name of Local Government: Any Town

Project/Facility Name	Project Code	Project Cost	Conservation Trust Funds used <i>(Do not list "other" revenue" sources from page one)</i>	Actual (or projected Start Date (Month/Year)	Project Address (Be Specific)	Description of Work Performed
(1) All Night Graduation Party	45		\$ 1,000			Graduation party
(2) Open Space Purchase/Development Recreation Programs	32, 45	\$115,000	\$10,000	3/16/02		Help fund running activities
(3) Holiday Lights		\$ 5,000	\$ 5,000			Holiday lights for downtown area

The electronic version of this report is available on the Web site of the
Office of the State Auditor
www.state.co.us/auditor

A bound report may be obtained by calling the
Office of the State Auditor
303.869.2800

Please refer to the Report Control Number below when requesting the report.

Report Control Number 1638