INTRODUCTION

In the second half of 2008 and through the first half of 2009, the plunging revenues of the current recession posed the greatest challenge to Colorado’s state finances in generations. The governor’s and the General Assembly’s charge to balance the current and next years’ budget required cutting or replacing $1.4 billion in General Fund revenues over two years. These were, of course, dismal and dismaying, but all concerned must be credited with saving the state’s general operating fund from worse damage than otherwise possible. The federal American Recovery and Reinvestment Act (ARRA) helped in retaining higher education funding and in underwriting a vigorous highway construction and maintenance program, among others.

However, parallel to these efforts, there were brighter accomplishments. Lawmakers crafted steps to move Colorado out of the fiscal strangulation created by 1992’s Taxpayers Bill of Rights (TABOR). An important constitutional question was resolved by the Supreme Court in the Mesa County case involving school funding. The impact of the ruling for tax policy is broad and points to a partial recovery of the state’s tax base beyond the current recession. Meanwhile, a former Supreme Court Justices’ careful revisiting of legislative choices regarding TABOR has yielded a redefinition of General Fund limits. This was an important year.

The year’s accomplishments took place in the context of 2008’s Democratic party consolidation and constitutional ballot struggles, subjects to which this chapter will turn first. Thereafter, the revenue and economic background of the 2009 budget season will be examined. Innovations in highway and hospital funding and the Supreme Court decision in Mesa County will then be analyzed. The origins, passage and implications of Senate Bill 228 will then be presented, to be followed by a brief examination of some elements of the 2009 Long Appropriations Bill.

THE NOVEMBER 2008 CANDIDATE ELECTIONS AND FEDERAL OFFICES

The 2008 elections swung positively for Democrats. No statewide races for state public office were held, but Boulder’s Democratic Congressman, Mark Udall, become one of the eight Democratic gains in the U.S. Senate after running a cautious campaign to replace retiring Republican U.S. Senator Wayne Allard. Tagged a “Boulder liberal,” by the opposition, Udall defeated former U.S. Representative and “oil and gas industry lobbyist” Bob Schaffer 53-42%. The state also contributed one of the net democratic gains in the House of Representatives, with Fort Collins businesswoman Betsy Markey accumulating 54% of the Fourth Congressional District vote to defeat Republican incumbent Marilyn Musgrave. First Congressional District Congresswoman Diana DeGette easily won her race with 62%, as did incumbent Third
Congressional District Representative John Salazar. Boulder tech entrepreneur and political activist, Jared Polis, won his election for Mark Udall’s House seat with 71% of the vote after defeating former Senate President Joan Fitz-Gerald in the Democratic primary. The fifth democrat to win a House seat was Seventh District two-term suburban incumbent Ed Perlmutter with 55%. Colorado’s most famous House member, Tom Tancredo, retired to private life in 2008 and that suburban Denver seat was won by former Secretary of State Mike Coffman with 61% of the vote. One-term incumbent Doug Lamborn held the Fifth Congressional District (Colorado Springs area) for the Republicans, winning with 60% of the vote.

While the general election tide was strongly fueled by the Obama tide, the losses to the far right of the Republican Party were more pronounced than the numbers show. The replacement of Tancredo with Coffman is a loss of one of the West’s most vocal conservative critics of centrist policies, especially immigration, abortion and church-state issues. Although a fiscal conservative, Coffman’s hesitancy to leap reflexively to socially conservative issue positions distances him a bit from party’s far right.

The replacement of Musgrave by Markey in the Fourth Congressional District was a very big deal. The Fourth District had not elected a Democrat since Wayne Aspinall’s last victory in 1970 and has been regarded as unwinnable by Democrats. Markey’s victory was aided by her stint as regional district office manager for Senator Ken Salazar and a heretofore unseen amount of national Democratic Party support. This was Markey’s first campaign for any office. Markey ran a disciplined campaign that worked the sprawling district very hard. Musgrave’s self-presentation was defensive and churlish. Even the occasionally noisy Schaffer Senate campaign against Udall was dispirited, with the Schaffer camp declaring a couple of ‘timeouts’ in the late months for ‘regrouping.’ Shaffer’s campaign was dogged early by unsavory associations to Mark Abramoff-organized junkets and lobbying for oil companies in Iraq against the prohibitions of the State Department. Honoring his voluntary three-term limit in the House of Representatives (making way for Marilyn Musgrave), Shaffer continues to look for a better gig than his current membership on the State Board of Education. Unless the right enjoys a quick rebirth in Colorado, a reboot of Schaffer’s career in elective office looks discouraging. After the 2008 elections, Colorado Springs’ Doug Lamborn is the only movement conservative holding federal office from Colorado and the strength of Republican moderates in Coffman’s district appear to foreclose a return to a movement conservative there. Colorado now has five Democratic House Members and two Democratic U.S. Senators.

When President Obama announced Senator Ken Salazar as his choice to run the Interior Department, speculation ended with a thud when Governor Ritter announced his vacancy appointment of Denver School Superintendent Michael Bennet. Bennet had earlier served as chief of staff to Denver Mayor John Hickenlooper. Before that, the 40-something Bennet had managed several businesses for billionaire investor Philip Anschutz. Those Democrats not baffled by the abruptness of Bennet’s appointment were surprised and angry, not least of whom were Hispanic Democrats lamenting the loss of a Hispanic Senator in a state dependent on Hispanics for Democratic victories and angry for having been ignored by Ritter in the process of considering Salazar’s successor. Bennet has never run for elective office and while a successful manager, by midsummer still had Democrats attempting to figure out how to think about this
NOVEMBER 2008 INITIATIVES AND REFERENDA.

No election in Colorado would be complete without initiatives and referenda. A state with the lowest signature requirements to place constitutional initiatives on the ballot, there are always several. As we will see, they were a good reflection of the state’s currently unsettled Democratic-dominated politics. The November 2008 ballot held 14 initiated and four referred measures, the greatest number of any year since 1912 when 22 initiatives and 6 referenda appeared. Although several initiated and referred measures contained taxing and spending provisions, the more important of these did not pass.¹ Several issues pitted an invigorated labor movement against threatened elements of the organized business sector. A small menu of social conservative measures appeared. One cannot say that the initiative process failed to generate interest in the election. Finally, the tail end of the ballot contained constitutional revenue earmarks of small and larger scale implications, followed by referred items. Whatever hopeful tide the national elections generated, it was accompanied by the fears of deeper recession and a long ballot that was confusing.

Amendment 46, the ‘Colorado Civil Rights Initiative’ was brought by American Civil Rights Initiative headed by Californian Ward Connerly. It would end ‘race and gender preferences’ in all state programs. Opposed vigorously by a new organization, Colorado Unity, as well as a large body of Democratic officials and the Council of Churches, the measure failed 49-51%.

Amendment 48 would alter the definition of ‘person’ in the Colorado Constitution to include any fertilized egg, embryo or fetus. Supported by a number of conservative religious denominations, Focus on the Family, and a conspicuous group of ‘pro-life’ physicians, the measure had been organizing for well over a year. The opposition was led by associates of Planned Parenthood and based its opposition on “It just goes too far.” This resonated well and voters rejected it 27-73%.

Amendment 53 would have made executives criminally liable for their businesses’ legal improprieties. Protect Colorado’s Future, a labor organization, supported this as well as 47, 49 and 55.

Amendment 54, the Clean Government Initiative, intended to end ‘Pay to Play’ in government contracts by restricting sole source state government contractors (over $100,000) from contributing to party or candidates during the term of the contract and 2 years thereafter and similarly disqualifies contributors from entering into sole-source contracts. It specifically targeted union organizations and families of union members with sole-source service contracts. It was sponsored by Clean Government Colorado, organized by Independence Institute fellow

¹ Ballotpedia.org has compilations and source links for the 2008 Colorado measures, as does the NCSL.
Conflict between labor and capital were also very much in evidence through the fall, even as the mainstream press ignored its volatile implications. While the full background cannot be recounted here, a couple of initiated measures were direct broadsides to organized labor, and organized labor brought several ballot items into the field for signatures.

Amendment 47, the Colorado Right to Work Initiative, was brought by “A Better Colorado,” supported by a broad spectrum of business groups, including NFIB, Coors, prominent retailers, and homebuilders. It sought to constitutionalize the state’s open shop laws. A large group of labor and business organizations and a Who’s Who of elected officials and candidates lined up to defeat this and two other measures. The largest volume of television spots were aired in this contest and the measure failed 44-56%.

Amendment 49, the ‘Colorado Limitation on Public Payroll Deductions Initiative,’ another constitutional measure, is a ‘paycheck protection’ or ‘Ask First’ measure to prohibit public union or employee organizations from using payroll deductions without specific authorization by the employees. The initiative was a direct response to Governor Ritter’s November 2007 Executive Order permitting ‘partnership agreements’ with employee organizations. More heat than light has been cast on the executive order whose actual use remains to be shown. Outcry was so loud among some sectors of business that the state appears to have largely stalled in its attempt to use a device championed by former Indianapolis Mayor, Steve Goldsmith, to elicit innovative gain-sharing and restructuring of public works agencies. “Clean Government Colorado,” led by Independence Institute president, Jon Caldara, sponsored it. Labor’s effective campaign and strategic pact reached in early October with business groups (See #’s 55, 56, and 57 below) caused the measure to fail 39-61%

Amendment 55, the ‘Just Cause Amendment,’ was sponsored by Protect Colorado’s Future and would impose a ‘just cause’ requirement on employee terminations.

Amendment 56, the Colorado Health Insurance Initiative would require all business firms of greater than 20 employees to provide major medical insurance to employees and their families. It was sponsored by the United Food and Agricultural Workers Union (UFAWU) Local 7. It filed this and other measures on March 31st in response to filing of the Right to Work Initiative (Amendment 47). The others included a prohibition of tax credits or public subsidy to corporations moving operations abroad; a non-residential property tax assessment ratio increase from 29 to 34% (raising nearly $600 million); and a mandatory annual cost-of-living increase for all Colorado employees. The other labor-backed measures were “pulled from the field” in June as part of a deal to induce business cooperation against Amendment 47.

Amendment 57, the Colorado Safe Workplace Initiative, was also supported by UFAWU. Amendments 55, 56 and 57 each achieved sufficient signatures for the November ballot. However, in a mega-deal among advocacy groups, the UFAWU and other labor/professional
organizations and business groups (importantly the Denver Chamber of Commerce led by Joe Blake), the sponsors agreed to withdraw Amendments 53, 55, 56, and 57 from the November ballots hours before the October 2nd deadline. Blue books had been printed, however, and went out to all voters with the four ‘anti-business/pro-labor’ initiatives included, adding to confusion among voters.

Amendment 50, one of a few initiated measures with direct fiscal implications was a constitutional initiative brought by gaming interests. It passed handily: 59-49%. It extends casino hours, permits roulette and craps and elevates maximum bets from $5 to $100 in Blackhawk and Central City gaming areas. Twenty percent of the earnings from these additions goes to public purposes, 78% of which goes to the Community Colleges and 22% goes to the city and county governments involved. Gaming interests raised $7 million by mid-September and overwhelmed the opposition with well-crafted television ads statewide. From the enhanced gaming alone, Amendment 50 was forecast to generate $29 million for the colleges and increase to $63 million in year five, with local governments gaining from $8 to $18 million over the interval. In the context of current fiscal crisis, these are trivial amounts and the measure was largely a fig leaf for casino’s tax breaks contained in the measure’s fine print.

Amendment 51 was a constitutional amendment to raise the state sales tax from 2.9% to 3.1% over two years to serve the backlog of developmentally disabled Coloradans eligible but waitlisted for services. It would raise $89 million in its first year and $186 million in its first full year of collection. It failed 38-62%. If Amendment 50 showed that pairing a sympathetic appeal could be a winner in constitutional initiative fiscal earmarking, Amendment 51 showed that it could also fail. In this case, the sacrosanct nature of the sales tax, combined with the general economic fears that set in by early fall, doomed 51. In a non-recessionary year with a shorter ballot, it could succeed in spite of the lopsided result in 2008.

Amendment 52, the ‘Severance Tax and Transportation Initiative’ was sponsored by three ambitious state legislators, Representatives Gardner and McNulty and Senator Josh Penry, in an attempt to preempt Governor Ritter’s severance tax initiative (filed earlier, but qualifying later, as Amendment 59). The measure would divert 50% of the portion of severance tax revenue going to the state ($181 million in FY 2008) for highway purposes. The initiative got the three crossways with water interests in the state, since the lion’s share of that diversion has financed water projects. The measure even troubled always thirsty highway advocates, since priorities for these funds would be decided outside the normal careful funding process. Club 20 (an association of western Colorado counties), the Denver Water Board, the Colorado Forum, and a group of leading conservation organizations rallied to oppose the measure. It failed 36-64%, costing its sponsors in political capital.

Amendment 58, was the most visible ballot measure and had Governor Ritter as its sole visible promoter. By ending the state deductibility of oil and gas severance taxes paid to local governments, the measure was forecast to generate $300 million in its first full year of enactment (2010). The tax rates would bring Colorado severance taxes up to the norm for the region. Responding to what it regarded as rough treatment by Ritter and the General Assembly over a reconstitution of the state Oil and Gas Conservation Commission in 2007, and as a pre-emptive strike against severance tax proposals in other western states, the oil and gas industry very
publicly raised $10 million early in the summer. Its campaign ads framed the question as a ‘gas tax’ with a campaign logo featuring a gasoline-pump nozzle with a drip issuing from its business end. The ad gained greater appeal as record high gasoline prices lingered from July through September. Higher education supporters liked this measure: 60% of the new funds were earmarked for college scholarships, but enthusiasm waned as the industry peppered television with ads.

Governor Ritter was overused as the lone subject of proponent ads and the campaign was not able to convey its message. The tone of the governor’s ads was apologetic. Ritter’s centrist moderation prevented him from attempting to reframe the issue in populist terms. It was defeated soundly, a bad omen for Ritter. His value plummeted as a public pitchman. To many non-centrists and program advocates, the need to have a credible voice to alter TABOR was paramount. Frustration with Ritter’s performance grew as the 2011 end to 2005’s Referendum C ‘timeout’ began to appear closer.

Among several other reasons for its resounding (42-59%) failure are...

(1) While the measure earmarked 60% of funds for the universities, it promised 15% to pay for oil and gas impacts on roads and water quality; 15% for wildlife habitat and 10% for clean energy projects. These elements smacked of “liberal-environmental pork” and detracted from its higher education message.

(2) University presidents and board members were conspicuously absent from the campaign. In particular, Former U.S. Senator and Colorado University President Hank Brown, whose support was decisive for the Ref C passage, did not support Amendment 58.

Amendment 59, the last initiative qualifying for the ballot, was intended to reduce the load placed on the state General Fund produced by Amendment 23 (2000). But its provisions seem to loosen some restrictions of the Taxpayers Bill of Rights. The former required the State Education Fund to increase by inflation, thereby ‘crowding’ other GF-supported programs even when the state is under revenue duress from recession. Amendment 59 would remove the inflation requirement, but would also require diversion of surplus revenues under TABOR and 10% of the Education Fund into an Education Savings Account within that Fund. This would serve as a specialized kind of education finance stabilization fund: Appropriations in high revenue years could be made from the fund under 2/3 majority agreement of both legislative houses and under simple majority rule when the state personal income grows 6% or more.

The measure was spearheaded by Colorado Savings Account for Education (SAFE) and was supported by the Colorado Children’s Campaign which had authored Amendment 23. Of nearly $1.7 million, SAFE raised over $1 million from two Denver foundations as well as $260,000 from the CEA and $250,000 from the NEA. It was originally proposed in the General Assembly as a referred item by Senator Johnson (R-Loveland) and House Majority Leader Andrew Romanoff (D-Denver), but failed to pass. The measure was hard to understand. It was opposed by a familiar cacophony of anti-tax, pro-TABOR groups who persuasively argued that its passage would spell the end of taxpayer refunds under TABOR. Given the complexity of the
measure, its goring of the TABOR refund, and the long ballot, the measure did surprisingly well in its 45-55% defeat. Enemies of TABOR take note.

Referendum L, which attempted to reduce the age requirement for service in the State General Assembly from 25 years to 21 years, failed 46-54%. Referendum M removed archaic provisions in the constitution regarding land assessment, passing 62-38%. Referendum N removed archaic constitutional provisions regarding importation of liquor. It passed 69-31%

Reform of Colorado’s ‘too-easy’ initiative laws has been floating around since the 1992 passage of TABOR and numerous organizations have held forth on the subject, important among them being the ‘Economic Futures Panel’ made up of senior businessmen and retired public officials who opined aggressively on this issue. Referendum O attempted to change the requirements for ballot initiatives. It would have increased the signature requirement for Constitutional Initiatives while lowering them for Statutory Initiatives and would require that at least 8% of petition signatures come from each Congressional district. Governor Ritter and Former Governor Owen supported this, as did Club 20, the Colorado Municipal League, AARP and the Denver Chamber of Commerce. It was promoted vigorously statewide through direct retail means by retiring Speaker Andrew Romanoff and others but it generated comparatively little interest and little notable media presence. Supporters raised about $100,000 to promote the measure. It failed 48-52%. Had it been the only measure on the ballot, public attention and years of public education efforts by supporting organizations might have focused the electorate to pass the measure.

THE CURRENT POLITICAL ENVIRONMENT OF STATE GOVERNMENT

Statehouse races in 2008 continued to favor Democrats. After a suburban Aurora Republican switched parties in the House, the Democrats came into the 2008 General Elections with 40 of 65 seats. Their new colleague was term limited and the seat was retaken by the Republican Party. The other important loss was two-term veteran, JBC Chair, and prospective Speaker Bernie Buescher, who was narrowly defeated by Laura Bradford for the Grand Junction seat. The 55th District registration favored Republican 2-1. With a 38-27 House majority, there ensued a short, but intense battle over leadership positions and the Democrats agreed on Terrance Carroll (D-Denver) as Speaker. Rival Kathleen Curry (D-Gunnison) was elected Speaker Pro tem, and Paul Weissman (D-Louisville) as Majority Leader. The Republicans elected Mike May (R-Parker) as Minority Leader. The loss of Buescher’s talents in state government was mitigated by Governor Ritter’s appointment of Buescher as Secretary of State following Republican Secretary of State Mike Coffman’s successful election to the vacating Tancredo’s Third Congressional District. The state likely has another eight years of Bernie Buescher, if he wants it. Left out in the cold is former Speaker Romanoff, termed out in 2008, one of 20 applicants for the Secretary of State position, snubbed by the Governor on both the Secretary of State and the U.S. Senate appointments.

Senate Democrats’ net loss of one seat leaves the Party with a 20-15 majority. President Peter Groff (D-Denver) retains the Presidency of the Senate and he is joined by Majority Leader
Brandon Shaffer (D-Boulder Co.). Josh Penry (R-Grand Junction) became Senate Minority Leader. The Democratic caucus results were also notable for the fact that each chamber now has an African-American man presiding over it. This being the first election Democratic partisans retained control of both elective branches since the 1940’s, the overall results were a relief to Democrats. Enthusiasm for Barack Obama also had a great deal to do with maintaining the Democratic balance.

While Democrats are getting used to controlling the Capitol, Republican caucuses have not yet resolved the current partisan environment. A return to depressing partisan acrimony emerged weeks within caucuses after commitments to bipartisanship were pledged by all concerned. While Republicans did little to advance their hopes in the fall elections, nothing succeeds like failure. Richard Wadhams remained the Republican state party chair. His uncompromising partisanship has earned him the (likely inflated) reputation as author of every partisan stunt, slight, and bon mot slung by Republicans. Related to partisanship is the tension between Governor Ritter and organized labor, an important organizational resource for the Democratic Party. Labor is impatient and angry with the governor for the lack of appreciation for Ritter’s 2006 victory and for the Democrats successes in the 2008 legislative races, even while preoccupied with the Right to Work initiative on its plate. Ritter, for his part, is calculating that his reelection in 2010 and the continued chances for domination of the General Assembly rest on capturing enough votes from Denver suburbs and conservative leaning smaller cities whose voters are scared or put off by organized labor. Overall, however, Ritter’s orientation to the legislative process is not the keenest, registering his legislative shortcomings as the price of centrist ambition.

ECONOMIC AND REVENUE TRENDS.

The current recession’s rapid onset, depth and dynamics is outside the experience of many forecasters, and confidence in most forecasting models declined over the later months of 2008 and beyond the 2009 legislative session. Most official announcements concerning the state of Colorado’s economic situation are beginning with “Although there are many ways in which the state is doing better than the rest of the country…” In the light of June 2009, this appears to be whistling past the graveyard.

The state’s December 2008 unemployment rate was 18th among the states. But two of the state’s seven Metropolitan Statistical Areas are in the bottom half of the nation’s 369 MSA’s: Colorado Springs (at 194 with 6.9% unemployment) and Pueblo (at 222 with 7.4% unemployment) (Bureau of Labor Statistics, 2008). The last quarter of 2008 saw a near tripling of unemployment insurance claims: 61,000 claims were recorded as against 27,000 in the previous quarter (Department of Labor and Employment, 2009).

Beneath the aggregate numbers was a more chilling image of the impacts of this recession, because half of the September and October job losses reported by the December forecast (5,400 jobs equaling 5.9%) of the state’s employment were squarely in the center of upper middle class professionals in the Professional and Business Services category. This category bore nearly half of the 12.4% of Colorado jobs lost in this period.
Compared to later events, the December 2008 forecast viewed the possibilities of recovery with some optimism. In spite of dramatic job losses over two months, the Legislative Council forecast in December that unemployment would grow from 2007’s 3.8% to 5.2% in 2008 and crest at 6.3 in 2009. In actuality, official unemployment in Colorado grew to 5.7% for October 2008, climbed again to 6.1% in December and is expected to grow another percent by the end of 2009. Forecasters pointed to the relatively high income and economic diversity of the state as foundations of a future recovery. Personal income growth had been in a modest decline (-5.9%) in the first half of 2008, but the recent September and October reports were bad omens for the 2009-2010 year. Retail sales grew only 2.7% through September 2008, after having grown 6.9% in 2007. Retail sales would not rebound and consumers were especially wary of purchases of big ticket items in durable goods and cars. The March forecast predicted that the sales tax, accounting for nearly 28% of General Fund revenue, would decline by an astonishing 6.2% in 2008-2009, to be followed by a 1.3% in the next year (March Forecast 2009, 9-10). [See the record of declining estimates for General Fund revenues in Table 1 below.]

Housing markets were in the same post-bubble condition as those in many states, but the Denver Metro median sale price declined only 11.2% from the prior year’s (October) comparison. Using Las Vegas, Phoenix, and Miami as reference points, this was thought to be modest (December Forecast, 28). The report observed a marked decline in permits and construction in the residential and non-residential areas. Colorado’s 2008 home foreclosure rate was nowhere near to Nevada’s or California’s but it was ranked #8 nationally with one in 394 homes in foreclosure compared to the national average of one in 416. In May 2007, Colorado ranked #2 with one in 290 homes in foreclosure compared to the national average of one in 656 (Realty Trac, 2008). Data from the Division of Housing Foreclosure Reports shows a slight decline in 2008 foreclosure filings from 2007, the peak year at 39,915.

**CURRENT YEAR REBUDGETING**

It was apparent by September’s economic and revenue forecast that the rate of revenue decline had been increasing and the governor began a litany of freezes, ‘holdbacks’ and other measures to prepare for the cuts that the legislature would need to make. The December forecast placed the trends in more tangible form as this forecast was the one that, until March’s forecast, the General Assembly has to work with.
Table 1. Successive General Fund Revenue Forecasts for 2008-2009 and 2009-2010

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</thead>
<tbody>
<tr>
<td>2008-09 Gen Fund revenues</td>
<td>$8,012</td>
<td>$7,946</td>
<td>($66) -.8%</td>
<td>$7,742</td>
<td>($270) -3.4%</td>
<td>$7,213</td>
<td>($799) -10%</td>
<td>$6,931</td>
<td>($1099) -13.5%</td>
</tr>
<tr>
<td>2009-10 Gen Fund revenues</td>
<td>$8,508</td>
<td>$8,575</td>
<td>$70 .82%</td>
<td>$8,316</td>
<td>($189) (2.2%)</td>
<td>$7,261</td>
<td>($1,244)</td>
<td>$6,833</td>
<td>($1,675) -14.6%</td>
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The December Forecast reported that revenues were forecast to come in $604 million less than the expenditures budgeted in the 2008-2009 Long Bill. Given current legal interpretations of the constitutional Taxpayers Bill of Rights, the future ability of the state’s finances to rebound from the recession were limited by the fact that General Fund growth would be limited (according to December forecasts) to about .4%, far short of the 6% “Arveschoug-Bird” General Fund growth limit.

Much of the story of the 2009 Session of the General Assembly would be the grim task of slicing and shifting the current year budget and building on those efforts for the 2009-2010 budget. By mid March, the General Assembly had passed supplemental appropriations to cut expenditures and revenue ‘enhancements’ to reduce the General Fund shortfall to about $208 million. Key among the revenue bills were cash fund transfers engineered by SB09-208 to the tune of $224 million. A number of other bills either deferred budgeted payments to other funds or reduced the General Fund reserve by 50% (freeing up about $148 million). With these two initial measures, the legislature permitted the General Fund appropriations for 2008-2009 to grow 1.7% over 2007-2008.

The March Forecast on which the budget MUST be made would pose the need for more cuts in the current year than required by the December 2008 forecast. A second wave of cash fund bills and special bills to address shortfall would spill out of the JBC early April. Below are recorded the major legislative features of Colorado’s budget balancing packages. Transfers of funds from Cash Funds to the General Fund were accomplished by SB09-208, which details are reported below in Table 2.

<table>
<thead>
<tr>
<th>Department of Labor total:</th>
<th>$116,700,000</th>
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<tbody>
<tr>
<td>Workmen’s Compensation Fund</td>
<td>$15,770,000</td>
</tr>
<tr>
<td>Subsequent Injury Fund</td>
<td>$26,500,000</td>
</tr>
<tr>
<td>Major Medical Insurance Fund</td>
<td>$69,500,000</td>
</tr>
<tr>
<td>Employment Support Fund</td>
<td>$5,000,000</td>
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**Judicial Branch total:** $3,300,000

<table>
<thead>
<tr>
<th>Education</th>
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<tbody>
<tr>
<td>Public School Contingency Reserve Fund</td>
<td>$3,000,000</td>
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<table>
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<tr>
<th>Higher Education</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Higher Ed Maintenance Reserve Fund</td>
<td>$33,700,000</td>
</tr>
</tbody>
</table>

| Department of State Cash Fund | $2,175,000 |
| Capitol Complex Facilities Fund | $2,300,000 |

<table>
<thead>
<tr>
<th>Health &amp; Environment</th>
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<tbody>
<tr>
<td>Hazardous Substance Response Fund</td>
<td>$17,500,000</td>
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**Natural Resources total:** $30,250,000

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<tr>
<th>Transportation total:</th>
<th>$4,500,000</th>
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<tbody>
<tr>
<td>Water Conservation Board Construction Fund</td>
<td>$10,250,000</td>
</tr>
<tr>
<td>Perpetual Base Account of Severance Tax Trust Fund</td>
<td>$20,000,000</td>
</tr>
</tbody>
</table>

| Transportation Infrastructure Revolving Fund | $3,000,000 |
| State Rail Bank Fund                        | $1,500,000 |

In addition to Cash Fund transfers in SB09-208, a series of more precise and more delicate transfers were accomplished in separate statutes. Note, however, that one of the governor’s preferences… to encourage tourism, film production and other activities… diverted over $18 million destined for the General Fund through SB09-217.
### TABLE 2.a. Other Significant Cash Fund Transfers to General Fund for 2008-2009 -- net $136,793,000

<table>
<thead>
<tr>
<th>Bill Number</th>
<th>Description</th>
<th>Amount</th>
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<tbody>
<tr>
<td>SB09-210</td>
<td>Tobacco Litigation Funds - Health Programs</td>
<td>$1,191,416</td>
</tr>
<tr>
<td>SB09-217</td>
<td>Regarding Transfers of Limited Gaming Funds to General Fund -- Transfers these moneys from General Fund to four Cash Funds – Tourism Promotion Fund ($16.6 million); Council of the Arts Fund ($1.2 million); New Jobs Incentives Fund ($1.4 million; and, Film Incentives Fund ($480,000)</td>
<td>($18,658,788)</td>
</tr>
<tr>
<td>SB09-269</td>
<td>Transfers from Tobacco Litigation Settlement Cash Fund to General Fund</td>
<td>$13,900,000</td>
</tr>
<tr>
<td>SB09-270</td>
<td>Transfers from 6 Cash Fund proceeds from tobacco tax funds from Amendment 35 (2004).</td>
<td>$6,217,956</td>
</tr>
<tr>
<td>SB09-279</td>
<td>Cash Fund Transfers</td>
<td>$134,143,821</td>
</tr>
</tbody>
</table>

**Major elements:**
- Risk Management Fund: $10 million
- Risk Mgt Fund – State Employee Worker’s Comp Account: $10 million
- Hazardous Substance Response Fund: $12.5 million
- Unclaimed Property Trust Fund: $50 million
- Severance Tax Fund: $15 million
- Local Govt Severance Tax Fund: $27.5 million


Over the course of rebudgeting for the current year, the legislature passed other bills in the package to reduce General Fund expenditures. The most significant are recorded below in TABLE 3.
**TABLE 3. 2008-2009 General Fund Expenditure Reductions through Supplemental Appropriations, major bills**

<table>
<thead>
<tr>
<th>Department Supplemental Bills and Reductions: $95 million total reductions</th>
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Note: Another 13 Department supplementals passed. None totaled $1 million in General Fund cuts. For brevity’s sake they are not listed above.

**“Special Bills” and GF Expenditure Reductions for 2008-2009**

| SB09-227 | Suspends GF transfers for Unfunded Liability of Old Hire [FPPA] Fund | $25,300,000 |
| SB09-207 | Delays implementation of child welfare and mental health pilot program. | $2,100,000 |
| SB09-211 | Eliminates requirement for SCHIP eligibility expansion* | $3,000,000 |
| SB09-212 | Caps vendor compensation for sales tax collection | $12,000,000 |
| SB09-215 | Eliminates base funding increase for schools $20 million; Reduces charter school construction funding by approx $5 million; shifts cost of state administration. | $26,858,000 |
| SB09-261 | Transfers Supplemental Old Age Pension [SOAP] moneys to GF portion of Medicaid program | $3,000,000 |

**Change in General Fund Statutory Reserve Fund Requirement**

| SB09-219 | Reduction of General Fund Statutory Reserve from 4% to 2% | $148,600,000 |

**Federal Program alterations, funding shifts**

| SB09-263 | Alterations of nursing home provider fee & reimbursement rates under SB08-1114 approved by federal CMMS; shift to Cash Fund basis | $3,700,000 |
| SB09-264 | Increase in the Federal Medicaid match rate under ARRA from 50 to 56.9%; transfers of excess federal funds to General Fund | $18,916,000 |


Not recorded here is the fact that although higher education was forced into some cuts, the cuts would have been deeper (or tuitions would have mushroomed) were it not for the fact that discretionary ARRA funds were used to prevent these, a strategy that would carry over to
the 2009-2010 fiscal year. Due to the fact that these funds were available for only two years, the universities overall funding would ‘fall off a cliff’ unless another source could be found.

THE FIRST SESSION OF THE 67TH GENERAL ASSEMBLY.

Colorado’s budget process is dominated by the General Assembly, specifically the Joint Budget Committee (JBC), whose six members are chosen from the Appropriations Committees of both chambers. There are two majority and one minority member from each chamber, with the Chairmanship rotating annually. This year, the Chairman was Maryann (‘Moe’) Keller (D-Jefferson County). Depending on the partisan control of the General Assembly and the governor, the JBC will accept the leadership of the governor. The JBC becomes more of an ally of the governor with partisan concurrence, if the governor makes clear his priorities, his prohibitions and (by his silences) his indifferences. The JBC conducts hearings and its staff support the members’ interrogations and instructions to the agencies through a series of hearings beginning each November. The General Assembly’s Joint Budget Committee, with important exceptions, remains the center of gravity for the budget process. It is common for JBC members to be at odds with their own caucus majorities during which meetings JBC members will present outlines of the Long Bill and attempt to ‘sell’ the bill. Of great importance is the independence and courage of JBC members to speak truth to disbelieving caucuses. Republican JBC members Senator Al White (R-Hayden) and Rep John Marostica (R-Loveland) absorbed a lot of flak from their own party caucuses.

Tensions with caucuses are often paralleled by unresolved tensions in Appropriations Committees which meet regularly on subjects undertaken by the JBC. The Long Bill is referred to the Appropriations Committees, and rules require that it move quickly—within about 2 weeks from introduction to final passage in each chamber. In non-recession years, there is a fast pace to budget committee actions, heavily scripted with decision deadlines interspersed throughout the Long Bill’s path stretching from September through the following April. In recession years, economic and revenue premises of budgetary decisions are mostly in flux and there are a lot of ‘do-overs.’ Confusion may occur due to the succession of forecasts which require revision, even reversal, of the directions taken by budgeters. This was a difficult year.

In addition to the scramble to respond to revenue forecasts, the fiscal policy making had a vertiginous ‘de-centered’ aspect. The closure of Denver’s oldest newspaper, The Rocky Mountain News, was not so grave due to the absorption of excellent reporters by the specialized press and web-based news media. This year Colorado faced its most desperate budgetary trauma in generations. Nonetheless, the image of an unceasing barrage of dismal choices neglects the larger fiscal meanings of this years General Assembly. To a large extent, state finance politics focused beyond the immediate horizon of grim supplemental bills and the dance of fund transfers. New opportunities were created for Colorado’s finances. There were many more moving parts to this year’s budget and fiscal policy process than ever before. There were so many streams converging on the legislature from ‘outside’ that it seemed that every two weeks a significant ‘external perturbation’ would land on the General Assembly:

CO-14
The work of two of the governor’s blue ribbon commissions framed the passage of two extraordinarily important fee bills, SH09-109, “F.A.S.T.E.R” for roads; and HB07-1293: the Health Care Affordability Act;

The federal ARRA recovery package from Congress passed in early 2009 and its details and uses would change periodically;

A mid-March Supreme Court ruling in *Mesa County v State of Colorado* changed the landscape of tax policy which redefined and loosened constraints on taxation that had become institutionalized since TABOR passed in 1992;

Dismal economic and revenue forecasts in December were followed by do-overs after the March forecast was released. Revenue decline forced two painful waves of supplemental appropriations for the current 2008-2009;

A half-billion dollar raid on a worker’s compensation insurance fund was planned and shelved;

A single bill, SB09-228, changed General Fund spending definitions and restriction which had been in practice since the passage of TABOR.

In the final analysis, despite the growth in state unemployment and the prospect of a longer recession, many changes freshened the state’s long term outlook and hinted at greater possibilities. Accordingly, this paper will depart from a sequential treatment of this session’s decisions and emphasize the elements of what constitutes new, if unrealized, shapes in Colorado’s fiscal landscape.

Recent recessions have helped elevate JBC staff institutional capacity to assist the JBC in managing a recessionary budget scenario where budget execution, redoing budgetary priorities telescope or conflate what are usually discrete sequential staff and legislative exercises. Budgets, of course, rely on revenue forecasts. An awkward disbelief haunted the initial phases of the budget process were possessed by implausibly optimistic measures of the state’s circumstances. The JBC is a consumer not a producer of the legislative revenue forecasts; this is the role of the Legislative Council staff economists. Surprise and discord among forecasts was a hindrance to the clarity and pace of JBC work.

The Legislative Council September 2008 forecast was a fairly rosy scenario, with the expectation of energy sector growth to generate employment and revenues for the 2009 year. It forecast no revenue shortfalls for the current year. The governor’s November Budget letter leaned on a rosy scenario and drew a $19.2 billion budget for 2009-2010. But, the staff presentation of the governor’s budget to the JBC forecast some revenue decline and requested the JBC to hold $70 million in reserve for contingencies. Trouble had been foreshadowed with the governor’s September order to freeze state hiring and to hold back construction projects for full-day kindergarten and college building projects. Nonetheless, the governor asked for a GF budget of 5.2% higher than last year (at just over $8 billion). Favored departments were Corrections (9.3%) Public Safety (9.8%) and Regulatory Agencies (8.8%). Public Health would
have an 8.4% increase. Ritter also proposed that $77 million be held in reserve (in addition to the statutory 4% GF reserve). If any programmatic shifts were advanced in the 19-page request, the greatest attention was given to his multi-agency recidivism reduction package, which the current request for $10.6 million (9.5 million from the General Fund) was expected to produce cost avoidance and cost saving of nearly $380 million over five years (Ritter to Buescher, 2008).

No General Fund transfers would be forthcoming to the HUTF via SB97-1. In all, Transportation would receive some $300 million less for 2009-2010 under forecast scenarios. The request lamented the loss of 21.7% of federal highway funds ($97 million) since the prior year, due to the Federal Safe Accountable Flexible Efficient Transportation Act. The governor’s plans to lift the state into the New Energy Economy, one of the signature quests of his term, received only passing mention.

Ritter’s State of the State Address, of course, came on the heels of the dismal news summarized in the December economic and revenue forecast. The governor’s staff and the Legislative Council forecasts had been fantastically discordant. The legislative staff forecast a $604 shortfall for the current year and another $385 General Fund revenue decline for 2009-2010, while the governor’s OSPB forecast $70.2 million and $277 million shortfalls respectively (Ashby 2008). By the time of the speech, Ritter had accepted the Legislative Council revenue projection. The speech was self-congratulatory in some respects, particularly with regard to his advancing the ‘new energy economy’ through a series of grant/loan programs initiated in prior years. The single specific tax policy proposal mentioned (HB09-1001) was a tax credit program for companies creating 20 jobs or more. Funding Advancements for Surface Transportation and Economic Recovery (FASTER) was announced to be the culmination of two years of Blue Ribbon Transportation Panel jawboning, details of which be revealed later. Ritter also revealed a plan, without details, to fund health insurance for another 100,000 Coloradans via a hospital fee program to be detailed later in the session. Finally, Ritter’s brief mention of TABOR was made in the context of whether and when to extend Referendum C, which permits the state to retain revenue over and above TABOR limits through 2011. Part pep-talk, part credit-claiming, part unveiling, the address lasted 33 minutes without mentioning higher education except once in the context of The New Energy Economy (Ritter 2009).

STIMULUS PACKAGE UNDER ARRA

With great fanfare President Obama signed the American Reinvestment and Recovery Act in Denver on Monday, February 16th in a signing ceremony at the Denver Museum of Nature and Science. The governor’s office began making announcements concerning elements of Colorado’s share of direct funds which totals $2.84 billion (COFPI March, 2009).

- The biggest single share is dedicated to fiscal stabilization and the states are to use these at their discretion. A disproportionate share of fiscal stabilization money in Colorado will be used to prevent deep, possibly crippling cuts to higher education over the current and next fiscal years. Over $540 million of the total $740 million appear to be destined to
support higher education. Nearly $140 million will be spent for maintaining programs (or preventing deeper cuts) in health and human service.

- Special Education and Disadvantaged student programs are targeted for $141 and $161 million respectively.

- Under ARRA, the state’s Medicaid program will receive a revised federal match to about 62-48% instead of its 50-50% shares (‘FMAP’).

- The Food Stamp program will also be augmented with an additional $181 million over the next four years.

- $70 million is designated through various housing assistance programs.

- $24 million is brought through augmentation of the Child Care and Development Block Grants. There is also an $8 million boost for Head Start.

- Transportation infrastructure loomed large:
  - Nearly $404 million in transportation projects under the federal Surface Transportation Program for highway and bridge repair.
  - Over $103 million in Mass Transit Capital Grants.

- Other localized construction in:
  - $99 million in weatherization funds.
  - $48 million in renewable energy development funds.
  - $65 million in Clean Water funds, under revolving fund programs for Clean Water and Drinking Water.

- Income Support and Insurance
  - Supplemental Security Income increases of $33.9 million in 2009.
  - With state compliance with new eligibility guidelines, $125 million in unemployment insurance funds.

In addition to direct funds authorized by ARRA, tax provisions under ARRA increase the value for Coloradoans of several elements of the federal income tax.

- The expansion of the Child Tax Credit, valued at $163 million, is estimated to encompass 191,000 children in the state.
The Making Work Pay tax credit is profoundly valuable: Almost 40% of Coloradoans will qualify for this credit, making it worth $1.9 Billion.

FASTER COLORADO

In the past several years, the HUTF has received a boost of nearly $1.2 billion from General Fund transfers authorized by SB97-1. General Fund revenues in excess of its annual 6% growth limit (under the so-called Bird-Arveschoug Amendment of 1991) had been designated for the HUTF and the Capital Construction Fund (under HB02-1310). From a high of nearly $230 million, transfers to the HUTF were out of the question in the current recession. One result of the 2006 elections: a governor willing to assemble representatives of the transportation sector into a forum for reaching consensus on a solution to the gas tax’ loss of productivity. The unpopularity of the SB97-1 among Democrats also seemed to foreclose another patchwork arrangement such as SB97-1 which increased the General Fund squeeze on Education, Medical Care, Universities, Correction, and Social Services.

On January 14th, the governor’s office revealed a plan to fund transportation projects by generating greater funds from the state vehicle registration fee. A blue ribbon commission, created by Ritter after his election in 2006, had recommended a fee increase to result in $500 million per year—a sum widely agreed that the state needed for repair of existing roads and bridges. The governor, however, settled on a $250 million per year figure based on an average fee increase of $41 per vehicle. The bill creates fee surcharges: a “Road Safety Surcharge” (with fees ranging from $16 to 39) to be transferred to the HUTF and one for repairing designated bridges (from a “Bridge Safety Surcharge” through a Statewide Bridge Enterprise currently in deficit). Rental cars statewide will generate $2/day as well. Finally, oversized vehicles pay a larger fee.

The highway funding discussion that is taking place across the nation has been taking place in Colorado but is conditioned by the Taxpayers Bill of Rights which requires that one obvious solution, a gas tax increase, would require a vote of the electorate. Two provisions were removed from the Senate bill. This was to study and test proposals similar to Oregon’s current trial of mileage base pricing, under the direction of a new Mileage Based Revenue Commission. The other was to peg the fee surcharges to inflation. There was opposition to the bill, a caucus position for the Republicans who quarreled with raising fees per se. The Colorado Contractors Association, arguably one of the four or five most influential interests in the state, came out solidly in favor of FASTER as both a transportation AND a recovery bill (Milo, 2009). And a broad collection of business groups stood up for the bill at Ritter’s announcement press gathering and did so continuously over its two months of gestation. Industry advocates stressed that federal transportation funds for the state within the federal stimulus package (about $404 million) were inadequate to cover the long term problem. (The long term ‘transportation deficit’ is claimed to require $1 billion/year). Nonetheless, Colorado’s transportation coalition will see $404 million in new federal funds AND $450 million in ‘new’ FASTER funds over the next two years, in addition to the normal gas tax revenues. A two year phase-in of the fees was adopted in deference to the expectation that federal stimulus money will fill the funding deficiencies sooner. The Senate vote was party line. House Republicans voted solidly against it joined by four
democratic defectors. The House passed the bill by 34-31. The 2009 fees will begin at an average $32 and ramp up to $41 in 2011. The sponsors and beneficiaries of the bill have devoted a great deal of thought to the politics of public toleration for this ‘new’ funding arrangement. There appears to be little question of the constitutionality of this measure, but advocates appear to be taking no chances. A website, Coloradofaster.com, went up early in the year, listing sponsoring organizations, justifying the fees with a 13 page list of deficient bridges which, it should be added, were distributed among all counties, offering downloadable fact sheets, etc. Framed by a large gaggle of private and public stakeholders, the governor’s outdoor bill signing near a bridge north of Denver was punctuated by an outburst from a Westminster resident outraged by the absence of a public vote. This is the kind of response that TABOR ideologues threaten for all fee increases, and a reminder of inevitable political assaults that accompany revenue measures of all kinds.

COLORADO HEALTHCARE AFFORDABILITY ACT [HB09-1293]

Since its formation two years ago, the state’s Blue Ribbon on Health Care Reform has been percolating with discussions on refinancing and reorganizing health care. HB09-1293 is the first major manifestation of this broad attempt to move the ball forward after ten years of relative static in state health care finance. It would augment General Fund financing of state Medicaid and SCHIP programs with a hospital provider fee by a sum nearly equal to the state funded cost. The intended effect is to pay for uncompensated hospital costs from Medicaid patients as well as expand health coverage to another 100,000 uninsured patients. The arrangements offered in the bill have been crafted by the governor’s and the Colorado Hospital Association. Following twenty other states’ provider-fee-funded programs, Colorado’s is said to closely parallel Missouri’s program. The fees would be phased in beginning July 2009 and increase through 2012-2013, ultimately generating $480 million/year. Although it might be viewed as low-hanging fruit, the bill represents a new application of the concept of partnership with the state’s hospitals that directly reflects Ritter’s approach to governing. Swift approval for the federal match was expected by the federal CMS.

The impacts of FASTER and the Health Care Affordability Act will be to increase the growth of cash fund expenditures which, unless exempted by a constitutional referendum, will count toward the TABOR expenditure growth ceilings. The implication of either bill is to hasten the date at which the TABOR limits are met, requiring the state to refund “surplus revenues.” The HB09-1293 fiscal note projects that cash funds under this bill will reach the TABOR limit around 2011-2012. Since the General Assembly chose to draw funds for such refunds from the General Fund, overages generated by the Health Act would come out of the General Fund. To that extent, both bills pose an unresolved near-term problem for the General Fund.

MESA COUNTY TO THE RESCUE: THE 2007 “MILL LEVY FREEZE” SURVIVES CONSTITUTIONAL CHALLENGE.

The passage of SB07-199, or the “Colorado Children’s Act,” was a key fiscal policy event of Governor Ritter’s first legislative session. The ‘school mill levy freeze’ halted the
downward trend of local cost-sharing for school (more specifically ‘pupils’) under the state School Finance Act. As was explained earlier (Moore 2007, 12-15) the combination of the Gallagher Amendment of 1982 and TABOR of 1992, caused mill levies to float downward from 23% in 1984 to less than 8% by 2007, in order to enforce the provision’s requirement that residential property provide no more than 45% of the total property tax revenue statewide (Legislative Council 2003). Meanwhile, the state share of school funding soared from 42% to over 60% during the same interval. SB07-199’s freeze in districts’ mill levies would staunch the outflow of state funds by $117 million during 2007-2008, growing to over $400 by the sixth year of implementation. A $1.5 billion windfall for the General Fund over several years, the measure was applauded in many quarters, although it left several questions unanswered, particularly the status of Gallagher’s 45-55% ratio provision.

Several parties had challenged the constitutionality of SB07-199 claiming that TABOR required a public referendum on all measures having the effect of increasing revenues. Denver District Judge Christina Habas ruled in May 2008 that since SB07-199 had the effect of increasing the size of state government, voter approval requirements in TABOR had been violated. Habas observed the district court’s limited authority and denied the plaintiff request for refunds, deferring these questions to appellate courts. The Supreme Court in Colorado takes all Constitutional cases directly on appeal. In December 2008, the Court stayed Judge Habas’ ruling, so as not to disrupt the implementation of school districts’ mill levies and budgets, but deferred its judgment on the merits of the case. On Monday the 16th March, the Court upheld the constitutionality of SB07-199, 5-1 and one partial concurrence. The response of the governor was immediate, committing the state to use this decision to improve school performance.

The basis of the Mesa County Commissioners’ case was that SB07-199 violates TABOR’s prohibition of ‘tax policy change directly causing a net tax revenue gain’ to a unit of government (state, district, etc.) without a vote of the citizens of the relevant unit. Orthodox TABOR-ites have for years argued that ‘net revenue gain’ was wedded to their notion that revenues should shrink – period – and that any decision made to prevent that shrinkage was a violation of the intent of TABOR. ‘Net’ was measured against what revenues would be if no public action were taken. To paraphrase part of the plaintiff case, the Colorado Children’s Act violated the constitution because it caused school district revenues to be greater than the amount to which they would have shrunk in the absence of the Act’s freezing the school mill levies.

The court majority found that freezing the mill levies in the affected school districts did not produce a net revenue gain. Therefore, the freeze does not require elections. In a later section of the ruling, the Court sanctioned the ‘waiver elections’ of 174 of the state’s 178 school districts who voted to allow their districts to retain revenues in excess of their TABOR limits, finding their wordings sufficient to authorize retaining the mill levy revenues under the frozen mill levies ordered by SB07-199. The Court ruled that frozen mill levies were not mill levy increases under the law. Interestingly, the Court rejected plaintiff arguments that waiver elections were insufficient to authorize retaining ‘frozen’ mill revenues on the basis that they...

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2 This ‘waiver’ language refers to the attempt of districts to ‘waive’ their revenue limits, eliminating current and future affect of such limits.
could not have intended such eventualities. The court went to some lengths to answer that point and rejected ‘intent’ arguments as irrelevant against the unambiguous language of referenda wordings.

Since the legislation did not increase state revenues beyond the Constitutional limit, the Court also rejected the claim that it violated TABOR’s limits. Finally, the Court’s opinion reminded plaintiffs of the standard it expressed in another recent TABOR case regarding the constitutionality of cash fund transfers into the General Fund during the previous recession from 2001 through 2004. The court held in Barber vs. Ritter [196 P. 3d 238 (Colo 2008)] that “a statute challenged under [TABOR] must be proven to be unconstitutional beyond a reasonable doubt.” In that case as well, the court was not persuaded that a “net revenue gain” to the state had occurred as a result of the cash fund transfers in question.

When the Mesa County decision was published, new possibilities were opened to the General Assembly. The major restrictions were now “net revenue gain” measured against the status quo, not against a hypothetical future. The General Assembly had not been keeping systematic track of this rich vein of revenue potential embedded in tax expenditures but the staff of the Joint Budget Committee presented 36 pages of options for increasing revenues and cutting appropriations for the current and 2009-10 fiscal year [Ziegler March 24]. With an April staff memo estimating the current impact of sales tax exemptions alone at $1.8 billion, tax exemptions leapt to the foreground of Democratic cerebral cortexes. – tax policy changes that would raise revenues, but not beyond their current (‘recessionereed’) levels.

PINNACOL AND THE LONG BILL.

Prior to mid-March, sitting members might have identified “Pinnacol” as a brand of mouthwash. Intense discussion and negotiations from March through April were focused on Pinnacol Assurance, a quasi-state entity that provides worker’s compensation insurance to 58,000 private Colorado companies. It has upwards of 90% of the state’s market for such insurance. After more than a month’s examination, however, nobody could offer convincing explanations of its exact status. Pinnacol DID possess treasure. Its most recent (2007) private audit showed a $722 million surplus in Pinnacol’s reserve account, well above the $1.3 billion set aside for claims. The 1991 statutory reforms of the state’s worker’s comp program expressly prohibited legislative transfers of its funds, thus clouding matters.

However, the 2009-2010 Long Bill was drafted to include some of the Pinnacol surplus funds. Sponsored by the two Republicans on the JBC, Senator Al White and Representative Don Marostica, SB09-273 was part of the ‘budget package’ the JBC assembled after the March revenue forecasts which found that the plunge in state revenues had not stopped. It would change the law to permit the General Assembly to transfer $500 million of its surplus funds to the General Fund (avoiding cuts to higher education) and $200 million to refund the General Fund Reserve close to its previous state. These figures were incorporated into a draft of the Long Bill (SB10-259).
Another more aggressive change in Pinnacol, SB09-281 was introduced by the Senate Majority Leader Brandon Shaffer (D- Boulder Co.). Co-sponsored by Democratic Representative Paul Weissman (D-Boulder Co.), it would…

- repeal the statutory charge to Pinnacol to operate as a private insurer.\(^3\)
- establish an Interim Committee from the existing membership of the Worker Safety and Injury Compensation Group to make recommendations on Pinnacol’s operations and performance.
- require Pinnacol to pay dividends to its small business client equal to 5% of its surplus funds.
- order the State Auditor to conduct a Performance Audit in 2009 and thereafter.

The company is a hybrid – on one hand, its 9-member Board of Director is appointed to five-year terms by the governor and confirmed by the Senate. Its rates are set by statute and it is exempt from taxes unlike its private competitors (“Shaffer offers” 2009). But it is also an enterprise operating with the independence of a private company which contracts with private companies. Its CEO is expected to act as a private insurance executive; it had issued dividends totaling over $500 million in the four years prior and it maintains a large surplus outside of the fund accounting of the State. All this covetous legislative attention generated vigorous reaction from the company itself. So began a sidebar to the session which crystallized intense contests of opinion and forced an examination of the state Worker’s Comp program.

The whole matter put the governor in a vice – between the business community he viewed as essential to support his significant incremental steps to reform the state’s finances and the immediate problem of protecting the state’s precarious support for higher education. Ironically, the organized business community has also seen the state’s economic prospects turning on the colleges and universities and the Ritter administration has permitted Republican appointees to persist in controlling the administration of the state’s institutions. Ritter’s boldest declaration on the Pinnacol matter was that higher education was not going to suffer $300 million more in cuts (Sleven, 2009). However, as days of informal talks with Pinnacol continued, which reporting included the proposal of a Pinnacol loan to the General Fund, Democratic legislative leadership and the governor agreed on Wednesday morning, April 15, to remove the offending elements of SB 273 and to pursue a number of other budget-balancing measures for 2009-2010 (Hoover 2009b).

Because of the gravity of the 2009-2010 revenue estimates, the JBC did not present the Long Bill until three weeks later than normal. It was introduced in the Senate on April 6th. After months of slashing and transferring, by mid-March the JBC had had enough of marginal cuts.

\(^3\) The first paragraph of the enabling statute begins: “There is hereby created Pinnacol Assurance, which shall be a political subdivision of the state and shall operate as a domestic mutual insurance company except as otherwise provided by law.” 8-45-101 Colorado Revised Statutes. (The contestable meanings this sentence seized all concerned with the likelihood of litigation.)
Legislators became increasingly uncomfortable with it. Vocal members of the minority party preferred proportional cuts across programs. JBC members had had enough and were emboldened both by the availability of Pinnacol funds AND by what some perceived to be the governor’s over-solicitousness to business. The budget process was different this year, not merely for its gravity and the uncertainties, but for the boldness of the JBC in its efforts to get the attention of the General Assembly and to force the latter to consider hard choices.

From the beginning, the Long Bill generated controversy: The JBC took the March economic forecast to require $300 million be cut from higher education or find the funds in Pinnacol. It has to be emphasized that 2009’s JBC was uncharacteristically ready to defy the governor, the parties’ leadership and anyone else if necessary. Repr. Jack Pommer had been the JBC Chair in 2008. Frustrated by Ritter’s willingness to hold truth-telling hostage to his modest ambitions, Pommer was comfortable with advocating hard choices and forcing the governor to confront them. The chair switches from House to Senate each year and 2009 would see Senator Moe Keller (D-Jefferson County) assume leadership of the committee. Keller, a former social worker, has been a very serious, tough and understated presence in the Senate and the JBC. Senator Abel Tapia (D-Pueblo) had served on the JBC as Chair before and had a reputation as an independent advocate for public spending in his part of the state. Mark Ferrandino (D-Denver) had been appointed to a legislative vacancy in late 2007. His experience as a financial analyst recommended him for the JBC appointment after his election in 2008. A more experienced and tough-minded Republican contingent cannot be imagined from the 66th General Assembly. Veteran Senators Al White (R-Hayden) and John Marostica (R-Loveland) were undeterred by their respective caucus’ public postures. Their party would soon unload on the JBC for cutting higher education and for conspiring to raid private assets. Nonetheless, on the 7th of April, the Senate Appropriation Committee sent the bill unamended to the Committee of the Whole.

On April 8th, Senate President Groff asked the JBC to remove the higher education cuts from the bill, and the JBC declined. Some argued that the Mesa County case had opened the possibility of repealing tax exemptions to avoid higher education cuts, permitting resolution of Pinnacol’s status later. JBC members argued that it was too late in the session to give consideration of which exemptions to repeal, if any (Mook, 2009). The governor’s office had intervened and was in discussions with Pinnacol executives concerning a ‘loan’ to the General Fund and other options forced by the two Senate bills.

On Friday, April 10th, the state’s Republican Attorney General endorsed a memo written by the Solicitor General claiming that the proposed use of Pinnacol reserves was unconstitutional. The governor’s own counsel as well as Legislative Legal Services, however, made the judgment that the legislature could use these particular funds as it saw fit (Hoover,
Pinnacol purchased a full page ad in the Sunday Post defending its uncooperative position. The same Sunday Post editorialized in favor of a retreat from the “gimmickry” proposed by SB09-281 (Editorial 2009a). Yet, the two ‘Pinnacol bills’ (281 and 273) passed the Senate on Monday, the 13th, as did the Long Bill [SB09-259], which included the funds transfer authorized, but not before a Pinnacol-organized rally was held on the Capitol steps. The governor’s talks with the Pinnacol management ended without resolution on Tuesday, the 14th and the governor ultimately threatened to veto the budget bill if it retained the Pinnacol funds (Kosena, 2009c). The bill was later killed in House committee.

Boxed in, the JBC found a series of smaller cuts and tax exemption repeals to avoid the higher education cuts. Key among these were cigarette tax and capital gains. HB09-1342’s repeal of cigarette exemptions from the state’s 2.9% sales tax was the first such measure posed. Colorado’s exemption dated from 1959 and was one of three sales-taxing states with complete exemptions for cigarettes. All state-raised cigarette tax revenues had come from an eighty-four cents/pack excise tax. HB09-1342 was introduced on April 9, and the floor votes were (with one or two defections) party line. The measure is forecast to raise $31 million over the next two fiscal years, after which it expires. Clearly posed as an emergency recession measure, under cover of threats to higher education, the repeal did not extend to local the governments. Notwithstanding token verbal assaults by the Republican minority, effective resistance was negligible.

Another bill designed to raise funds in the short term was HB09-1366, which was directed at capital gains of income tax payers. Colorado appears to give investors in Colorado companies a ‘double-dip,’ adding a Colorado tax benefit onto the federal capital gains benefit. Sponsored by Representative Pommer, the bill eliminates the capital gains subtractions for the sale of qualifying Colorado-based assets, including stock, real property, and personal property. The fiscal note forecasted $7.1 million to be retained by the state in 2009-2010 and $15.8 million in 2010-2011. Having retreated on Pinnacol and forced to manage another set of smaller budget cuts, the JBC could not have been pleased with the legislatures disconnect on tax matters. One successful bill was HB09-1101, mentioned by the governor in his State of the State. It provided income tax credits from 2009-2018, of up to 50% of the cost of Social Security and Medicare payments for employees making above average wages for their respective counties. It is expected to cost nearly $14 million by 2012 and $2.9 million in fiscal 2009. Eligibility for tax credits is restricted to applicants to the Economic Development Commission and must be reestablished annually. The stringency of the process is mostly due to the fact that taxation is a limited incentive for firm expansion and relocation. Surprisingly, the bill’s fiscal note referenced two studies skeptical of the impacts of tax credit programs of that sort.

Co-sponsored by Senator Jennifer Viega (D-Denver), SB173, the Colorado Regional Tourism Act, flew through the Senate, but faced possible defeat in the House, where Representative Pommer vowed to kill the “biggest special interest tax giveaway in history” (Sealover 2009). Big interests in the state had lined up in favor of the proposal, which seemed to be designed to induce the Schuck Corporation and International Speedway Corporation to build a NASCAR venue planned for the outskirts of Aurora along I-70 east of Denver (Vuong 2009; Illescas & Chambers, 2009). The bill permits the creation of TIF financing districts and the retention of sale tax increments for tourism-related projects. House Democrats, led by
Representative Jack Pommer (D-Boulder), managed to limit the state’s financial liabilities to $50 million, require local government concurrence and place approval, require oversight authority in the hands of the State’s Economic Development Commission, and require annual reporting to the General Assembly. Dispute over the merits of the bill and the irony of supporting tax benefits to stock car promoters during a period of unprecedented revenue losses, helped define fracture lines among House Democrats. It is widely expected that the 2010 Session will contain hearings on many sales and income tax expenditures as the state continues to fight to maintain current law programs in the face of disappointing revenue performance.

Meanwhile, legislative action on the other Pinnacol bill (SB09-281) continued late in the session. House floor action caused provisions defining Pinnacol’s status as a state entity to be stripped, but later reattached. However, in the conference tussle, the final bill did not emerge with language clarifying Pinnacol’s status. By this time, apparently, the value of Pinnacol to Democrats had morphed from that of a temporary cash funding source to a saleable asset. Confusion over the status of Pinnacol and/or its financial obligations (not to mention the veto power of powerful groups who observed the present conflict) was not resolvable in the near term. A legislative victory was estimated to be a shallow one, and the likelihood of lawsuits counseled patience. The Final Bill passed both Houses by early May. It requires:

- the State Auditor to conduct a Performance Audit in 2009 and to conduct audits thereafter; and
- an interim legislative committee to examine the operations of Pinnacol and to make recommendations on the implications of the sale of Pinnacol to a third party. This committee is a newly constituted committee made up of 10 legislators, 2 Pinnacol officials, the Insurance Commissioner, a policy-holder, an injured worker, and a member of the general public.

Sometimes it gets interesting.

THE BEGINNING OF THE END FOR GENERAL FUND LIMITS – SENATE BILL 228

The 6% limit on General Fund spending was repealed in 2009. The origins of this bill, SB09-228, were the legislative challenges of the immediate post-TABOR years during which the economy was recovering from recession, the legislature was struggling with the question of how to augment education funding, and the fuller implications of the Taxpayers Bill of Rights were barely dreamed by more than a few. An obstacle to a new education finance bill was the Bird-Arveschoug statute which limited General Fund appropriation growth to 6% annually. Legislators sought guidance from the Supreme Court (1993) which demurred, and from the Legal Services staff of the General Assembly. The latter produced a series of memoranda, of which a January 24, 1994 memo is thought to be the most definitive. The memo responded to legislative questions as to whether the Arveschoug-Bird ‘appropriations’ limits were ‘spending’ limits in the language of the TABOR amendment. The task of the authors was to determine whether a technical term (“appropriation”) was included in TABOR’s ordinary language term “spending.” The memo reasoned that it was, first of all, because spending and appropriations are
“closely related concepts.” “Agencies normally cannot make expenditures unless they have appropriations, and placing limits on appropriations indirectly limits spending” (OLLS 1994, 2).

Second, the General Assembly passed SB93-74, a statute which defined the terms of TABOR for legislative purposes, defined ‘expenditure’ very broadly. Third, the author of TABOR (Douglas Bruce) had opined in support of the view that TABOR incorporated such limits into the constitution. Fourth, the Courts “will construe constitutional language to give it a natural and obvious significance as opposed to a narrow, literal meaning (OLLS 1994, 2). On this basis, “a court would probably conclude that for the purposes of Amendment 1 [TABOR], the Arcveschoug-Bird limit is a limit on spending (OLLS 1994, 1).”

This was the controlling legal interpretation of the Arveschoug Bird limit as it related to the state Constitution after TABOR’s passage. [In November and December of 1992, this author witnessed discussions among JBC members wherein it was explained by Chairman Bird that “Arveschoug-Bird” was constitutionalized by Amendment 1.] However, several things should be noted. The first is that the memo was not a particularly sharp analysis of legislative rules, statutory construction or constitutional construction of what ‘spending’ is. Instead, it was a response to members’ questions about what they were permitted under TABOR, and was not focused on a particular legal challenge or issue. In the absence of considering specific problems, proposals, conflicts or dilemmas, the memo concluded that the conflated definition of spending and appropriation would ‘probably’ stand. Second, the memo did form the basis of the General Assembly’s understanding of TABOR, since the General Assembly constructed the implementation for TABOR in SB93-74. Had it been more assertive, the legislature could have modified the approach and acted independently of what was construed to be instructions from the voters (and TABOR author Douglas Bruce). Clearer terms of reference could have been invented by the General Assembly for the purposes of greater precision rather than the blanket and sloppy prohibition it was taken for in the beginning. Third, while many members of the Republican majority in the General Assembly accepted Douglas Bruce as oracle, Bruce’s pronouncements were irrelevant to the legal construction of the words in Amendment 1 passed in November 1992. Finally, the prediction of the courts likely conflation of ‘spending’ with ‘appropriation’ was speculative and presumptuous. The memo was what it was: the response of the legal staff to a broad, indefinite question from members of the General Assembly. It was not a legal brief or a final word, although it acquired the status of finality.

If the point of the memo was to answer the question of whether the legislative interpretation-in-use of ‘spending’ incorporated the technical act of “appropriation” would withstand a court challenge, it bears further examination whether such a challenge was contemplated and what its legal basis would have been. The preference of the majority faction of the General Assembly was to not go against the grain of the anti-government sentiments that were seen to drive Amendment 1. And, within the following year in November 1994, the General Assembly referred a constitutional single subject amendment (Referendum A) to prohibit another far-ranging constitutional provision like Amendment 1 [TABOR]. Ironically, the statute prevented, and still prevents, wholesale repeal or broad amendment of TABOR. This has been a constant thorn in the side of revision attempts. [see cartoon at http://www.coloradobudget.com/repository/PDF/TheSingleSubjectRule.pdf]
Legislative timidity kept the issue (mostly) closed until the 1997 session when the legislature passed SB97-1 – which diverted sales tax revenue to HUTF when General Fund revenues exceeded the Arveschoug-Bird 6% ‘limit.’ Hidden in plain sight, SB97-1 showed that a ‘spending limit’ is not a ‘spending limit’ when its overages are spent on roads and bridges. Thus the breach of the “Constitutional spending limit” was boldly accomplished—and ignored. SB97-1 diversions took on a strange unspeakability, even among legislators opposed to them.

The Taxpayer Bill of Rights specified that ‘weakening’ of limits on revenue, spending and debt existing at the time of TABOR’s passage would require authorization by a vote of the people. So, as the story went, spending 6% would require the voters to approve a ‘weakening’ of revenue, spending or debt limits, except for SB97-1 diversions and (later) HB02-1310 diversions into the Capital Construction Fund. New thinking has been fostered by a lucid memo written by former Supreme Court Justice Jean Dubofsky (Dubovsky, 2007) in early 2007. Its findings were pondered for about a year, before the 6-page memo was circulated more broadly in 2008.

The Dubovksy memo took issue with the then-accepted meaning of TABOR’s language stating that limits on ‘revenue, spending, and debt’ cannot be ‘weakened’ without voter approval. At the center of Dubovsky’s analysis is the language of Arveschoug-Bird as passed in 1991. Her reading of TABOR and the 1991 statute leads to the conclusion that Arveschoug-Bird has been a limit on appropriations for General Fund programs, not a spending limit per se. She traces the misinterpretation to the Legislative Legal Services memo of January 1994. Although spending and appropriation are related insofar as they related to public expenditure, they are not the same. Since it is not a spending limit, a repeal of Arveschoug-Bird would not weaken a spending limit and would, therefore, not require a vote of the people to authorize. The memo notes that Arveschoug-Bird has not limited the spending of General Fund revenues in practice: the General Assembly appropriated General Fund revenues which exceeded 6% to the HUTF and CCF, defining a revenue siphon of General Fund revenues for highways and capital construction. The General Assembly has transferred GF monies to a range of other fund accounts, such as K-12 Schools, courts, corrections, Medicaid, and welfare (for the federal match). Spending will not increase by means of removing the Arveschoug-Bird limit. Instead spending would be “reformulated.” The implications of the memo portend greater flexibility in funding Colorado state government, but for the moment, we will focus on the journey of SB228 itself.

Conventional wisdom had it that repealing SB97-1 was political suicide, requiring that the author of such a repeal was either necessarily possessed of extraordinary courage, stupidity or both. Early in the year, however, it was clear that Representative Don Marostica (R- Larimer) and Senator John Morse (D-El Paso) were planning to introduce a bill that would attempt to do that and at the same time—following the logic traced by the Dubovsky memo—remove the 6% limit on General Fund appropriations. Press reporting on this subject was highly personalisitic, in part because of the unthinkability of the idea. Perhaps the press elided its history because of its own complicity in the SB97-1 masquerade. In any case, John Marostica, first elected in 2006, came to the legislature as a mature man in his 50’s who enjoyed a record of serious personal, professional and civic accomplishment, A fiscal conservative and political/social moderate, Marostica is the ranking Republican on the House Appropriations Committee and one of two Republicans on the JBC. He found himself the target of bitter charges of betrayal after agreeing
to be House sponsor for a bill that may shatter most of the strangulation-of-government dreams of Colorado’s libertarian right.

The vitriol heaped upon Marostica overshadowed the Senate sponsor of the bill, John Morse (D-El Paso Co.). Encouraged to run for office in 2006 by former Senate President Joan Fitz-Gerald, Morse’s accomplishments contain those of two working lifetimes: a CPA, a non-profit CEO, a paramedic, police officer, police chief, with an MBA, an MPA and a Ph.D., Morse has been wired into the state’s center-progressive network of reformers and quickly been moved into positions of leadership and counsel in the Senate. Morse shared the heavy lifting with Marostica. Less inclined to Marostica’s bluntness, particularly in Marostica’s baiting some of his Republican colleagues as ‘losers’ and ‘lemmings’ for their rigid lockstep with the party’s far right, Morse’s intelligence and tact has earned him a place in any serious legislative debate. Dubovsky joined the two SB09-228 co-sponsors for the press conference marking the bill’s Senate introduction (Tomasic 2009b).

The Senate Bill intended to eliminate the 6% General Fund ‘ratchet’ mentioned here many times (See Moore 2004, 2005, 2006). The effect of the 6% growth limit on General Fund expenditures is to prevent programs supported by the state General Fund to recover from recessions. Recovery of General Fund operations under a 6% post-recession limit is not even a theoretical possibility. The detail of the bill is devoted to untangling the ‘overages’ beyond the 6% from a series of triggers and diversions: the most important is its repeal of SB97-1 which transferred General Fund ‘surpluses’ to HUTF [up to 10.35% of sales tax revenues] and the HB02-1310 transfers to the Capital Construction Fund. $1.2 billion was transferred to HUTF between 2004 and 2007; during the same period, $243 million was transferred to the Capital Construction Fund. The February 24 fiscal note for SB228 forecast elimination of projected transfers to HUTF—$107 million and $245 million in 2010 and 2011 respectively. For the current and 2009 fiscal years, there will be no General Fund overages, hence no GF transfers to HUTF or Capital Construction.

The Senate Finance Committee passed the bill unamended 4-3 on Feb 24th. Meanwhile, the co-author of the 1991 bill, former Senator Mike Bird, now-retired to Arizona after a career as a Colorado College economics professor, entered the public discussion on several occasions during the week of its Senate consideration. Bird was interviewed several times to condemn the constitutionalization of the General Fund limit as bad policy.

The final 10-hour Senate debate partially deflected the effectiveness of Republican dramatization of the horrors of legislative discretion (Hoover, 2009 March 3), by missing the evening and late TV news and truncating newspaper coverage. Instead, the signing of the FASTER Colorado bill at a decaying Interstate 25 bridge north of Denver absorbed the television attention on that night. One strains to imagine how SB228 would have survived a Senate Finance Committee vote had the highway interests not been held harmless by FASTER’s immediate and stable fee-based revenue stream. However, if fantasies of a quid pro quo between FASTER and the SB228 “ratchet repeal” occurred to onlookers, the House transit of SB228 would disappoint.
The bill reached the House true to its original form. However, the Chair of the House Committee on Transportation and Energy Representative Buffie McFadyen (D- Pueblo) had earlier recorded an objection to the bill blanket repeal of SB97-1 transfers to HUTF (Colo Capitol J 2009). The Speaker’s referral of SB228 to McFadyen’s committee predicted substantial amending that would occur over the following weeks. The bill picked up several new provisions that became law:

- SB228 restored a cap on General Fund spending equal to 5% of state personal income. This provision had been a forgotten part of Arveschoug-Bird. It had set GF appropriation at the lower of 6% from the prior year or 5% personal income. SB 228, as amended, would restore a cap, albeit a higher one.

- Transfers to other Funds will occur each year between 2012 and 2017 IF Personal Income grows at least 5% over each of the previous years. This is what became called ‘triggers.’

- Subject to triggers, SB228 requires the following transfers of GF monies to other funds.
  - Beginning 2012-13, increases the General Fund reserve at .5% until it reaches 6.5% of the General Fund total. This would mean between $35 and $47 million over five years and would continue indefinitely when needed. The General Fund Reserve will grow from 4% to 6.5% over five years.
  - For a 5-year period beginning in 2012-13, requires 2% of General Fund revenues to be transferred to the HUTF. These are estimated to range from $170 - $230 million per year.
  - For a 2-year period beginning in 2012-2013, requires .5% of General Fund revenues to be transferred to the Capital Construction, and for the three years thereafter, requires 1% of the General Fund to be transferred to the CCF. Legislative economists estimate the dollar amounts for the first two years to range between $42 and $47 million, with the succeeding three ‘1%’ years to range from $95-114 million.

The governor had played a strong role in the negotiations over the bill, working with legislators and lobbyists to hammer out a legislative consensus that would repeal Arveschoug-Bird while reducing the political liabilities for doing so. Ritter’s reintroduction of capital funding into the mix seems to have changed the trajectory of what had appeared a ‘clean bill’ from the Senate that restored legislative discretion over the General Fund. Clearly those wishing a ‘clean bill’ without triggers, diversions and siphons would find themselves at odds with Ritter, who leaned against them consistently. The package of diversions to transportation brokered by the governor left several Democrats displeased and this provided an opening for a maneuver by House minority leader May during the Third Reading debate (Kosena 2009b). Republicans proposed an amendment to divert the highway funds into education, which peeled away enough angry Democrats to change the political complexion of the bill. Marostica pleaded with Democrats to restore the highway provision stating that the road funding was ‘the whole deal’
and the amendment threatened weeks of negotiation organized by the governor (Hoover 2009e). The six perturbed House Democrats were persuaded to repeal the changes.

The final version of the Bill included a provision for a larger reserve, a variation on the Rainy Day Fund idea that had been circulating since the 2001. [Ironically, the idea was proposed during Republican control of the General Assembly and the governor’s office after they had presided over billions of taxpayer refunds AND a succession and state tax cuts.] A Republican chorus was joined by House Democrats to support the 6.5% ‘Rainy Day’ provision, albeit smaller than the 10% Reserve proposed by Representative Ferrandino’s (failed) HB 1269 and others earlier in the session. This demonstration of Democratic ‘Rainy Day’ prudence in the rainy day provision deflected Republican attacks over SB228’s removal of the Arveschoug-Bird 6% limit.

Republican outcry continued beyond the session’s end over SB228’s repeal of SB97-1 transfers. The passage of SB228 continued to gall orthodox TABORites, who challenged – in public debates – the constitutionality of the act. There seems to be little doubt among the legal community, including the state’s Republican Attorney General, that Dubovsky’a analysis and SB228 is constitutionally defensible. The Independence Institute has been noticeably circumspect, and at this writing there appears to be nobody organizing a suit against SB228. After 2012, it appears that transportation and capital funding may have a more stable General Fund revenue stream than enjoyed during the 12 year life of SB97-1. The intervening three years of federal transportation stimulus funding should be sufficient to satisfy the highway lobby. In retrospect, the power of the construction and highway industry seems to be affirmed in several ways. First, how it has avoided approaching the voters for the obvious – increasing the gas tax – is itself impressive. Although FASTER was a major accomplishment for Ritter and others, with both FASTER AND SB228 the industry will have a more stable and strong revenue stream, to be augmented by occasional GF revenues. What is the status of the 5% PI limit? It is not a constitutional spending limit for the General Fund. It is entirely up to the discretion of the General Assembly as to it permeability and as to the destination of any surpluses over this 5% limit, if ever reached. Reaping General Fund revenues depends on how much Personal Income grows annually after 2011. It’s a fairly safe bet that PI growth will grow, but in the eight years since 2001, five years registered an annual Colorado PI growth of less than 5% and one year just barely 5%.

What is more impressive in retrospect is the SB97-1 masquerade itself. How passages in a 1994 legislative staff opinion became inflated to an inflexible prohibition on General Fund spending for sixteen years is stunning, involving strategic silence by many officials and institutions. At the same time, however, the highway lobby has never been forced to reckon seriously with the need to enlarge public funding of highways through increasing its dedicated gasoline revenues. Had the highway lobby enlarged the tax base for highway construction, it would have diminished many of the threats to General Fund programs. The strong-but-unimaginative pose of the highway lobby is one of the truly striking aspects of the state fiscal politics helping to paralyze the state. One imagines that with a governor less inclined to Ritter’s centrum, the General Assembly may well have pushed the construction lobby into facing the public.
BUDGET HIGHLIGHTS FOR THE 2009 SESSION.

For 2009-2010, major balancing actions taken in addition to those engineered for 2008-2009 were suspending the $90 million Senior Homestead Property Tax Credit, diverting $65 million of tobacco settlement funds from health programs, transferring $25 million from K-12 to higher education budgets, and even the closure of a prison. Even as the session saw budget cuts and near term revenue increases from exemption repeals, some were not optimistic: the June revenue forecast may bring the need for further cuts and funding shuffles.

The 2009 budget was constructed more-or-less contemporaneously with the rebudgeting of the 2008 fiscal year. The appropriations for 2007-2008 and 2008-2009 reported below are after supplemental cuts.

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Corrections: Caseload Growth and Continued Investment in Inmate Programs.

The governor and a number of legislators showed the seriousness with which they take their commitment to long term savings via recidivism reduction. The Corrections budget was increased from $753 to $761 million (General Fund Appropriations $667 to $677 million). The Institutions line was increased $9 million; management was cut about $7 million. Reimbursements for private prisons and county backlogs remained constant, while the prison population is expected to grow 2.7% and the average daily jail backlogs are expected to grow 11%. Inmate programs were increased about $5 million over 2008-09, representing a nearly 18% jump in funding, trailing a prior year increase of some 12%. Correctional Industries also increased a couple of percentage points.

Education: Insufficient Funds Constitutionally Programmed for Growth.

Like that of all states, education is unique in its scale: It is the state’s largest department, consuming 43% of the $7.4 billion General Fund appropriations and 25% of the state’s $19 billion total budgeted appropriations [from all Funds] for 2009-10 and forecasts show it consuming 90% of such budgets in ten years time, under current law. It is also unique in that the core of state education funding – the State Assistance Program – enjoys Constitutionally mandated growth regardless of the condition of the state at large.

The statewide base funding program drives the “Per Pupil” appropriations. These figures reflect the total per pupil funding which includes both state and local funding sources. The state share is supported by General Fund revenues, while districts are supported by Property taxes and specific ownership taxes. The state contribution is the difference between the base funding and the local revenues. As the property tax base has dwindled as a result of the Gallagher Amendment passed in 1982, the state share has grown from about 40% to its current 63.9%. [Incidentally, SB07-199 affirmed by ruling in the Mesa County “School tax freeze” case, prevents school district decreases otherwise under TABOR, thereby altering rate of change in state-local shares.] The local shares for 2009-10 are just over $2 billion, while the state assumes $3.7 billion.

Amendment 23 to the Colorado Constitution mandates annual increases in funding for the state assistance program by a factor equal to inflation, plus an additional one percent through 2010-2011. Specifically, the Amendment expresses its mandates as annual increases in schools’ “base per pupil funding.” As the Amendment defines inflation through the Boulder-Denver CPI which increased 3.9% in 2008, the state constitution thus requires the per pupil 2008-09 base to increase 4.9% from $5,250 to $5,508. In addition, pupil counts are estimated at 1.4% for 2009-10. Additions to the base program are made for locale-specific costs of service provision. Thus 24% of the total school per pupil funding is based upon three variable factors specific to each school district: cost of living, size, and proportion of at-risk students. Accounting for these, the average per pupil funding increased faster than the base program for 2009-10, at 5.1% to an average per pupil funding of $7,225. School Funding under the base funding program thus increased $343 million over 2008-2009.
Education funding advocates frequently state that while Amendment 23 (2000) constitutionally taps General Fund for annual revenue growth, the results of this earmark have been insufficient. In 2005-2006, Colorado ranked 38th in the nation for total K-12 for all-source per pupil revenue and 41st for state revenues per pupil. Ranking Colorado in terms of K-12 spending as a proportion of Personal Income, Colorado all-source revenues place Colorado at 48th among the states (U.S. Census, 11-12). Education’s constitutional funding privilege obscures the fact that schools are not well supported in the state. Under ARRA of 2009, categorical programs for special education and disabilities grew some $97 million, or 59% of the ‘categorical’ budget.

Higher Education: Institutions on a Bubble.

Higher education enjoys an ambivalent sympathy under the Democratic General Assembly and governor in contrast with the muted hostility when both branches were Republican. Legislative supporters profess sorrow about ‘what is happening to higher ed.’ With a business community committed to higher education as a driver of economic growth, prominent Republican leaders have increasingly been extended a kind of proprietary role in overseeing the institutions, serving at the helm of the state’s flagship institutions, including University of Colorado, Colorado State University, and University of Northern Colorado, as well as the Community College system. The governor’s expectation of organized business championship of higher education has yet to spawn explicit pronouncements of higher education policy beyond vague intimations of ‘privatizing’ the university system. This has been obscured by the recent economic events.

Funding patterns for higher education have become more legible to both the legislature and the public over the past several years. In 2004, the General Assembly passed SB04-189 which funds universities through a College Opportunity Trust Fund. This device permits the universities to receive state funds without those funds being “appropriated” by the General Assembly, driving down the share of direct state appropriations to less than 10% whereupon the governing boards could elect to apply for a new ‘enterprise’ status under extant law. The value of this arrangement is that enterprise status permits tuition to escape the TABOR accounting under the spending limits: tuition spent without it being counted under TABOR expenditure limits or it being (indirectly) refunded to taxpayers as a ‘surplus’ refund. Enterprise status did not transfer tuition authority to the governing boards: the legislature and the governor retain this, but there are rumblings about the desirability of transferring all tuition authority to the governing boards. It is possible that the state will simply move by increments into tuition supported, autonomized higher education.

The Department of Higher Education appropriation is $2,790,568,563 for 2009-10, of which the largest portion, $1,373,468,595 (49%), is Cash Funds (tuition), followed by General Fund sources (through CoF) $660,575,732 (23%). The higher education budget was assisted by the ARRA funds, which permitted ‘backfilling’ $150 million in ARRA funds for each of 2008-09 and 2009-10 to compensate for the cuts in CoF funds and fee-for-service contracts. In the end, the ARRA played a role in saving the universities, insofar as the proposed cuts of $300
million for the colleges would have brought expenditures below 2004-05 levels, costing the state all of its $750 million in ARRA funds for the year. (This Week @ Metro 2009).

Looking at the numbers alone, the colleges as a whole were not major losers in the 2009-10 budget. However, students were dinged significantly, perhaps explaining the obscurity (in the Appropriations Report) of the College Opportunity Fund (CoF) stipends for 2009-10. For several years it seemed as if the General Assembly was intent on showcasing the precise dollar amounts in the stipend, after Republicans hailed it as the first American higher ed voucher plan and Democrats touting it as an entitlement. This year, the Appropriations Report overlooked the subject of stipend amounts, compared to the table on page 160 of the 2008 Appropriations Report. However, it is clear from University financial aid websites that 2009-10 academic year stipends were cut from $92 per credit hour ($2,760 full time per year) to $68 per credit hour ($2040 for equivalent full load per year). An additional 8,396 students will be eligible for the CoF stipends in 2009-10, resulting in a near-level appropriation compared to the prior year. At the same time, authority was granted the governing boards to raise tuition up to 9% (resident) and 5% (non-resident). This raised $141 million across the university system. The biggest question for higher education is what happens after the ARRA funding runs out in 2010.

Colleges have developed elaborate ‘rainy day’ reserve schemes for the eventuality of a soaring funding gap for 2010-2011, in addition to plans for high tuition increases. But the prospects of a near-term jobless recovery leave the Colorado economy without revenue growth to support Colorado’s perennial budget balancer.

CLOSING COMMENTS

This was a year of astonishing change in the state’s finances and fiscal future. Several events marked this years’ budget activity. First was the use of Cash Funds and the General Fund Reserve to feed the General Fund. Second, having performed these shell games, the General Assembly, in the absence of heaping cuts on one or a few programmatic areas in Colorado’s already-minimalist general operating budget cuts, would be more aggressive in personnel cuts in the form of furloughs for the 2009-2010 year.

Colorado is a paradoxical place. Enjoying among the top rankings among states for personal income, it self-congratulation is sustained in part by a parallax view of the quality of its services and a wishful view of its future. But using ‘straight-down-the-middle’ data gathered by the Census Bureau and the Bureau of Economic Analysis, the latest reports show Colorado 48th among the American states for K-12 revenues per $1,000 of Personal Income. It ranks 49th for Medicaid spending, 48th in Higher Education spending, and 48th in State highway spending by the same PI measure. Colorado ranks 47th in state spending by the same measure and 45th in per capita expenditure (Aiming for the Middle, 2009).

The politics of TABOR seem to have shifted. Armed with the Mesa County decision, the General Assembly began a search for revenues by taking back exemptions from its sales and income tax bases with repeal of the cigarette sales tax exemption and a capital gain income exemption (together worth $39 million in 2009-2010). It reduces the fee vendors retain for
complying with the sales tax, raising nearly $69 million for 2009-2010. And it suspended a senior property tax exemption worth $90 million. It is likely that the 2010 session will see consideration and passage of numerous tax preferences after the JBC and the Legislative Council takes full measure of the possibilities. The mantra of the JBC and others was ‘protect the General Fund’ and it seems that this will be accomplished to the greatest degree possible under the current majority.

While the state cogitates about the when and how of revising or uninstalling TABOR, the General Assembly has been slicing pieces of government from the revenue and expenditure base that TABOR regulates, by spinning off pieces as state enterprises. The latest is HB09-1363’s designation of Unemployment Insurance as an enterprise, avoiding the impacts of its volatile financing on the General Fund. Continuing the trend to budgetary spin-off (or ‘attenuation’) is another of this year’s legislative accomplishments.

Third, fee legislation was the core of this session’s most dramatic revenue accomplishments, accelerating the spin-off dynamic. Expansion of medical programs heretofore funded out of the GF was managed by the hospital provider fee legislation. Highway funding pressure was relieved by FASTER and continued highway funding pressure (‘raids’) has been put off by SB228’s rewiring of the General Fund limits. SB228’s removal of the 6% limit and its replacement by a 5% PI growth limit gives the General Assembly greater flexibility by raising the effective limits on retainable GF revenue. Presumably this statutory solution can be revised to alter the timing and amounts of transfers to HUTF if needed. The fee-dependent orientation of this and prior years’ fiscal innovations may have the overall effect of pointing to the opportunity for making TABOR limits less onerous by rendering them irrelevant, if only their revenues (as in the case of higher education) can be redefined under ‘enterprise’ status. The FASTER fees and the HCAA generate large chunks of money, and under current funding arrangements, these funds are accumulated under TABOR’s accounting. Conceivably, similar funding arrangements could be constructed which allowed university tuitions to escape TABOR accounting. Doing so would complicate, but not diminish legislative control over these functions any more than creating enterprises of the universities diminished legislative control.

At the beginning of Governor Ritter’s term of office, and the Democratic majorities in the General Assembly, the possibilities of constitutionally altering the fiscal trajectory of the state seemed bright. Political commentary focused on a constitutional referendum to resolve the state’s funding mess. Yet, increasing hostility between Ritter and core Democratic constituencies, conflicts over goals and strategies among legislative Democrats, and distrust between Ritter and his Party, still combine to frustrate a plan, a message, and strategies to accomplish the heroic vision of constitutional redemption that stalwarts of Republican democracy would prefer. Over the past few years, nobody in official positions appears to have been addressing what happens when Referendum C’s ‘TABOR-time out’ ends in 2010-2011, except whatever had to happen would have to wait for the governor’s reelection in 2010. Rattled and preoccupied by this season’s intense fiscal dramas and the urgency of responding to the recession, this silence continued.
However, grand strategies may not be as necessary as earlier imagined. The arc of a satisfactory solution may have been mapped by the sum of the legislative lifting over the past five years, especially the past two years. SB07-199’s ‘mill levy freeze’ and its following court ruling reduced pressure on the General Fund and showed the way for tax policy changes. This year, the General Assembly recovered from its cringing early 1990’s obeisance to an unstated TABOR Manifesto by redefining General Fund limits (even though, the legislature found it expedient to pretend that it did not). Large harvests of provider fees have been underwritten a ‘bank shot’ to address problems of indigent health care and uncompensated hospital costs. In FASTER, the state has its first augmentation of ‘user’ revenues since the one-cent gas tax increase in 1991. IF the ‘enterprise’ roadmap is followed, another series of financial steps may lie ahead which further reduces pressure on the General Fund and liberates revenues from TABOR limits. For the immediate few years, what holds the state back is not TABOR as much as the recession’s revenue drought. TABOR still enjoys enough support to make legislators hope or fear backlash for betraying whatever the public still believes TABOR to be. The fact is TABOR has come to mean less each legislative session for the past five years. TABOR may not be repealed as much as superseded.

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