



City and County of Denver

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Dennis Gallagher

Auditor

December 29, 2009

The Honorable John Suthers, Esq.
Attorney General of the State of Colorado
1525 Sherman Street
Denver, CO 80203

Dear Attorney General Suthers:

My office recently conducted an audit of certain operations at Denver International Airport. The audit revealed that DIA allocated an Aviation Fuel Tax Reimbursement (AFTR) received from the State in 2008 totaling approximately \$10.7 Million to certain signatory airlines, in violation of state law. Colorado Revised Statutes specify the AFTR should only be used for aviation purposes and cannot be used for airline subsidies.

Background:

The State of Colorado collects an excise tax on all aviation gasoline and jet fuel. The Colorado Department of Revenue states, "Aviation fuel taxes are collected on aviation gasoline (0.06 per gallon) and aviation jet fuel (0.04 per gallon). The tax is due and collected at the wholesale level when fuel is acquired at the terminal or imported into Colorado for gasoline, aviation and special fuel products." In addition, the State charges a 2.9% sales tax on aviation fuel. The Department of Revenue collects excise and sales taxes and deposits the funds into the Aviation Fund. The Division of Aeronautics then disperses the funds back to the airports in accordance with Colorado Revised Statute (CRS) 43-10-110. That statute provides that: "The board shall transfer from the fund, on a monthly basis, to the airport operating fund of the governmental entity operating the public accessible airport an amount...equal to sixty-five percent of any sales and use taxes collected by the state on aviation fuel sold for use at such airport..."³ Article X Section 18 of the Colorado Constitution authorizes CRS 43-10-110. Both Article X and CRS 43-10-110 require that these funds should only be used for aviation purposes.

The Issue:

In 2008, the State refunded \$10,746,100 Denver International Airport (DIA) as an Aviation Fuel Tax Reimbursement (AFTR) adjustment. This adjustment was due to the City because two fuel providers omitted filing tax form DR1510 to the State for the years 2004 through 2007. As a result of a State audit, the identified refund was given to DIA in a lump-sum payment by the State's Aeronautics Division. I believe and our audit finds that DIA inappropriately and illegally allocated these funds back to the airlines.

To promote open, accountable, efficient, and effective government by performing impartial reviews and other audit services that provide objective and useful information to improve decision making by management and the people.

We will monitor and report on recommendations and progress towards their implementation.

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DIA accounted for the AFTR funds as a revenue account. This means that the funds were not separately expensed allowing the airport to allocate the money to signatory airlines based on the airport's revenue-sharing practice. The co-mingling of these funds was non-compliant with accounting and reporting requirements identified by state law. DIA previously used the AFTR funds for airport operations such as snow removal. However, DIA allocated this one time reimbursement via credit memos based on the aviation fuel usage for the refund period. The allocation only included signatory, non-international airlines which were in operation at the time of the allocation. It did not include international airlines because they purchase bonded fuel and therefore do not pay the aviation fuel tax. However, non-signatory airlines that do pay this tax did not receive an allocation.

I assert that this allocation violates Colorado Revised Statute (CRS) 43-10-110 and the Colorado Constitution, which dictate that these funds are to be used only for "aviation purposes" by the recipients of the funds from the State. The State provides additional details regarding the appropriate use of these funds, illustrated by (CRS) 43-10-102 (3) as follows:

"(3)(a) "Aviation purposes" means any objective that provides direct and indirect benefits to the state aviation system and includes, but is not limited to:

- (I) Any work involved in constructing, planning, or repairing a public access airport or portion thereof and may include any work involved in constructing or maintaining access roads;
- (II) The removal, lowering, relocation, and marking and lighting of any hazard to the safe operation of aircraft utilizing federal rules and regulations as guidelines for determining such hazards;
- (III) The acquisition of navigational aids used by aircraft landing at or taking off from such airport;
- (IV) The acquisition of safety equipment necessary for the enhancement of the state aviation system;
- (V) Any research study, proposal, or plan for the expansion, location, or distribution of aviation facilities or resources that are directly related to the state aviation system;
- (VI) The promotion of economic development which is related to the promotion, development, operation, or maintenance of the state aviation system;
- (VII) Any acquisition of land, of any interest therein, or of any easement through or other interest in airspace, including land for future airport development, which is necessary to permit any such work or to remove, mitigate, prevent, or limit the establishment of any hazard to the safe operation of aircraft; and
- (VIII) Any informal education or training made available to the public concerning aviation in the state or any informational materials for dissemination to the public concerning aviation.

(b) Subsidization of airlines is expressly prohibited as an aviation except for the promotion and marketing of air service at airport facilities."

In this case, monies were provided directly to the airlines in the form of credits. Airlines have complete control over how these credits are utilized (unless the airlines are delinquent in their payments). In addition, during 2008 (CRS) 43-10-110 also required each entity receiving the funds to "...submit an annual report to the division providing information concerning the aviation purposes for which the moneys have been used." DIA did not submit annual reports to the State's Division of Aeronautics. Because the funds were combined into the revenue account, DIA did not separately account for how the AFTR funds were spent and were therefore unable to identify how these specific funds were utilized. With the passage of House Bill 09-1066 in 2009, AFTR recipients are no longer required to submit annual reports to the State. However, recipients are still required to utilize the funds only for aviation purposes as described above.

The Request:

DIA has taken a position that the \$10.7 Million in credits to the airlines does not constitute a 'subsidy' and therefore is an appropriate allocation. However, they can provide no legal or other support for that position.

I am requesting a formal legal opinion from you as to whether direct unfettered credits to airlines as occurred in the instance our audit cites, are in point of fact a subsidy and inappropriate under CRS 43-10-110 and that such credits are inconsistent with 'aviation purposes' as defined in (CRS) 43-10-110.

I am enclosing a copy of our audit.

Respectfully,



Dennis J. Gallagher
Auditor of the City and County of Denver

cc: John Hickenlooper, Mayor of Denver
Kim Day, Manager of Aviation
Sally Symanski, Colorado State Auditor
Jeanne Robb, President, Denver City Council