9-30-1985

Colorado General Assembly v. Lamm

SUPREME COURT, STATE OF COLORADO

Case No. 85 SA 70

OPENING BRIEF
Appeal from the District Court of the City and County of Denver
Civil Action No. 82 CV 9345
Honorable HAROLD D. REED, Judge

THE COLORADO GENERAL ASSEMBLY,

Plaintiff-Appellee,

v.

THE HONORABLE RICHARD D. LAMM, Governor of the State of Colorado; et al.,

Defendants-Appellants.

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This opening brief is submitted on behalf of defendant-appellant Governor Richard D. Lamm by his attorney, Duane Woodard, attorney general for the State of Colorado.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether federal grants to Colorado received pursuant to the block grant provisions of the Omnibus Budget Reconciliation Act of 1981 or the conditions of the Job Training Partnership Act, must be appropriated by the Colorado General Assembly prior to expenditure for federal purposes.

STATEMENT OF THE CASE

A. The Nature of the Case.

This appeal arises from the Colorado General Assembly's challenge to Governor Lamm's vetoes of certain provisions of the 1982 general appropriation bill (the "Long bill"). Other issues in this lawsuit were resolved by this court in its August 26, 1985 opinion in Colorado General Assembly v. Lamm, N. 84 SA 79. The instant appeal raises an issue which the district court determined required trial and therefore was not included in the previous appeal.

The question raised in this appeal focuses judicial scrutiny on the historic constitutional authority of the executive branch to expend federal grant funds without appropriation by the Colorado General Assembly. Resolution of this question requires this court to consider whether the separation of powers established in art. III of the Colorado constitution permits legislative encroachment into activities which this court has acknowledged as clearly within the zone of executive authority.

B. The Course of Proceedings

The Colorado General Assembly filed this action seeking declaratory and injunctive relief against Governor Lamm and various other executive officials (subsequently dismissed as par-

ties.) Several claims were raised relating to Governor Lamm's veto of certain provisions of the 1982 Long bill and a 1981 supplemental appropriation bill. One claim asserted that the Governor improperly vetoed a Long bill headnote which purported to appropriate federal funds received by the state pursuant to eight block grants (the "federal funds claim"). Governor Lamm filed a motion to dismiss asserting several defenses. Central to this appeal is the Governor's contention that the measure appropriating federal block grant funds was beyond the constitutional authority of the general assembly and therefore void.1/

With respect to the federal funds claim, Judge Harold D. Reed determined on January 17, 1984 that a trial of disputed factual issues was required. Prior to trial, two additional federal grant programs were added as issues by amendment to the complaint. Trial to the court commenced on September 10, 1984 and concluded after 5 days of testimony.

On January 14, 1985, Judge Reed entered his findings, conclusions and order (the "federal funds order") granting declaratory judgment and injunctive relief in favor of the general assembly. With respect to the federal funds claim, Judge Reed concluded that the legislative power of appropriation extends to federal funds received by the state under these ten specific grants.

Governor Lamm timely filed a motion for new trial, which

was denied. This appeal followed.

C. Statement of Facts

Beginning with the 1982 Long bill, the general assembly enacted a headnote which purported to require legislative appropriation before the executive branch could expend designated federal funds, specifically:

> Primary Care Block Grant
> Social Services (Title XX) Block Grant
> Preventive Health Block Grant
> Alcohol, Drug Abuse, and Mental Health Block Grant
> Community Services Block Grant
> Maternal and Child Health Block Grant
> Elementary and Secondary Education Block Grant
> Community Development Block Grant

1982 Sess. Laws, ch. 1, pp. 4-5. Governor Lamm vetoed this headnote on the ground that legislative appropriation of federal funds violated the constitutional separation of powers and was void. 1982 Sess. Laws, ch. 1, pp. 88-89. In the 1983 and 1984 Long bills, the general assembly enacted substantially similar headnotes, adding two additional federal grant programs;

> Job Training Partnership Act
> Low Income Energy Assistance Block Grant

1983 Sess. Laws, ch. 36, p. 190; 1984 Sess. Laws ch. 1, p. 5. Governor Lamm vetoed both headnotes on the same grounds. 1983 Sess. Laws, ch. 36, p. 287; 1984 Sess. Laws, ch. 1, p. 98.

Excepting only the Job Training Partnership Act (JTPA), all of these grant programs were enacted by the United States Congress as a small part of the massive Omnibus Budget Reconcilia-

tion Act of 1981 (OBRA). Pub. L. 97-35. JTPA was enacted in separate federal legislation in 1982. Pub. L. 97-300, 96 Stat. 1324 (1982). Since most of the trial testimony focused on the requirements of the federal legislation establishing the various grants, the lengthy authorizing provisions of the United States Code were made part of the record by stipulation as joint exhibits I through X.

Both sides presented expert witnesses to discuss the history of federal grant-in-aid programs, describe federal grants generally, and testify in more detail about the complex provisions of the grants at issue. Generally speaking, plaintiff's expert witnesses placed more emphasis on the discretionary aspects of these grants, while defendant's experts stressed the numerous conditions and restrictions which Congress enacted.2/ The general assembly also called the director of the joint budget committee staff. The Governor called several state executive officials, who were the only witnesses directly involved in administering these federal grants.

Despite disagreements of opinion among the expert witnesses, there was no serious dispute about a number of facts. Federal grants to the states began well before the 20th century with land grant programs, and have expanded steadily since then. The period most relevant to this litigation began in the 1960's with an explosion of federal grant programs and proliferation of

accompanying federal regulations and oversight. Many of these grant programs were relatively narrow in purpose and involved substantial direct federal oversight, known to the political scientists as "categorical grants."

In the 1960's and 1970's critics of excessive federal supervision, including federal decisionmakers, began to explore means to provide more flexibility to state and local government grant recipients to administer federal funds to better achieve the national goals for which Congress appropriated federal grants. This lead to experiments with "block grants" 3/ and "general revenue sharing."

In describing the relative restrictiveness of federal grants, the experts agreed that grant programs may be placed on a continuum with categorical grants generally appearing at the most restrictive end. General revenue sharing (i.e. virtually unconditional grants of federal funds) is placed at the other end. Block grants were placed somewhere between the ends of the continuum, but the experts could not agree where any particular block grant should be placed. The disputes ranged from whether a particular grant was a block grant at all (whether it was so entitled or not), to whether a particular block grant actually overlapped with predecessor categorical grants.

Early federal block grants included the Partnership for Health enacted in 1966 and the Safe Streets Act of 1968, which

established the Law Enforcement Assistance Administration (LEAA).4/ Block grants gained wider use under the administrations of Presidents Nixon and Ford with enactment of: Comprehensive Employment and Training Act (CETA) enacted in 1973; Community Development Block Grant (1974); and Title XX Social Services Block Grant (1975). In 1972 Congress enacted a program which became general revenue sharing, whereby federal tax revenues were turned back to the states with no limits on the functional areas where funds could be spent. General revenue sharing to the states ended about 1980 and consequently was not an issue in this litigation.5/

In 1981, President Reagan proposed major new block grant programs as part of OBRA. While Congress added numerous earmarking restrictions to the original administration proposal, the OBRA grants nonetheless marked a major consolidation of anywhere between 50 to 90 existing categorical grants into nine block grants. The stated purpose of the block grants was to increase administrative flexibility for the states and to reduce direct federal oversight. In several instances the states assumed administrative responsibilities previously performed by federal executive agencies. The cost for these added responsibilities was that the states had to accept a reduction in the level of federal funding of about 25 percent from the predecessor categorical programs consolidated into these block grants. Although in certain

instances the states were permitted to transfer funds among blocks with similar purposes, the block grants nontheless retained extensive, express federal directives, restrictions and conditions designed to insure that federal funds were expended for the national objectives identified by Congress.6/

Whatever other impact OBRA had, it certainly did not replace categorical grants. The nine OBRA block grants constitute only about 11 percent of total federal aid to the states, the remainder of which continues to be categorical grants.

More detailed descriptions of specific provisions of the nine OBRA block grants, and of the separately enacted JTPA, will be discussed later in this brief in part III. See also attached schedule I.

SUMMARY OF ARGUMENT

This court has repeatedly recognized that the plenary appropriation power of the Colorado General Assembly extends only to state moneys, not to contributions from the federal government which properly are administered by the executive branch. The general assembly now contends erroneously that this principle of the constitutional separation of powers turns upon the label which can be placed upon a particular federal grant program.

The district court agreed with the general assembly that federal block grants must be subject to legislative appropria-

tion. To reach this result the district court erroneously concluded that the key factor in determining whether funds are custodial is the degree of discretion available to the recipient state grantee. The correct inquiry should have been whether the federal government holds the state accountable to expend grant funds for federal objectives. If the federal grants are conditional in nature, the state is a custodian of those federal funds.

Federal law provides that the states are accountable for misuse of block grants to exactly the same degree they are accountable for other types of federal grants. The decision below overlooked the body of federal law which precludes the state from treating federal blocks grant funds as if they were state moneys.

Examination of the federal grants at issue demonstrates that they do not confer significantly more discretion than the state has exercised under categorical grants. Even if the federal government allows wider administrative latitude in expending federal block grants, such grants fundamentally do not differ from other narrower grants because all are conditional in nature. No line can be drawn between these types of federal grants that would be conclusive of the constitutional power of the executive branch to administer some federal grants, but not others.

ARGUMENT

I.

THIS COURT PREVIOUSLY HAS EQUATED FEDERAL FUNDS WITH CUSTODIAL FUNDS. NO LEGAL BASIS EXISTS TO DISTINGUISH FEDERAL BLOCK GRANTS FROM OTHER FEDERAL FUNDS.

Pivotal to the district court's federal funds order was the conclusion that federal funds received under these ten federal grant programs are not "custodial" in nature. Consequently the court distinguished the precedent of MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (1972), which held that "federal funds" are not subject to the legislative power of appropriation. These specific grants are not custodial, reasoned the trial court, because Congress conferred more discretion on the states to decide how to expend these federal funds than is the case under categorical grant programs. Federal funds order, pp. 16, 19.

The district court erred in this decision by basing its constitutional ruling upon the relative degree of discretion found in a particular federal grant. The court's decision erroneously overlooks the essentially conditional nature of these federal grants, whether they are described as block grants or as categorical grants.

A. Federal funds are not subject to the legislative power of appropriation.

As early as 1939, this court recognized that state executive agencies had full discretion to expend funds received from the federal government without legislative appropriation. Bedford v. People, 105 Colo. 312, 98 P.2d 474 (1939), cited in MacManus v. Love, supra. In 1972, this court ruled that the legislature's plenary power of appropriation extends only to "state funds", concluding that "federal contributions are not the subject of the appropriative power of the legislature." MacManus v. Love, supra, 179 Colo. at 222, 499 P.2d at 610. (Language in general appropriation bill which required legislative approval prior to executive expenditure of federal funds held to be void as violative of separation of powers.) In 1978, this court reiterated the principle that the legislature lacks authority to appropriate federal funds, but reasoned that that constitutional principle did not preclude the general assembly from conditioning the appropriation of state moneys upon receipt of matching federal funds. Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620(1978).7/

Neither MacManus nor Anderson make any distinction among types of federal grants programs for purposes of the constitutional separation of powers. The evidence at trial was undisputed that Colorado had received funds under the LEAA block grant prior to 1972, the date of the MacManus decision, and that at

least 3 major federal block grant programs had been enacted prior to 1978, the date of Anderson. Consequently there is no basis, either legal or factual, for the district court's conclusion that MacManus intended to apply only to federal categorical grants.

B. The custodial nature of federal funds does not change because there is discretion to elect among federal objectives.

In MacManus, federal funds were equated with custodial funds, the expenditure of which is properly a matter for executive administration without legislative appropriation. 179 Colo. at 222, 499 P.2d at 610. This reasoning is consistent with precedent establishing that the legislative plenary power of appropriation does not extend to all moneys for which the state is responsible. Pensioners Protective Assoc v. Davis, 112 Colo. 535, 150 P.2d 974 (1944). (Moneys held in the care and custody of the state as a trust in the Old Age Pension Fund for the benefit of contributors, nonetheless were not state moneys and not subject to legislative appropriation.) In a recent decision (issued after the district court entered its federal funds order) this court provided further definition of funds which are custodial in nature:

> /F/unds not generated by tax revenues which are given to the state for particular purposes and of which the state is a custodian or trustee to carry out the purposes for which the sums have been provided.

Colorado General Assembly v. Lamm, 700 P.2d 508, 524 (Colo. 1985) . (Funds received by the executive branch pursuant to a consent order between Chevron and a federal agency were not subject to legislative appropriation whether viewed as federal contributions or custodial funds.)

In the General Assembly case, this court considered the fact that the executive branch had discretion to decide among several purposes for which the Chevron funds could be spent and concluded that the custodial nature of those funds was not altered by the existence of such discretion, stating:

> While the determination of which specific purpose among several options should be benefited was a determination which would inevitably affect the level of activity of some governmental department, the role of the state in administering the fund, as determined by the external source generating the fund, was essentially custodial in nature. The fact that a discretionary determination had to be made concerning the object for which those non-Colorado sums would be spent is not the controlling factor in assessing the nature of the fund.

700 P.2d at 525. (Emphasis added).

Likewise with respect to the block grants and JTPA funds, the existence of discretionary determination is not the controlling factor in determining the mature of those funds. The Governor contests the general assembly's position that these particular grants convey significantly more discretion than other federal grants. Nontheless, the custodial nature of these federal

funds does not turn upon the amount of discretion involved, but upon the state's accountability to use federal funds for Congressional objectives.

The district court's final order entirely ignores the body of federal law which imposes custodial responsibilities upon state recipients to expend federal funds for national objectives defined by Congress. The considerable federal law on this subject was discussed by Thomas Madden, an expert on federal grant law, and in the briefs filed by the Governor in the district court. Before turning to the specific federal requirements and conditions placed upon the federal grants at issue in this case, it is necessary to consider certain general principles of federal grant law as developed in the federal courts.

II.

FEDERAL LAW IMPOSES THE CUSTODIAL NATURE OF FEDERAL FUNDS, AND DRAWS NO DISTINCTION BETWEEN CATEGORICAL GRANTS AND BLOCK GRANTS.

Implicit in the ruling of the district court was the conclusion that block grant funds differ from other types of federal grants because block grant funds somehow lose their federal character and become state moneys once received by the state. This conclusion is reflected in the court's reliance on a Kentucky decision, Legislative Research Commission v. Brown, 664 S.W. 2d 907

(Ky. 1984), from which the court quotes with approval the following language purporting to describe federal block grants:

> When the federal tax dollars are delivered to the states, they become state controlled money to be spent in accordance with the state budget document....

Federal funds order, p. 20, quoting from 664 S.W. 2d at 928. (Emphasis in the district court order.)

This Kentucky decision makes no distinction between block grants and categorical grants, so at most it represents precedent that under the Kentucky constitution, the Kentucky legislature may properly appropriate all federal funds (regardless of the type of grant). If the decision is proposed for the broader proposition that the federal government does not consider block grant funds to be federal moneys once received by the state, then it cites no supporting precedent and is clearly contrary to existing federal case law. The federal courts treat grant funds as subject to federal claims even after they have passed through the conduit of the state to the ultimate recipients. No distinction is made between categorical and block grants in imposing federal accountability.

Federal case law views federal grant programs as voluntary, providing states the choice of complying with the federal conditions or forgoing the benefits of federal funding. Pennhurst State School v. Halderman, 451 U.S. 1 (1981). See Madden, Future Directives for Federal Assistance Programs: Lessons from Block

Grants and Revenue Sharing, 36 Fed. B. J. 107, 110-11 (1977). Where Congress enacts grant programs pursuant to its spending authority, the typical remedy for noncompliance with federally imposed conditions is termination of funding. Pennhurst State School v. Halderman, supra at 28. The federal government also may recover federal funds which were misused by a state under a federal grant, whether the program is a block grant or some other type. Bell v. New Jersey, 461 U.S. 773 (1983) (state held liable for the misuse of funds granted under title 1 of the Elementary and Secondary Education Act, with express holding that it made no difference whether the grant was under the 1981 OBRA block grant or under the predecessor categorical grant). See 461 U.S. at 781, footnote 6; Madden testimony, Sept. 11 tr. pp. 262-263. Moreover, the federal government retains an equitable reversionary property interest in federal grant funds, and as well as in property purchased with such funds, to insure that congressional intentions are met. Henry v. First National Banks of Clarksdale, 595 F.2d 291, 308-309 (5th Cir. 1979) (United States had property interest in the assets of its Headstart Program grantee sufficient to enjoy immunity from unconsented judicial process).

The Seventh Circuit recognized last year that the United States retains a property interest in block grant funds appropriated to the states, even after the state has distributed federal funds to a nonprofit community service organization. Palmiter v.

Action Inc., 733 F.2d 1244 (7th Cir. 1984). There a judgment creditor attempted to garnish the banking accounts of a nonprofit community service organization substantially funded by federal grants, including the Community Services block grant administered by the State of Indiana. The federal court declined to distinguish between direct grants to the organization and federal funds received indirectly through the state pursuant to a block grant, stating:

> These indirect grant funds which Action received prior to making grant expenditures must be treated identically to the direct grant funds ... which it also received prior to expenditures.... /T/hese funds are not Actions's but must be paid out for grant purposes or, if it is no longer possible to use the funds for grant purposes, they are subject to the United States' equitable reversionary interest.

733 F.2d at 1248-1249.

The federal courts have stated emphatically that recipients of federal grants remain accountable to expend those funds for the purposes designated by Congress, even though grantees may have wide discretion to choose among specific programs which serve those objectives. In 1984 the United States Supreme Court extended application of the definition of "public officials" subject to prosecution under the federal bribery statutes to include executives of a private nonprofit corporation which administered

the Housing and Community Development Act block grant as a subgrantee of the City of Peoria. Dixson v. United States, ___ U.S. ___, 79 L. Ed. 2d 458 (1984).

The court held that the federal interest in protecting the integrity of its block grants was so substantial that these private executives should be held accountable as federal agents even though they had no direct agreement with the United States. The majority rejected the theory of the dissenting opinion that the liability of grant administrators should be different under federal block grants because grantees had greater autonomy, stating:

> We recognize that the manner in which the HCDA block grant program combines local administration with federal funding initially creates some confusion as to whether local authorities administering HCDA grants should be considered public officials under the federal bribery statute. However, when one examines the structure of the program and sees that the HCDA vests in local administrators like petitioners Hinton and Dixson, the power to allocate federal fiscal resources for the purpose of achieving congressionally - established goals, the confusion evaporates and it becomes clear that these local officials hold precisely the sort of positions of national public trust that Congress intended to cover with the "acting for or on behalf of" language in the bribery statute. The federal government has a strong and legitimate interest in prosecuting petitioners for the misuse of government funds.

79 L. Ed.2d at 473. (Emphasis added). Compare with dissenting opinion of O'Connor, J., 79 L. Ed. 2d at 479.

Federal law directs that a state grantee is accountable for federal block grant funds to exactly the same degree it is accountable for categorical grants or other types of federal grants. This is the case because Congress has appropriated federal block grants for the ultimate benefit not of the state itself, but for clearly identified third party beneficiaries. See Madden testimony, Sept. 11 tr. p. 261. This is an important consideration because the Colorado constitution requires a distinction to be made between state moneys and funds for which the state is a custodian. In considering this distinction, the district court erroneously applied a legal test which considered only the amount of discretion available in a particular grant and entirely overlooked the state's accountability to Congress for the ultimate expenditure of these grants. With these broad principles in mind, the federal grants at issue in this case should be examined more closely to illustrate that Congress has intended these moneys to serve national objectives and has not simply turned revenue back to the state to make its own broad policy choices.

III.

BLOCK GRANTS DO NOT CONFER SIGNIFICANTLY GREATER DISCRETION THAN EXISTS UNDER CATEGORICAL GRANTS.

As discussed above, the degree of discretion in a particu-

lar federal grant does not control whether it is a custodial fund. The Governor does not concede, however, that the block grants do confer a significantly greater degree of discretion than categorical programs. Categorical grants, too, involve important discretionary decisions (including determinations of the qualifications of eligible recipients of federal aid within federal guidelines) which are the equivalent of decisions required under the block grants. Robert Gage testimony, Sept. 17 tr., pp. 76, 80, 81, 121.

In the block grants, as with categorical grants, discretionary expenditure decisions are made within policy guidelines set by Congress. These are precisely the type of administrative decisions which the executive branch was established to perform without legislative interference. See Anderson v. Lamm, supra. Under several block grants, the state is simply assuming the role formerly played by federal executive agencies which administered Congressional appropriations.

Several executive branch administrators, who have actual experience in administering both categorical and block grants, testified at trial that there is no significant difference in the degree of discretion permitted under the block grants compared to the predecessor categorical programs. See Harold Knott testimony, Sept. 12 tr., pp, 331-332 (state's discretionary role under Community Development grant is essentially to substitute for the

federal Department of Housing and Urban Development); Arvin Blome testimony, Sept. 12 tr., pp. 410-412 (state had more discretion to set competitive criteria for grants to local school districts under predecessor categorical grant than under education block grant); George Kawamura testimony, Sept. 12 tr., pp. 445-446 (Social Services block grant basically continues federal program in existence since 1975); Daniel Gossert testimony, Sept. 13 tr., pp. 15-18 (under predecessor categorical grants for maternal and child care, state had discretion to define services, set priorities among services and choose which care providers to fund, all discretionary decisions equivalent to those under the block grant); Rita Barreras testimony, Sept. 13 tr. pp. 88-89 (low income energy assistance block essentially continues predecessor categorical program which gave the state discretion to set the income level of eligible beneficiaries); Don Rice testimony, Sept. 17 tr., pp. 6-18 (preventive Health block actually reduced discretion available under predecessor categorical grants because several substantial new restrictions were added by the block grant legislation that did not apply to predecessor grants, plus a substantial reduction in federal funds under the block grant curbed discretion to try new programs). The testimony established that categorical grants, like block grants, require the state to exercise discretion on such issues as, who is a qualified recipient of federal funds and how much that recipient

should receive. When such decisions are made with federally appropriated funds and in the context of Congressional guidelines and conditions, such discretion is properly exercised by the executive branch of state government whether categorical grants or block grants are involved.

IV.

FEDERAL GRANTS WHICH ARE CONDITIONAL ARE NOT SUBJECT TO LEGISLATIVE APPROPRIATION REGARDLESS WHETHER THEY CAN BE TERMED CATEGORICAL GRANTS, BLOCK GRANTS OR OTHERWISE.

1. Job Training Partnership Act

A basic flaw in the district court decision was to permit the separation of powers established by the Colorado Constitution to turn on the label which public administrators place on particular federal grants. The term "block grant" is a particularly elusive one, as the general assembly's expert witness Richard Nathan candidly admitted:

> What is it Lewis Carroll said, "Words are what I say they mean," and the word block grant is used in lots of different ways.

Sept. 10 tr., p. 86.

JTPA provides an excellent example where the court strained to apply the label "block grant", even where the federal government did not use that term, to boot strap itself to the conclusion that a particular federal grant must be appropriated by the

legislature. Defendant's expert witness Robert Gage explained that in his view JTPA was a restrictive categorical grant. Sept. 17 tr., pp. 113-114. Even the general assembly's expert witness Richard Nathan testified that in his opinion only a portion of JTPA should be called a block grant. Sept. 10 tr., pp. 44, 86-87.

JTPA, enacted in 1982 separate from OBRA is far more restrictive than the other grants at issue in this case. James McGraw, a federal manpower development specialist on loan to the Governor's job training office, testified that on the basis of his 20 years of administering federal grants he concluded, JTPA was not a block grant, and described in detail the narrowly restricted, formulary allocation of federal funds by Congress. Sept. 17 tr., pp. 26-48.

JTPA was enacted principally for the purpose of increasing private sector involvement from what had been the case under the predecessor Comprehensive Employment and Training Program (CETA) program. McGraw testimony, Sept. 17 tr., pp. 30, 46.8/ The federal legislation specifies duties to be performed by "the Governor" of each grantee state. The principal exercise of discretion under JTPA is delegated to the specific "service delivery areas" (SDA's), which are defined in the federal legislature. 29 U.S.C. sec. 1511(a)(4). Mr. McGraw described the specific earmarking of federal dollars in the JTPA legislation as follows:

Title II A - Primary Training (29 U.S.C. sec. 1602)
(75 percent of all dollars received by the state)

78 percent of this portion must be passed through by the Governor to SDAs as specified by federal formula to be used at SDA discretion.

22 percent of this portion is expended by the state but is earmarked as follows:

5 percent for administrative costs (including audits);

3 percent for training for elderly workers;

8 percent for vocational education (must pass through state educational agencies);

6 percent reserved for incentive bonuses to be paid SDAs which meet federally prescribed incentive standards.

Title II B - Summer Youth Employment (29 U.S.C. sec. 1631(b))
(15 to 20 percent of funds received by state)

Governor must allocate to service delivery areas according to federal formula

Title III - Dislocated Worker (29 U.S.C. sec. 1653)
(5 percent of funds received by state)

Governor must pass funds through to assist disabled workers according to federal formula.

McGraw testimony, Sept. 17 tr., pp. 32-46. Without question, the state serves as a custodian to pass JTPA funds through to the ultimate recipients designated by Congress.

The federal requirements which direct how JTPA funds are to be spent take up 80 pages of the United States Code and 13 pages of federal agency regulations. See joint ex. X and XIV. Examples of further restrictions include: requirement that the Gov-

ernor prepare an annual planning report and two year plan (29 U.S.C. sec. 1531); private industry councils with federally defined membership must advise the SDA's (29 U.S.C. sec. 1512); state job coordinating council with federally mandated membership, is required to advise the Governor (29 U.S.C. sec. 1532); ultimate beneficiaries are identified by the terms "economically disadvantaged" and "unemployed individuals" specifically defined by federal law (29 U.S.C. sec. 1503(8), (25)).

The court's conclusion that federal law delegates extensive discretion to the state to expend JTPA grant funds is an erroneous conclusion of law which demonstrates a lack of knowledge of the legislation. If there is significant policy discretion, it exists at the level of the local service delivery areas, not the state administrators. The ultimate beneficiaries of JTPA are not the states, but rather youth, unskilled adults and economically disadvantaged individuals whom Congress determined should benefit from federal funds for job training programs.

2. OBRA Block Grants.

The OBRA grants permit more flexibility for the states to administer them than is the case with JTPA. The states may use their knowledge of local conditions to fashion the most effective means to achieve the specifically stated congressional objectives. In all of the block grants Congress has identified beneficiaries for whose benefit the state has an obligation to expend

federal funds. The OBRA block grants are highly conditioned federal grants for which the state serves as a custodian for Congressional objectives.

It is not possible in a brief (even of this length) to analyze all of the restrictions in the federal legislation. The record, covering five (5) days of testimony, does provide such in-depth analysis. Below is a summary which attempts to point out a number of the most significant conditions that illustrate the state's custodial role. Further reference should be made to the provisions of federal law and a useful synopsis found in the General Accounting Office report dated December 30, 1982, admitted as joint exhibit XV. Defendant's expert witness Robert Gage prepared several charts summarizing the eight OBRA block grants actually administered by the State of Colorado. See defendant's exhibit 5. Page 1 of that exhibit 5 is an overview, a copy of which is attached to and made part of this brief as schedule 1.

The block grants have a number of common restrictions. Each of the block grants requires the state to submit a plan or application to the federal government describing how federal funds will be spent. The state is required in most instances to certify that funds will be spent for federally authorized purposes. To enforce these restrictions, the federal legislation imposes audit reporting requirements to an appropriate federal agency. In every block grant there are public accountability re-

quirements, ranging from advisory committees with a federally designated membership to public hearing requirements. Under most block grants federal funds must be used to supplement state dollars, and cannot be used to supplant the state dollar contribution to similar programs.

A. Community Service

(Harold Knott, department of local affairs, Sept. 12 tr., pp. 301-382). A continuation of the antipoverty programs of the 1960's, this program is intended to ultimately benefit low income persons. Federal law requires not less than 90 percent of the funds to be passed through the state to "community action agencies" as defined by federal law.9/ 42 U.S.C. sec. 9904(c)(2)(A)(i) and (ii). Not more than 5 percent may be spent on state administrative costs (Colorado actually spends 2 percent). The remaining 8 percent is distributed in Colorado on a competitive basis to "limited purpose agencies" as defined by federal law. The chief executive of the state must submit a plan describing how funds are spent and certify the the grant funds will be expended in accordance with federal law to meet the antipoverty objectives stated by Congress. 42 U.S.C. sec. 9904(C).

B. Community Development (small cities)

(Harold Knott) - States assumed responsibilities previously performed by the federal Department of Housing and Urban Development (HUD) to serve as a conduit for federal funds to enable small cities to develop "viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunity, principally for persons of low and moderate income." 42 U.S.C. sec. 5301(C). The ultimate beneficiaries are local governments

in Colorado, i.e., small cities. Grant funds are allocated on a competitive basis according to a plan submitted by the state to the federal government. HUD still administers the large cities portion of this block grant and since 1983 Congress has required the states to administer their portion according to extensive HUD regulations, which appear as joint exhibit XIII. No more than 2 percent of the funds may be retained as administrative costs at the state level.

C. Elementary and Secondary Education

(Arvin Blome, department of education, Sept. 12 tr., pp. 384-433.) Federal law requires the state to pass through at least 80 percent of block grant funds to local school districts and prohibits the state from interfering with the discretion of local school districts to spend for designated federal objectives. 20 U.S.C. secs. 3815(a) and 3816(c). State is directed to provide higher per pupil allocations to those local districts with added costs because of low-income children, children in economically depressed areas or children in sparsely populated areas. 20 U.S.C. sec. 3815(a). Federal legislation specifies that the state educational agency is responsible for administration and supervision of remaining block grant funds. See 20 U.S.C. sec. 3822.

D. Social Services (Title XX)

(George Kawamura, Department of Social Services, Sept. 12, tr. pp. 434-460.) This block continues the prior title XX social services grant available to Colorado since 1975. Objectives prescribed by legislation:

1. achieving or maintaining economic self-support;

2. achieving or maintaining self-sufficiency, prevention of dependency;

3. preventing or remedying child abuse and neglect, preserving families;

4. referral for institutional care where other forms are inappropriate.

42 U.S.C. sec. 1397.

At least eight specific restrictions prohibit certain uses of block grant funds, including: No use for purchase or improvement of land, no payments for medical care or social services provided by a hospital. 42 U.S.C. sec. 1397d. The state must report on the intended uses of funds. 42 U.S.C. sec. 1397c. George Kawamura testified that the block grant is used to fund basically the same social services that have been in place since the early 1960's. The ultimate grantees are the beneficiaries of programs provided by county social services departments. Sept. 12 tr., pp. 445-446.

E. Maternal and Child Health Services

(Daniel Gossert, Department of Health, Sept. 13 tr., pp. 4-25). This block grant consolidates several prior categorical programs whereby Congress specified provisions of health services for mothers and children, the ultimate beneficiaries. Those prior programs and the specific congressional purposes are set out in defendant's exhibit 5.

The state must submit a report of intended expenditures to the federal government. 42 U.S.C. sec. 705. The state must make assurances to the federal government that it will use the funds consistent with federal legislation, including giving special consideration to the continuation of maternal

and child health projects funded under predecessor categorical programs. If charges are imposed for services, "low income" mothers and children as defined in the block grant law cannot be required to pay and any charges must be adjusted for income level. 42 U.S.C. sec. 705(2)(D).

F. Alcohol and Drug Abuse and Mental Health Services

(Bruce Berger, Department of Institutions, Sept. 13 tr., pp. 25-56; Robert Aukerman, State Department of Health, Sept. 13 tr., pp. 57-84). Although the block grant consolidated ten prior categorical programs, it requires the state to use a formulary allocation of funds between the mental health portion and the alcohol and drug abuse portion, based upon what the state spent for each portion under the prior federal categorical programs for these purposes. 42 U.S.C. sec. 300X-4(c)(6). The ultimate beneficiaries of the mental health portion are required to be "community health centers" as defined under federal programs dating back to the 1960's. The state was required to continue to fund those community health centers which had been funded under predecessor categorical grants.

The federal legislation makes specific percentage allocations of the amount available for alcohol and drug abuse activities: not less than 35 percent for alcohol abuse; not less than 35 percent for drug abuse; not less than 20 percent for prevention and early intervention programs to discourage alcohol and drug abuse; and no more than 10 percent may be spent for administrative costs. 42 U.S.C. sec. 300X-4, (c) (7) and (8).

G. Low Income Home Energy Assistance

(Rita Barreras, Department of Social Services, Sept. 13 tr., pp. 84-109.) Continuation of one existing categorical grant de-

signed to help eligible households meet the costs of home energy, with the addition of a weatherization program. Federal law mandates payments for home energy costs of eligible low income households and defines these ultimate beneficiaries, eligible households, as households that have one or more members receiving aid under specified federal income supplement programs or have incomes which do not exceed the greater of either, 150 percent of the state poverty level or 60 percent of the state median income. 42 U.S.C. sec. 8624(b)(2).

Numerous other federal restrictions include furnishing highest level of assistance to these households with the lowest incomes and highest energy costs. In Colorado third party beneficiaries of this grant have filed litigation challenging the interpretation which the state has placed on this federal criterion. Federal law mandates right of administrative appeal to persons found ineligible. 42 U.S.C. sec. 8624(13).

H. Primary Care

(Donald Rice formerly of the Department of Health, Sept. 13 tr., pp. 131-138.) Appropriation of this block grant is a moot issue because the state has never applied for nor received federal funds under this program. Mr. Rice testified that because of the size of the state dollar match required to obtain federal funds, Colorado and virtually every other state has decided not to pick up this block grant. The federal government has continued to directly fund community health providers under this program even though the state did not elect to administer it.

I. Preventive Health and Health Services

(Don Rice, Sept. 17 tr., pp. 4-21). Block grant combined eight former categorical programs in the area of preventive health.

Mr. Rice testified that 14 new restrictions were added which did not exist under predecessor categorical grants. A few of the significant restrictions are: requirement of continuation funding to prior grantees in designated programs, including hypertension; receipt of block grant funds conditioned upon the state establishing a new rape prevention program and expending specified amounts for that purpose. Overall federal funding in this area was reduced significantly under the block grant. Don Rice testimony, Sept. 17 tr., pp. 4-20.

3. General federal requirements -- crosscutting -- recategorization

The OBRA block grants and JTPA funds are further restricted by the crosscutting requirements of other federal legislation, such as antidiscrimination and environmental protection laws. The Governor's expert Thomas Madden testified that there are at least 20 to 25 federal statutes that impose additional requirements on all federal grantees, including states that administer the block grants. Sept. 11 tr., pp. 255-257. See Ely v. Velde, 451 F.2d 1130 (1971) (expenditure of a federal block grant made to Virginia by the LEAA for law enforcement purposes required the state to meet the conditions set forth in the National Environmental Policy Act of 1970 and the National Historic Preservation Act). The general assembly's expert George Brown also testified that federal crosscutting requirements do apply to the block grants. Sept. 11 tr., p. 164.

An additional fact established by the Governor's expert

witnesses, and not in serious dispute, is that block grants are not static, they tend to be subject to the phenomenon of "recategorization". The Governor's expert Robert Gage testified that block grants historically start out with substantial flexibility but are unstable because Congress subsequently adds restrictions to the original legislation to serve specific objectives. Mr. Gage pointed out the 1983 amendments to the Community Development block grant as an example where Congress decided to restrict the flexibility of the states after it saw how the states used that flexibility, recategorizing the block grant by imposing additional regulations. Sept. 17 tr., pp. 74-78. Thomas Madden described how the LEAA block grant developed historically with more and more restrictions as the federal government discovered problems in the way the block grant was administered, until finally little discretion remained. Sept. 11 tr., pp. 257-259. The fact that a particular grant can be characterized today as a block grant, does not mean that the administrative flexibility will continue indefinitly.

CONCLUSION

In this court's recent decision dealing with the Chevron moneys it defined custodial funds as those from non-Colorado sources given to the state for particular purposes, for which the state is a custodian or trustee to carry out those purposes. The

OBRA block grants and JTPA fall within this definition, regardless whether they are called block grants or given any other label.

It is undisputed that these funds originate with the federal government. The federal government has provided in the federal legislation for this money to be spent for specified purposes and has described who the ultimate beneficiaries are intended to be. Where the trial court erred was to conclude that the amount of discretion permitted to the state in the federal legislation removed the custodial nature of the funds.

That contention was expressly rejected in the context of the Chevron funds. There the federal government, acting with Chevron, provided a wide list of possible uses that would be acceptable, including the option for the state to suggest additional uses not on the list.10/ The range of discretion available to the state to use the Chevron funds was certainly as broad or broader than that available under any of the block grants. Compare 46 Fed. Reg 41,854 (1981). There, as is the case with the block grants, the state had to submit a broad plan of proposed uses for federal approval. The fact that the state had discretion to use the Chevron funds for a variety of purposes was held to be consistent with their custodial nature. 700 P.2d at 525. The Governor properly can exercise authority over these federal grants, as he could over the Chevron funds, without invading the

General Assembly's right to appropriate public funds. 700 P.2d at 525.

The approach taken by the district court has a serious flaw. The constitutional separation of powers between executive and legislative branches is made to turn upon the label placed on a federal grant by the jargon of public administration. This leads to an absurd result. Federal funds now received under the Social Services, Preventive Health and Education block grants, for example, would now be subject to appropriation. Prior to the consolidation of the categorical grants in the block, they were not subject to appropriation even though spent for essentially the same programs.

The federal grant process is not static. Favored methods of grants vary with the political atmosphere of a particular administration or a particular Congress. Richard Nathan testimony, Sept. 10 tr., p. 84. Doctrines such as "New Federalism" may wax and wane. Grants which begin as very flexible, discretionary ones, over time tend to become increasingly restrictive and categorical as Congress sees certain objectives not being met. The terms block grant and categorical grant are relative terms, which the experts for both sides agree are used in different ways. If the test of custodial funds turns on such a subjective factor, then every new federal grant program may require litigation and a judicial determination what type of grant it is for purposes of

the state appropriation process.

This court's definition, applied to the Chevron funds, requires rejection of the district court's analysis. The final element of that definition, whether the state is a custodian or trustee to use non-Colorado funds for particular purposes, requires inquiry whether the state is held accountable should it attempt to use these funds for purposes other than the specified ones. In the case of block grants as well as categorical grants, federal law is emphatic that the state is accountable for misuse of federal funds. In short, if a federal grant is fundamentally conditional in nature, then the state is a custodian or trustee for national objectives chosen by Congress.

It is respectfully submitted that the decision of the district court should be reversed. Judgment properly should be entered for the Governor holding that the attempt of the general assembly to appropriate the OBRA block grants and JTPA funds were unconstitutional and therefore void.

1/ Subsequently, the general assembly filed a motion for summary judgment. Both motions were considered simultaneously by Judge Harold D. Reed who, on January 17, 1984, issued an order resolving all claims as a matter of law except the federal funds claim. An immediate appeal was taken from that portion of the January 17, 1984 order which was certified as final pursuant to Colo. R. Civ. P. 54(b), resulting in this court's opinion on August 26, 1985.

2/ The general assembly called two witnesses as experts in the area of intergovernmental fiscal relations and block grant fund-

ing: Richard P. Nathan and George D. Brown. Governor Lamm called two witnesses who were expert in intergovernmental fiscal relations: Robert Gage and Marshall Kaplan, plus one witness, Thomas Madden, expert in both the law of federal grants and intergovernmental fiscal relations.

3/ A working definition used by the expert witnesses for both sides was the Advisory Commission on Intergovernmental Relations (ACIR) definition of a block grant:

> A program by which funds are provided chiefly to general purpose governmental units in accordance with a statutory formula for use in a broad functional area, largely at the recipients discretion.

See defendant's exhibit 5.

4/ Robert Gage testimony, tr. Sept. 17 at p. 71. Defendant's expert Thomas Madden, former general counsel for the LEAA, testified that the Safe Streets Act was a block grant designed to give more discretion to state and local leaders to spend federal funds on law enforcement programs. He gave further unrebutted testimony that the State of Colorado submitted state plans to the LEAA and received block grant funds from the LEAA as early as 1969. Madden testimony, tr. Sept. 11, pp. 238-244. Plaintiff's expert Richard Nathan testified that he considered the Partnership for Health grant program as "not significant," but that he would not disagree with those persons who described the LEAA program as a block grant, stating that it is not possible to give a rigid definition of block grant. Nathan testimony, tr. Sept. 10, pp. 27-40, p.90.

5/ Although general revenue sharing was discussed at trial and in the federal funds order, it has not been available to the State of Colorado since 1980 and was not one of the grant programs addressed in the complaint. The issue whether general revenue sharing properly is subject to legislative appropriation is moot and not before this court for decision.

6/ The general assembly's expert witnesses testified, and defendant's experts agreed, that the OBRA block grants reflect a Congressional intent to remain neutral on the question, should state legislatures appropriate federal funds. See e.g., Nathan testimony, Sept. 10 tr. pp., 94-95. Despite this testimony the district court improperly placed considerable weight on

plaintiff's exhibit L, a pre-1981 report of the General Accounting Office (GAO), an arm of Congress, which recommended that state legislatures should appropriate federal funds. In light of the agreement of the experts, the only possible conclusion the court properly could have reached is that Congress rejected the prior recommendation of the GAO when it enacted the neutral provisions of OBRA. Consequently the court erred in relying on exhibit L to support its decision that block grants must be appropriated by the state legislature.

7/ The MacManus decision has been cited as the leading case for the proposition that administration of federal funds is properly an executive branch function. See generally Note, 46 Albany L. Rev. 1020 (1982). Other jurisdictions have reached the same conclusion, generally relying upon the notion that federal grants are conditional, hence the state is only a custodian of grant funds which are not subject to the plenary power of the legislature to appropriate state grants. In re Application of State of Oklahoma ex rel. Department of Transportation, 646 P.2d 605 (Okla. 1982) ("federal money deposited in the state treasury pursuant to some grant-in-aid program is held in trust for a specific purpose" 646 P.2d at 609-610); Opinion of the Justices, 375 Mass. 851, 378 N.E. 2d 433 (1978) (federal funds subject to the condition they be used only for the objects specified by federal statutes or regulations are impressed with a trust and not subject to legislative appropriation); Navajo Tribe v. Arizona Dept. of Administration, 111 Ariz. 279, 528 P.2d 623 (1974) (citing MacManus for the proposition that federal funds do not belong to the state which is simply a custodian or conduit, hence not subject to legislative appropriation.); State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974). Certain states have reached a contrary conclusion when interpreting their respective state constitutions and have not drawn a distinction between state moneys and custodial funds. See Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978), appeal dismissed sub. nom; Thornburg v. Casey, 440 U.S. 942 (1979); Andersen v. Regan, 53 N.Y. 2d 356, 442 N.Y. 2d 404, 425 N.E. 2d 792 (1981); Opinion of the Justices, 118 N.H. 7, 381 A. 2d 1204 (1978).

The evidence at trial established that state legislators in 37 states exercise some type of appropriation control over all federal funds received by these states, categorical grants as well as block grants. Nathan testimony, Sept. 10, tr., p. 55. Both of the general assembly's expert witnesses testified that in their opinion public policy would best be served by state legislative appropriation of all federal funds, categorical grants as well as the block grants at issue in this case. Nathan testimony, Sept. 10 tr., p. 85; Brown testimony, Sept. 11, tr., pp. 182-

183. That testimony, however, provides no assistance to this court in resolving the central issue posed by the lower court opinion, i.e., whether the Colorado constitution requires legislative appropriation of federal block grants even though it does not require appropriation of federal categorical grants.

8/ The Congressional declaration of purpose for JTPA declares:

> It is the purpose of this chapter 6 establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment.

29 U.S.C. sec. 1501.

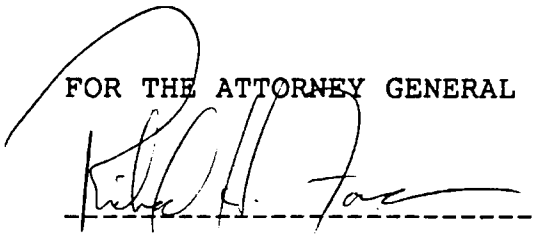
9/ In Colorado only 33 counties have community action agencies. The executive branch wanted discretion to allocate federal funds throughout all counties but could not do so without express Congressional approval. In order to do this, the state had to obtain a Congressional waiver of the statute authorizing counties as eligible recipients. In short, Congress determined who was to be the ultimate recipients of these funds. Knott testimony, Sept. 12 tr., pp. 307-308.

10/ In the notice published in the Federal Register on the proposed Chevron consent order, the statement was made:

> The state or territory may suggest other projects that benefit consumers of motor gasoline, No. 2 diesel fuel, No. 2 heating oil, and kerosene-based jet fuel.

46 Fed. Reg. at 41,855 (1982).

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within OPENING BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 30th day of September 1985, addressed as follows:

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