DISTRICT COURT, PITKIN COUNTY STATE OF COLORADO 506 E. Main Suite 300 Aspen, Colorado 81611 970-925-7635	
COLORADO UNION OF TAXPAYERS FOUNDATION, a Colorado non-profit corporation, Plaintiff, v. CITY OF ASPEN; MICK IRELAND, ADAM FRISCH, TORRE, STEVE SKADRON, and DEREK JOHNSON, all in their official capacities as members of the Aspen City Council, Defendants.	COURT USE ONLY
James M. Manley (Reg. No. 40327) Steven J. Lechner (Reg. No. 19853) MOUNTAIN STATES LEGAL FOUNDATION 2596 South Lewis Way Lakewood, Colorado 80227 (303) 292-2021 jmanley@mountainstateslegal.com lechner@mountainstateslegal.com Attorneys for Plaintiff	Case No.: 12CV224 Division: 5

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Colorado Union of Taxpayers Foundation ("CUT"), on behalf of its members and by and through undersigned counsel, hereby replies to Defendants' Response to Plaintiff's Motion for Summary Judgment and responds to Defendants' Cross Motion for Summary Judgment (filed April 11, 2013) (hereinafter "Defs.' Motion").

RESPONSE TO DEFENDANTS' UNDISPUTED FACTS

Plaintiff submits the following response to Defendants' statement of undisputed facts, set forth on pages 2–6 of Defs.' Motion. Plaintiff does not concede the materiality of any of these facts.

- Plaintiff disputes Defendants' characterization of the documents referenced at 2–6 of Defs.' Motion and submits that the documents referenced speak for themselves and are the best evidence of their content. Moreover, Defendants' reliance on legislative history to divert attention from the plain text of the Ordinance is inappropriate. *In re 2000-2001 Dist. Grand Jury*, 97 P.3d 921, 924 (Colo. 2004) ("Only where the wording in the statute is unclear and ambiguous will we resort to other modes of construction, such as relying on legislative history.") (citation omitted).

- Plaintiff disputes that the "the fee on the use of paper bags is voluntary . . . ." Defs.' Motion at 5. As Defendants note, anyone who receives a paper bag from a grocer is "charged the mandatory per bag fee."

- Defendants state that "[t]he 'goal of this ordinance is not to raise money but to reduce single use bags and give customers a choice.'" Defs.' Motion at 3 (citing Strickland Exh. 3 at 870). Defendants fail to attribute this quote as the opinion of city staffer Ashley Cantrell. Moreover, that opinion is directly contradicted by the ordinance creating the bag tax, which

declares that the purpose of the tax is "*to fund* the City's efforts to educate residents, businesses, and visitors about the impact of trash on the regional environmental health and *to fund* the use of reusable carryout bags, City cleanup events and infrastructure and programs that reduce waste in the community[.]" Ex. G. to Pl.'s M. for Summ. J. at 839 (emphasis added).

- Defendants state "that the purpose of the fee was to 'create awareness of unsustainable behaviors by consumers.'" Defs.' Motion at 3 (citing Strickland Exh. 4 at 1085). But other purposes include "provid[ing] reusable bags for tourists and residents who arrive without a bag, as well as signage, training, education, help to hotels, and other outreach initiatives. If the fee were lower, covering these costs could require a general fund subsidy to ensure the success of the ordinance." Defs.' Strickland Exh. 4 at 1085–86.

REPLY CONCERNING PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Defendants did not address Plaintiff's Statement of Undisputed Facts. Therefore, these facts should be treated as undisputed. C.R.C.P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.").

ARGUMENT

I. STANDARD OF REVIEW.

Any duly enacted law is entitled to a presumption of constitutionality. *Mesa County Bd. of County Comm'rs v. State*, 203 P.3d 519, 527 (Colo. 2009); Defs.' Motion at 7. But that presumption does not defeat the plain terms of the Taxpayer's Bill of Rights ("TABOR"), which states that "[i]ts preferred interpretation shall reasonably restrain most the growth of government."

Colo. Const. art. X, § 20(1). The Colorado Supreme Court has described the courts' duty in TABOR cases as guided by this standard of review: "[W]here multiple interpretations of [TABOR] are equally supported by the text . . . a court should choose that interpretation which it concludes would create the greatest restraint on the growth of government." *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994).

Here, this Court must interpret TABOR to determine whether Defendants were required to obtain voter approval before levying the bag tax.[1] Accordingly, any presumption of constitutionality must be applied in tandem with TABOR's preferred interpretation. Defendants' reliance on *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008), is misplaced, because, unlike the situation in *Barber*, Defendants do not argue that interpreting TABOR's voting requirements to apply to the bag tax "would hinder basic government functions or cripple the government's ability to provide services." *Id*. at 248; Defs.' Motion at 7. The revenue stream provided by the bag tax may be small, but the legal principle at stake is significant. Plaintiff has demonstrated that the only reasonable interpretation of TABOR and the case law applying it renders Defendants' actions unconstitutional. Accordingly, this Court must act to remedy this constitutional violation.

[1] There is no dispute about the meaning of the ordinance, and so Defendants' discussion of canons of statutory construction is misplaced. Defs.' Motion at 7, 8; *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333, 1337 (Colo. 1996) ("If the statutory language is unambiguous, there is no need to resort to interpretive rules of statutory construction because it is presumed that the General Assembly meant what it clearly said."). Defendants also ignore that if, "in analyzing a taxing statute or ordinance, there appears any doubt concerning the legislature's intent, the statute or ordinance is to be construed most strongly against the government, and in favor of the taxpayer." *Rancho Colorado, Inc. v. City of Broomfield*, 586 P.2d 659, 661 (Colo. 1978).

II. THE BAG TAX IS A TAX ON THE PRIVILEGE OF RECEIVING A PAPER GROCERY BAG.

Defendants' reliance on *Ard v. People*, 182 P. 892 (Colo. 1919), is misleading, but helps to illuminate why the bag tax is a tax subject to TABOR. Defs.' Motion at 10. Defendants are correct that *Ard* held vehicle registration fees were not ad valorem property taxes in violation of the uniformity requirements of Colo. Const. art. X, § 3. 182 P. at 893. But Defendants overlook the Court's affirmative holding that the charges were another kind of tax: an excise or use tax. In language equally applicable to the bag tax, the Court held: "The [vehicle] registration or license fees required by the act of 1913 are a taxation imposed upon privileges, ... Such registration fees are a tax upon the privilege of using the motor vehicle upon the public highway." *Id.* at 893 (quotation omitted); *see also Bloom v. Fort Collins*, 784 P.2d 304, 307 (Colo. 1989) ("In contrast to a direct tax on property, an excise tax is not based on the assessed value of the property subject to the tax but, instead, is imposed on a particular act, event, or occurrence."); *Matter of Title, Ballot Title And Submission Clause, and Summary Pertaining to Proposed Tobacco Tax Amendment 1994*, 872 P.2d 689, 691 (Colo. 1994) ("The revenue derived from the [proposed tobacco sales tax] would be used for health care, educational programs to reduce tobacco use, and research concerning tobacco use and tobacco-related illnesses."). Likewise, the bag tax is imposed on the privilege or occurrence of receiving a paper bag from a grocer; accordingly it is a tax.

The bag tax is collected like a sales tax, Aspen Mun. Code § 13.24.050(e) ("A Grocer shall pay and the City of Aspen shall collect this fee at the same time as the City Sales Tax."), modeled after other City tax provisions, PSOF ¶ 26, and knavishly disguised as a fee in a clumsy attempt to avoid TABOR's voting requirements. *Id*. ¶ 25 ("The extra line on the [sales] tax form

made it seem way too much like a tax."). Like a sales tax, the only way to avoid paying the bag tax is to avoid the transaction upon which it is levied: receiving a paper grocery bag.

Defendants' argument that the "mandatory" bag tax is voluntary—and therefore not a tax—because one can simply choose not to use a paper grocery bag proves too much. Defs.' Motion at 11 ("It is a choice, not a tax."). This logic would make any charge imposed by a government "a choice, not a tax." For example, a person can avoid paying the City sales tax by not buying groceries in Aspen. Aspen Mun. Code § 23.32.060. Or avoid having the City telephone tax added to his phone bill by not having a telephone. Aspen Mun. Code § 23.40.010. Or "choose" not to pay the City occupation tax, which is levied because "businesses and occupations in the City depend for their welfare to a large extent on municipal expenditures," by not hiring any employees. Aspen Mun. Code § 23.44.020. The City's real estate transfer tax is easily avoided by not buying property within the City limits. Aspen Mun. Code §§ 23.48.060, .070. And if one nevertheless buys property in Aspen, the owner can make the "choice" to not pay the City use tax by not building on that property. Aspen Mun. Code § 23.52.3. Like the bag tax, these other taxes are in no reasonable sense "voluntary" and the fact that a person can avoid paying these taxes by not engaging in the activity or privilege taxed does nothing to strip these charges of their essential character as taxation measures. The only consequence of paying the bag tax, like paying any other City tax, is the privilege of conducting a transaction in the City of Aspen; in this case, receiving a paper bag from a grocer. The bag tax is therefore a tax subject to TABOR's voting requirement.[2]

[2] Plaintiff submits that the purpose of TABOR "to protect citizens from unwarranted tax increases" is best served by requiring TABOR-exempt fees to be voluntary. *Submission of*

III. THE BAG TAX IS NOT A TABOR-EXEMPT FEE.

A. The Bag Tax Is Not A Fee Because It Does Not Finance A Particular Service Utilized By Those Who Must Pay The Charge.

The bag tax is subject to TABOR's voting requirement unless "the primary purpose for the charge is to finance a particular service *utilized by those who must pay the charge* . . . ." *Barber*, 196 P.3d at 249 (emphasis added). Defendants do not dispute this. But Defendants struggle to identify a service provided to persons who pay the bag tax, Defs.' Motion at 11–12, because no such service is provided. PSOF ¶¶ 4, 12–14. Instead, Defendants contend that any charge that is not deposited into the general fund is a TABOR-exempt fee. Defs.' Motion at 8, 9, 13.

The ordinance is clear that shoppers who pay the bag tax are not entitled to any benefits because of the taxes they have paid, PSOF ¶ 12, and the revenue generated by the bag tax is available for a wide variety of vague projects such as waste-reducing infrastructure, pollution-reduction equipment, a government website, and community cleanup events. *See* PSOF ¶ 17.[3]

Interrogatories on Senate Bill 93-74, 852 P.2d 1, 4 (Colo. 1993). The Colorado Supreme Court has repeatedly recognized that TABOR's primary goal was to empower taxpayers to consent to taxation. *See, e.g., Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 891 (Colo. 2011). The United States Supreme Court has taken the view that fees must be voluntary, *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340–41 (1974), *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350 (1974), but the Colorado Supreme Court has never squarely answered that question with respect to TABOR-exempt fees.

[3] Bag tax revenue is available for a wide variety of projects, only tangentially related to paper grocery bag use and in no way specifically directed at payers of the bag tax, including:

> (2) Ongoing campaigns conducted by the City of Aspen to:
>
> (A) Provide reusable bags to both residents and visitors; and [sic]
>
> (B) Create public educational campaigns to raise awareness about waste reduction and recycling;

None of the approved uses for bag tax revenues provides a service directed at the individuals paying the bag tax. These programs are in no way dependent upon the use of paper bags; they are general government programs for the purported betterment of the community at large. The broad range of uses to which the bag tax revenues may be put indicate that the bag tax is a tax subject to TABOR. *See Barber*, 196 P.3d at 249 ("[W]hen determining whether a charge is a fee or a tax, courts must look to the primary or principal purpose for which the money was raised, not the manner in which it was ultimately spent.").

Defendants conveniently omit the numerous programs the City Council can fund with bag tax revenues, focusing instead on the public education campaign and reusable shopping bags that have been funded. Defs.' Motion at 7, 11–12. By definition, these are not services provided to bag tax payers; they are classic public goods provided to the community at large. *See* Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 9 (2003) ("Pure public goods, in economic parlance, display two salient characteristics: lack of rivalry in consumption and nonexcludability of benefits."). By its very nature a public education

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> (C) Funding programs and infrastructure that allows the Aspen community to reduce waste and recycle. [sic]
>
> (D) Purchasing and installing equipment designed to minimize trash pollution, including, recycling containers and waste receptacles;
>
> (E) Funding community cleanup events and other activities that reduce trash;
>
> (F) Maintaining a public website that educates residents on the progress of waste reduction efforts; and
>
> (G) Paying for the administration of this program.

Aspen Mun. Code § 13.24.050(g)(2).

campaign is directed to the general betterment of the community, not the provision of particular services to individuals.[4] Additionally, the fact that an individual pays the bag tax is evidence that he or she has not received the benefit of a reusable bag provided by Defendants, otherwise the individual would not be paying the bag tax. Moreover, no one who pays the bag tax is entitled to receive a reusable shopping bag because they have paid the tax. PSOF ¶¶ 12–13. Defendants point to the "privilege of using a paper bag" as a benefit, but grocers provide the paper bag, not Defendants. Defs.' Motion at 12. As established above, the payment of any excise tax involves this sort of "privilege" and simply reinforces that the bag tax is a tax subject to TABOR.

Instead of identifying a service provided to persons who pay the bag tax, Defendants contend that any charge that is not deposited into the general fund is a TABOR-exempt fee. Defs.' Motion at 8, 9, 13. Defendants' simplistic definition of fees, derived from *Bloom*, is at odds with the Colorado Supreme Court's later analysis of TABOR in *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995), and *Barber*—and fails to fully consider *Bloom* itself.

Under Defendants' test, any charge legislatively dedicated to a particular purpose would become a TABOR-exempt fee. This would transform school property taxes into school fees

[4] It is far from clear that encouraging widespread reusable bag use actually betters the community. *See, e.g.,* Casey McNerthney, *Store owners say plastic bag ban causes more shoplifting*, SEATTLE POST-INTELLIGENCER, Feb. 28, 2013, *available at* http://www.seattlepi.com/local/article/Store-owners-say-plastic-bag-ban-causes-more-4314744.php - ixzz2S9anQpUb; Debra J. Saunders, *S.F.'s plastic bag ban may be unhealthy*, SAN FRANCISCO CHRONICLE, Feb. 10, 2013, *available at*, http://www.sfgate.com/opinion/saunders/article/S-F-s-plastic-bag-ban-may-be-unhealthy-4264075.php - ixzz2S9btp3xO ("Our results suggest that the San Francisco ban led to, conservatively, 5.4 annual additional deaths.")

(C.R.S. § 39-10-107(1)(a)), cigarette and tobacco taxes into old age pension fees (C.R.S. § 39-28.5-108(1), § 39-28-110(1)), gasoline taxes into highway and aviation fees (C.R.S. § 39-27-112(2)(b)), and so on. Aspen's own tax code is replete with examples of taxes that are not "general fund revenue generating measures," Defs.' Motion at 9, 13. *See, e.g.,* Aspen Mun. Code § 23.48.060(c) ("All funds received by the City of Aspen pursuant to this section 23.48.060 shall be deposited in the Wheeler Opera House real estate transfer tax special revenue fund . . . for the purpose of renovation, reconstruction and maintenance of the Wheeler Opera House . . . . and for the purpose of supporting the visual and performing arts."); Aspen Mun. Code § 23.48.070(d)(i) ("All funds received by the City pursuant to this Section 23.48.070 shall be deposited in a separate fund . . . only for the purpose of . . . employee/community housing projects . . . ."); Aspen Mun. Code § 23.52.3(C) (City transit service and pedestrian improvements); Aspen Mun. Code § 23.32.060(c) (various "separate fund" designations).

The Colorado Supreme Court has avoided this absurd result by making clear in *Nicholl* and *Barber* that a TABOR-exempt fee may only be collected against persons or property actually receiving the services financed by the charge. Defendants ignored this aspect of *Nicholl* and *Barber*, and thus their arguments concerning the definition of a TABOR-exempt fee are fundamentally flawed.

In *Nicholl*, the Court pointed to "collecting tolls directly from E–470 highway users" as an example of a TABOR-exempt fee. 896 P.2d at 868. ("By providing access to a public roadway in exchange for the payment of tolls and user fees, the Authority is engaging in an activity conducted in the pursuit of benefit, gain or livelihood . . . ."). But a charge collected "with no direct relation to services provided" is a tax subject to TABOR. *Id*. at 869. Thus, a fee

must be collected on the basis of actual use of the service being funded by the person or property being charged.[5]

The Court's decision in *Barber* further clarifies that a fee must be assessed as part of a quid pro quo exchange: "If the language discloses that the primary purpose for the charge is to finance a particular service *utilized by those who must pay the charge*, then the charge is a 'fee.'" 196 P.3d at 249 (emphasis added); *id*. at 250 ("In the present case, the primary purpose of the enactments that created the special cash funds was solely to defray the cost of services provided to those assessed.").

Defendants place significant weight on *Bloom*, 784 P.2d at 310, but, *Bloom*, like the other cases discussed above, actually observed that "developed lots subject to the fee receive the benefit of a program of city maintenance."[6] *Id*. The fee assessed in *Bloom* was levied only on developed properties actually fronting the roads that were to be repaired by the revenue collected:

> The transportation utility fee [is] imposed upon owners or occupants of developed property fronting city streets and the revenues generated thereby are used for the

[5] Defendants suggest the bag tax rate is connected to a service because it supposedly takes into consideration "not only the estimated costs of the particular services to be provided in relation to the revenues to be generated, but also the approximate waste/life cycle cost of each paper bag to the taxpayers and the incentive effect of the fee." Defs.' Motion at 8. But this is contradicted by the admission of the Ordinance's principal drafter that there was no attempt to calculate the bag tax based on the actual cost of providing any City services to the people of Aspen. PSOF ¶¶ 14–15, 22; Cantrell Dep. at 31 ("Q. Was any similar study conducted with respect to the City of Aspen and its costs for the lifecycle of a paper bag? A. No."). Defendants did consider the bag tax rates charged by other municipalities, but these charges varied widely, from $0.05 to $0.25 per bag. Cantrell Dep. at Ex. 3, bates no. 751.

[6] A quid pro quo requirement is also present in the cases upon which *Bloom* relied, including *Western Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 155 (Colo. 1961). *Bloom*, 784 P.2d at 308–09. Thus, Defendants' reliance on *Western Heights* is equally unavailing. Defs.' Motion at 10.

> purpose of defraying the expenses connected with the operation and maintenance of city streets. The owners and occupants of developed lots subject to the fee receive the benefit of a program of city maintenance calculated to provide effective access to and from residences, buildings, and other areas within the city.

Id. Moreover, the fee in *Bloom* was based on actual usage, because it "varies with the amount of the lot's street frontage and the 'traffic generation factor' (or estimated street usage) applicable to the lot."[7] *Id*. at 309.

Bruce v. City of Colorado Springs, 131 P.3d 1187 (Colo. Ct. App. 2005), is distinguishable from the present case on the same basis as *Bloom* because the properties charged a streetlight fee in *Bruce* were located in the City of Colorado Springs and received streetlight service from the City. *Id*. at 1190. Moreover, the streetlight fee—unlike the bag tax—was not intended to generate revenue for multifarious projects, but rather precisely calculated "based on the overall cost of providing streetlights."[8] *Id*.

Defendants fare no better under *Anema v. Transit Const. Authority*, 788 P.2d 1261, 1267 (Colo. 1990), where the Court identified a planning study as a direct, immediate benefit to the fee payers, who were the owners of "commercial property within the service area" and "employers within the service area." *Id*. at 1262–63. "At the time of the assessments challenged here, the service performed was the determination of the feasibility, contours, and cost of rapid rail transit." *Id.* at 1267 (emphasis added). Like *Nicholl*, *Barber*, and *Bloom*, *Anema* requires a facial and actual connection between the fees paid and a service directed to the person charged.

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[7] Like *Ard* before it, the central allegation in *Bloom* was that the fee was a property tax, in violation of the uniformity requirements of Colo. Const. art. X, § 3. *Bloom*, 784 P.2d at 306. Notably, TABOR was enacted in 1992, three years after *Bloom* was decided.

[8] Defendants distinguish this case even further from *Bruce* when they admit that "the incentive effect of the fee" was a driving force behind the bag tax rates, rather than the actual cost of any City services. Defs.' Motion at 8.

There simply is no support for Defendants' claim that a TABOR-exempt fee may be assessed without regard to actual services provided. Defendants have pointed to no case that genuinely supports that premise. Accordingly, this Court must reject Defendants' central argument: That the bag tax can still qualify as a fee if it finances no services provided to the people charged.

B. The Bag Tax Is Not A Fee Because The Stated Purpose Of The Bag Tax Is To Raise Revenue.

The ordinance states two core purposes: change shoppers' behavior and create a revenue stream to pay for a wide variety of projects. PSOF ¶¶ 16, 17; Ex. I to Pl.'s M. for Summ. J. at bates no. 906 ("Mayor Ireland said he would like revenues in order to supply hotels with reusable bags."). Accordingly, the ordinance contains two separate provisions: the plastic bag *ban*, not at issue here; and the paper bag *tax*, which required voter approval.[9] The two provisions both seek to impose a burden on disposable grocery bag use—but the bag tax serves a unique purpose Defendants recognized a ban alone could not serve: raising revenue "*to fund* the City's efforts to educate residents, businesses, and visitors about the impact of trash on the regional environmental health and *to fund* the use of reusable carryout bags, City cleanup events and infrastructure and programs that reduce waste in the community[.]" Ex. G. to Pl.'s M. for Summ. J. at 839 (emphasis added). As the quoted provision demonstrates, the bag tax portion of the ordinance evinces "a primary purpose for the charge is to raise revenues for general

[9] As Defendants point out, Defs.' Motion at 6, the ordinance also contains a severability clause, indicating the City Council's intent "that parts of a law can and should be struck without upsetting the law's proper purpose." *Dallman v. Ritter*, 225 P.3d 610, 639 (Colo. 2010). Accordingly, this Court can strike down the paper bag tax while leaving the plastic bag ban untouched.

governmental spending . . . ." *Barber*, 196 P.3d at 249. Defendants do not dispute that this was their motivation in including a paper bag tax alongside the plastic bag ban. PSOF ¶ 16. Defendants simply offer the additional explanation that the bag tax would also discourage paper bag use; but it is obvious that taxation increases the price of a product, which often reduces demand for whatever is taxed. This truism does not convert every sin tax into a TABOR-exempt fee; even sin taxes must be approved by the voters. *See Matter of Title, Ballot Title And Submission Clause, and Summary Pertaining to Proposed Tobacco Tax Amendment 1994*, 872 P.2d at 691 ("The revenue derived from the measure would be used for health care, educational programs to reduce tobacco use, and research concerning tobacco use and tobacco-related illnesses.").

Looking, as this Court must, at the "express language of the charge's enabling legislation," *Barber*, 196 P.3d at 241, quoted above, the conclusion that the bag tax was enacted to fund a wide variety of general government programs is inescapable. Standing in contrast to the plastic bag ban also enacted by the ordinance, the revenue raising purpose of the bag tax becomes even clearer.[10] The bag tax is therefore a tax subject to TABOR's voting requirement.

CONCLUSION

For the foregoing reasons and those demonstrated in Plaintiff's Memorandum in Support, summary judgment should be entered for Plaintiff and against Defendants.

[10] Defendants' reliance on legislative history to muddle the plain text of the Ordinance, Defs.' Motion at 2–5, is inappropriate. *In re 2000-2001 Dist. Grand Jury*, 97 P.3d at 924 ("Only where the wording in the statute is unclear and ambiguous will we resort to other modes of construction, such as relying on legislative history.") (citation omitted).

DATED this 2nd day of May 2013.

Respectfully submitted,

/s/ James M. Manley

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of May 2013, the foregoing document was filed with the Court and true and accurate copies of same were served on counsel of record via LexisNexis File & Serve.

/s/ James M. Manley
James M. Manley