

## COLORADO BRIDGE ENTERPRISE A CASE STUDY IN CONTRAVENING COLORADO'S CONSTITUTION

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In 2009 the General Assembly passed Senate Bill 09-108, more commonly known as FASTER.<sup>1</sup> Signed by Governor Bill Ritter, the bill relies on distortions and deliberate

misdirections to subvert Colorado's Constitution and silence the voice of the people. The bill depends on continued silence for its provisions to move forward. Under FASTER, Colorado families are being forced to pay an unconstitutional tax of almost \$100 million annually.<sup>2</sup> This tax hits everyone who registers a vehicle in the state squarely in the pocketbook—a tax that was enacted directly by the

legislature without a vote of the people.

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### THE SPECIFICS

SB 09-108 (FASTER) created the Colorado Bridge Enterprise, a government-owned business chartered to repair and maintain bridges within the state; work previously performed directly by the Colorado Department of Transportation (CDOT). Under the Taxpayer's Bill of Rights (TABOR), government-owned enterprises must operate independently of state government and be self-supporting via fees charged directly to those benefiting from the activities of the business. Government-owned enterprises cannot be funded through taxes.<sup>3</sup> In complete and deliberate defiance of Colorado's Constitution, FASTER funds the Bridge Enterprise by establishing a new tax,<sup>4</sup> the Bridge Safety Surcharge, levying from \$13 to \$39 each year against every vehicle registered in the state. The amount of tax is based on the vehicle's gross weight, with the average Coloradan required to pay \$23 every year.

### THE BRIDGE SAFETY SURCHARGE IS A TAX - NOT A FEE

Despite the careful wording within FASTER designating the Bridge Safety Surcharge as a fee, the assessment is in fact a tax. This conclusion is based on official guidance from the General Assembly's own Office of Legislative Legal Services. Shortly after the adoption of TABOR, the legislature sought the assistance of the Office in determining which revenues are properly taxes and which qualify as fees. In January 1993 the Office outlined a logical sequence of questions, leading to classification of any proposed revenue initiative as a tax or fee.<sup>5</sup> The Surcharge qualifies as a fee under only one of the five tests presented in Step 3 of the guidance – the criterion that the charge not be referred to in the language of the bill as a "tax." In defiance of common sense, SB 09-108 carefully ensures that all references to the Surcharge call it a fee. Otherwise, classification of the Surcharge as a fee fails each of the remaining four tests:

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- A) "Is there any evidence that the people who voted for [TABOR] intended that a vote would be required for [the tax]?" TABOR proposals that preceded the version passed in 1992 required a vote on all tax and fee increases. TABOR Committee members in the years leading up to passage recall that key objections to the 1988 TABOR amendment focused on "nuisance" items (e.g., "people don't want to go to the polls to vote on every quarter [\$0.25] increase in towel fees at the local rec [recreation] center."<sup>6</sup>) or county-specific charges (e.g., "Sawatch county shouldn't need a statewide vote to increase their inspection fees."<sup>7</sup>). To negate these objections,

the adopted version of TABOR simply removed the requirement that fees be subject to a vote. The leaders who promoted TABOR clearly state that their intention was to eliminate voter approval of charges for direct services that beneficiaries could choose to forego. The leaders are unanimous that they both intended and communicated that any levy, widely applied and obligatory to pay (such as the Bridge Safety Surcharge), would be subject to voter approval.

- B) Will voting on the charge “reasonably restrain most the growth of government?” If Colorado voters had rejected the proposed additional tax, the activities of CDOT would have been restrained; in fact, the entire establishment of the Bridge Enterprise would have been prevented. Under this criterion, the Surcharge is a tax.
- C) “How much revenue is generated by the charge?” The more revenue, the more likely the proposed charge is a tax. Clearly the collection of \$100 million in additional annual revenues to the State is a significant sum.
- D) “How broadly based is the charge?” The more people subject to the charge, the greater the likelihood the charge is a tax. Since the vast majority of all adult Colorado residents register automobiles within the state, the Bridge Safety Surcharge is a broadly applied charge and should be considered a tax.

***...a fee is distinct from a tax in that, “unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular government service.”<sup>8</sup>***

The 1989 Colorado Supreme Court decision *Bloom v. City of Fort Collins* held that a fee is distinct from a tax in that, “unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular government service.”<sup>8</sup> Ever since the first publicly owned bridges were constructed in the State, bridge maintenance always has been considered a general function and a general expense of government.

The court further held that “imposition of assessment upon particular class of taxpayers can be justified only to the extent that such taxes are equivalent to special benefits conferred upon

those taxpayers”<sup>9</sup> and that the “amount of special fee must be reasonably related to overall costs of particular governmental services being supported.”<sup>10</sup> In other words, fees are imposed on direct beneficiaries and must be proportionate to value received. Dorm residents at a state-run university are charged fees for use of the dormitory. Drivers who park their cars in a government-operated parking garage pay parking fees.

But the FASTER legislation makes no attempt to align the application of the Surcharge to persons directly benefiting from Bridge Enterprise projects. Residents of Custer, Pitkin, and Chaffee counties are subject to the tax even though not a single bridge within these counties is targeted for maintenance or repair under the Bridge Enterprise’s plan.<sup>11</sup> In fact, almost half of Colorado’s counties will receive no direct benefit from the Bridge Enterprise, yet the residents of these 29 counties are forced to pay the tax.<sup>12</sup> And in answer to those who might argue that residents routinely travel outside their county of residence and so benefit from bridges in other parts of the State, the Surcharge does not contemplate or support allocation of the Surcharge based on broadly defined areas, such as the Front Range, Eastern Plains, Central Mountains, or Western Slope.

And FASTER makes no attempt to make fees proportionate to value received. A Denver resident clearly receives greater benefit from the 51 bridges targeted for maintenance in the seven-county metro area than does a Grand Junction resident who receives benefit from only two bridges targeted within the combined area of Moffat, Rio Blanco, Garfield, Mesa, Delta, Montrose, San Miguel, Dolores, and Montezuma counties—an area covering the entire western boundary of the State from Wyoming to New Mexico. Yet Denver and Grand Junction residents are subject to the same fixed amount of tax.

Further, fees are assessed regardless of residency status. Out-of-state residents in a college dorm are charged fees. Drivers on E-470, including out-of-state drivers, are charged toll fees. But the Bridge Safety Surcharge is imposed only on Colorado residents and applied equally to all vehicle owners, regardless of whether they benefit.

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The State makes the absurd argument that the Surcharge qualifies as a fee because it is assessed only against beneficiaries, but then defines beneficiaries to include

virtually every adult living in Colorado while excluding out-of-state beneficiaries. If it looks like a duck, walks like a duck, and quacks like a duck, then it's a duck—no matter what the legislature calls it.

Finally, the proceeds are used to fund work previously performed by CDOT and funded through General Fund appropriations. The only rationale for creating the Bridge Enterprise entity and funding it through a tax masquerading as a fee was to deliberately circumvent TABOR and deny the citizens of Colorado their constitutional right to choose whether improved bridge infrastructure justifies \$100 million in additional annual taxation.

### **THE GENERAL ASSEMBLY TURNED A BLIND EYE**

When confronted with legal concerns regarding a piece of legislation, on the request of any representative or senator,

Legislative Legal Services typically assigns a staff attorney to write a memorandum to show the legal logic, precedents and existing constitutional and statutory provisions that support a measure. No such memorandum was requested for FASTER by any legislator in 2009.<sup>13</sup>

### **THE CURRENT SUPREME COURT WEIGHS IN**

In 2008, the Colorado Supreme Court weighed in on the general issue of classifying revenue as taxes or fees. In *Barber v Ritter* the Court held that:

...a charge is a 'fee' and not a 'tax,' when the express language of the charge's enabling legislation explicitly contemplates that its primary purpose is to defray the cost of services provided to those charged. Because the *purpose* for which the charge is imposed, rather than the manner in which the monies generated by the charge are ultimately spent, determines the characterization of the charge as a fee or a tax.<sup>14</sup> (emphasis added)

Some experts assert that in *Barber v Ritter*, the Court ignored its own previous ruling in *Bloom v. City of Fort Collins*, the precedent established by Amendment 3 in Colorado Springs, and the specific guidance from the Office of Legislative Legal Services provided within months of the enactment of TABOR, which captured the original intent of the legislation.<sup>15</sup> Instead, these experts argue, the Court established its own two-part test: Did the legislature remember to call it a "fee," and did the legislature remember to say that the "fee" is for a particular purpose? If this interpretation of the Court's ruling stands against future challenges, then under the loose criteria established by the Court, the Bridge Safety Surcharge qualifies as a fee. Worse, under this interpretation of the Court's ruling, the ability of the legislature to bypass TABOR and impose millions in additional "fees" without a vote of the people is limited only by the Assembly's imagination.

However, important language within the ruling places specific limitations on charges designated as 'fees.' Specifically, the Court recognized that a fee is intended "to defray the cost of services provided to those charged." Even a Court demonstrably hostile to the Taxpayer's Bill of Rights raises valid questions as to the legitimacy of classifying the Bridge Safety Surcharge as a fee by upholding the common sense notion that a fee is charged to a direct beneficiary of the service provided. But hundreds, if not thousands, of Coloradans living in rural counties are subject to the Surcharge while receiving no direct benefit.

Colorado's families, small business owners, farmers and ranchers, and students—the people actually mandated to turn over their hard-earned cash to the government—have been saddled with an unconstitutional tax. The fact that the Colorado Supreme Court continues to attempt to nullify the Taxpayer's Bill of Rights does not excuse legislators from adhering to their own oaths to preserve, protect, and defend the Constitution of the State of Colorado. FASTER and the Bridge Safety Surcharge were unconstitutional the day they were proposed, and remain so today.

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## ENDNOTES

<sup>1</sup> Funding Advancements for Surface Transportation and Economic Recovery.

<sup>2</sup> Colorado Bridge Enterprise Annual Report, January 14, 2011, Section 3: Revenue and Program Costs reports actual revenues of \$43.8 million for 2010 and \$68.9 million for 2011 from the Bridge Safety Surcharge enacted as part of SB 09-108. The report estimates revenue for 2012 and beyond at \$93 million annually.

<sup>3</sup> Article X, Section 20 of the State Constitution allows only a maximum of 10 percent tax subsidy. See paragraph (2)(d) which is the definition of "Enterprise."

<sup>4</sup> Within SB 09-108, the word "fee" is used in place of tax.

<sup>5</sup> Office of Legislative Legal Services memo to the Legislative Council Executive Committee, January 6, 1993; Test to be applied in determining what is a tax under [TABOR]

<sup>6</sup> Interviews with original TABOR Committee members Penn Pfiffner and Fred Holden.

<sup>7</sup> Ibid.

<sup>8</sup> *Bloom v. City of Fort Collins* 784 P.2d 304 (Colo. 1989).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Colorado Bridge Enterprise Annual Report, January 14, 2011, Appendix A, List of 128 Designated FASTER Bridges. Twenty-nine Colorado counties have no bridges targeted for maintenance or repair by the Bridge Enterprise.

<sup>12</sup> Ibid.

<sup>13</sup> In February 2011, former Representative Penn Pfiffner asked current Senator Kevin Lundberg to identify and to make public any related opinions or memoranda prepared by Legislative Legal Services regarding the issue of whether the Bridge Surcharge was a tax or a fee. Senator Lundberg's request of Legislative Legal Services was met with the definitive information that no memorandum was ever generated.

<sup>14</sup> *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008).

<sup>15</sup> The Clear the Bench Colorado website (<http://www.clearthebenchcolorado.org>) provides several references to expert opinions regarding *Barber v Ritter*