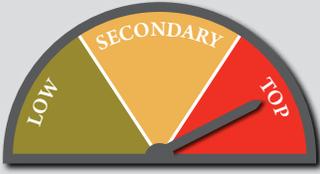


# BRIDGE ENTERPRISE FUND

## PRIORITY



## OVERVIEW

The material describes a corrupt and dishonest scheme that violates the State Constitution and diverts funds off-budget. It is the first time this chapter has appeared in a Citizen's Budget.<sup>1</sup>

## RECOMMENDATIONS

**TOTAL RECOMMENDED REVISION = \$1 BILLION IN DEBT**  
 New legislation could render moot the current lawsuit, *TABOR Foundation vs. Colorado*<sup>2</sup>, allowing the representatives to figure out the best cure and best steps forward in a proactive manner, rather than reacting later to a system in crisis. Additional savings would be found by not trying the case, freeing up resources in the community, for the Attorney General's office and the Colorado Department of Transportation.

The legislature has an opportunity to take control of a very bad situation, render moot a current lawsuit against the State, and renew its commitment to uphold Colorado's Constitution. The alternative is

to do nothing and let the courts decide the issue, with the real potential of a fiscal and legal crisis if the courts rule against the State.

The Colorado Bridge Enterprise, enacted as part of the "FASTER" legislation in 2009, is the poster child of government run amok. It hides potentially billions in expenditures and debt by moving those dollars off-budget and operates as a pseudo-government agency that is unaccountable to elected officials. In creating the Enterprise, the Legislature distorted the plain meaning of the Colorado Constitution by denying the right of voters to approve any

tax hike or debt issuance before it occurs. The details below are harrowing in that they show Colorado state government

to operate in the basest and least responsible fashion, with utter disregard for the people it should serve. Current legislators should reverse this egregiously corrupt scheme, and if they still want to move forward with the tax and debt, let the people vote on the issue, as mandated by The Taxpayer's Bill of Rights (TABOR).

But there is a much bigger, and more concerning, issue. If the Colorado Bridge Enterprise is allowed to stand without a vote of the people, future lawmakers will have a proven mechanism with which to enact any tax and raise any debt—for any project—they wish. The legislature will have an open checkbook for virtually unlimited off-budget spending, taxing, and issuance of debt, with limited to non-existent legislative oversight. Voter-approved constitutional constraints on government will go out the window. This cannot be allowed to happen.<sup>3</sup>

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## BACKGROUND - THE WRONG ANSWER TO A REAL PROBLEM

In 2009, our legislature considered the declining condition of many of our state's bridges. A CDOT study listed 128 bridges that were "structurally deficient, functionally obsolete or rated as poor." But the legislature decided not to appropriate funds to CDOT to fix the bridges, as legislators voted to spend limited money on other priorities.

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The legislature, as guided by TABOR, could have gone to voters with a proposal to raise a tax and issue debt to fix the bridges. Legislators could have made their case that the condition of the bridges

justified a tax hike and new debt, and let voters decide. But the legislature decided not to take the straightforward, transparent road, apparently fearing that voters might turn them down.

Instead, in 2009 the General Assembly passed Senate Bill 108, commonly known as FASTER. The legislation requires every car owner to pay a tax from \$13 to \$39 each year. The amount of the tax is based on the vehicle's gross weight, with the average Coloradan required to pay \$23 every year.<sup>4</sup> On an individual Coloradan's car registration receipt, the amount paid is listed as a "Bridge Safety Surcharge." The total amount of the tax is approximately \$100 million per year.<sup>5</sup>

FASTER also created the Colorado Bridge Enterprise, a government-owned business chartered to repair and maintain bridges within the state—work still performed directly by the Colorado Department of Transportation (CDOT). The "Bridge Safety Surcharge" tax is used to fund the Colorado Bridge Enterprise. Under 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>6</sup> Yet the Bridge Safety Surcharge, called a fee by the State but a tax in practice, funds the entity. To make matters worse, in 2010 the Bridge Enterprise issued \$300 million of debt, backed by these same taxpayer-paid funds, with the goal of issuing up to \$1 billion in total debt.

TABOR, enshrined in the Colorado Constitution, clearly states that our legislature cannot enact a tax or issue debt without a vote of the people. Yet the FASTER legislation enacted a tax and provided for the issuance of debt all without a vote of the people. In 2012, the TABOR Foundation brought suit against the State requesting the Court find the FASTER legislation unconstitutional. That suit is awaiting its first hearing in District Court.

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Below we provide the arguments detailing how FASTER fails Constitutional muster.

## **LEGAL FICTION #1: 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 considered 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>7</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, FASTER 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.

In addition to the Office of Legislative Legal Services, the Colorado Supreme Court has weighed in on the issue of "fee" versus "tax." The Supreme Court has 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

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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 only on the people who directly benefit from the government service. Furthermore, the fee charged must be in-line with the actual cost of the service.

There are numerous examples of legitimate fees levied by the State. For example, 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 if a Coloradan does not live in the dorm or park in the lot, he is not assessed the fee to pay for those services.

The FASTER legislation makes no attempt to align the application of the surcharge to persons directly benefiting from Bridge Enterprise projects. The legislature could have called for a toll

to be charged each time a driver uses a designated bridge. In this way, only the users of a designated bridge pay for its upkeep. If the legislature had taken this approach, there would be little argument that the toll charged is a fee and not a tax. Instead, the

legislature declared that every Colorado car owner benefits directly from the upkeep of every single designated bridge, whether or not the owner actually uses that bridge. Every owner pays the same amount of tax, whether his car crosses one of the bridges once, a thousand times, or never.

Given the geographical dispersion of the bridges, it’s clear that not every Colorado car owner uses each and every bridge. Consider:

1. Residents of 29 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>
2. The fee is imposed on farm vehicles that likely never leave the immediate property.
3. A Denver resident arguably 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.
4. Out-of-state residents pay no tax, even though they may drive in our state and use designated bridges more than locals.

The only rationale for creating the Bridge Enterprise entity and funding it through a tax masquerading as a fee was to circumvent TABOR and deny the citizens of Colorado their constitutional right to choose whether improved bridge infrastructure justifies \$100 million in additional annual taxation.

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## THE BRIDGE ENTERPRISE ISSUES MASSIVE DEBT

TABOR also provides citizens the final determination before our state borrows money. FASTER subverted citizens' rights to vote on debt issues. The law allows an unelected group of bureaucrats to

appoint an unelected administrator and together borrow whatever amounts of debt can be backed by FASTER funds. On December 1, 2010, these unelected political appointees did just that by issuing \$300 million of bonds. The program plans would support approximately \$1 billion of total debt, all without prior voter approval.<sup>12</sup>

TABOR does not prohibit the State or a district government from borrowing money; it only stipulates that citizens must be asked

first. In this age of exploding government debt, it is only prudent that citizens be asked before any new debt is incurred. But legislatures have manipulated an exception in TABOR that allows them to avoid such a vote. TABOR exempts an "Enterprise," defined as "a government-owned business" that receives "under 10% of annual revenue in grants from all Colorado state and local governments combined."<sup>13</sup> In other words, an Enterprise is meant to be a self-supporting business that is owned by the government but receives little funding from taxpayers.

The original provision anticipated that some government services could be self-funding, such as constructing a parking lot with bonds that are paid off over time by fees from people parking their cars. Since the enterprise is assumed to be a self-supporting business, it does not live under the restraints voters have placed on general government spending and debt. Well-known examples of government enterprises are the State Lottery and the state nursing home system. They sell a good or service to customers, and compete with alternate providers. Only willing buyers who actually use the service pay for it. These entities clearly fit the common definition of a business, and they receive minimal government funding. So when organizations owned by the government operate as truly independent businesses, they are legitimately exempt from the "Ask Citizens First" requirement before raising fees or taking on debt.

*The law allows an unelected group of bureaucrats to appoint an unelected administrator and together borrow whatever amounts of debt can be backed by FASTER funds.*

## LEGAL FICTION #2: THE COLORADO BRIDGE ENTERPRISE IS NOT A LEGITIMATE ENTERPRISE AS DEFINED IN THE CONSTITUTION

The legitimacy of issuing massive amounts of debt without voter approval rests on whether the Bridge Enterprise is a true enterprise as defined in TABOR. Consider:

1. **The Bridge Enterprise and CDOT do the same work overseen by the same managers.**

The executive officers of CDOT are the executive officers of the Bridge Enterprise. The Colorado Transportation Commission members who oversee CDOT are the same people who comprise the Board of Directors of the Bridge Enterprise. There is no attempt to run the Bridge Enterprise as an "independent business;" it is interwoven with CDOT. The Bridge Enterprise is a task force operating under the direct control of CDOT.

2. **A true enterprise receives less than 10 percent of its funding from the government.** The Bridge Enterprise is in the business of fixing bridges, but the bridges have been owned by the State of Colorado. In order to maintain the pretense, the state government periodically "transfers" the bridges to the Enterprise. In 2010, 77 bridges were transferred to the Enterprise. To comply with TABOR's enterprise funding restrictions, the total value of the transferred bridges had to be less than \$6.8 million (10 percent of the \$68 million collected via the

Bridge Safety Surcharge in 2010). CDOT claimed that only two of the 77 bridges had value, and that their combined value was only \$1.4 million. The other 75 bridges were claimed to have zero value. By using this strained logic, the value of the transferred bridges was said to be less than the 10 percent subsidy cap, therefore upholding the pretense that the Bridge Enterprise did not violate TABOR's revenue guidelines.

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Can 75 bridges be worthless? In an accounting sense, yes. Under standard accounting procedure, CDOT's accountants simply assumed that after 40 years a bridge would have no value, and lowered the value of the bridge by 2.5 percent (1/40th) every year. Since almost all the bridges transferred to the Bridge Enterprise are older than 40 years, CDOT deems them to have no book value. And that is the problem. The bridges were transferred at book value, whereas any arms-length movement of assets from the State to an independent business takes place at fair market value.

In the real world in which we live and drive our cars, the bridges still have tremendous value. After all, the bridges are still in use. If a bridge was in such disrepair that it truly had no functional value, CDOT should have taken it out of service long ago. And if a bridge really were not usable, its scrap metal still has value greater

than zero. Clearly the bridges transferred to the Bridge Enterprise have tremendous value, and therefore violate the requirement that enterprises receive little funding from government.

3. **The legislature failed to ask for a legal opinion concerning whether the Bridge Enterprise really qualifies as an "enterprise" under our state's Constitution.** In the past, when an entity has decided to seek enterprise status, the State Auditor has ruled on the designation and then audits the enterprise each year to ensure compliance with the Constitution.

Not so with the Bridge Enterprise. The legislature simply declared in the FASTER legislation that "The Bridge Enterprise shall constitute an Enterprise for purposes ... of the State Constitution." The legislature further declared that since "the power to impose taxes is inconsistent with 'Enterprise' status under ... the State Constitution, the General Assembly finds and declares that a bridge safety surcharge ... is not a tax but instead a fee."

So no need to follow the rules to ask the State Auditor. The General Assembly simply declared the Bridge Enterprise Fund to be an "enterprise," and the tax it charged to be a "fee." The legislature bypassed any check or balance of its dictum.

## WHAT TO DO

The simple solution is to repeal the FASTER legislation and do away with its annual car tax since it was never voter-approved. But the \$300 million in outstanding debt makes outright repeal of FASTER problematic. If the FASTER tax is repealed and no other funding mechanism is put in its place, the Bridge Enterprise will default on its bonds. The Bridge Enterprise bondholders have no legal right to go to the State for money. However, a default by the Bridge Enterprise likely will have future ramifications on the cost and ability of other legitimate Colorado government agencies to issue debt.

Of the \$300 million in existing debt, \$43 million matures in 2027,

*If the FASTER tax is repealed and no other funding mechanism is put in its place, the Bridge Enterprise will default on its bonds.*

while the remaining \$257 million matures in 2040, so this debt will be with us for decades if nothing is done.

There are at least four options worth considering:

1. **Scrap the FASTER fees, and default on the existing debt.** This approach may have repercussions on future State borrowing.
2. **Scrap the FASTER fees, and simply appropriate enough money from the General Fund each year to make necessary bridge repairs and debt payments.** Scheduled payments on the \$300 million debt are \$18.2 million per year from 2012 to 2025, and then average approximately \$28 million each year until the debt is paid off in 2040. The legislature could appropriate this money each year from normal revenues.
3. **Continue to Collect The Fee for Three Years and Pay Off the Majority of the Debt.** The Bridge Enterprise could redeem early the \$257 million of debt due in 2040. A clause in the bond agreement allows the \$257 million of debt to be redeemed at any time with a small penalty (the penalty is determined by current level of interest rates), while the remaining \$43 million cannot be redeemed until 2020. The state legislature could direct the Bridge Enterprise Board to collect the \$93 million tax each year but not spend it. After three years, the Board will have collected enough money to pay off the first \$257 million of debt.  
  
Colorado citizens will still be on the hook for the remaining \$43 million of debt, which cannot be redeemed until 2020. But after three years the legislature could direct the Bridge Enterprise to lower the annual fee paid by car owners to a level only sufficient to cover the remaining debt payments each year. This will dramatically lower the fee paid each year by car owners.
4. **Some combination of 2 and 3 above could be enacted** (early redemption of bonds coupled with the legislature making required debt payments as part of the normal appropriations process).

Either of these options can be pursued in 2 manners:

5. **Hold a vote of the people to decide the fate of the FASTER tax and debt.** Built into such a vote must be language that explains how the existing debt would be addressed in the event the tax and debt are rejected by the voters. A vote of the people should have been held prior to the passage of FASTER, but better late than never.
6. **Even in the absence of a citizen referendum on the FASTER fees and debt, the legislature could enact 2 and/or 3 above.**

Regardless of which of the previous options is pursued regarding the imposition of the Bridge Safety Surcharge and the outstanding debt, it must be recognized that the Bridge Enterprise does not qualify as an “enterprise” under Colorado’s constitution. The legislature should take immediate steps to de-charter the Bridge Enterprise and reestablish responsibility for all bridge maintenance and repair back with CDOT. This action alone would resolve most of the claims within the current lawsuit.

## CONCLUSION

Legislators swear an oath 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. This legal fiction must be undone, or future legislatures will use the mechanism over and

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over to enact tax hikes and issue debt. State government must not be allowed to ignore citizens' Constitutional rights.

## ACKNOWLEDGEMENTS

Richard Sokol was the primary author of this chapter. See his biographical material in the major authors section.

Dick Murphy reviewed the chapter for accuracy and interpretation. Mr. Murphy has made a career as an institutional money manager and financial advisor, operating his own firm since 1991. He earned a Ph.D. in Economics from Iowa State University and taught at various colleges and universities before coming to Colorado in 1974. At a couple points in his career, Dr. Murphy worked in the State Treasurer's Office, including a position as Deputy State Treasury.

## ENDNOTES

- <sup>1</sup> A chapter in the first Citizen's Budget, written by Dick Murphy, Ph.D., on "CDOT Debt" was solicited to document the remaining T-Rex highway debt. To his great credit, Mr. Murphy took the initiative to bring attention for the first time on the existence of the scheme. [http://tax.i2i.org/files/2010/11/CB\\_CDOTDebt.pdf](http://tax.i2i.org/files/2010/11/CB_CDOTDebt.pdf).
- <sup>2</sup> *Nota bene*, as a matter of full disclosure, the lead author of the Citizen's Budget, Penn R. Pfiffner, is also the Chairman of the TABOR Foundation, which is the plaintiff in the lawsuit. Also note that Mr. Pfiffner has nothing to gain personally from the lawsuit, and was led to urge action by the organization when the nature of the scheme was exposed. Plaintiff's attorney is Mountain States Legal Foundation.
- <sup>3</sup> To see a TV interview with the authors of this scholarship, turn to "A FASTER Way to Ignore TABOR" on *Devil's Advocate*, which aired May 20, 2011, found at [http://www.youtube.com/watch?v=XgQlvgbshfo&feature=player\\_embedded](http://www.youtube.com/watch?v=XgQlvgbshfo&feature=player_embedded). Jon Caldara tries to wrap his brain around such a preposterous scheme.
- <sup>4</sup> Colorado Senate Bill 09-108, "An Act Concerning the Improvement of the Transportation System of the State, and, in connection therewith, Providing Additional

Sources of Funding for Transportation and Modifying the Transportation Planning Process," 67th General Assembly, 1st Regular Session. The section of the Bill creating the Bridge Enterprise can be found in Colo. Rev. Statutes § 43-4-805.

- <sup>5</sup> The first section of this chapter draws directly and exclusively from a Backgrounder by Tom Ryan, "Colorado Bridge Enterprise: A Case Study in Contravening Colorado's Constitution," Independence Institute Issue Backgrounder 2011-C (May 2011), [http://tax.i2i.org/files/2012/05/IB\\_2011\\_C\\_rev\\_05\\_2012.pdf](http://tax.i2i.org/files/2012/05/IB_2011_C_rev_05_2012.pdf). The scholarship is entirely Mr. Ryan's. Large portions of that work are reproduced here, with permission.
- <sup>6</sup> Article X, Section 20 of the State Constitution allows only a maximum of 10 percent tax subsidy. See paragraph (2)(d), which provides the definition of "Enterprise."
- <sup>7</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>8</sup> *Bloom v. City of Fort Collins*, 784 P2d 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.
- <sup>12</sup> For a more complete description of this material, see Richard Sokol, "How Colorado Has Raised \$300 Million in Debt Without Asking Its Citizens: The Colorado Bridge Enterprise," Independence Institute Issue Backgrounder 2011-B (May 2011), [http://liberty.i2i.org/files/2011/05/IB\\_2011\\_B\\_2.pdf](http://liberty.i2i.org/files/2011/05/IB_2011_B_2.pdf).
- <sup>13</sup> Colorado Constitution, Article X, § 20, (2)(d).