DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock Street Room 256 Denver, Colorado 80202 720-865-8302	DATE FILED: February 11, 2013 6:29 PM FILING ID: FFC8828B
TABOR FOUNDATION, a Colorado non-profit corporation, Plaintiff, v. COLORADO BRIDGE ENTERPRISE; COLORADO TRANSPORTATION COMMISSION; TREY ROGERS, GARY M. REIFF, HEATHER BARRY, KATHY GILLILAND, KATHY CONNELL, DOUGLAS ADEN, STEVE PARKER, LES GRUEN, GILBERT ORTIZ, EDWARD J. PETERSON, all in their official capacities as members of the Colorado Transportation Commission, 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.: 12cv3113 Division: 259

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, TABOR Foundation, on behalf of its members and by and through undersigned counsel, and moves, pursuant to C.R.C.P. 56, for summary judgment because there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law with respect to both of its claims. Pursuant to C.R.C.P. 121, 1-15(8), counsel for Plaintiff in good faith conferred with opposing counsel about this motion prior to filing. Support for this Motion is provided in a Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed concurrently herewith.

WHEREFORE, Plaintiff respectfully requests that summary judgment be entered in its favor with respect to both of its claims.

DATED this 11th day of February 2013.

Respectfully submitted,

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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.: 12cv3113 Division: 259
MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

TABOR Foundation, on behalf of its members and by and through undersigned counsel, hereby moves for summary judgment as to its claims that Defendants have engaged in unconstitutional taxation and debt creation.

INTRODUCTION

Through this lawsuit, TABOR Foundation seeks enforcement of the Taxpayer's Bill of Rights of the Colorado Constitution ("TABOR"). Colo. Const. art. X, § 20. In 1992, Colorado voters adopted TABOR, limiting the power of the State or any part thereof to levy taxes or create debt without voter approval. Colo. Const. art. X, § 20; *City of Aurora v. Acosta*, 892 P.2d 264, 268 (Colo. 1995). TABOR "was designed to protect citizens from unwarranted tax increases." *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4 (Colo. 1993). Accordingly, TABOR requires voters to approve "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a). TABOR also requires that the State seek voter approval before creating new debt. Colo. Const. art. X, § 20(4)(b).

In 2009, the Colorado General Assembly passed Senate Bill 09-108, commonly known as Funding Advancements for Surface Transportation and Economic Recovery ("FASTER"). C.R.S. § 43-4-802, *et seq*. FASTER created the Colorado Bridge Enterprise ("CBE") and placed it under the control of the Colorado Transportation Commission, the same body that oversees the Colorado Department of Transportation ("CDOT"). *See* C.R.S. § 43-4-805(2)(a)(I); C.R.S. § 43-1-106. The CBE was created for the sole purpose of attempting to circumvent TABOR. *See* C.R.S. § 43-4-805(2)(c). Under FASTER, the CBE has forced Coloradans to pay "bridge safety

surcharge" taxes approaching $100 million annually, without seeking the voter approval required by TABOR. *See* CBE 2010 Annual Report ("2010 Annual Report") at 3.[1] The CBE has also issued $300 million in new government bonds, again without a TABOR-required vote of the people. *See id*. By taking these actions without a vote of the people, Defendants have violated the rights of TABOR Foundation's members to vote on the imposition of new taxes and debt, as guaranteed by TABOR.

On May 21, 2012, TABOR Foundation, on behalf of its members, filed the instant action seeking declaratory and injunctive relief to remedy Defendants' unconstitutional taxation and debt creation. On August 15, 2012, the CBE filed an Answer ("CBE Answer") denying that it is subject to TABOR because it is purportedly a TABOR-exempt enterprise.[2] The Colorado Transportation Commission and its members separately answered ("Commission Answer"), likewise denying that the CBE is subject to TABOR.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

For purposes of Plaintiff's Motion for Summary Judgment only, Plaintiff submits that the following facts are undisputed:[3]

1. TABOR Foundation is a nonprofit, public-interest membership organization organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. TABOR Foundation is dedicated to protecting and enforcing the

[1] Attached hereto as Exhibit 1.

[2] TABOR defines an "enterprise" exempt from its voting requirements and revenue limitations as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. art. X, § 20(2)(d).

[3] Hereinafter "PSOF ¶ __."

Taxpayer's Bill of Rights on behalf of its members. TABOR Foundation Articles of Incorporation[4]; TABOR Foundation Bylaws.[5]

2. TABOR Foundation has members who live and work throughout Colorado and who are registered to vote in the State. *See, e.g.,* PSOF ¶¶ 3–6. Many of these members depend on cars and trucks registered in Colorado to operate ranches, produce agricultural products, and clear snow from their property. *Id*. The TABOR Foundation's members are therefore required to pay the unconstitutional taxes levied by the CBE and repay the unconstitutional indebtedness created by the CBE.

3. TABOR Foundation member Chris Sammons is a rancher in Grand County, Colorado. Affidavit of Chris Sammons ¶¶ 1, 2.[6] Her livelihood depends on the development of livestock and crops. *Id*. ¶ 3. In order to make these activities economically viable, she relies on numerous vehicles, including two pickup trucks and a dump truck that are licensed and registered in Grand County, Colorado. *Id*. The profitability of her business is affected by the cost of registering these vehicles. *Id*. In 2010, 2011, and 2012 she was assessed and paid bridge safety surcharges for the vehicles described above. *Id*. ¶ 4. She intends to register these vehicles again in 2013. *Id*. Since she has owned these vehicles, they have never left Grand County because they are used exclusively on or near her ranch. *Id*. ¶ 5. She has not and will not use these vehicles to cross any bridges designated by the CBE for repair, reconstruction, replacement, or maintenance. *Id*. ¶ 6. She has derived no benefit from the bridge safety surcharges she has paid for these vehicles. *Id*. ¶ 7. She owns other vehicles licensed and

[4] Attached hereto as Exhibit 2.

[5] Attached hereto as Exhibit 3.

[6] Attached hereto as Exhibit 4.

registered in Grand County, Colorado, which she drives when she leaves Grand County. *Id*. ¶ 8. She was assessed and paid bridge safety surcharges when registering these vehicles. *Id*.

4. Ms. Sammons is a registered voter in the State of Colorado. Registered Voter Information for Christina M. Sammons.[7]

5. TABOR Foundation member William Wharton lives in Grand County, Colorado. Affidavit of William Wharton ¶¶ 1, 2.[8] He relies on a 1971 Toyota Landcruiser FJ-40 fitted with a snowplow to clear snow from his driveway in Grand County. *Id*. ¶ 3. This vehicle is licensed and registered in Grand County. *Id*. In 2010, 2011, and 2012 he was assessed and paid a bridge safety surcharge for the vehicle described above. *Id*. ¶ 4. He intends to register this vehicle again in 2013. *Id*. Since he purchased this vehicle on February 5, 2005, it has never left Grand County because it is used exclusively on or near his property. *Id*. ¶ 5. He has not and will not use this vehicle to cross any bridges designated by the CBE for repair, reconstruction, replacement, or maintenance. *Id*. ¶ 6. He has derived no benefit from the bridge safety surcharges he has paid for this vehicle. *Id*. ¶ 7. He owns other vehicles licensed and registered in Grand County, Colorado, which he drives when he leaves Grand County. He was assessed and paid bridge safety surcharges when registering these vehicles. *Id*. ¶ 8.

6. Mr. Wharton is a registered voter in the State of Colorado. Registered Voter Information for William Wesley Wharton.[9]

7. Trey Rogers, Gary M. Reif, Heather Barry, Kathy Gilliland, Kathy Connell, Douglas Aden, Steve Parker, Les Gruen, Gilbert Ortiz, and Edward J. Peterson are the members

[7] Attached hereto as Exhibit 5.

[8] Attached hereto as Exhibit 6.

[9] Attached hereto as Exhibit 7.

of the Colorado Transportation Commission and are responsible for overseeing the CBE and CDOT. In that capacity they are currently enforcing the policies complained of in this action. C.R.S. § 43-4-805(2)(a)(I); Compl. ¶¶ 5–15; CBE Answer ¶¶ 5–15; Commission Answer ¶¶ 5–15.

8. The CBE is a State-owned entity within CDOT; it is empowered to repair, reconstruct, replace, or maintain designated bridges, a governmental function previously performed directly by CDOT. Compl. ¶¶ 4, 18; CBE Answer ¶¶ 4, 18; Commission Answer ¶¶ 4, 18.

9. The CBE employs 5 full-time consultants and relies on more than 400 CDOT employees to carry out its functions. Defendants' Jan. 11, 2013, Disclosures ("Jan. Disclosures") at 26–36.[10]

10. The CBE has designated bridges for repair, reconstruction, replacement, or maintenance in 37 Colorado counties. CBE Quarterly Report No. 05 (Q4 FY2012) at App. B, C.[11]

11. Defendant Bridge Enterprise has designated no bridges for repair, reconstruction, replacement, or maintenance in 27 counties, including Grand County. *Id*.

12. The CBE has levied a mandatory bridge safety surcharge and issued revenue bonds. C.R.S. § 43-4-805(2)(b)(I)–(II); Compl. ¶ 4; CBE Answer ¶ 4; Commission Answer ¶ 4.

13. The CBE's fiscal year 2011 was July 1, 2010 to June 30, 2011. CBE 2011 Annual Report ("2011 Annual Report") at 4.[12]

[10] Relevant portions attached hereto as Exhibit 8.

[11] Relevant portions attached hereto as Exhibit 9.

[12] Attached hereto as Exhibit 10.

14. The CBE's fiscal year 2011 annual revenue was $65,328,855. 2011 Annual Report at 5, Table 2.

15. No public vote was held before the CBE levied a bridge safety surcharge on vehicles registered in Colorado. Compl. ¶ 30; CBE Answer ¶ 30; Commission Answer ¶ 30.

16. In fiscal year 2011, the CBE issued $300 million in government bonds. 2010 Annual Report at 3.

17. The CBE does not have "adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years" to pay for the bonds it has issued. Colo. Const. art. X, § 20(4)(b); Compl. ¶ 32; CBE Answer ¶ 32; Commission Answer ¶ 32.

18. No public vote was held before the CBE created financial obligations in the form of government bonds. Compl. ¶ 31; CBE Answer ¶ 31; Commission Answer ¶ 31.

19. In fiscal year 2011, the CBE was granted ownership of 56 bridges by CDOT. Jan. Disclosures at 12–14; Resolution BE-34.[13]

20. All of the 56 transferred bridges were functioning at the time of transfer. Defs.' Initial Disclosures at 9–10.[14]

21. CDOT last assessed the value of these 56 bridges in 2007 for accounting purposes using a depreciation method and concluded that these bridges had a combined depreciated value of $5.25 million. Jan. Disclosures at 3, 8–14.

22. Of the 56 bridges, structures F-11-AC and F-11-AB were valued by CDOT at almost $1.4 million at the time of transfer. Resolution BE-42.[15]

[13] Attached hereto as Exhibit 11.

[14] Relevant portions attached hereto as Exhibit 12.

[15] Attached hereto as Exhibit 13.

23. The CBE valued structures F-11-AC and F-11-AB at almost $1.4 million for TABOR purposes. *Id*.

24. CDOT's valuation methodology required that the remaining 54 bridges be assigned a value of zero, because CDOT determined that the depreciated value of each of the 54 remaining bridges to be less than $500,000. Jan. Disclosures at 2–3, 8–11.

25. CDOT did not recalculate the value of the remaining 54 bridges at the time of transfer to CBE. Jan. Disclosures at 3.

26. The CBE considered the value of the remaining 54 bridges to be zero for TABOR purposes. Resolution BE-34.

27. CDOT's valuation methodology did not consider the true market value of the 56 bridges. Jan. Disclosures at 8–11; Expert Report of Paul W. Wingard, PE, CGC, *Colorado Bridge Valuation* (February 2013) ("Wingard Expert Report") at 13.[16]

28. The CBE disclosed to potential bond investors that "the proceeds from the sale or other disposition of any Designated Bridge" are a "primary source of payment of principal and interest on the Series 2010 Bonds." Defs.' Initial Disclosures at 18, 29.

29. In fiscal year 2011, CDOT granted the CBE $1,085,837 worth of design work associated with bridge projects that were transferred to the CBE. Jan. Disclosures at 6.

30. In fiscal year 2011, CDOT's budget for replacement, rehabilitation, maintenance, repair, and inspection of bridges ("CDOT bridge budget ") was $49.8 million. Jan. Disclosures at 17.

31. In fiscal year 2011, $21.4 million of the CDOT bridge budget was provided by the

[16] Attached hereto as Exhibit 14.

State of Colorado and $27.4 million was provided by the Federal government. *Id*.

32. In November 2010, the Transportation Commission authorized itself to grant CBE up to $15 million of the CDOT bridge budget per year. Resolution TC-1925.[17]

33. The Transportation Commission characterized the $15 million as a Federal grant to the CBE. *Id*.

34. CDOT has sole discretion over what portion, if any, of the $15 million the CBE might be granted in any given year. *Id*.; Jan. Disclosures at 23.

35. In fiscal year 2011, CDOT transferred $14.4 million from the CDOT bridge budget to CBE. CBE Audited Financial Statements (June 30, 2011) ("2011 Audit") at 7.[18]

[17] Attached hereto as Exhibit 15.

[18] Attached hereto as Exhibit 16.

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate under C.R.C.P. 56(c) if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). A material fact is one that will affect the outcome of the case. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984). When reviewing a motion for summary judgment, courts review the pleadings and the documentary evidence in the light most favorable to the nonmoving party. *Peterson*, 829 P.2d at 376. "[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); Colo. Const. art. X, § 20(1).

There is no genuine issue of material fact regarding whether the CBE is subject to TABOR. Defendants cannot dispute that the bridge safety surcharge is a mandatory charge, assessed without regard to any benefits actually conferred. Nor can Defendants dispute their own documentary evidence, which shows that the CBE has received grants from the State of Colorado in excess of ten percent of its revenue. For the reasons demonstrated herein, the TABOR Foundation is therefore entitled to entry of summary judgment as a matter of law pursuant to C.R.C.P. 56 with respect to each of its claims.

II. THE CBE IS NOT A TABOR-EXEMPT BUSINESS ENTERPRISE.

The CBE was created for the sole purpose of attempting to circumvent TABOR. *See* C.R.S. § 43-4-805(2)(c). This subterfuge was meant to be accomplished by creating a TABOR-exempt enterprise. TABOR defines an "enterprise" exempt from its voting requirements and revenue limitations as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. art. X, § 20(2)(d). However, the CBE does not qualify as a TABOR-exempt enterprise for two independent reasons. First, TABOR-exempt enterprises must function as self-supporting businesses, yet the CBE does not function as such a business. Rather than engage in market exchanges, it generates revenue by levying a general tax called the bridge safety surcharge. Second, in fiscal year 2011, the CBE received grants from the State—via CDOT—totaling more than ten percent of its annual revenue, thus losing its enterprise status. Under either rationale, the CBE did not have enterprise status when it levied the bridge safety surcharge or created $300 million in new debt. Accordingly, both actions required voter approval pursuant to TABOR.

A. The CBE Does Not Function As A Business Because It Has The Power To Levy A General Tax.

The CBE is not a business enterprise exempt from TABOR because it generates revenue by levying a general tax, rather than by engaging in market transactions. TABOR-exempt enterprises may not levy taxes, because "[t]he ability to levy general taxes is inconsistent with the characteristics of a business." *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 868 (Colo. 1995). The CBE can only qualify as a TABOR-exempt enterprise if it is:

> [O]perated as a self-supporting business activity and the transactions between the enterprise and [customers] are market exchanges taking place in a competitive, arms-length manner. This requirement is necessary to eliminate the concern that such a transaction is merely a subterfuge designed to circumvent the . . . provisions of TABOR.

Op. Att'y Gen. No. 95-07, Dec. 22, 1995.[19] The CBE's revenue is not derived from "market exchanges taking place in a competitive, arms-length manner," but rather from the bridge safety surcharge—a compulsory tax collected without regard to any benefits conferred to payers. PSOF ¶¶ 3, 5, 12.

In an attempt to dress up the CBE as a business, the bridge safety surcharge is legislatively declared to be a "fee" rather than a tax:

> [T]he bridge safety surcharge . . . is not a tax but is instead a fee imposed by the bridge enterprise to defray the cost of completing designated bridge projects that the enterprise provides as a specific service to the persons upon whom the fee is imposed and at rates reasonably calculated based on the benefits received by such persons.

C.R.S. § 43-4-805(2)(c). However, this description of the bridge safety surcharge does not comport with reality because the surcharge shares none of the characteristics of a fee as defined by the Colorado Supreme Court and is not levied to provide "a specific service to the persons upon whom the fee is imposed and at rates reasonably calculated based on the benefits received by such persons." *Id*. The surcharge is therefore a tax, and not a fee. *See Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. Ct. App. 2005) ("The distinction between a fee and a tax depends on the nature and function of the charge, not on its label."); *Cherry Hills Farms, Inc. v. City of Cherry Hills Village*, 670 P.2d 779, 782 (Colo. 1983) ("The [Service Expansion Fee], regardless of its label, is a tax."). Accordingly, the CBE is not a business

enterprise exempt from TABOR and the bridge safety surcharge must be approved in advance by a vote of the people.

The distinction between a fee for service and a general tax is whether a direct quid pro quo exchange occurs:

> If . . . 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." On the other hand, if the language states that a primary purpose for the charge is to raise revenues for general governmental spending, then it is a tax.

Barber v. Ritter, 196 P.3d 238, 249 (Colo. 2008) (emphasis added); *Campbell v. Orchard Mesa Irr. Dist.*, 972 P.2d 1037, 1040 (Colo. 1998) ("While general taxes exact revenue from the public at large for general governmental purposes, an irrigation district's special assessment benefits specific landowners whose land the district supplies with water."); *see also Board of County Com'rs v. Fixed Base Operators, Inc*., 939 P.2d 464, 469 (Colo. Ct. App. 1997) ("The [passenger facility charges] are akin to user fees assessed and collected from users of airport facilities."); *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 716 (Colo. Ct. App. 1991) ("Rates charged for use of a public facility . . . are not considered taxes because . . . they are imposed only upon those using the service provided.").

The United States Supreme Court applies a similar test to distinguish between fees and taxes: "A fee . . . is incident to a voluntary act, . . . which, presumably, bestows a benefit on the applicant, not shared by other members of society." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340–41 (1974); *see also Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350 (1974) (a charge will most often be a tax "when the identification of the

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[19] *Available at* http://www.coloradoattorneygeneral.gov/ag_opinions/1995/no_95_07_ag_alpha_no_he_cu_agaun_december_22_1995

ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public.").

The Colorado Supreme Court's guidance in *Nicholl*, 896 P.2d at 868, is especially instructive because the court concluded that the E-470 Public Highway Authority's power to levy taxes defeated its enterprise status. In *Nicholl*, the court noted that the Highway Authority "fits the definition of a 'business'" when it "generates revenue by collecting tolls directly from E–470 highway users." *Id.* ("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 . . . ."). However, because the Highway Authority also had the power to levy taxes, it lost its status as a business, and consequently its status as a TABOR-exempt enterprise. *Id*. at 869 ("The ability to levy general taxes is inconsistent with the characteristics of a business.").

Unlike the Highway Authority, the CBE does not raise any revenue from consensual market exchanges. The bridge safety surcharge is not collected "directly from [CBE bridge] users." *Id*. at 686. The CBE extracts its revenue by assessing a general levy on all vehicles registered in Colorado, without any regard to payers' utilization of CBE bridges. C.R.S. § 43-4-805(5)(g)(I). Essentially every vehicle in Colorado "primarily designed to be operated or drawn upon any highway" must be registered, "whether or not it is operated on the highways." C.R.S. § 42-3-103(1)(a). "The owner of each [vehicle] shall pay an annual specific ownership tax . . . ." C.R.S. § 42-3-106(1). The bridge safety surcharge is an additional tax on vehicle ownership assessed by the CBE.

The notion that the bridge safety surcharge provides "a specific service to the persons

upon whom the fee is imposed and at rates reasonably calculated based on the benefits received by such persons" is demonstrably false. C.R.S. § 43-4-805(2)(c). Indeed, almost half of Colorado's counties receive no direct benefit from the CBE, yet the residents of these 27 counties are forced to pay the same bridge tax as residents of those counties actually served by the CBE. PSOF ¶ 3, 5, 11; C.R.S. § 43-4-805(5)(g)(I). Even vehicles that never leave those 27 forgotten counties must pay the same surcharge rates as every other vehicle registered in Colorado. PSOF ¶¶ 3, 5.

No one who pays the bridge safety surcharge is provided a "specific service," nor do actual benefits received, if any, have any bearing on the surcharge rates paid. If a person owns a vehicle registered in Colorado he pays a bridge safety surcharge based on that vehicle's weight; no consideration is given to any services or benefits actually provided. C.R.S. § 43-4-805(5)(g)(I).

The plight of those Coloradans in the 27 counties without a CBE bridge is all the more striking, since the CBE has done nothing to explain how these citizens receive any benefits from the CBE. TABOR Foundation has identified certain of its members who live hundreds of miles from any CBE bridge and have paid the bridge safety surcharge for vehicles that will never cross a CBE bridge. Two of these members reside in Grand County; no CBE bridge is located in Grand County. PSOF ¶¶ 3, 5, 11.

TABOR Foundation member Chris Sammons owns numerous vehicles used in connection with her ranch. PSOF ¶ 3. These vehicles never leave Grand County because they are used exclusively on or near her ranch. *Id*. Nevertheless, she has been forced to pay bridge safety surcharges for all these vehicles. *Id*.

TABOR Foundation member William Wharton owns a 1971 Toyota Land Cruiser fitted with a snowplow to clear snow from his property. PSOF ¶ 5. That vehicle has never left Grand County since Mr. Wharton purchased it in 2005, yet it too has been assessed the bridge safety surcharge. *Id*.

Both these members own other vehicles better suited to travel far from home, including travel outside Grand County. PSOF ¶¶ 3, 5. They have been assessed and have paid bridge safety surcharges for these vehicles, too. *Id*. They have not been provided a specific service, nor do the surcharge rates they pay bear any relationship to benefits received. *Id*. At a minimum, they pay the bridge safety surcharge twice, but receive no additional services; they pay once for vehicles that might utilize CBE bridges, and again for vehicles that never come within sight of a CBE bridge.

Thus, the CBE is not engaged "in an activity conducted in the pursuit of benefit, gain or livelihood," it is engaged in general taxation in pursuit of the construction of public infrastructure. *Nicholl*, 896 P.3d at 874 (citing *Lindner Packing & Provision Co. v. Industrial Comm'n*, 99 Colo. 143, 147 (1936)). A worthy cause, perhaps, but a quintessentially government one, devoid of any characteristics of a business.[20] The bridge safety surcharge shares none of the characteristics of a fee identified by the Colorado Supreme Court and is not imposed to provide a specific service to the persons upon whom the fee is imposed and at rates reasonably calculated based on the benefits received by such persons. Accordingly, the CBE is not a business enterprise exempt from TABOR's voting requirements and the bridge safety surcharge must be approved in advance by a vote of the

[20] Indeed, prior to the creation of the CBE, CDOT used tax revenue to carry out precisely the same activities as the CBE now undertakes using bridge safety surcharge revenues—with many of the same CDOT employees. PSOF ¶¶ 8–9.

people.

B. The CBE Receives More Than Ten Percent Of Annual Revenue In Grants From CDOT.

Assuming arguendo that the CBE functioned as a business and the bridge safety surcharge were not a tax, the CBE would nevertheless not qualify as an enterprise because it is funded in large measure by CDOT. A TABOR-exempt enterprise must "receiv[e] under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. art. X, § 20(2)(d). Both the CBE and CDOT are controlled by the Transportation Commission. PSOF ¶ 7. Grants from CDOT to the CBE have been unsurprisingly generous; so generous, in fact, that the CBE does not comply with TABOR's ten percent limit and is, therefore, not an exempt enterprise.

In fiscal year 2011, the CBE's revenue was $65,328,855 (PSOF ¶ 14), making the ten percent maximum grant from Colorado state and local governments allowable under TABOR $6.5 million. Grants from CDOT to the CBE in fiscal year 2011 came in two primary forms, which totaled at least $20.7 million: (1) a $14.4 million cash infusion to the CBE from CDOT's bridge budget; and (2) a group of 56 bridges owned by CDOT that was gifted to the CBE (along with associated design work), worth at least $6.3 million. Thus, these grants from CDOT impermissibly exceeded the $6.5 million allowed under TABOR by $14.2 million (the difference of $20.7 million minus $6.5 million). Thus, the CBE lost its enterprise status in fiscal year 2011 due to these grants. Accordingly, the $300 million debt issuance the CBE undertook in December 2010, PSOF ¶ 16, required voter approval. Colo. Const. art. X, § 20(4)(b).

1. The CBE lost enterprise status as a result of a $14.4 million grant the CBE received from CDOT in fiscal year 2011.

CDOT's fiscal year 2011 budget for replacement, rehabilitation, maintenance, repair, and inspection of bridges was $49.8 million. PSOF ¶ 30. Of that total, $21.4 million was provided by the State of Colorado and $27.4 million was provided by the Federal government. PSOF ¶ 31. In November 2010, the Transportation Commission authorized itself to grant the CBE up to $15 million of the CDOT bridge budget per year. PSOF ¶ 32. The Transportation Commission made use of that authority in fiscal year 2011 and transferred $14.4 million from CDOT to the CBE. PSOF ¶ 35.

In an apparent effort to avoid TABOR's ten percent limitation, the Transportation Commission characterized these funds as a Federal grant to the CBE.[21] PSOF ¶ 33. Importantly, however, CDOT—and not the Federal government—has discretion over what portion, if any, of the $15 million the CBE might receive in any given year. PSOF ¶ 34; Resolution TC-1925 ("[A]ny decision as to whether or not to allocate and transfer such funds to the Colorado Bridge Enterprise shall be made by the Transportation Commission, in its sole discretion, in the year in which the transfer is to occur."). Quite simply, this is CDOT's money; it is not a Federal grant that merely "pass[es] through the State" to the CBE. C.R.S. § 24-77-102(7)(b)(III). The State of Colorado determines how the money is spent and whether the CBE receives any of it. The only reason the Federal government knows that the money might flow from CDOT to the CBE is because CDOT obtained consent from the Federal government to give the money to the CBE if, in CDOT's "sole discretion," CDOT determined such a grant was necessary. PSOF ¶ 34.

[21] TABOR's ten percent limit applies only to grants from "Colorado state and local governments"; accordingly, grants from the Federal government do not contribute to the limit.

CDOT's control over these funds removes the Federal character of this money for TABOR purposes. While Colorado case law specific to TABOR offers no guidance here, the Attorney General has concluded that the proximate source of a grant defines its character. Op. Att'y Gen. No. 05-03, Jul. 29, 2005.[22] The Attorney General's opinion was rendered in the context of examining the impact of the 2004 College Opportunity Fund Act, C.R.S. § 23-18-101 *et seq*., on the enterprise status of state institutions of higher education. The Attorney General concluded that stipends provided by the State of Colorado to college students lost their character as State grants for TABOR purposes because the students exercised sole discretion over distribution of the grants. Op. Att'y Gen. No. 05-03 at 5. Similarly, CDOT's control over its budget—including that portion provided by the Federal government—means that any money that flows to the CBE does so only because of the sole discretion of CDOT, removing the Federal character of that money for TABOR purposes.

The Attorney General's opinion relies on U.S. and Colorado Supreme Court decisions that have considered the issue of indirect government grants in other contexts. *Id*. at 4–5. For example, the U.S. Supreme Court has held on numerous occasions that "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing" do not violate the Establishment Clause of the U.S. Constitution. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *accord Americans*

Colo. Const. art. X, § 20(2)(d).

[22] *Available at* http://www.coloradoattorneygeneral.gov/ag_opinions/2005/no_05_03_ag_alpha_no_he_he_agbbl_june_29_2005

United for Separation of Church and State Fund, Inc. v. State, 648 P.2d 1072, 1083 (Colo. 1982). This is because, although the school aid comes from the government, the individual recipients' control over the money means that "'[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients,'" removing the government character of that money for Establishment Clause purposes. *Zelman*, 536 U.S. at 650–51 (quoting *Witters*, 474 U.S. at 487). Similarly, the CBE receives a portion of CDOT's bridge budget only because of the genuinely independent choices of CDOT, removing the Federal character of that money for TABOR purposes.

In a different context, the Colorado Supreme Court applied a similar rationale to the Colorado Constitution's Gift Clause, Colo. Const. art. XI, § 2. *In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 878 (Colo. 1991). The Gift Clause prohibits the State from giving aid to private companies. Colo. Const. art. XI, § 2. Nevertheless, the court held that the State could give tax revenues to local governments or the Colorado Housing and Finance Authority ("CHFA"), which would in turn give the money to private companies. *Id.* The court approved the grants at issue because the local governments or the CHFA would allocate the money, not the State. *Id*. at 883. Thus, the local governments' or the CHFA's authority over the money removed the State character of that money for Gift Clause purposes. *Id*.

As these cases demonstrate, the $14.4 million CDOT gave to the CBE is a grant from the State of Colorado. CDOT has sole discretion over any such grants that it provides to the CBE. Any money that flows from CDOT to the CBE does so only because of the genuinely independent choices of CDOT. Quite simply, CDOT's bridge budget is State money for

purposes of TABOR's ten percent limit. The $14.4 million the CBE received from CDOT in fiscal year 2011 exceed TABOR's ten percent limit and the CBE accordingly lost enterprise status as a result of that grant.

2. The CBE lost enterprise status as a result of 56 bridges the CBE received from CDOT in fiscal year 2011.

In addition to the cash infusion from CDOT in fiscal year 2011, the CBE also received significant capital contributions from CDOT in the form of 56 bridges that were transferred from CDOT ownership to the CBE.[23] PSOF ¶ 19. By CDOT's own reckoning, all these bridges have value and should have been accounted for pursuant to TABOR's ten percent limit, PSOF ¶ 21; yet the CBE takes the position that only two of the bridges counted against the ten percent limit. PSOF ¶ 23. Moreover, CDOT and the CBE radically underestimated the true value of the 56 bridges because it conflated the accounting value of the bridges with their market value. PSOF ¶ 27; Wingard Expert Report at 13–14.

Long before any transfer to the CBE was contemplated, CDOT assessed the depreciated value of all its bridges for accounting purposes. PSOF ¶ 21. CDOT last appraised the 56 transferred bridges in 2007 using a depreciation method, concluding that the total *depreciated* value of all 56 bridges was $5.25 million. *Id*. CDOT concluded that bridges F-11-AC and F-11-AB were together worth approximately $1.4 million. PSOF ¶ 22. However, CDOT concluded that the other 54 bridges had a depreciated value under $500,000 each. PSOF ¶ 24. For purposes of CDOT's accounting practices, these 54 bridges were not capitalized, i.e., their value

[23] CDOT also granted the CBE $1,085,837 worth of design work associated with bridge projects that were transferred to the CBE. PSOF ¶ 29.

was recorded as zero, even though CDOT calculated a depreciated value for each bridge.[24] *Id*.

Despite the fact that all of the transferred bridges were functioning at the time of transfer, PSOF ¶ 20, the CBE imported this accounting assumption wholesale, with no rational justification, in order to ignore the value of the 54 bridges for TABOR purposes. PSOF ¶¶ 23, 26. Paradoxically, the CBE listed these mostly "valueless" bridges as a source of repayment for the $300 million bonds it issued. PSOF ¶ 28. The CBE did acknowledge that bridges F-11-AC and F-11-AB "carry substantial value and must be treated and accounted for under TABOR as having such value for purposes of transfer from CDOT to the Bridge Enterprise." Resolution BE-42; PSOF ¶ 23. Even by CDOT's own reckoning, however, the 54 "valueless" bridges had millions of dollars of depreciated value and should have been accounted for pursuant to TABOR. PSOF ¶ 21. Accordingly, the CBE should have accounted for the total value of all these bridges to determine its continued eligibility for enterprise status pursuant to TABOR.

Moreover, the $5.25 million value assigned to these 56 bridges by CDOT underestimates the true market value of the bridges. CDOT's use of depreciated value for accounting purposes may have been appropriate. Wingard Expert Report at 13. However, the depreciated value of the bridge assets for accounting purposes is not the same as their true market value; the latter is the price the asset would command if sold on the open market in an arms-length transaction. *Id*. The extent of the variance between CDOT's depreciated value and the true market value is significant. For example, bridges F-11-AC and F-11-AB were valued at almost $1.4 million using CDOT's deprecation methodology. PSOF ¶ 22. A more accurate estimate of the bridges' true market value could be at arrived at via a number of methodologies. Wingard Expert Report

[24] Exhibit 8 at 12–14 shows the depreciated value of each bridge as assigned by CDOT.

at 8.

One method is to value the bridges based on replacement cost, which the CBE has determined to be $14,758,453. *Id*.

A second method is to arrive at a depreciated value based on current replacement cost. *Id*. at 9. Bridges F-11-AC and F-11-AB are approximately half way through there estimated life cycle, with 38 of 75 years of useful life remaining. *Id*. Therefore the value of these structures would be $7,477,616 [(38/75) x $14,758,453)]. *Id*.

A third method is to adjust replacement value based on the estimated cost to correct issues of functional obsolescence. *Id*. Replacement cost ($14,758,453), minus cost of improvements ($5,880,000), equals a current market value of $8,878,453. *Id*.

A fourth method is to look at the value of the structures to the traveling public, i.e., the inconvenience cost if the structures were no longer in use. *Id*. at 10–11. In the case bridges F-11-AC and F-11-AB, the alternative route is approximately 3 miles, but at a slower maximum rate of speed. *Id*. Assuming a typical annual number of trips for a road of this capacity, the annual cost of inconvenience is estimated at $4.4 million per year. *Id*. Based on a remaining useful life of seven years at $4.4 million per year, the current value would be $30,800,000. *Id*. at 11.

A fifth method would consider potential revenue raised if tolls were collected for crossing bridges F-11-AC and F-11-AB. *Id*. at 11–12. Assuming a travel distance of four miles, a cost per mile of $0.02, and a typical annual number of trips for a road of this capacity (8,798,400), current market value would be $13,796,201. *Id*. at 12.

Under any of these methodologies, the true market value of these bridges far exceeds the

value assigned by CDOT's depreciation method. Importantly, even the lowest reasonable valuation of only bridges F-11-AC and F-11-AB exceeds TABOR's ten percent limit by approximately $1,000,000 [depreciated value based on current replacement cost ($7.5 million), minus fiscal 2011 ten percent TABOR maximum ($6.5 million)]. The CBE accordingly lost enterprise status as a result of the 56 bridges that CDOT granted in fiscal year 2011.

III. THE TABOR FOUNDATION IS ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF TO REMEDY DEFENDANTS' UNCONSTITUTIONAL TAXATION AND DEBT CREATION.

As demonstrated above, the CBE is not a TABOR-exempt business enterprise. Colo. Const. art. X, § 20(2)(d). The CBE does not qualify as a TABOR-exempt enterprise because it does not function as self-supporting business and because in fiscal year 2011, the CBE received grants from CDOT totaling more than ten percent of its annual revenue. Under either rationale, the CBE did not have enterprise status when it levied the bridge safety surcharge or created $300 million in new debt. Accordingly, both actions required voter approval pursuant to TABOR. Until such time as Defendants receive voter approval for these actions, Defendants must be enjoined against continued enforcement and maintenance of the bridge safety surcharge and must be enjoined from issuing revenue bonds. Colo. Const. art. X, § 20(4)(a)–(b); *Nicholl*, 896 P.2d at 866 ("[T]axpayers have standing to seek to enjoin an unlawful expenditure of public funds."); *see also Barber v. Ritter*, 170 P.3d 763, 779 (Colo. Ct. App. 2007), *aff'd in part, rev'd in part on other grounds*, 196 P.3d 238 (Colo. 2008) (quoting *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 180 (1803) ("a law repugnant to the constitution is void")). Additionally, TABOR requires that all "[r]evenue collected, kept, or spent illegally" be refunded. Colo. Const. art. X, § 20(1).

CONCLUSION

For the foregoing reasons, summary judgment should be entered for TABOR Foundation and against Defendants with respect to both of TABOR Foundation's claims.

DATED this 11th day of February 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of February 2013, the foregoing document was filed with the Court and true and accurate copies of same were served on counsel of record via the Integrated Colorado Courts E-Filing System.

/s/ James M. Manley
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