



# ISSUE BACKGROUNDER

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## HOW COLORADO HAS RAISED \$300 MILLION IN DEBT WITHOUT ASKING ITS CITIZENS: THE COLORADO BRIDGE ENTERPRISE

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Colorado's citizens are supposed to have a final say before our state can borrow money. But the 2009 FASTER law<sup>1</sup> subverted citizens' rights to vote on tax and 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, they did just that. And now Colorado's citizens are burdened with \$300 million of newly issued debt—with the promise of more to come. Because of the borrowed money, it is unlikely a future legislature can ever repeal the FASTER tax. All this, and we weren't asked!

### HERE'S THE STORY:

The Taxpayer's Bill of Rights, commonly known as TABOR, passed by voters in 1992 and thus enshrined in the State Constitution, mandates that the State "must have voter approval in advance for...creation of any debt." It does not prohibit the State or a district government from borrowing money; it only stipulates that citizens must be

asked first. Sounds good. In this day and age of exploding government debt, it is only reasonable that citizens be asked before any new debt is incurred.

But there is an exception in TABOR that our legislators manipulated to allow them to avoid a vote of the people. TABOR does not apply to 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>2</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 functions could be self-funding, such as constructing a college dormitory with bonds that are paid off over time by fees from students who reside there. Since the enterprise is a self-supporting business, it does not live under the restraints voters have put on general government spending and debt.

The most well-known Enterprises are our state's public universities. They are funded largely by the tuition paid by students (the customers). Other Enterprises include the State Lottery and the state nursing home system. Most people would agree that our state universities, State Lottery, and nursing home system all fit the definition of a business. They are organizations that sell a good or service to customers, and that compete for those customers with other businesses. Only willing buyers who actually use the service pay for it. So far, so good.

### NOW COME THE LEGAL CONTORTIONS.

FASTER created the "Colorado Bridge Enterprise" as a government-owned business within the Colorado Department of Transportation (CDOT). According to the Bridge Enterprise website, its purpose is "to complete designated bridge projects" that are "structurally deficient, functionally obsolete or rated as poor." When FASTER was passed in 2009, 128 bridges in the state had been identified as fitting this description. So our state legislators created a "business" to fix bridges.

In the past, fixing bridges was part of the normal operations of state government. In fact, CDOT has been fixing roads and bridges for a long time. So why the change?

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Simply put, the Colorado General Assembly cannot raise taxes or issue debt without a vote of the people. But an Enterprise can!

## HOW DOES THIS WORK?

Due to FASTER, every person who registers a car in Colorado pays on average an extra \$18 a year that is designated for the Bridge Enterprise, in addition to an extra \$23 per year for road safety. The \$41 annual payment is called a “fee” rather than a “tax,” which is nonsensical in itself (please see Tom Ryan’s Independence Institute paper, *Colorado Bridge Enterprise: A Case Study in Contravening Colorado’s Constitution*<sup>3</sup>).

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Enterprises cannot be funded by taxes. They are supposed to be businesses supported by payments from customers.

Now every Coloradan who registers a car is considered a “customer” of the Bridge Enterprise. It does not matter whether the car is driven over one of the designated bridges or not. In fact, there are large areas of Colorado nowhere near one of the designated bridges. A website run by former *Rocky Mountain News* transportation journalist Kevin Flynn has a good map locating each of the bridges.<sup>4</sup>

A true Enterprise like the State Lottery allows someone to decide whether or not to buy a lottery ticket. The more lottery tickets he buys, the more he pays. With the Bridge Enterprise, the government has decided that all Colorado car owners pay, even those who live and work nowhere near one of the 128 bridges. It does not matter whether the car crosses one of the bridges one time, a thousand times, or no times.

And out-of-state car owners don’t pay at all, even if they constantly use the bridges.

In order to accomplish its spending goals and still avoid the voters, CDOT had to use logic that gets even more tortuous. Here comes the debt part.

The Bridge Enterprise surcharge paid by Colorado car owners is expected to raise about \$93 million per year. A tidy sum to be sure, but it will take a while to fix all the bridges. The Enterprise’s Board of Directors decided it was not prudent to wait. The answer? Borrow money

now, and use the \$93 million per year to make interest and principal payments on that debt.

On December 1, 2010, with a payment of \$1.9 million to Wall Street-based bond dealers,<sup>5</sup> the Colorado Bridge Enterprise issued \$300 million of debt. Of this amount, \$43 million matures in 2027, and \$257 million matures in 2040. The interest rate on the debt is about 6.1 percent. The Enterprise will pay about two-thirds (4.0 percent) of the interest rate, and the federal government, through the taxpayer-funded Build America Bond subsidy, pays the rest.

So, without a vote of the people, a CDOT Enterprise has issued \$300 million in debt that will not be paid off for nearly 30 years.

According to a March 18, 2011, press release from the Colorado Bridge Enterprise, more debt issuance is planned for the future. The first \$300 million is slated to fund construction of only 47 out of the 128 bridge projects.

As if these facts are not enough to enrage citizens concerned about their rights, there’s more.

### Consider:

**I. The Bridge Enterprise and CDOT do the same work overseen by the same managers.** The Bridge Enterprise is overseen by an 11-member Board. They are the same 11 people who comprise the Colorado Transportation Commission and determine CDOT’s project priorities. Furthermore, the Executive Director of CDOT is also the Director of the Bridge Enterprise, and the CFO of CDOT is the CFO of the Bridge Enterprise. These overlapping assignments suggest that the Enterprise’s work is really the legitimate function of CDOT and not a separate business. Nothing has changed except the legal construct.

In fact, of the 128 bridges eligible for the Bridge Enterprise to fund, the first 20 were repaired with normal CDOT funds. Clearly, the distinction between CDOT and the Bridge Enterprise is a legal fiction.

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2. **The Commission/Board members are not elected by the people.** All 11 current members were appointed by then-Governor Bill Ritter to four-year terms and confirmed by the State Senate.

3. **The Board selects a Bridge Enterprise Director.** At the May 20, 2010, meeting the Board empowered the Director with the authority to “execute contracts” and to “take all necessary actions for issuance of revenue bonds.” In other words, the Director, with the consent of the Board, has the power to issue hundreds of millions of dollars of debt. Every Colorado car owner pays for this debt. But do we get a say in it? No. An unelected administrator picked and overseen by an unelected Board decides for us.

4. **As an Enterprise, less than 10 percent of its funding can come from the government.** The Bridge Enterprise is in the business of fixing bridges, but the bridges are owned by the State of Colorado. So in order to maintain the pretense, the state government periodically transfers bridge ownership to the Enterprise. In 2010, ownership of 77 bridges was transferred to the Enterprise. To comply with TABOR’s Enterprise regulations, the total value of the transferred bridges had to be less than \$6.8 million. CDOT claimed that only

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two 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.

Can 75 bridges be worthless? In an accounting sense, yes. 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 value.

But 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 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.

Since in CDOT’s official opinion any bridge over 40 years old has no value, will CDOT accept an offer to buy one of these older bridges for a dollar? Let’s extend the logic further. Our State Capitol building in Denver was completed in 1908. Using CDOT’s reasoning, our Capitol building—with its gold-plated dome—is worthless! Clearly, that is nonsense, as is proclaiming that the 77 transferred bridges have no value.

5. **Nearly all 128 bridges are expected to be repaired by 2017.** But the bridge safety “fee” motorists pay probably will live on forever, as there is no sunset clause in the FASTER legislation. The fee is imposed any time the Bridge Enterprise Board requests it. As long as there are bridges rated “poor,” whether currently on the list or not, and CDOT will not fund the repair, the fee will live on. As more bridges get added to the list, it is likely the Bridge Enterprise will keep on borrowing more.

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6. **It will be hard, if not impossible, for a future General Assembly to rescind the FASTER taxes now that debt has been issued.** A legislative decision to revoke the FASTER taxes, and not backfill with other funds, will leave the Bridge Enterprise unable to make required interest payments on the \$300 million of outstanding debt. In that situation, the bonds will default. The bonds are not a direct obligation of the State of Colorado. However, if the legislature allows the bonds to default, investors will be wary of any future bond issuance by all Colorado government agencies. If the bonds default, it will be harder and much more costly, for any Colorado government agency to legitimately issue debt in the future.

A better solution, worthy of further study, might be to redeem 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, 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 nearly three years, the Board will have collected enough money to pay off the first \$257 million of debt. This way, the wrong of not asking the people permission to issue debt can be legally undone.

**7. 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 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.”

***The General Assembly had good reason to not have the State Auditor rule on whether the Bridge Enterprise is truly an Enterprise.***

So no need 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.

The General Assembly had good reason to not have the State Auditor rule on whether the Bridge Enterprise is truly an Enterprise. Based on the Auditor’s past rulings, it is unlikely the Bridge Enterprise would pass muster. In a 2004 formal opinion the State Auditor observed:

Therefore, the primary characteristics of a business are to provide goods and services for a fee and be self-supporting. The enterprise should engage in arms-length, market exchanges and provide goods and services at a market rate sufficient for the independent operation of the

enterprise. Further, it has generally been held that to qualify as an enterprise the entity should engage in the kind of activity that is commonly carried on for profit outside of government.<sup>6</sup>

As noted above, the FASTER fee is not an “arms-length, market exchange,” since it is legislatively mandated. Car owners have no choice. Also, owning and repairing 128 bridges is not an activity normally performed by private businesses. The State Auditor’s previous formal rulings suggest that the Bridge Enterprise does not qualify as an “enterprise” as Colorado’s Constitution intended.

## **CONCLUSION**

Through legal contortions, Colorado state government officials have created a mechanism to charge car owners \$41 per year and to issue \$300 million in debt—with more to come—without asking voters for approval. This act violates the letter and spirit of TABOR and our basic rights as citizens. Our state Constitution declares that citizens need to be asked before a tax increase or a debt issuance is consummated. Our state legislature knowingly bypassed this specific obligation, and tied the hands of future legislatures to undo their actions.

Our elected officials purposely and knowingly breached the faith they hold with citizens. The Colorado Bridge Enterprise is government without the consent of the governed. Shame.

The argument here is not about the merit of raising taxes and issuing debt to fix bridges. Whether or not it is the right approach, the central point is: the government is required to obey plain constitutional meaning, and therefore must ask citizens first before issuing debt.

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## ACKNOWLEDGEMENTS

**Richard Sokol** is a local business owner, focusing on real estate and investments. He serves as the Vice Chairman of the South Metro Fire Rescue District Board, is on the Board of the Colorado Republican Business Coalition, and sits on the Advisory Board of the Leadership Program of the Rockies. He is also a Contributing Editor to *Line of Sight*, a monthly policy-oriented e-magazine. Mr. Sokol earned a degree in Economics from Yale University, and holds an MBA from Harvard Business School. He is married with two daughters, and is an avid Denver Nuggets fan.

## ENDNOTES

<sup>1</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. The section of the Bill creating the Bridge Enterprise reads as follows:

(c) THE BRIDGE ENTERPRISE SHALL CONSTITUTE AN ENTERPRISE FOR PURPOSES OF SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION SO LONG AS IT RETAINS THE AUTHORITY TO ISSUE REVENUE BONDS AND RECEIVES LESS THAN TEN PERCENT OF ITS TOTAL REVENUES IN GRANTS FROM ALL COLORADO STATE AND LOCAL GOVERNMENTS COMBINED. SO LONG AS IT CONSTITUTES AN ENTERPRISE PURSUANT TO THIS PARAGRAPH (c), THE BRIDGE ENTERPRISE SHALL NOT BE SUBJECT TO ANY PROVISIONS OF SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION. CONSISTENT WITH THE DETERMINATION OF THE COLORADO SUPREME COURT IN *NICHOLL V. E-470 PUBLIC HIGHWAY AUTHORITY*, 896 P2d 859 (COLO. 1995), THAT THE POWER TO IMPOSE TAXES IS INCONSISTENT WITH "ENTERPRISE" STATUS UNDER SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION, THE GENERAL ASSEMBLY FINDS AND DECLARES THAT A BRIDGE SAFETY SURCHARGE IMPOSED BY THE BRIDGE ENTERPRISE PURSUANT TO PARAGRAPH (g) OF SUBSECTION (5) OF THIS SECTION 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.

<sup>2</sup> Colorado Constitution, Article X, § 20 (2)(d).

<sup>3</sup> Tom Ryan, Colorado Bridge Enterprise: A Case Study in Contravening Colorado's Constitution, Independence Institute, May, 2011, [http://liberty.i2i.org/files/2011/05/IB\\_2011\\_C.pdf](http://liberty.i2i.org/files/2011/05/IB_2011_C.pdf)

<sup>4</sup> Kevin Flynn, "Kevin Flynn's Inside Lane – Colorado Transportation News," <http://www.inside-lane.com/2009/09/11/where-is-colorados-auto-registration-fee-hike-going-take-a-tour-of-the-states-poor-rated-bridges-your-money-will-replace/>, accessed April 29, 2011.

<sup>5</sup> RBC Capital Markets, Merrill Lynch, JP Morgan and others.

<sup>6</sup> Memorandum to Members of the Legislative Audit Committee

from Joanne Hill, State Auditor, August 12, 2004, re University of Colorado Enterprise Designation, [http://www.leg.state.co.us/osa/coauditor1.nsf/All/A7F9B217A551AA6E87256EFB00592575/\\$FILE/1679%20Final%20OLLS%20-%20OSA-%20CU%20Enterprise%20Memo.pdf](http://www.leg.state.co.us/osa/coauditor1.nsf/All/A7F9B217A551AA6E87256EFB00592575/$FILE/1679%20Final%20OLLS%20-%20OSA-%20CU%20Enterprise%20Memo.pdf), accessed April 29, 2011.