DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock Street Room 256 Denver, Colorado 80202 720-865-8302	DATE FILED: April 8, 2013 6:57 PM FILING ID: B7322AEA
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
REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	

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TABOR Foundation, on behalf of its members and by and through undersigned counsel, hereby replies to Defendants' Joint Response to Plaintiff's Motion for Summary Judgment (filed April 1, 2013) (hereinafter "Defs.' Resp.").

REPLY CONCERNING PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Plaintiff set forth 35 concise, numbered paragraphs comprising Plaintiff's Statement of Undisputed Facts. Mem. in Supp. of Pl.'s M. for Summ. J. at. 2. Defendants did not address these numbered paragraphs and have instead set out a bullet-point list of purportedly disputed facts. Defs.' Resp. at 6. Defendants have not attempted to dispute any part of the following paragraphs of Plaintiff's Statement of Undisputed Facts: 1, 4, 6, 7, 8, 9, 12, 13, 15–26, 28–31, 33. Therefore, these facts should be treated as undisputed. C.R.C.P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial."). Plaintiff replies as follows to the facts that Defendants attempted to dispute (paragraph numbers correspond to Plaintiff's Statement of Undisputed Facts ("PSOF ¶ __")). Defs.' Resp. at 6–10.

2. Defendants quibble with the meaning of the word "many," Defs.' Resp. at 6, but do not actually dispute the material facts contained in PSOF ¶ 2: "TABOR Foundation has members who live and work throughout Colorado and who are registered to vote in the State. . . . [T]hese members depend on cars and trucks registered in Colorado to operate ranches, produce agricultural products, and clear snow from their property. 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. Defendants do not dispute that Chris Sammons is a TABOR Foundation member. Defs.' Resp. at 6. Indeed, Defendants concede that Ms. Sammons was a TABOR Foundation member prior to the commencement of this lawsuit. *Id*.

Defendants dismiss as speculation the statement that Ms. Sammons "will not use [her ranch] vehicles to cross any bridges designated by the CBE for repair, reconstruction, replacement, or maintenance," and quibble with the statement that Ms. Sammons "has derived no benefit from the bridge safety surcharges she has paid for these vehicles" because it is possible that she could use a CBE bridge. Defs.' Resp. at 6–8. But Defendants ignore Ms. Sammons' sworn statement and testimony that these vehicles "are used exclusively on [her] ranch or in the town of Kremmling," and never travel over any bridge that the CBE has designated for repair, reconstruction, replacement, or maintenance. Deposition of Christina Sammons at 93:2–15.[1]

Defendants contend that Ms. Sammons "does not object to paying the Bridge Safety Surcharge for vehicles that are driven on the highway." Defs.' Resp. at 7. Ms. Sammons's testimony directly contradicts this allegation. Sammons Depo. at 93:16–23.

Defendants suggest Ms. Sammons can choose not to register her vehicles, Defs.' Resp. at 7–8, but concede elsewhere in their Response that state law requires any vehicle "primarily designed to be operated or drawn upon any highway" to be registered, "whether or not it is operated on the highways." C.R.S. § 42-3-103(1)(a); Defs.' Resp. at 2.

Defendants do not dispute the other facts contained in PSOF ¶ 3.

* * *

[1] Relevant portion attached hereto as Exhibit 1.

5. Defendants do not dispute that William Wharton is a TABOR Foundation member. Defs.' Resp. at 6. Indeed, Defendants concede that Mr. Wharton was a TABOR Foundation member prior to the commencement of this lawsuit. *Id*.

Defendants dismiss as speculation the statement that Mr. Wharton "will not use [his 1971 Toyota Landcruiser] to cross any bridges designated by the CBE for repair, reconstruction, replacement, or maintenance," and quibble with the statement that Mr. Wharton "has derived no benefit from the bridge safety surcharges he has paid for this vehicle" because it is possible that he could use a CBE bridge. Defs.' Resp. at 6, 8. But Defendants ignore Mr. Wharton's sworn statement and testimony that Mr. Wharton uses this vehicle to clear snow from his driveway, haul trash within his neighborhood, and pick up his mail in Grand Lake. Deposition of William Wharton at 46:1–5.[2] Moreover, no one has driven this vehicle over any bridge since 2007.[3] Wharton Depo. at 50:15–21.

Defendants do not dispute the other facts contained in PSOF ¶ 5.

* * *

10. Defendants do not dispute the material facts in PSOF ¶ 10. Defs.' Resp. at 8–9. It is undisputed that the CBE has designated bridges for repair, reconstruction, replacement, or maintenance in 37 Colorado counties. There are CDOT bridges in other counties, including Grand County, that may be eligible for repair by the CBE, but it is undisputed that the CBE has not designated these other bridges for repair, reconstruction, replacement, or maintenance or authorized the expenditure of any bridge safety surcharge revenues to benefit bridges in these

[2] Relevant portions attached hereto as Exhibit 2.

[3] Defendants point out that Mr. Wharton drives on Highway 34 and CDOT has a "poor" bridge on Highway 34. Defs.' Resp. at 8. But Defendants fail to mention that this bridge—which is not a CBE bridge—is several miles from where Mr. Wharton drives his Landcruiser. Wharton Depo. at 51:1–12.

forgotten counties. *See* BE Eligible Bridges-Not Programmed or Transferred as of 3/20/13 at 3;[4] *see also* CBE Quarterly Report No. 05 (Q4 FY2012) at App. B, C (Ex. 9 to Pl.'s M. for Summ. J).

11. For the same reasons demonstrated in ¶ 10, Defendants do not dispute the material facts in PSOF ¶ 11. Defs.' Resp. at 8–9.

* * *

14. The CBE's 2011 Annual Report documents the CBE's fiscal year 2011 revenue as $65,328,855. CBE 2011 Annual Report at 4 (Ex. 10 to Pl.'s M. for Summ. J). Defendants contend that CBE's fiscal year 2011 revenue was actually $66.965 million. Defs.' Resp. at 10. This case is not about the accuracy of the CBE's financial disclosures. Under either figure, the CBE received grants from CDOT totaling more than ten percent of its annual revenue.

* * *

27. Defendants do not dispute the material facts in PSOF ¶ 27; instead, Defendants make a legal argument about CDOT's inability to sell or transfer assets owned by Colorado taxpayers for more than depreciated value. As demonstrated below, this legal argument is meritless.

* * *

32. Defendants do not dispute the material facts in PSOF ¶ 32; instead, Defendants make a legal argument about the meaning of "grants" as that word is used in Colo. Const. art. X § 20(2)(d). As demonstrated below, this legal argument is meritless.

34. Defendants do not dispute the material facts in PSOF ¶ 34, which simply reflects Defendant Transportation Commission's Resolution TC-1925, which resolves that:

[4] Attached hereto as Exhibit 3.

> WHEREAS, the *Transportation Commission has previously authorized the transfer of federal bridge funds from CDOT to the Colorado Bridge Enterprise* for purposes of advancing the business purposes of the Colorado Bridge Enterprise; and
>
> WHEREAS, the Transportation Commission desires to state its intention, subject to the terms of this resolution, to, *in future fiscal years, transfer eligible federal funds from CDOT to the Colorado Bridge Enterprise* for the purposes of advancing the business purposes of the Colorado Bridge Enterprise;
>
> * * *
>
> [T]he Transportation Commission of Colorado expresses its intent to consider *allocating and transferring from CDOT to the Colorado Bridge Enterprise* fifteen million dollars ($15,000,000) of eligible federal funds in each year for the purposes of advancing the financing, repair, reconstruction, and replacement of Designated Bridges by the Colorado Bridge Enterprise. . . . it being the Transportation Commission's intention that *any decision as to whether or not to allocate and transfer such funds in any year shall be made by the Transportation Commission, in its sole discretion,* in the year in which the transfer is to occur.

Resolution TC-1925 (Ex. 15 to Pl.'s M. for Summ. J).

In any event, the apparent discrepancy between what the Transportation Commission was authorized to do and what it actually did is immaterial because, as demonstrated below, under the scenario explained in resolution TC-1925, or Defendants' post-hoc scenario conceived for purposes of this litigation, the CBE was authorized to receive $15 million of CDOT's bridge budget only because of the genuinely independent choices of CDOT.

35. For the same reasons demonstrated in ¶¶ 32 and 34, Defendants do not dispute the material facts in PSOF ¶ 35. Defs.' Resp. at 10.

ARGUMENT

I. THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). Defendants misstate the proper standard for summary judgment by conflating a "'complete absence' of disputed facts," Defs.' Resp. at 4 (quoting *Hatfield v. Barnes*, 168 P.2d 552, 553 (Colo. 1946)), with the existence of "no genuine issue as to any material fact." *Hatfield*, 168 P.2d at 553. Defendants rely on selectively quoting *Hatfield* in order to support their "complete absence of disputed facts" standard, but as the quote above demonstrates, even that 67-year-old case hews to the traditional "*genuine* issue as to any *material* fact" standard. *Id*. (emphasis added).

Defendants are correct in pointing out that a material fact is one that will affect the outcome of the case. Defs.' Resp. at 5 (citing *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984)). But Defendants never explain how any of the purportedly disputed facts identified in their Response would affect the outcome of this case.

Defendants raise a few objections to Plaintiff's Statement of Undisputed Facts, but none of their objections demonstrate a genuine dispute about a material fact. The majority of Plaintiff's Statement of Undisputed Facts is uncontested by Defendants. Indeed, most of the "disputes" Defendants try to create either depend on incomplete or inaccurate references to the depositions,[5] Defs.' Resp. at 6–8, concern facts that are not material, *id*. at 10, or are actually legal disputes, *id*. at 9–10.

[5] Defendants' suggestion that they "need not try a case on an opposing party's affidavits, given its inability to cross-examine affiants," Defs.' Resp. at 5, is peculiar, given the fact that

Defendants do not dispute that the bridge safety surcharge is a mandatory charge, assessed against TABOR Foundation members without regard to any benefits actually conferred. Nor do Defendants raise any material dispute as to 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.

Defendants have also not disputed the conclusions contained in the expert report provided by Paul W. Wingard, PE, CGC. Defendants' contention that the State's infrastructure has no value other than that reflected in CDOT's accounting records defies credulity and is contradicted by the undisputed testimony of Mr. Wingard. Mr. Wingard testified that he had "39 years of experience . . . putting values to the infrastructure; estimating the cost to build it, the value it has to a government agency." Deposition of Paul Wingard at 59:12–14, 60:1–7.[6] He also testified that transportation infrastructure has been sold on several occasions. *Id*. at 131–32. CDOT's use of depreciated value may have been appropriate for accounting purposes; however, as Mr. Wingard explained, depreciated value is not an appropriate estimate of fair market value:

> I would say that [depreciated value] would apply to the ownership in each side of that transaction, but not necessarily to the transaction, itself. If it's truly going to be an arms-length transfer of that asset—that property, it should be done based on real value, not based on something in accounting or a book value.
>
> And I'm sure when the State of Colorado buys a car for government employees to drive around in, and they depreciate that car over five years; at the end of the fifth year, they don't just give the car to the first person they see on the street. They say, Oh, do you want to buy it? Here's the value of it.

Defendants had Plaintiff's affidavits in hand when they deposed Plaintiff's affiants. If any party in this matter should be permitted the opportunity to cross-examine affiants, it is Plaintiff; however, Defendants' affidavits do not raise genuine issues of material fact, as demonstrated herein.

[6] Relevant portions attached hereto as Exhibit 4.

Id. at 204:6–17. Defendants declined to designate an expert pursuant to C.R.C.P. 26(a)(2)(C)(III) to rebut these conclusions and those contained in the expert report. Defendants cannot now be heard to complain about a genuine dispute about these expert conclusions, because Defendants present no evidence to support the existence of this purported dispute.[7] C.R.C.P. 56(e). Accordingly, there is no dispute here about the value of property. *Cf.* Defs.' Resp. at 5 (citing *Cucharas Sanitation & Water Dist. v. Mounsey*, 805 P.2d 1177, 1180 (Colo. Ct. App. 1990)).

Ultimately, Defendants concede that the claims in this case turn on two predominantly legal questions: (1) whether the bridge safety surcharge is a tax; and (2) whether CDOT's decision to grant the CBE a portion of its budget and to transfer 56 CDOT bridges to the CBE constitute "grants" for TABOR purposes. Defs.' Resp. at 3 ("Plaintiff's complaint presents, first, the legal issue of whether the Bridge Safety Surcharge is a fee or a tax."); *id*. at 23 ("'Grant' is a key term used in the definition of 'enterprise' . . . ."). These legal questions are appropriately decided on summary judgment. *See Figuli v. State Farm Mut. Fire & Cas*., 2012 WL 1036064, *2 (Colo. Ct. App. 2012) ("Because [this case] presents a legal question, summary judgment may be appropriate to resolve such a question.") (citing *Tynan's Nissan, Inc. v. Am. Hardware Mut. Ins. Co.*, 917 P.2d 321, 323 (Colo. Ct. App. 1995)).

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[7] The affidavits filed by Defendants concerning the State's accounting practices are inapposite. Defendants contend that state law requires them to use depreciated value for "annual financial reports" and "for purposes of financial reporting." Affidavit of David J. McDermott ¶¶ 14, 17. But Defendants never dispute Mr. Wingard's conclusion that:

> The transfer is a different animal. It's not tracking it, from year to year, through an accounting system. Now that has to—it's actually changing hands. It's going from Party A to Party B. So to be a true arms-length transaction, it needs to be—in my opinion—whatever the fair market value is at the time that the transaction occurred.

Wingard Depo. at 203:3–9.

II. DEFENDANTS MISCHARACTERIZE THE CLAIMS AND THEREFORE MISSTATE THE STANDARD OF REVIEW.

Any duly enacted law is entitled to a presumption of constitutionality and must be proven unconstitutional beyond a reasonable doubt. *Mesa County Bd. of County Comm'rs v. State*, 203 P.3d 519, 527 (Colo. 2009). But Defendants err when they suggest that this presumption has any relevance in this case. Defs.' Resp. at 11. Plaintiff has never alleged that C.R.S. § 43-4-801, *et seq*., the statute creating the CBE, is unconstitutional. Rather, Plaintiff has alleged, and proven, that Defendants' taxation and debt creation violates the voter approval provisions of TABOR, Colo. Const. art X, § 20. *See* Complaint at 11. Nothing in C.R.S. § 43-4-801, *et seq*., prevents Defendants from complying with TABOR; if Defendants had asked for voter approval prior to levying the bridge safety surcharge or issuing revenue bonds, the Complaint in this matter would never have been filed. But Defendants chose not to follow the requirements of TABOR.[8]

Defendants err further when they suggest that "a claim brought under Article X, section 20 of the Colorado Constitution ("TABOR") is no different" from any other constitutional claim. TABOR itself specifies that "[i]ts preferred interpretation shall reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). The Colorado Supreme Court has described the courts' duty in TABOR cases as guided by this standard of review: "[W]here multiple interpretations of [TABOR] are equally supported by the text . . . a court should choose

[8] C.R.S. § 43-4-805(2)(c) legislatively declares "the bridge safety surcharge . . . is not a tax but is instead a fee . . . ." However, Plaintiff does not challenge this provision as unconstitutional. Plaintiff has simply demonstrated that this provision is not consistent with the law and facts. Accordingly, this Court need not give deference to C.R.S. § 43-4-805(2)(c)'s clearly erroneous conclusion and Defendants may not rely on it as cover for their unconstitutional taxation and debt creation. *See City and County of Denver v. State*, 788 P.2d 764, 768 n.6 (Colo. 1990) ("While the statutory declaration is relevant, it is not binding."); *see also Aberdeen Investors, Inc. v. Adams County Bd. of County Com'rs*, 240 P.3d 398, 400 (Colo. Ct. App. 2009) ("A reviewing court must give appropriate deference to the [State Board of Assessment Appeals] interpretation of property tax statutes unless those interpretations are clearly erroneous.").

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). Plaintiff has demonstrated that the only reasonable interpretation of TABOR and the case law applying it renders Defendants' actions unconstitutional.

III. THE CBE IS NOT A TABOR ENTERPRISE BECAUSE IT HAS THE POWER TO TAX AND DOES NOT PROVIDE A SERVICE IN EXCHANGE FOR PAYMENT.

Defendants acknowledge that the CBE cannot qualify as a TABOR enterprise if the bridge safety surcharge is a tax. Defs.' Resp. at 12 ("Because the Bridge Safety Surcharge is a fee, CBE qualifies as an 'enterprise.'"). But Defendants conspicuously fail to address the two cases most directly on point in the TABOR enterprise analysis: *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008) and *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995). Defendants mention these cases in passing, Defs.' Resp. at 19, 21, but rely instead on a number of pre-TABOR cases, most significantly *Bloom v. Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). Defs.' Resp. at 17–19. Defendants never grapple with the significant impact *Barber* and *Nicholl* had on the principles laid out in *Bloom* and the other pre-TABOR cases.

Moreover, the cases upon which Defendants rely are easily distinguishable, because in all these cases a fee was levied on property actually deriving a benefit from the services funded. *Id*. No such actual benefits accrue to vehicles that have never come within miles of a CBE bridge.

Defendants also fail to grasp that a critical flaw with the CBE's enterprise status is that it collects its revenue "with no direct relation to services provided, [which] is inconsistent with the characteristics of a business as the term is commonly used." *Nicholl*, 896 P.2d at 869; *cf.* Defs.' Resp. at 20–21. The functions the CBE carries out are immaterial; the CBE is not a TABOR enterprise because it generates its revenue like a government.

Finally, Defendants contest whether TABOR-exempt fees should be voluntary, Defs.' Resp. at 14, but this point is not critical to this Court's decision because, voluntary or not, the bridge safety surcharge is collected against property that does not use CBE bridges and without regard to any benefits actually conferred in proportion to the charge. It is therefore a tax.

A. Defendants Ignored *Nicholl* And *Barber*, And Thus Their Arguments Concerning The Definition Of A TABOR-Exempt Fee Are Fundamentally Flawed.

Defendants contend that any charge that is used for a particular purpose and conveys a hypothetical benefit on fee payers is a TABOR-exempt fee. Defs.' Resp. at 12, 15, 19–20.[9] Defendants' simplistic definition of fees, derived from *Bloom*, is at odds with the Supreme Court's later analysis of TABOR in *Nicholl* and *Barber*—and fails to fully consider *Bloom* itself. Defendants also ignore the factual situation underlying each and every case upon which they rely.

Defendants do not quarrel with Plaintiff 's claim that the bridge safety surcharge "is collected 'without regard to payers' utilization of CBE bridges' and that 'no consideration is given to any services or benefits actually provided.'" Defs.' Resp. at 15 (quoting Mem. in Supp. of Pl.'s M. for Summ. J. at 13, 14.). Defendants respond that this aspect of the surcharge is simply irrelevant since it is metaphysically possible that a vehicle registered in Colorado might travel over a CBE bridge (or a bridge that might one day become a CBE bridge, Defs.' Resp. at 9), even though that vehicle has never done so and the owner has no intention of doing so. Defs.' Resp. at 16, 18. In other words, if a charge conveys a hypothetical potential benefit to the property charged, it is a fee.

[9] Defendants make the same argument repeatedly about how the bridge safety surcharge is used and who benefits. Defs.' Resp. Part III.A.1, III.B.1–3. Plaintiff will address this argument once.

Under Defendants' test, any time a charge is legislatively dedicated to a particular purpose and the payer might somehow conceivably benefit, the charge would become a TABOR-exempt fee. This would transform school property taxes into school fees (C.R.S. § 39-10-107(1)(a)), cigarette and tobacco taxes into old age pension fees (C.R.S. § 39-28.5-108(1), § 39-28-110(1)), gasoline taxes into highway and aviation fees (C.R.S. § 39-27-112(2)(b)), and so on. The Colorado Supreme Court has avoided this absurd result by making clear in *Nicholl* and *Barber* that a fee may only be collected against persons or property actually benefiting from the services financed by the charge. Defendants ignored *Nicholl* and *Barber*, and thus their arguments concerning the definition of a TABOR-exempt fee are fundamentally flawed.

In *Nicholl*, the Court explained that a TABOR enterprise may charge a fee by "collecting tolls directly from E–470 highway users." 896 P.2d at 868. ("By providing access to a public roadway in exchange for the payment of tolls and user fees, the Authority is engaging in an activity conducted in the pursuit of benefit, gain or livelihood . . . ."). But a TABOR enterprise may not collect revenue statewide, "with no direct relation to services provided . . . ." *Id*. at 869. Thus, a fee must be collected on the basis of actual use of the project being funded by the person or property being charged.

The Court's decision in *Barber* further clarifies that a fee must be assessed as part of a quid pro quo exchange: "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.'" 196 P.3d at 249 (emphasis added); *Id*. at 250 ("In the present case, the primary purpose of the enactments that created the special cash funds was solely to defray the cost of services provided to those assessed.").

Defendants ignored these cases and failed to address the fact that the bridge safety surcharge is assessed against numerous vehicles that never cross a CBE bridge—as demonstrated here by Plaintiff 's members—or are less likely to do so since they are operated in one of the 27 counties where the CBE does not operate. In order to qualify as a TABOR-exempt fee, the bridge safety surcharge cannot be assessed "with no direct relation to services provided . . . ." *Nicholl*, 896 P.2d at 869. The cases upon which Defendants rely are consistent with this conclusion that hypothetical benefits cannot justify the imposition of a fee.

Defendants cite *Loup-Miller Const. Co. v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984), as approving a fee for "'potential increased use' of the sewer system." Defs.' Resp. at 15 (quoting *Loup-Miller Const.*, 676 P.2d at 1173). But Defendants' stop their quotation short and drop the context. The fee in *Loup-Miller Const.* was charged only to new customers, who had requested that their properties be physically connected to Denver's sewer system, in order to defray the cost of accommodating those customers' use of the sewer system:

> Ordinance 583 established a "facilities development fee," a one-time sewer charge to be paid by new customers when they were connected to the city's sanitary sewer system. According to testimony at trial, this fee was to defray the cost of expanding the system's treatment capacity for potential increased use *by new customers*.

Id. (emphasis added). The "central question" in that case had nothing to do with the possibility of use, as Defendants suggest, but rather the certainty that a dwelling connected to a sewer system would use that sewer system in the normal course of human events. *Id*. at 1174–75 ("Since new connections are more directly related to the need for increased capacity than old connections, there is a rational basis for the distinction made by the ordinance."). Likewise, the minimum service fees charged to existing customers were for the actual provision of sewer services to those charged. *Id*. at 1175. Defendants gain nothing from *Loup-Miller Const.* when

its conclusions are placed in context because the case involved a fee that conveyed actual benefits to the properties connected to Denver's sewer system.

Defendants' reliance on *Westrac, Inc. v. Walker Field, Colo., Public Airport Authority*, 812 P.2d 714, 716 (Colo. Ct. App. 1991) is similarly unavailing. Defs.' Resp. at 17. In concluding that the amount of a user fee was not arbitrary, the Court of Appeals approved the use of the fee to maintain the entire airport facility, not just "specific portions of the facility utilized by plaintiff." *Id*. at 718. Likewise, Defendants suggest, anyone who registers a car in Colorado benefits from the bridge system that the CBE funds with the bridge safety surcharge, even if they do not use any CBE bridges. Defs.' Resp. at 17. Leaving aside that Defendants seem to equate the entire road network of Colorado with a small regional airport, the Court of Appeals did not approve the imposition of the fee on this basis, only its amount. The court approved the fee because it was "a user fee only on that portion of gross revenues directly related to [the payer's] use of the facility." *Id*. at 718. Indeed, the court required a facial and actual connection between the fee paid and benefits that accrued to the fee payer:

> We conclude that the charge is not a tax. It is a permitted fee used to defray overall expenses of operating the airport and imposed only upon that portion of plaintiff's revenues which are generated by passengers who arrive at the facility. *Therefore, the charge is directly related to plaintiff's use and the benefit thus afforded*.

Id. at 717 (emphasis added). *Westrac* in no way "preempted" the claim that a fee payer must actually benefit from the fees paid. Defs.' Resp. at 17. Indeed, *Westrac* explicitly requires such a connection.

Defendants fare no better under *Anema v. Transit Const. Authority*, 788 P.2d 1261, 1267 (Colo. 1990), when they suggest that the Court's holding in that case depended upon a hypothetical "future benefit." Defs.' Resp. at 17. The Court's holding was precisely the

opposite: "*At the time of the assessments* challenged here, the service performed was the determination of the feasibility, contours, and cost of rapid rail transit." *Anema*, 788 P.2d at 1267 (emphasis added). The planning study itself was a direct, immediate benefit to the fee payers, who were the owners of "commercial property within the service area" and "employers within the service area." *Id*. at 1262–63. Indeed, the only benefit the fee payers could possibly receive from the entity collecting the charge was the plan itself, since the entity lacked the authority to actually build the system envisioned. *Id*. at 1263. Like *Westrac* and *Loup-Miller Const.*, *Anema* requires a facial and actual connection between the fees paid and a benefit that accrues to the property assessed the charge.

Defendants place significant weight on *Bloom v. Fort Collins*, 784 P.2d 304 (Colo. 1989), claiming that the Colorado Supreme Court "addressed this very issue."[10] Defs.' Resp. at 17–18. While *Bloom* did involve road maintenance, and so is superficially similar, Defendants make at least two significant errors in trying to apply that case here. First, Defendants misstate the definition of a special assessment and misconstrue the Court's conclusions with respect to that section of the opinion.[11] Defendants state "[b]ecause there was no direct connection between the amount of payment made and the individualized benefit, the Court found that this charge was a 'fee' rather than a special assessment." Defs.' Resp. at 18. This is misleading; a special assessment requires *more* than a direct connection, it requires mathematical exactitude:

[10] Given that TABOR was enacted in 1992, three years after *Bloom* was decided, presumably Defendants do not mean the "very issue" at the heart of Plaintiff's claims.

[11] Nothing in *Bloom* suggests that the plaintiffs there "alleged that the transportation utility fee qualified as a 'special assessment.'" Defs.' Resp. at 17. The *Bloom* plaintiffs alleged—and the district court held—that the fee was a property tax, in violation of the uniformity requirements of Colo. Const. art. X, § 3. *Bloom*, 784 P.2d at 306. Nor does Plaintiff allege that the bridge safety surcharge is a special assessment. It is unclear why Defendants think this portion of *Bloom* is applicable here; nevertheless, Plaintiff will address the significant errors in Defendants' irrelevant argument.

> A special assessment is "based on the premise that the property assessed is enhanced in value at least to the amount of the levy." . . . A special assessment for a local improvement, therefore, must specifically benefit or enhance the value of the premises assessed "in an amount at least equal to the burden imposed."

Bloom, 784 P.2d at 308 (quoting *Reams v. City of Grand Junction,* 676 P.2d 1189, 1194 (Colo. 1984)). The Court therefore concluded:

> Since the ordinance does not require that the revenues generated by the fee be applied to enhance the value of the properties assessed "in an amount at least equal to the burden imposed," it is obvious that the transportation utility fee ordinance does not constitute a special assessment.

Id. at 310 (quoting *Reams*, 676 P.2d at 1194). Defendants' supposition that "*Bloom* thus validated a fee to provide for a 'network' of transportation infrastructure 'without regard to' whether the resulting expenditures benefited any particular property owned by a fee-payer" is therefore incorrect.

Indeed, *Bloom*, like the other cases discussed above, actually observed that "developed lots subject to the fee receive the benefit of a program of city maintenance." *Id*. This is Defendants' second error regarding *Bloom*. The fee assessed in *Bloom* was levied only on developed properties actually fronting the roads that were to be repaired by the revenue collected:

> The transportation utility fee [is] imposed upon owners or occupants of developed property fronting city streets and the revenues generated thereby are used for the purpose of defraying the expenses connected with the operation and maintenance of city streets. The owners and occupants of developed lots subject to the fee receive the benefit of a program of city maintenance calculated to provide effective access to and from residences, buildings, and other areas within the city.

Id. Moreover, the fee in *Bloom* was based on actual usage, because it "varies with the amount of the lot's street frontage and the 'traffic generation factor' (or estimated street usage) applicable to the lot."[12] *Id*. at 309.

There simply is no support for Defendants' claim that a fee may be assessed without regard to actual benefits received. Defendants have pointed to no case that genuinely supports that premise, and Plaintiff has been unable to find such a case. Accordingly, this Court must reject Defendants' central argument: That the bridge safety surcharge can still qualify as a fee if it conveys only hypothetical benefits to the property charged. The surcharge is therefore a tax, and not a fee. Accordingly, the CBE's authority to tax means it is not a business enterprise exempt from TABOR and the bridge safety surcharge is a tax that must be approved in advance by a vote of the people.

B. The CBE Does Not Comport With The Colorado Supreme Court's Definition Of A Business Enterprise.

Defendants accuse Plaintiff of "extrapolat[ing] that a government-owned business must 'raise... revenue from consensual market exchanges.'" Defs.' Resp. at 20–22 (omission in original) (quoting Mem. in Supp. of Pl's. M. for Summ. J. at 13). But Defendants' quarrel is with the Colorado Supreme Court and Attorney General's Opinion 95-07.

The Court made clear in *Nicholl* that an enterprise must function as a business "given the ordinary meaning and understanding" of that term.[13] 896 P.2d at 868. In *Nicholl*, the court

[12] A quid pro quo requirement is also present in the cases upon which *Bloom* relied. 784 P.2d at 308–09 (citing *Loup–Miller Const.*, 676 P.2d at 1170; *Zelinger v. City and County of Denver*, 724 P.2d 1356, 1359 (Colo. 1986); *Western Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 155 (Colo. 1961)).

[13] There is no dispute that the CBE is government-owned. *See Nicholl*, 896 P.2d at 867–68 ("In determining whether the Authority is an 'enterprise,' then, we must determine whether the

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.* But TABOR enterprises may not possess the "power to unilaterally impose taxes, with no direct relation to services provided, [because this] is inconsistent with the characteristics of a business as the term is commonly used." *Id*. at 869. The central question is whether the TABOR enterprise functions as a business, or instead has authority atypical of an ordinary business:

> 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 and, in these respects, fits the definition of a "business." However, while the Authority is "business-like" in these respects, it has authority to finance its operations in a manner not typical of a "business" as the term is commonly used.

Id. at 868.

No ordinary business has the authority to finance its operations by collecting revenue from every person who "has the inherent capacity to use one or more of" its services. Defs.' Resp. at 18. It would be akin to the University of Colorado charging tuition to every high school senior in the State, because they might attend CU. Such a scheme would obviously eviscerate CU's enterprise status,[14] just as Defendants' collection of the bridge safety surcharge eviscerates the CBE's enterprise status here, because the charge would be levied "with no direct relation to services provided, [which] is inconsistent with the characteristics of a business as the term is commonly used."[15] *Nicholl*, 896 P.2d at 869.

Authority is both 'government-owned' and a 'business,' given the ordinary meaning and understanding of these terms.").

[14] *See* C.R.S. § 23-5-101.7 ("Enterprise status of institutions of higher education").

[15] Although it is true that a TABOR enterprise need not "mimic a company's private sector activity," Defs.' Resp. at 21, *Nicholl* makes clear that those activities may not be funded through "unilaterally impose[d] taxes." 896 P.2d at 869. Defendants' argument that a TABOR enterprise may engage in bridge building responds to a straw man of Defendants' own creation.

In addition to apparently disagreeing with *Nicholl*, Defendants also take issue with Plaintiff's citation to Attorney General's Opinion 95-07, which simply applied *Nicholl* to ensure that CU's creation of auxiliary enterprises that carried out University functions were not "merely a subterfuge designed to circumvent the . . . provisions of TABOR." Op. Att'y Gen. No. 95-07, Dec. 22, 1995. An Attorney General's Opinion "is obviously entitled to respectful consideration as a contemporaneous interpretation of the law by a governmental official charged with the responsibility of such interpretation." *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) ("A court's resolution of an issue of statutory construction, however, must proceed from an independent analysis of the statutory scheme . . . .").[16]

Defendants make the baseless assertion that "courts have resisted using the Attorney General's thought process." Defs.' Resp. at 22. Until now, no court since *Nicholl* has been confronted with the question of whether an enterprise that does not function as a business can nevertheless be a "government-owned business" exempt from TABOR. Defendants' error is illustrated by the fact that they cite no case that has "resisted using the Attorney General's thought process." Instead, they point to one of the only TABOR cases on which they rely, *Bruce v. City of Colorado Springs*, 131 P.3d 1187 (Colo. Ct. App. 2005), for the proposition that *Bloom* is still good law. Given that *Bruce* did not involve the enterprise status of any entity and it is distinguishable from this case on the same basis as *Bloom*, Defendants gain nothing from this

[16] Defendants appear to concede that Opinion 95-07—and by implication *Nicholl*—is damaging for them, as they do not respond to the substance of either authority. *See* Defs.' Resp. 20–22. Indeed, both authorities demand summary judgment be entered against Defendants, since the bridge safety surcharge is a tax and the CBE does not function as a business.

citation to *Bruce*.[17]

C. TABOR-Exempt Fees Should Be Voluntary, But This Court Need Not Decide That Question.

Defendants contest whether TABOR-exempt fees should be voluntary, Defs.' Resp. at 14. The question of whether TABOR-exempt fees must be voluntary is not central to this Court's inquiry, and the Court need not answer this question in order to grant Plaintiff's Motion for Summary Judgment. Indeed, Plaintiff cited the United States Supreme Court's fee definition in order to provide this Court with the full legal context, not in support of any particular argument. *See* Mem. in Supp. of Pl.'s M. for Summ. J. at 12–13 (citing *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340–41 (1974); *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350 (1974)). Even if the Colorado Constitution allows involuntary charges to be collected without voter approval, the bridge safety surcharge is nonetheless not a TABOR-exempt fee, for the reasons demonstrated herein and in Plaintiff's Memorandum in Support of its Motion for Summary Judgment.

Nevertheless, Plaintiff believes that the purpose of TABOR is best served by requiring fees to be voluntary, especially when the purported fee is enacted by an unelected statewide body such as Defendant Transportation Commission.

TABOR "was designed to protect citizens from unwarranted tax increases":

> The Attorney General points out that "the principal purpose of TABOR, as judged by the express language approved by the voters, is to require that the voters decide for themselves the necessity for the imposition of new tax burdens, rather than delegating that decision to State and local legislatures as in the past." As presented to the electorate, it was designed to protect citizens from unwarranted tax increases.

[17] *Bruce*, 131 P.3d at 1190, is distinguishable from the present case on the same basis as *Bloom* because the properties charged the fee in *Bruce* were located in the City of Colorado Springs and were thereby directly benefited by the presence of street lights in that City. *Id*. at 1190.

> Thus, to protect taxpayers, [TABOR] requires voter approval for certain state and local government tax increases and restricts property, income, and other taxes.

Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 4 (Colo. 1993). The Court has repeatedly recognized that TABOR's primary goal was to empower taxpayers to consent to taxation. *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 891 (Colo. 2011) ("[TABOR] did not change the types or kinds of taxing statutes allowable under our constitution. Rather, it altered who ultimately must approve imposition of new taxes, tax rate increases, and tax policy changes . . . ."). Accordingly, the purposes of TABOR are best served by requiring fees to be voluntary.

The only decision that authorizes an involuntary TABOR-exempt fee is the Court of Appeals' decision in *Bruce*, 131 P.3d at 1190; however, that case, like *Bloom*, 784 P.2d at 310–11, involved a municipal fee, levied against property owners. Therefore, while the voter control provisions of TABOR were held not to apply in *Bruce*, the fee payers had recourse to the ballot box.[18] Here, the bridge safety surcharge is imposed by Defendant Transportation Commission, an unelected, unaccountable board. Accordingly, the voter control purposes of TABOR are completely stymied by Defendants' failure to comply with TABOR while imposing a mandatory fee on Colorado vehicles.

Regardless, even if the Colorado Constitution allows involuntary charges to be collected without voter approval, the bridge safety surcharge is nonetheless not a TABOR-exempt fee, for the reasons demonstrated above and in Plaintiff's Memorandum in Support of its Motion for Summary Judgment.

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[18] Indeed, the City Council ended the streetlight fee days after the litigation surrounding it ended. *See* City of Colorado Springs Streetlights FAQ, *available at https://www.springsgov.com/units/communications/Streetlights_FAQ_Final.pdf*

IV. MONEY IN CDOT'S BRIDGE BUDGET AND STATE-OWNED BRIDGES CAN BE "GRANTS" FOR TABOR PURPOSES.

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). The purpose of this limitation is "to distinguish a purported enterprise from a governmental unit." *Nicholl*, 896 P.2d at 869. Grants from CDOT to the CBE in fiscal year 2011 came in two primary forms, which totaled at least $20.7 million: (1) $14.4 million transferred from CDOT's bridge budget to the CBE; 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 or $6.6 million allowed under TABOR by approximately $14 million (the difference of $20.7 million minus $6.5 or $6.6 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).

Defendants argue that the ten percent limit is not implicated here because federal funds and non-cash contributions can never be "grants" pursuant to TABOR. Defs.' Resp. at 22–25 (citing C.R.S. § 24-77-102). Defendants also protest that state law prevents them from assessing the fair market value of State-owned assets for purposes of sale or transfer. Defs.' Resp. at 25–27. Each of these objections is meritless. First, the $14.4 million transferred from CDOT's bridge budget to the CBE were not federal funds because CDOT initiated and controlled the transfer. Second, the CBE conceded at the time it accepted the 56 bridges that at least two of the bridges "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.

Third, nothing in state law prevents Defendants from determining the fair market value of state assets they control; rather, state law actually requires CDOT to conduct such a valuation in the case of a sale or transfer. *See* C.R.S. § 43-1-210(5)(a)(II). Indeed, accepting Defendants' arguments concerning the bridge grants would render TABOR's ten percent limit a nullity.

A. CDOT Chose To Allocate A Portion Of Its Bridge Budget To The CBE.

Defendants rely on C.R.S. § 24-77-102[19] for the proposition that the $14.4 million received by the CBE in fiscal year 2011 was not a "grant" for purposes of TABOR's ten percent limit. Defs.' Resp. at 23. C.R.S. § 24-77-102(7)(b)(III) provides: "'Grant' does not include: . . . Any federal funds, regardless of whether such federal funds pass through the state or any local government in Colorado prior to receipt by an enterprise." Defendants place great emphasis on the alleged fact that the $14.4 million transferred to the CBE did not pass through CDOT's account at the state Treasurer's office. Defs.' Resp. at 23–24 (citing Affidavit of Benson Stein ¶¶ 11–13). This explanation is at odds with Defendant Transportation Commission's resolution TC-1925 authorizing itself to "allocate[e] and transfer[] from CDOT to the Colorado Bridge Enterprise fifteen million dollars ($15,000,000) of eligible federal funds." PSOF ¶ 34. In any event, the apparent discrepancy between what the Transportation Commission was authorized to do and what it actually did is immaterial. Under the scenario explained in resolution TC-1925, or the post-hoc scenario conceived in the Benson Affidavit for purposes of this litigation, the $14.4 million was not a federal grant to the CBE because any money that flows from the Federal Highway Administration ("FHWA") to the CBE does so only because of the genuinely independent choices of CDOT. Accordingly, C.R.S. § 24-77-102(7)(b)(III) is inapplicable here.

[19] In addition to the reasons demonstrated herein for rejecting Defendants' reliance on C.R.S. § 24-77-102, the statute itself counsels that the provisions contained in subsection -102 only apply "[a]s used in this article, unless the context otherwise requires: . . . ."

Plaintiff previously demonstrated in detail the conclusions of the Colorado Attorney General, the United States Supreme Court, and the Colorado Supreme Court that the entity that controls money determines its character. *See* Mem. in Supp. of Pl.'s M. for Summ. J. at 17–20; Op. Att'y Gen. No. 05-03, Jul. 29, 2005 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1083 (Colo. 1982); *In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 878 (Colo. 1991)). Defendants did not attempt to distinguish these authorities or respond to this argument.

Indeed, Defendants' Benson Affidavit only helps to bolster the applicability of these authorities. *See* Op. Att'y Gen. No. 05-03 at 5 ("Under the *Zelman* and *Americans United* analysis outlined above, it is not necessary that the financial assistance become the property of the student . . . indeed, this is not the situation in any of the cases cited above."). In the same way that a school board provides a voucher to a parent, who then directs the school board to give money to the school of her choice, FHWA provides bridge funding to CDOT, which then directed FHWA to give money to the CBE. *See Taxpayers for Public Education v. Douglas County School District*, 2013 WL 791140, *20 (Colo. Ct. App. 2013). In both cases, the entity with authority over the money—i.e., the entity that actually decides who receives the grant—never physically obtains the money. In other words, the grantor—the parent or CDOT—simply directs where the money should go and thus defines the character of the grant. CBE only received the $14.4 million because CDOT chose to allow it to receive it. PSOF ¶ 34. In the same way, a private school only receives money from a school board because a parent chooses to

allow it to receive it. Accordingly, the $14.4 million was not a federal grant and C.R.S. § 24-77-102(7)(b)(III) is inapplicable here.[20]

B. The CBE Has Conceded That The Bridges It Received From CDOT Were A Grant.

Defendants also rely on C.R.S. § 24-77-102 for the proposition that the 56 CDOT bridges transferred to the CBE in fiscal year 2011 were not a "grant" for purposes of TABOR's ten percent limit because they are not cash or money. Defs.' Resp. at 24. C.R.S. § 24-77-102(7)(a) provides: "'Grant' means any direct cash subsidy or other direct contribution of money from the state or any local government in Colorado which is not required to be repaid."

Defendants ignore that the CBE conceded at the time it accepted the 56 CDOT bridges that at least two of the bridges "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. This was a sound conclusion, because excluding transfers of "capital assets" from TABOR's ten percent limit would render the limit a nullity. The natural result would be a form of money laundering, whereby the State transfers cars, property, buildings, artwork—or bridges—to enterprises, which in turn either sell those assets to finance their operations or—as the CBE did here—pledge the assets as collateral to obtain debt financing. *See* Official Statement, Colorado Bridge Enterprise Revenue Bonds, Senior Taxable Build America Series 2010A at 4, 15 (Ex. 12 to Pl.'s M. for Summ. J at 18, 29) ("[P]roceeds from the sale or other disposition of any Designated Bridge" are a "primary source of payment of principal and

[20] If C.R.S. § 24-77-102(7)(b)(III) were applicable here, that conclusion would call into question the Attorney General's Opinion that the 2004 College Opportunity Fund Act, C.R.S. § 23-18-101 *et seq*., did not impact the enterprise status of state institutions of higher education. *See* Op. Att'y Gen. No. 05-03 at 4. This would in turn raise questions about whether state institutions of higher education lost enterprise status in 2004.

interest on the Series 2010 Bonds."). This is an absurd result and C.R.S. § 24-77-102 should not be interpreted to require it. *See Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) ("A statutory interpretation leading to an illogical or absurd result will not be followed."). Consistent with the CBE's pre-litigation conclusion, the 56 bridges were a grant for TABOR purposes.

C. State Law Requires CDOT To Use Fair Market Value When It Disposes Of Property.

Defendants concede that they did not determine the fair market value of the 56 bridges transferred from CDOT to the CBE. Defs.' Resp. at 25. The reason for this, they contend, is that state law "mandates that such assets be valued using their depreciated values." *Id*. at 26. This is wrong for three reasons.

First, Defendants point to C.R.S. § 24-77-101(2)(e) and (f) as "mandating" use of GASB's depreciation methodology. These provisions "were enacted to facilitate compliance with the state fiscal year spending limit" contained in Colo. Const. art. X, § 20(7). C.R.S. § 24-77-101(2)(a). These provisions have nothing to do with Colo. Const. art. X, § 20(2)(d), the section of TABOR that defines enterprises. Indeed, the legislature has not developed comprehensive legislation explaining its view of TABOR's enterprise exemption and has said nothing about the application of GASB in the enterprise grant context. Defendants' affiant acknowledges that any requirements concerning the application of GASB are limited to "annual financial reports" and "for purposes of financial reporting." Affidavit of David J. McDermott ¶¶ 14, 17.

Second, if state law mandates that CDOT use depreciated value for accounting and financial reporting, no such requirement exists for sales and transfers. Rather, state law requires CDOT to determine "fair market value" before disposing of property:

> Prior to the disposal of any property or interest therein that the department [of transportation] determines has an approximate value of five thousand dollars or more, the department shall obtain an appraisal . . . to determine the fair market value of such property or interest.

C.R.S. § 43-1-210(5)(a)(II). CDOT failed to comply with this requirement before transferring the 56 bridges to the CBE, despite the fact that even the depreciated values of almost all the structures exceeded $5,000. *See* 77 Bridges with Historic Value (Ex. 8 to Pl.'s M. for Summ. J at 12–14).

Additionally, even if state law did not dictate that CDOT use fair market value here, the purposes of TABOR—and simple common sense—indicate that relying on depreciated value is inappropriate when transferring state assets to a purportedly independent entity. The purpose of TABOR's ten percent limit, "to distinguish a purported enterprise from a governmental unit," would not be served by allowing the State to give away government property to enterprises at a fraction of its true value. *Nicholl*, 896 P.2d at 869. For all these reasons, Defendants were required by state law to value the 56 bridges according to their fair market value at the time of transfer.[21]

[21] Defendants complain that Mr. Wingard arrived at a range of potential fair market values for the bridges he studied. Defs.' Resp. at 27. But the exact price the bridges would be likely to sell for in an arms-length transaction is immaterial to the question here: Are the bridges worth more than ten percent of the CBE's annual revenues? That question is easily answered by looking at the valuation range provided by Mr. Wingard, because his lowest value estimate shows that the two bridges exceeded 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 or $6.6 million)]. *See* Mem. in Supp. of Pl.'s M. for Summ. J. at 20–23. Because even the lowest fair market value estimate exceeds the ten percent limit, the precise value of the bridges is immaterial.

CONCLUSION

For the foregoing reasons and those demonstrated in Plaintiff's Memorandum in Support, summary judgment should be entered for Plaintiff and against Defendants with respect to both of Plaintiff's claims.

DATED this 8th day of April 2013.

Respectfully submitted,

/s/ James M. Manley

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CERTIFICATE OF SERVICE

I certify that on the 8th day of April 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
James M. Manley