

*Bridge Enterprise Board
Regular Meeting Agenda
Thursday, August 15, 2013
4201 East Arkansas Avenue
Denver, Colorado 80222*

*Gary M. Reiff, Chairman
Englewood, District 3*

*Shannon Gifford
Denver, District 1*

*Ed Peterson
Lakewood, District 2*

*Heather Barry
Westminster, District 4*

*Kathy Gilliland
Livermore, District 5*

*Kathy Connell
Steamboat Springs, District 6*

*Douglas E. Aden - Vice Chairman
Grand Junction, District 7*

*Sydney Zink
Durango, District 8*

*Leslie Gruen
Colorado Springs, District 9*

*William Thiebaut
Pueblo, District 10*

*Steven Hofmeister
Haxtun, District 11*

THE CHAIRMAN MAY ALTER THE ITEM SEQUENCE OR TIMES

The times indicated on the Board agenda for each agenda item are approximate and subject to change. Generally, upon the completion of each agenda item, the Board will immediately move to the next agenda item. However, the order of agenda items is tentative and, when necessary to accommodate the public or the Board's schedules, the order of the agenda items is also subject to change.

Documents are posted at www.dot.state.co.us/commission nine days prior to the meeting. The documents are considered to be in draft form and for information only until final action is taken by the Board.

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|-----------|----|---|--|
| 1:00 p.m. | 1. | Call to Order and Roll Call | |
| 1:02 p.m. | 2. | Audience Participation
Subject Limit: 10 minutes; Time Limit: 3 minutes | |
| 1:12 p.m. | 3. | Act on Consent Agenda
Resolution to Approve Workshop and Regular Meeting
Minutes from July 18 th , 2013 (Herman Stockinger)...Page 159 | |
| 1:15 p.m. | 4. | Discuss and Act on Resolution to Revise Budget
Adjustment Policy (Ben Stein).....Page 166 | |
| 1:20 p.m. | 5. | FASTER lawsuit update
(Kathy Young).....Page 169 | |

- 1:25 p.m. 6. Project Highlight: Pecos over I-70 bridge move
(Tammy Maurer).....Page183
- 1:30 p.m. 7. Monthly Progress Report
(Tim Harris)
- 1:35 p.m. 8. Adjournment

**Bridge Enterprise Board
Regular Meeting Minutes
Thursday, July 18, 2013**

PRESENT WERE: Gary Reiff, Chairman, District 3
Shannon Gifford, District 1
Ed Peterson, District 2
Heather Barry, District 4
Kathleen Gilliland, District 5
Kathy Connell, District 6
Douglas E. Aden, District 7
Leslie Gruen, District 9
Gilbert Ortiz, Sr., District 10
Steven Hofmeister, District 11

EXCUSED: Sidney Zink, District 8

ALSO PRESENT: Don Hunt, Executive Director
Ben Stein, CFO
Heidi Bimmerle, Director of Admin & Human Resources
Debra Perkins-Smith, Director of Division of Transportation
Development
Mike Cheroutes, Director of HPTE
Scott McDaniel, Director, Staff Services
Herman Stockinger, Director of Policy and Government
Relations
Amy Ford, Director, Public Relations
Barb Gold, Director, Division of Audit
Ryan Rice, Director, Operations Division
Tony DeVito, Region 1 Transportation Director
Tom Wrona, Region 2 Transportation Director
Dave Eller, Region 3 Transportation Director
Johnny Olson, Region 4 Transportation Director
Kerrie Neet, Region 5 Transportation Director
Kathy Young, Chief Transportation Counsel
Doug Bennett on behalf of John Cater, FHWA
Vince Rogalski, Statewide Transportation Advisory
Committee (STAC)

AND: Other staff members, organization representatives,
the public

Chairman Reiff convened the meeting at 12:50 p.m. in the CDOT Headquarters building at 4201 E. Arkansas Avenue, Denver, CO.

Audience Participation

The Chair noted that no members of the Audience had signed up to address the Board of Directors.

Act on Consent Agenda

Chairman Reiff stated that the next thing on the Agenda was action on the Consent Agenda. Director Connell moved for approval of the Consent Agenda. The motion was seconded by Director Ortiz. Chairman Reiff asked if there was any discussion of the motion and hearing none he asked for those in favor to signify by stating Aye and asked for those opposed to state no. He stated that the motion had passed unanimously.

Approval of the Regular Meeting Minutes for June 20, 2013

Resolution #BE-137

Approval of Regular Meeting Minutes for June 20, 2013

BE IT RESOLVED THAT, the Minutes for the June 20, 2013 meeting of the Bridge Enterprise Board of Directors are hereby approved by the Bridge Enterprise Board as published in the Agenda for the July 18, 2013 meeting of the Bridge Enterprise Board of Directors.

Resolution #BE-138

BE IT RESOLVED THAT, the 2nd Supplement to the FY 2013 Budget is hereby approved by the Bridge Enterprise Board.

Discuss and Act on Resolution to Approve the 2nd Budget Supplement to the FY'2014 Budget

Chairman Reiff mentioned that the next item of business was discussion and action on the second budget supplement. Ben Stein mentioned that the supplement could be found in the packet and mentioned that if there were any questions, he would be happy to answer them or try to answer them and requested approval of the supplement. Commissioner Aden declared that there was an item that required some discussion and confirmed that it was the request from Region 3 to budget an additional \$10M plus for the Grand Avenue Bridge in Glenwood Springs. He stated that Joe Elsen and Dave Eller were present to address any questions that may be raised. Commissioner Aden said that in a memo from Joe Elsen included in the packet outlining the details of the request, it says the potential cost of the project is up to \$111M which is just a stunning number in terms of discussions about the status of the Bridge Enterprise, its cash flow and the other challenges CDOT is facing – particularly the I70 viaduct and other things around the state. He said that he did support the idea to go ahead with this project as it is a very challenging assignment from a technical standpoint, with the crossing of the river and the railroad and the proximity of the Glenwood Hot Springs. Commissioner Aden confirmed that the bridge will be a vital economic link to the whole Roaring Fork Valley and that the traffic counts on 82 many days are greater than they are on I70 and

this bridge is for all practical purposes the only way in and out of the Roaring Fork Valley for all that commerce. He declared that he felt strongly that the only way to get to a real number on what the bridge will cost is to give them the money to get to a 60% design level and that having said that, he wants to send a very strong message, to Region 3 that that number needs to be a lot less than 111M. He stated that it's another situation where we have to acknowledge right up front, a premium is going to be paid here for an expedited construction process and that it needs to be known that the approval of the action is not a blank check. He stated that those were his comments.

Chairman Reiff thanked Commissioner Aden and asked if there were any other questions or comments on the bridge budget supplement. Commissioner Connell confided that she did agree with Commissioner Aden, but that she was so concerned by the message the action would send and that knowing the special circumstances of the project that it would probably be her last vote on that kind of approach to a problem.

Chairman Reiff asked if there were any further questions or comments. Director Aden stated that he wanted to ask that Ben Stein work with the team on the financing and confirmed that it made no sense to charge \$20M plus of indirects to the project and that he would ask that the team comes back next month with a report on what can be done stating that it is a separate issue from this budget action but, that it would impact the long term cost of how much money is allocated to the project.

Commissioner Aden stated that with all of those Comments he would move for approval of the budget supplement.

Chairman Reiff stated that there was a motion and that prior to taking a motion, he recognized Ben Stein for a response. Ben Stein stated that without disagreeing with Director Aden, he wanted to point out that it is construction engineering and indirects not just indirects. He confirmed that the bridge would require significant construction engineering and that the cost of the bridge does and should bear. He stated that he didn't disagree that there is an issue on indirects.

Chairman Reiff declared that with the understanding that obviously this was an incredibly difficult project arterial and that there was obviously a lot of work left to be done, there was a motion to adopt and asked if there was a second. The move was seconded by Director Peterson and Chairman Reiff asked if there was any further discussion. He stated that hearing no further discussion all those in favor please signify by saying Aye and that the opposed state no. Chairman Reiff stated that there was a no vote by Director Hoffmeister and Asked if there were any further abstentions. Chairman Reiff stated that the motion had passed on a 9 to 1 vote, and with one absent.

Resolution #BE-138

BE IT RESOLVED THAT, the 2nd Supplement to the FY 2014 Budget is

hereby approved by the Bridge Enterprise Board.

Monthly Progress Report

Scott McDaniel presented the update on behalf of Tim Harris as follows:

Program Schedule

- Program schedule updated for work complete through June 2013
- June Schedule Performance Index (SPI) = 0.92
 - Reflects a 0.01 INCREASE from previous month
 - May SPI = 0.91
- Over-performing projects
 - 9 projects with \$12.7M in combined Earned Value (EV) greater than planned
 - Increases overall program SPI by 0.04
- Under-performing projects
 - Non-Railroad projects
 - 3 worst projects with \$14.8M in combined lost Earned Value
 - Reduces program SPI calculation by 0.05
 - Railroad projects
 - 11 Railroad projects with \$8.5M in combined lost Earned Value
 - Reduces overall program SPI calculation by 0.03

Major Achievements (June workshop – July workshop)

- Bond Program increased from 88 to 91 structures
 - Added 3 bridges Region 2, Ilex Bridge, D/B project
 - K-18-AX: I25 ML Northbound over US 50 Business Route (Pueblo, CO)
 - K-18-R: US 50 Business Route Eastbound over Arkansas River (Pueblo, CO)
 - L-18-AU: Mesa Ave over I25 ML (Pueblo, CO)
 - Program Reporting
 - Completed April 30th, 2013 Bond Allocation Plan Update
 - Completed Q3 FY2013 Quarterly Report
 - Issued Q1 FY2014 Maintenance Invoice
- Program submitted award application
 - 2013 International Road Federation
 - Excellence in Project Finance & Economics
- Design/Build Procurements
 - Region 1: US6 Design/Build Project
 - Initiated Contractor Design phase
 - Region 2: Ilex Design/Build (Pueblo) RFQ due 6/18/13
 - Total of 8 bridges to be addressed
 - 2 bridge replacements
 - 6 bridges to be rehabilitated

- Three Bridges went to AD
 - Region 1
 - E-17-DC: I 76 ML Eastbound over UPRR (Commerce City, CO)
 - E-17-DU: I 76 ML Westbound over UPRR (Commerce City, CO)
 - F-17-DM: SH 88 ML over Cherry Creek (Arapahoe County, CO)

- Six Bridges went to Construction
 - Region 1
 - E-17-EX: Peoria Street over I 76 ML (Commerce City, CO)
 - F-16-EJ: US 6 ML over BNSF Railroad (Denver, CO)
 - F-16-EF: US 6 ML over South Platte River (Denver, CO)
 - F-16-EN: US 6 ML over Bryant Street (Denver, CO)
 - F-17-F: US 40 ML Eastbound over Sand Creek (Aurora, CO)
 - F-17-BS: US 40 ML Westbound over Sand Creek (Aurora, CO)

- CM/GC
 - Region 1: Pecos over I-70
 - Move to take place July 19th to July 21st (50-hour closure)

- Completed Four Bridges
 - Region 1
 - F-16-DP: I-25 ML over Roadway, RR and South Platte River; Bronco Bridge (Denver, CO)
 - F-16-FL: US 6 ML over SH 95 ML (Denver, CO)
 - Region 2
 - O-19-J: US 350 ML over Draw (Model, CO)
 - P-19-AD: SH 239 ML over Irrigation Canal (Trinidad, CO)

Adjournment

Chairman Reiff asked if there were any more matters to come before the Bridge Enterprise Board and hearing none, he announced the adjournment of the meeting at 1:10 p.m.

Herman Stockinger, Secretary
 Colorado Bridge Enterprise Board

Date

Meeting Notes
Bridge Enterprise Workshop
CDOT HQ
July 18, 2013

CBE Board of Directors/Executive Director: D. Hunt, Chairman G. Reiff, K. Gilliland, K. Connell, L. Gruen, D. Aden, E. Peterson, H. Barry, S. Hofmeister and G. Ortiz

CDOT Staff: T. Harris, B. Stein, S. McDaniel, J. Laipply, T. Devito, D. Eller, T. Wrona, J. Olson, K. Neet, H. Stockinger, D. Perkins-Smith, H. Bimmerle, G. Vansuch, T. Bircher, K. Hruska

BE Program Manager: K. Szeliga, A. Gurulé, M. Cirulli, and C. Baudermann

The meeting was led by Chairman Reiff and the following items were discussed.

1. Chairman Reiff called the meeting to order.
2. B. Stein provided the Board of Directors with a Bridge Enterprise (BE) Bond Program update.
 - B. Stein referenced and summarized the “Bond Program Update Memorandum” provided in the July 2013 Workshops & Regular Meeting Agenda booklet (July booklet).
 - o The bond update data provided reflects work complete through April 30, 2013.
 - o B. Stein reported that while the BE program is not on target to reach its anticipated \$255.0M spending goal, current Summer 2013 construction has shown an acceleration in spending.
 - o B. Stein referenced the “Forecasted 85% Bond Spending with Adjustment Modifiers” document provided in the July booklet. B. Stein summarized that the program is projecting expenditure of \$229.9M of bond proceeds by calendar year-end, a forecasted \$25.1M deficit relative to the target of \$255M. Based upon actual expenditures and monthly spending patterns, a second calculation shows a forecast of \$226.3M in expenditures by year-end; a predicted \$28.7M deficit relative to the \$255.0M target number.
3. B. Stein referenced and summarized the “April 2013 Total Bond Program Encumbrance” table provided in the July booklet.
 - As per B. Stein, findings and observations in the encumbrance table indicate the following:
 - o A non-cash deficit of \$54.6M is forecasted in FY 2014 (projected revenues as compared to forecasted financial commitments).
 - o Over-budgeting at the program level is estimated at approximately 10% (based on a $0.10 \times \$760.7M$ calculation).
 - o A Projected Funding Surplus of \$2.5M is projected for FY 2014, based on encumbrance and over-budgeting comparisons.
4. B. Stein briefly discussed the effects of the I-70 viaduct replacement project on the BE Program.
 - B. Stein noted that the cost of the I-70 viaduct is estimated at \$1 billion. B. Stein explained that from a financial standpoint this could mean that all bridge safety surcharges collected FY 2017 through FY2021 (I-70 construction period) will be dedicated to this project.

Meeting Notes
Bridge Enterprise Workshop
CDOT HQ
July 18, 2013

- B. Stein stressed the importance of not over committing to BE projects as the cost of the viaduct combined with federal funds dedicated to paying debt service on the \$300.0M bond and additional bonds for the balance of the viaduct will also exhaust BE funds in the coming years.
5. B. Stein referenced the Bridge Prioritization Plan scoring worksheet and the corresponding “Prioritization Plan Un-Programmed Bridges, 5 Highest Ranked Structures” table provided in the July booklet and summarized the benefits and implications of the plan:
- The recently established Prioritization Plan will be used to help identify which projects represent the most deserving use of available funding. The plan will help to address the issue of over-committing funds.
 - Prioritization Plan scoring allows BE and CDOT to identify the most and least eligible bridges for the program.
 - BE and CDOT will continue to solicit the Board’s input in regards to decisions and recommendations for BE spending and prioritized bridges.
6. There were no questions or comments from the Board or audience members.
7. The meeting was adjourned.

End of Meeting Notes

COLORADO BRIDGE ENTERPRISE

Memorandum

Colorado Bridge Enterprise
4201 East Arkansas Avenue
Denver, CO 80222

DATE: August 2, 2013
TO: Bridge Enterprise Board of Directors
FROM: Ben Stein, CDOT/BE Chief Financial Officer
SUBJECT: Budget Resolution

I updated the budget resolution that was proposed in July to provide further clarification at the request of the board. The resolution delegates authority to the Bridge Enterprise Director to move non-project related administrative budget within and between the approved administrative budget categories, so long as the changes net to zero. This resolution clarifies that the following non-project related Bridge Enterprise budget categories are not considered administrative: Regional Scoping Pools, Maintenance, Preservation and Bonding Program / Debt Service.

This is intended to improve efficiency and reduce the number of minor budget revisions brought to the Bridge Enterprise Board.

Resolution Number BE –

Revise Budget Adjustment Policy

Proposed to the Bridge Enterprise Board of Directors on: August 15, 2013

WHEREAS, pursuant to 43-4-805(2)(a)(I) C.R.S., the Colorado Bridge Enterprise was created as a government-owned business within the Colorado Department of Transportation (“CDOT”); and

WHEREAS, pursuant to 43-4-805 C.R.S., the Bridge Enterprise is to operate as a government-owned business within the Department of Transportation and shall constitute an “enterprise” for the purpose of Section 20 of Article X of the Colorado Constitution so long as the Bridge Enterprise retains authority to issue revenue bonds and received less than ten percent (10%) of its total annual revenues in grants, as defined in C.R.S. 24-77-102(7), from all State and local governments combined; and

WHEREAS, the business purpose of the Bridge Enterprise is to finance, repair, reconstruct, and replace Designated Bridges (as defined in 43-4-803(10), C.R.S.) in the State, and as agreed to in the Master Agreement between the Bridge Enterprise and CDOT, maintain the Designated Bridges it finances, repairs, reconstructs, and replaces; and

WHEREAS, Section 43-4-805(5)(f), C.R.S. authorizes the Bridge Enterprise Board to enter into agreements with the Colorado Transportation Commission or CDOT; and

WHEREAS, in furtherance of the business purposes of the Bridge Enterprise the Bridge Enterprise Board has determined it necessary and appropriate to delegate authority to the Bridge Enterprise Director to move non-project related budget within and between the approved budget categories, so long as the changes net to zero; and

WHEREAS, the following non-project related Bridge Enterprise budget categories are not considered administrative: Regional Scoping Pools, Maintenance, Preservation and Bonding Program / Debt Service; and

WHEREAS, this budget adjustment policy is intended to improve efficiency and reduce the number of minor budget revisions brought to the Bridge Enterprise Board.

NOW THEREFORE BE IT RESOLVED, the Bridge Enterprise Board hereby resolves to delegate authority to the Bridge Enterprise Director to move non-project related administrative budget within and between the approved administrative budget categories, so long as the changes net to zero.

Herman Stockinger

Secretary, Bridge Enterprise Board of Directors

COLORADO BRIDGE ENTERPRISE
Memorandum

Colorado Bridge Enterprise
4201 East Arkansas Avenue
Denver, Colorado 80222

DATE: July 31, 2013
TO: Bridge Enterprise Board of Directors
FROM: Kathy Young, CBE Counsel
SUBJECT: Update on TABOR Foundation v. CBE lawsuit

The Colorado Bridge Enterprise (CBE) has been awaiting a decision stemming from the two-day bench trial held before Judge Michael Martinez of Denver District Court on May 13-14, 2013. On July 19, 2013, Judge Martinez issued his final order and CBE won on all issues.

The trial stemmed from the TABOR Foundation's (Plaintiff) challenge of the bridge safety surcharge fee, which the Legislature enacted as part of the FASTER legislation, as a tax, not a fee, requiring a vote of the people. Plaintiff also challenged bonds issued by CBE as being in violation of TABOR.

Judge Martinez issued Findings of Fact and Conclusions of Law on July 19, 2013. Judge Martinez ruled in favor of the CBE on both issues raised by the Plaintiff. Judge Martinez concluded that the bridge safety surcharge was indeed a fee and not a tax and held that CBE was an "enterprise" under TABOR because it did not receive impermissible "grants" from CDOT exceeding the 10 percent limitation on state and local government revenue in any fiscal year. The Court concluded that federal money provided to CBE was exempt from the 10 percent limitation and the value of bridges transferred by CDOT to CBE for replacement or repair did not violate the 10 percent limitation. Therefore, bonds issued by CBE without a vote of the people did not violate TABOR. The Court's ruling and trial record provide little basis for an appeal, but Plaintiff's counsel indicated prior to trial that an adverse judgment against the TABOR Foundation would be appealed. Plaintiff must file a Notice of Appeal on or before September 6, 2013.

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	DATE FILED: July 19, 2013 10:12 AM ▲ COURT USE ONLY ▲
Plaintiff: TABOR FOUNDATION v. Defendant: COLORADO BRIDGE ENTERPRISE, et al.	Case Number: 12 CV 3113 Courtroom: 259
FINDINGS OF FACT AND CONCLUSIONS OF LAW	

THIS MATTER came on for trial to the Court on May 13 and May 14, 2013. Plaintiff Tabor Foundation (“Plaintiff”) appeared through its counsel, James Manley, Steven Lechner, and Jessica Spuhler. Defendants Colorado Bridge Enterprise, et al. (“Defendants”) appeared through their counsel, Mark Grueskin and Harry Morrow. Plaintiff seeks relief pursuant to C.R.C.P. 57 and 65, and requests a declaration that the Defendants acted in violation of TABOR through its assessment of a user fee, and when they received grants totaling more than 10 percent of its annual revenue in Fiscal Year 2011. The Court has considered the testimony and credibility of the witnesses presented by the respective parties hereto and reviewed the exhibits admitted during the course of the trial. Having heard the arguments and statements of counsel and being otherwise fully advised, the Court now makes the following findings of fact and conclusions of law:

BACKGROUND

This dispute arises out of the Colorado General Assembly’s enactment of Senate Bill 09-108, commonly known as Funding Advancements for Surface Transportation and Economic Recovery, C.R.S. § 43-4-802, *et seq.* (“FASTER”). FASTER established the Colorado Bridge Enterprise (the “CBE”) and through the Bridge Enterprise Program,

CBE endeavors to finance, repair, reconstruct, and replace bridges that are determined to be structurally deficient or functionally obsolete, and rated as “poor.” *See* C.R.S. § 43-4-803(10) (defining “designated bridge”). Under FASTER, Colorado residents who register a motor vehicle that can be used on Colorado state highways are required to pay a “bridge safety surcharge.” *See* C.R.S. §§ 43-4-805(5)(g)(II); 42-3-103(1)(a).

In the present action, Plaintiff seeks enforcement of the Taxpayer’s Bill of Rights (“TABOR”), which limits a governmental entity’s authority to levy taxes or create debt without voter approval. Colo. Const. art. X, § 20. The CBE was established as an “enterprise,” as that term is used in the TABOR provisions. C.R.S. § 43-4-805(2). Under TABOR, an enterprise is exempt from TABOR’s voting requirements and revenue limitations as “a government-owned business authorized to issue its own revenue bonds and receiving under 10 percent of annual revenue in grants from all Colorado state and local governments combined.” Colo. Const. art. X § 20(2)(d).

At trial, Plaintiff sought to invalidate the bridge safety surcharge, asserting that the CBE does not qualify as a TABOR-exempt enterprise because: (1) the CBE does not function as a “self-supporting business;” and, (2) the CBE lost its “enterprise” status when it received grants from the state of Colorado, via the Colorado Department of Transportation, totaling more than ten percent of its annual revenue in fiscal year 2011.

I. FINDINGS OF FACT

1. Plaintiff is a nonprofit membership organization, organized under the laws of the State of Colorado. The organization is dedicated to enforcing the provisions of TABOR on behalf of its members. Plaintiff’s standing to bring their claims was not

challenged by the Defendants, and thus the Court finds that Plaintiff has standing in this proceeding.

2. Defendants are entities created by the Colorado General Assembly, and are authorized to impose a bridge safety surcharge fee as the mechanism “to finance, repair, reconstruct and replace any designated bridge.” The purpose of this enactment is to fund the maintenance and replacement of bridges, and to cure bridge safety hazards to the travelling public.

3. The bridge safety surcharge fee assessed on all motor vehicles registered in Colorado has been in effect since July 1, 2009. The bridge safety surcharge fee is based upon vehicle weight, and for most private-use vehicles, the fee does not exceed \$18.00 annually. The bridge safety surcharge for agricultural vehicles, owned by farmers or ranchers, and used commercially only for the transport of raw agricultural products, commodities, or livestock, is half the amount otherwise imposed by weight classification.

4. All revenues generated by the bridge safety surcharge are credited to the “bridge special fund” created within the Colorado State Treasury, and the use of such revenue is restricted to the statutorily defined purposes of the CBE.

5. The authorized purposes of the CBE consist of: the replacement and rehabilitation of designated bridges; the maintenance of new bridges; the acquisition of land required in conjunction with a designated bridge project; and the administration of the Bridge Enterprise program. C.R.S. § 43-4-805(3)(c). A “designated” bridge eligible for Bridge Enterprise funding is defined as a structurally deficient or functionally obsolete bridge which is rated in “poor” condition.

6. Currently, there are approximately 3,500 bridges in the Colorado state highway system, 168 of which have been identified as eligible for CBE funding.

7. The Colorado General Assembly has directed that the expenditure of revenues in the “bridge special fund” be under the exclusive authority of the Bridge Enterprise Board for the purposes of budgeting and expenditure. The General Assembly has retained no authority with regard to the expenditure of the “bridge special fund.”

8. The CBE is an independent entity and is not controlled by the Colorado Transportation Commission or the Colorado Department of Transportation (“CDOT”). The CBE and CDOT maintain separate financial accounting and reporting systems, and the Colorado State Treasurer keeps separate the funds for each entity within the state treasury.

9. The CBE has collected more than \$261 Million in bridge surcharge safety fees since its inception in 2009. These funds have been used for bridge replacement and repair, and none of the monies have been placed in the State’s general treasury fund, or otherwise used for the general, non-bridge related costs of government.

10. In November 2010, the Colorado Transportation Commission authorized the CBE to receive up to \$15 Million in reimbursements annually from federal transportation funds allocated to the State of Colorado. These funds were explicitly allocated for the CBE’s statutorily approved uses, came from the Federal Highway Administration, and did not pass through the general CDOT treasury fund.

11. The total revenues of the CBE in Fiscal Year 2011, running from July 1, 2010 to June 30, 2011, based upon its audited financial statement, totaled \$78.5 Million,

including \$11.447 Million in federal funds, and \$ 66.964 Million in bridge safety surcharge fees. In December, 2010, the CBE issued \$300 Million in bonds.

12. As part of its status as an “enterprise” under the provisions of TABOR, the CBE may not receive more than 10 percent of its revenue from state and local government grants each year. This figure is measured against the total revenues of the enterprise, including any federal funds.

13. The statutes implementing TABOR specify that a “grant means any direct cash subsidy or other direct contribution of money from state or local government in Colorado which is not required to be repaid.” C.R.S. § 24-77-102(7)(a).

14. In Fiscal Year 2011, CDOT transferred 56 bridges to the CBE. Only two of the transferred bridges were assessed at a book value of more than \$500,000.00. The remaining bridges carried zero book value. All of these bridges were operational and used for vehicle traffic at the time of their transfer from CDOT to the CBE.

15. The record confirms that the total value of the bridges transferred to CBE was \$1,368,000.00.

16. Pursuant to the testimony of David McDermott (“Mr. McDermott”), former Colorado State Controller,¹ whom this Court finds particularly credible on the issue due to his relevant work experience and substantial knowledge on the subject matter, the value of these bridges was computed in accordance with both the State’s generally accepted accounting principles of financial recording, and the valuation requirement mandated by TABOR. Mr. McDermott further testified that it was improper to value these bridges under a “fair market value” basis because that valuation type is

¹ Mr. McDermott held his title as State Controller from April 2008 until May, 2013, when he accepted a new position as Director of the Colorado Financial Reporting System Implementation.

inappropriate for bridges that are still in use, and is not the accounting valuation principle currently mandated by TABOR. Instead, the value of the bridges was computed under the depreciation method² used by CDOT, a process which is consistent with other state and local governmental entities that own bridges, roadways, and related transportation infrastructure.

17. Pursuant to Benson Stein, Chief Financial Officer of the CDOT and the CBE, whom this Court finds credible on the issue due to his extensive professional and practical experience in the subject matter, had fair market value been used to value the bridges transferred to the CBE, the Colorado State Auditor would have issued a “qualified opinion,” indicating non-compliance with accounting standards required by state law. Upon notification of such non-compliance, the State Controller would have reversed the use of the fair market value approach and employed the depreciation method instead.

18. At trial, Plaintiff’s witness Chris Sammons (“Ms. Sammons”) testified that she and her husband own several vehicles that are used exclusively on their ranch in Grand County, Colorado. Sammons testified that she objected to the imposition of the bridge safety surcharge on her vehicles that never travel off her ranch and onto CBE maintained bridges.

19. Ms. Sammons’s husband uses each of the vehicles for business and personal purposes. Ms. Sammons testified that she does not monitor the actual use of

² CBE bridges are given a “service life” of 75 years, and depreciation is measured by the estimated remaining useful life of the bridge. In determining estimated useful life remaining, CDOT considers the bridge’s present condition and how much longer it is expected to be in service. *See* Exhibit A at 1-2; Testimony of David McDermott, May 14, 2013.

these vehicles by her husband, and does not know whether he used any of the vehicles outside Grand County or used a CBE designated bridge.

20. In addition to use by the Sammons family, the vehicles are lent to their neighbors to use in their own farming or ranching operations. Ms. Sammons testified that she does not monitor the actual use of these vehicles by her neighbors, and does not know whether any of the vehicles have left Grand County or driven on a CBE designated bridge.

21. At trial, Plaintiff's witness William Wharton ("Mr. Wharton") testified that he and his wife own three vehicles, one of which, a 1971 Toyota Landcruiser, has not used any CBE eligible bridge since 2007. Mr. Wharton has paid the bridge safety surcharge fee as part of that vehicle's registration for at least the three most recent years.

22. Mr. Wharton objects to paying the bridge surcharge safety fee for vehicles that he asserts receive no benefit from the CBE.

23. Mr. Wharton does not specifically anticipate that he will use the Toyota Landcruiser to cross a CBE eligible bridge, but he is not certain that he will not do so, and in fact, he testified that it is possible that he will.

II. CONCLUSIONS OF LAW

The basis of Plaintiff's claim in this action is that the CBE does not qualify as a TABOR-exempt enterprise because: (1) the CBE does not function as a "self-supporting business;" because it levies an improper "tax" on drivers; and, (2) the CBE lost its "enterprise" status when it received grants from the state of Colorado, via the Colorado Department of Transportation, totaling more than ten percent of its annual revenue in fiscal year 2011. The Court will address these questions, in turn.

A. The Bridge Surcharge Safety Fee is Not a Tax.

This Court's resolution of this first issue depends in large part on whether the bridge safety surcharge fee is a permissible "fee," or whether it constitutes an unauthorized "tax" on Colorado drivers.

The distinction between a fee and a tax depends on the nature and function of the charge, not on how it's labeled. *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 716 (Colo. App. 1991). A "fee" is a charge imposed on persons to defray costs of a particular government service. *E-470 Public Highway Auth. v. 455 Co.*, 3 P.3d 18, 24-25 (Colo. 2000). A "tax" is a means of distributing the general burden of the cost of government, rather than an assessment of benefits received by an individual party. *Thorpe v. State*, 107 P.3d 1064, 1072 (Colo. App. 2004). Importantly, a taxpayer receives a much more general set of benefits and privileges than does the payer of a user fee.

There is a strong presumption in Colorado favoring the permissibility of "user fees," irrespective of an individual's actual frequency of use of the particular service, and so long as the fee "is reasonably designed to defray the cost of the particular service rendered" by the government. *Bloom v. City of Fort Collins*, 784 P.2d 304, 311 (Colo. 1989) (upholding transportation utility fees). *See also E-470 Public Highway Auth.*, 3 P.3d at 18 (upholding highway expansion fees); *Loup-Miller Const. Co. v. City and County of Denver*, 676 P.2d 1170 (Colo.1984) (upholding sewage service fee upon apartment building owners).

Likewise, Colorado courts have acknowledged that the amount of a "user fee" need not be precisely calibrated to the use that a party makes of government services. *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 269 (Colo. 1991) (quoting *U.S. v. Sperry*

Corp., 493 U.S. 52, 60 (1989)). Additionally, a fee does not have to be voluntary in order to be deemed a permissible user fee. *Bloom*, 784 P.2d at 310-11. A usage fee can be upheld even when it is mandatory, so long as the fees are reasonably designed to offset the overall cost of services for which the fees were imposed. *Id.* Specifically, this demonstrates that imposition of the bridge safety surcharge fee does not have to be proportionally matched only to those drivers who regularly travel over CBE bridges. Moreover, the bridge surcharge fee can be properly assessed on drivers regardless of their willingness to pay the fee voluntarily. To suggest that this type of fee must be tailored to an individual's usage would severely hamper the collection and enforcement of all government-levied fees, rendering them ineffective, counterproductive, and significantly more expensive to administer.

In this matter, the Court concludes that the charge assessed by the CBE constitutes a permissible user fee, rather than an illegal tax as argued by the Plaintiff. It is clear from the record here that the General Assembly's intent in enacting FASTER was to use the funds to maintain and replace bridges within the Colorado highway system. The party challenging the constitutionality of a statute bears the burden of proving it unconstitutional beyond a reasonable doubt. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 905 (Colo. 1993). The record overwhelmingly demonstrates that the monies raised via the bridge safety surcharge fee are kept in a separate treasury account, to be used only for the CBE's authorized purpose. Plaintiff's assertions that the benefit its members derive is required to be proportional to the fee paid is without support in the law. The witnesses Plaintiff offered as members of its organization were not sufficiently persuasive or credible in their testimony to suggest any fundamental inequities in the

imposition of the bridge safety surcharge fee. Furthermore, a nexus between an individual's use and the permissibility of a user fee is not required in Colorado.

Therefore, because the CBE does not levy a general tax; the bridge safety user fee is appropriately assessed on Colorado registered vehicles; and the funds are properly and solely used for the CBE's operations, Plaintiffs have not met their burden of proof, and the Court finds that the CBE is a self-supporting business under the TABOR statute.

Specifically, the bridge surcharge safety fee is correctly labeled as a "fee" and is a proper exercise of the CBE's authority under its enabling statutes.

B. The CBE Did Not Receive Impermissible Grant Amounts from CDOT.

Plaintiff argues that the CBE lost its "enterprise" status when it received grants from CDOT totaling more than 10 percent of its annual revenue. Loss of enterprise status would mean that the CBE would no longer be exempt from TABOR's voting requirements and revenue limitations.

The Court concludes, however, that the CBE did not lose its enterprise status as a result of federal grant money received. Funds from the Federal Highway Administration allocated to the CBE were never credited to CDOT's state treasury account and there was no transfer from CDOT to the CBE under this process. Specifically, the grant from the federal government went directly to the CBE as reimbursement for its costs incurred and debt service on qualifying elements of a designated bridge project. Moreover, the grant process defined under TABOR "excludes any federal funds, regardless of whether such federal funds pass through the state . . . prior to receipt by an enterprise." C.R.S. § 24-77-102(7)(b)(III). Thus, even if the grant did pass through CDOT's treasury account before

its transfer to the CBE, it came from federal funds and has no effect on an entity's status as an enterprise.

Further, Plaintiff maintains that rather than use generally accepted accounting principles as the Colorado General Assembly has specifically prescribed for all matters of TABOR compliance, as discussed above, CDOT should have used a fair market value method in determining the value of the bridges transferred to the CBE. Specifically, Plaintiff asserts that had a fair market value method been utilized, Defendants would have exceeded the 10 percent limitation on TABOR-exempt enterprises.

However, there is no legal basis for using a fair market value standard for valuing transfers of such property. In fact, as earlier stated, such a valuation would be contrary to the specific accounting principles mandated by the State. The value of all bridges transferred to the CBE was properly calculated using generally accepted accounting principles, namely the depreciation valuation method.

Plaintiff's valuation expert, Paul Wingard ("Mr. Wingard"), testified concerning the condition of the bridges transferred to the CBE by CDOT, as well as their approximate *fair market* value. However, the Court finds Mr. Wingard's evaluation techniques questionable and unreliable. While Mr. Wingard physically visited two of the transferred bridges the day before trial in this matter, he failed to make a full inspection of those bridges and failed to take into consideration such obvious factors as heavier weekend vehicle traffic when making his overall evaluation. Rather, Mr. Wingard's testimony concerning the bridge valuation was based in large part upon observations of the bridges using the Google Earth software program, which contains dubious assurances of truth and accuracy in matters of assessing the structural integrity of bridges. An

expert's testimony before the court is assessed based on its "validity and reliability," and specifically must be "reasonably reliable" such that it can lead to legal conclusions.

Brooks v. People, 975 P.2d 1105, 1114 (Colo. 1994). Mr. Wingard's testimony does not rest upon valid or factual underpinnings or use reliable techniques, and as such, does not pass muster under *Brooks*.

Mr. Wingard's testimony regarding the use of a fair market valuation was also unpersuasive, as it failed to comport with Colorado's standard valuation procedures, or make meaningful reference to the standard required by TABOR. As such, Mr. Wingard's testimony was not sufficiently credible or persuasive to comprise a basis for this Court's decision.

Accounting valuation principles notwithstanding, this Court finds that under the state statutes implementing TABOR, any bridges transferred to the CBE did not count toward the 10 percent limitation on state and local government grants because they were not cash subsidies or other direct contributions of money. *See* C.R.S. § 24-77-102(7)(a). Further, as discussed above, the grant monies received from the federal government did not affect CBE's status as an enterprise under the TABOR statutes pursuant to Colo. Const. art. X § 20(2)(d), and therefore, did not result in the CBE's loss of exemption from TABOR's voting requirements and revenue limitations.

ORDER

WHEREFORE, for the reasons set forth above, the Court finds and hereby declares that the CBE was an "enterprise," as that term is defined in the applicable TABOR provisions, C.R.S. § 43-4-805(2), when it properly assessed the bridge surcharge safety fee and issued revenue bonds in fiscal year 2010-2011, and did not violate TABOR

by the issuance of such bonds without submitting the matter to voters in a statewide election. Therefore, Plaintiff is not entitled to declaratory or injunctive relief in this proceeding and Plaintiff's Motion pursuant to C.R.C.P. 57 and 65 is now DENIED. This Order shall constitute a final judgment pursuant to C.R.C.P. 58.

DONE this 19th day of July, 2013.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Michael A. Martinez", written in a cursive style.

MICHAEL A. MARTINEZ
District Court Judge

COLORADO BRIDGE ENTERPRISE

Memorandum

Colorado Bridge Enterprise
4201 East Arkansas Avenue
Denver, Colorado 80222

DATE: August 3, 2013
TO: Bridge Enterprise Board of Directors
FROM: Ken Szeliga
SUBJECT: Pecos Street over I-70 Bridge Move

CDOT successfully replaced the Pecos Street over I-70 bridge using various innovative accelerated bridge construction techniques including: off-site fabrication of the replacement structure and tracking (or moving) a 2,400 ton (or approximate 5,000,000 pound) structure into place using self-propelled modular transporters (or SPMTs).

The CDOT Region 1 Project Manager, Tammy Maurer, will present a time-lapse video highlighting the the bridge move and “50-hour closure of I-70” including:

- Offsite bridge fabrication
- Demolition of existing Pecos Street structure
- Bridge move via SPMTs

BRIDGE ENTERPRISE
BOARD OF DIRECTORS MEETING



AUGUST 2013 MONTHLY PROGRESS REPORT

Colorado Bridge Enterprise

8/15/2013

Program Schedule

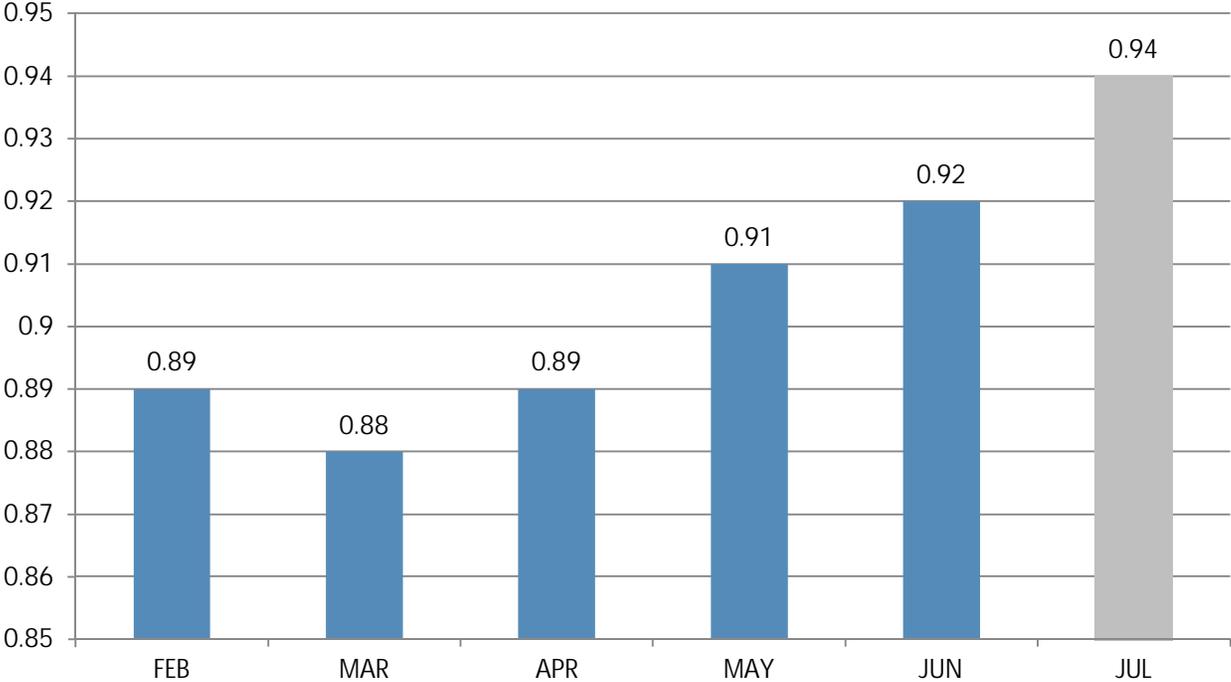
2

- Program schedule updated for work complete through July 2013
- July Schedule Performance Index (SPI) = 0.94
 - Reflects a 0.02 INCREASE from previous month
 - June SPI = 0.92
- Over-performing projects
 - 12 projects (4 more than last month) with \$16.7M in combined Earned Value (EV) greater than planned
 - Increases overall program SPI by 0.05; a 0.01 increase from prior month
- Under-performing projects
 - Non-Railroad projects (Lost SPI \geq 0.01)
 - 2 worst projects (1 less than last month) with \$11.8M in combined lost Earned Value
 - Reduces program SPI calculation by 0.03; a 0.02 decrease from prior month
 - Railroad projects
 - 11 Railroad projects with \$12.1M in combined lost Earned Value
 - Reduces overall program SPI calculation by 0.04; a 0.01 increase from prior month

8/15/2013

Program Schedule

Program SPI by Month



Program Goal SPI \geq 0.90

Major Achievements (July workshop – August workshop)

4

- Favorable ruling in FASTER Lawsuit
 - ▣ Released July 19, 2013
 - ▣ the Court finds and hereby declares that the CBE was an "enterprise," as that term is defined in the applicable TABOR provisions, C.R.S. § 43-4-805(2), when it properly assessed the bridge surcharge safety fee and issued revenue bonds in fiscal year 2010-2011, and did not violate TABOR
- Program Reporting
 - ▣ Completed Bond Allocation Plan Update
 - Work complete through May 31st
 - ▣ Drafting Q4 FY2013 Quarterly Report
- Present Prioritization Plan at PE III meeting

8/15/2013

Major Achievements (July workshop – August workshop)

5

- Design/Build Procurements
 - ▣ Region 2: Ilex Design/Build Project RFQ (Pueblo, CO)
 - Short list released July 22, 2013
 - Edward Kraemer & Sons, Inc. (Kraemer) / Tsiouvaras Simmons Holderness (TSH)
 - Flatiron Constructors, Inc. / HDR Engineering, Inc.
 - Ralph L. Wadsworth Construction Co. (RLW) / Michael Baker Jr. , Inc. (Baker)
- Bridges to AD
 - ▣ Region 1
 - F-17-DM: SH 88 ML over Cherry Creek (Centennial, CO)
- Completed One Bridge
 - ▣ Region 1
 - F-16-CS: SH 121 ML (Wadsworth) over Bear Creek (Denver, CO)

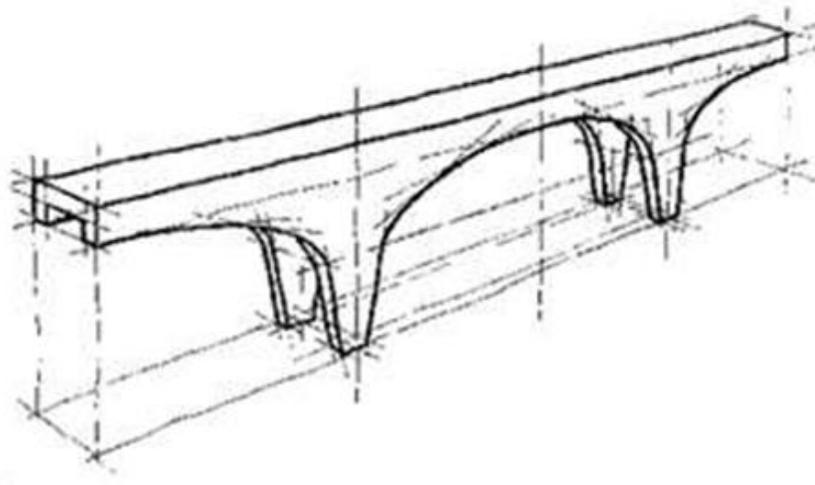
8/15/2013

Completed **FASTER** bridge

6

Region 1

F-16-CS: SH 121 ML (Wadsworth) over Bear Creek (Denver, CO)

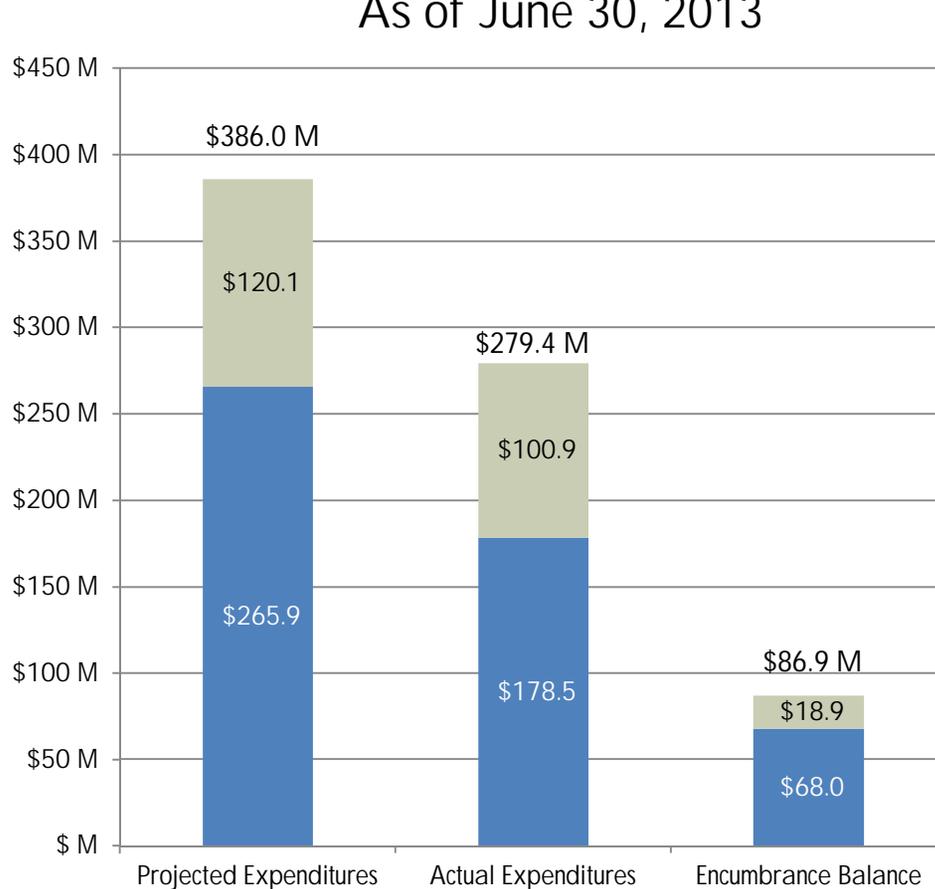


Project team to provide photographs of completed structure.

Total Program Financial Performance

7

As of June 30, 2013



■ Non-Bond ■ Bond-Only

Changes from Previous Month

Projected Expenditures

- Overall increased by \$12.6M or 3.4%
- Bond-Only increased by \$10.4M or 4.1%

Actual Expenditures

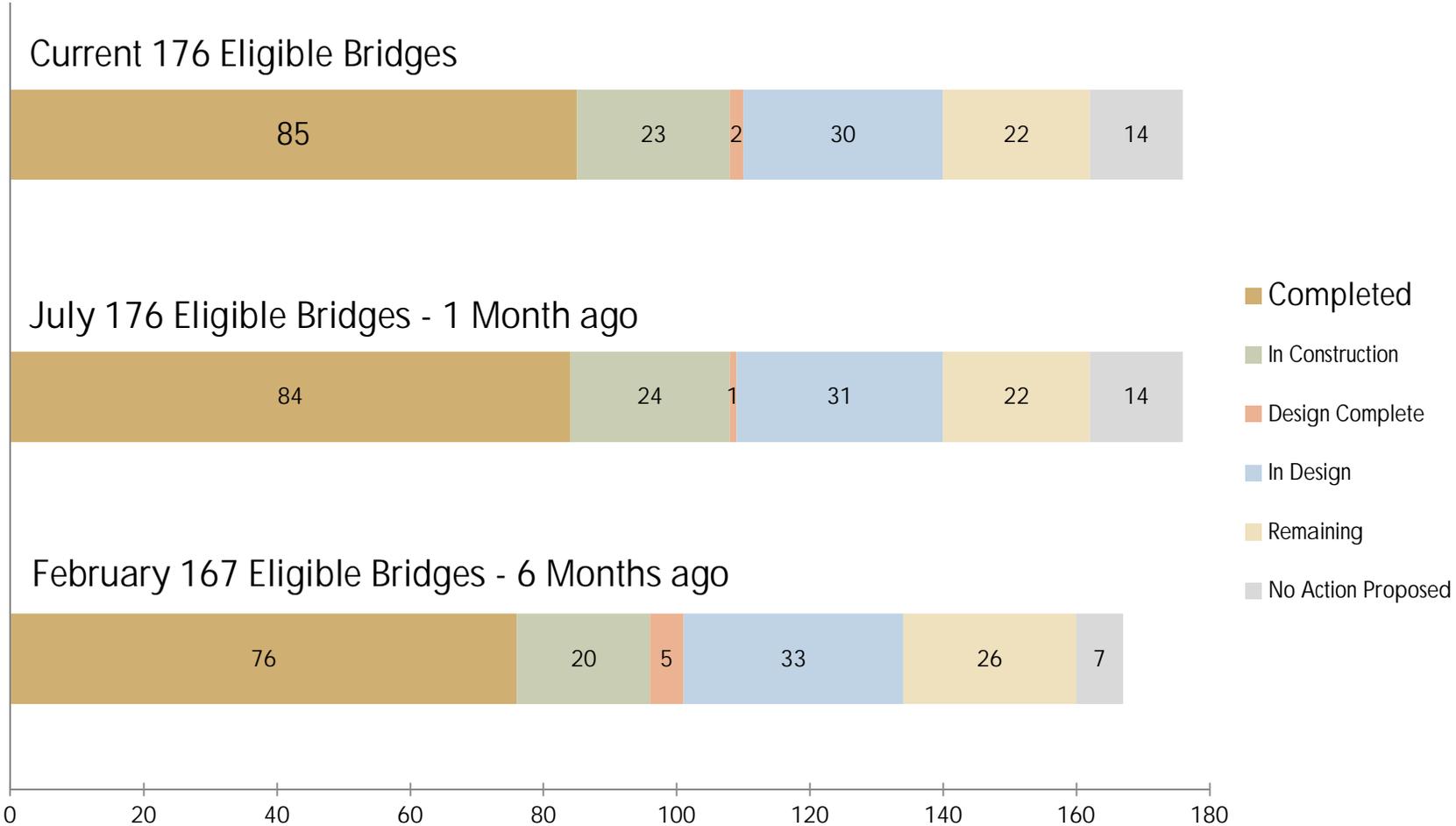
- Overall increased by \$27.5M or 10.9%
- Bond-Only increased by \$24.1M or 15.6%

Encumbrance Balance

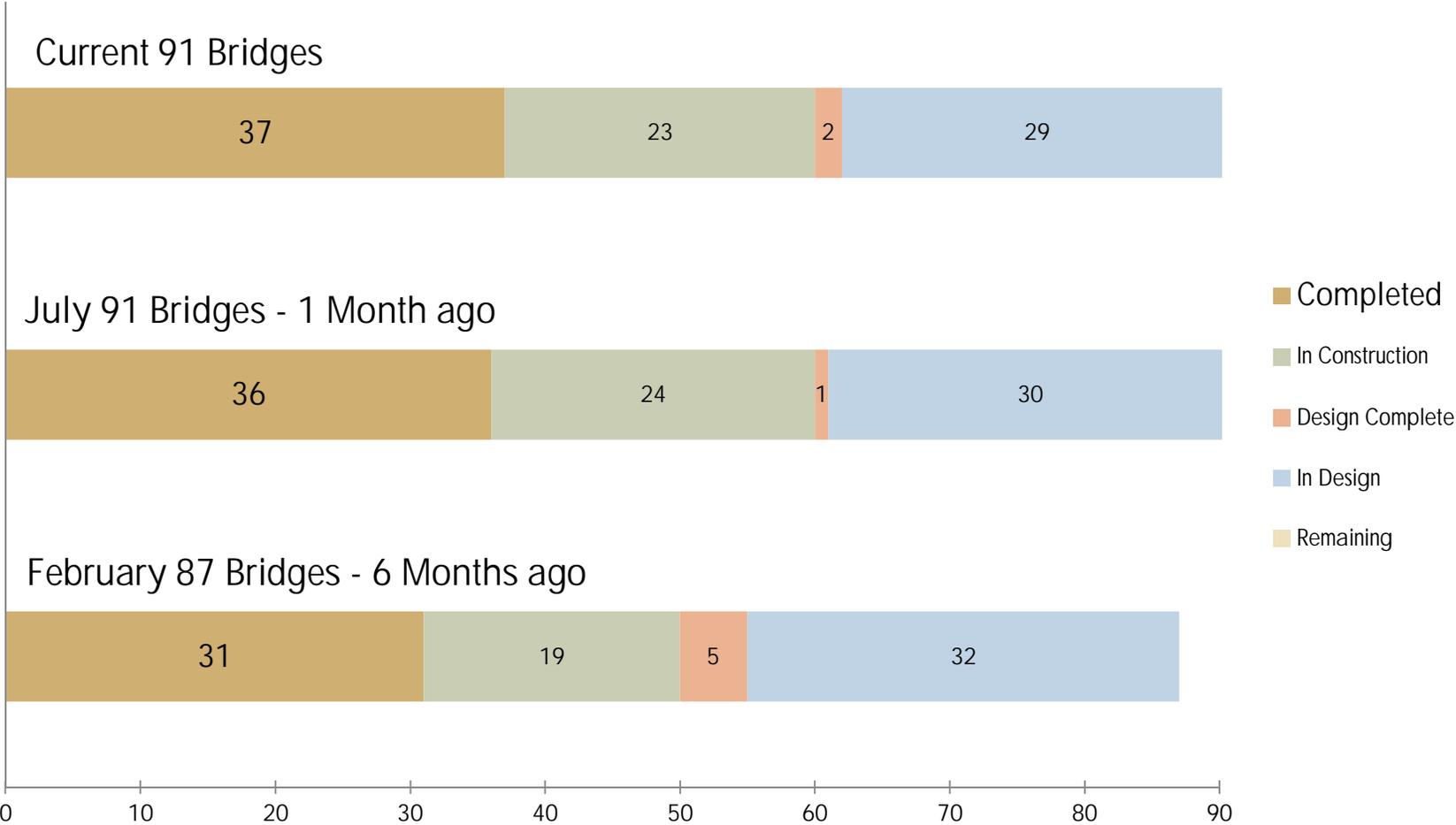
- Overall decreased by -\$10.8M or -11.1%
- Bond-Only decreased by -\$7.4M or -9.8%

Encumbrance balances to decrease as expenditures increase; unless new work scope is contracted.

Status FASTER Eligible Bridges



Status \$300M Bond Bridges



Status of 30 Most Deficient Bridges

10

	2013 Poor List Bridges Worst 30 Status	Original 128 Bridges Worst 30 Status
Complete	3	23
In Construction	11	5
Design Complete	0	0
In Design	11	1
Remaining	5 ^b	1 ^a
Total Addressed	30	30

No Change from July, 2013

a	Region	Location	Current Status
E-17-FX	R1	I-70 Viaduct	Pending I-70 East FEIS
b	Region	Location	Current Status
E-17-EW	R1	I-70 ML EBND over UP RR	Pending I-70 East FEIS
E-17-DF	R1	I-70 ML WBND over UP RR	Pending I-70 East FEIS
E-17-KR	R1	I-270 ML EBND over I-70 ML	Newly Poor: Evaluating
C-17-B	R4	SH 60 ML over SOUTH PLATTE RIVER	Newly Poor: Evaluating
K-17-F	R2	SH 96 ML over RUSH CREEK	Newly Poor: Evaluating

8/15/2013

DBE Participation; Quarterly Update

11

- From 3/1/2010 – 6/30/2013, State & FHWA-funded BE construction contracts* continue to help CDOT exceed its overall DBE goal through the following achievements:
 - 3 DBE Prime Contracts Awarded = \$ 7,014,350
 - 283 DBE Subcontracts Awarded = \$29,142,553
 - 286** Total DBE Contracts Awarded = \$36,156,903
 - Overall DBE Participation on BE Contracts = 16.6%

* Design-Bid-Build only

** The 286 total contracts went to 100 individual DBE firms

FASTER Q&A

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Questions & Answers

8/15/2013