



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

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John Hickenlooper, Governor

Mike King, DNR Executive Director

James Eklund, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Kirk Russell, P.E., Chief Finance Section  
Jonathan Hernandez, Project Manager

*KLR*  
*JH*

DATE: July 27, 2015

SUBJECT: Boxelder Basin Regional Stormwater Authority  
Flood Control Project Loans

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In regards to the Boxelder Basin Regional Stormwater Authority (BBRSA) Projects, CWCB Board Members, CWCB Staff, and members of legislature have been contacted by Mr. Eric Sutherland multiple times regarding legal issues surrounding the projects and the repayment of the debt. Attached hereto are three samples of the numerous e-mails mass distributed to CWCB Staff and others. Mr. Sutherland is well known to local governments in the Fort Collins area as a vocal citizen who takes issue with the way public financing is executed, particularly in regards to TABOR compliance. The purpose of this memo is to summarize Mr. Sutherland's many complaints into three primary oppositions, and provide you with Staff's current understanding of his concerns.

**Background:**

CWCB approved three loans for BBRSA's East Side Detention Facility, Larimer & Weld Canal Crossing Structure, and County Road 52 Improvements. Both the canal crossing and CR-52 projects are related to the detention facility project and all three together comprise the BBRSA's overall project (Project). The estimate for all three projects is \$11,750,000 and the total of all three loans combined is \$8,999,100, including the 1% service fee. The BBRSA has successfully completed other flood control projects identified in their Regional Master Plan that did not involve CWCB funds.

*Complaint #1: The Project is not needed; the engineering is fraudulent; the entire Project's goal is to generate a profit for a few private developers by bringing property out of the floodplain.*

Staff View: This seems to be based on a general philosophical difference of opinion regarding the government's role in flood control, a full discussion of which is beyond the scope of this response. We should keep in mind that the Project was developed out of a Regional Stormwater Master Plan that studied the flood risk associated with the Boxelder Basin and determined cost/benefits to multiple flood control projects. Entities that put together the Regional Master Plan include: Larimer County, Fort Collins, Wellington, Timnath, Windsor, Boxelder Sanitation District, North Poudre Irrigation Company, New Cach la Poudre Irrigation Company, CDOT, and CWCB. Professional Engineers specializing in floodplain management performed the engineering. As far as the merits of providing flood control within the Boxelder Basin, CWCB Finance Staff largely relies on local governments to determine what they deem



as necessary and beneficial for their community. The Project largely benefits existing public and private structures built prior to a complete understanding of the floodplain.

*Complaint #2: BBRSA is violating TABOR; therefore the loan is illegal and BBRSA has no legal means to payback the loan.*

Staff View: Not only does Mr. Sutherland fail to support his complaint but he has yet to act on his continual lawsuit threat against the BBRSA, CWCB, individual CWCB staff, and other entities tied to BBRSA. As a part of CWCB's loan contract requirements, staff received legal opinions from BBRSA and its Bond Counsel stating that: (1) BBRSA can legally enter into our loan contract; (2) the contract is binding; (3) BBRSA has the legal means to assess stormwater fees for the repayment of this debt; and (4) that as a drainage authority without the power to tax, BBRSA is not subject to the tax provisions of TABOR.

*Complaint #3: The Judge's recent ruling that BBRSA cannot claim title to the dirt on the condemned land killed the Project; the \$1.4 million that CWCB loaned is gone forever.*

Staff View: The Judge did amend his original ruling to state that BBRSA cannot claim title to the dirt on the condemned land. CWCB received an explanation letter from BBRSA's attorneys regarding this ruling. BBRSA contends that the ruling will not impact the Project because the ruling states that BBRSA is not precluded "from excavating or moving the excavated materials as needed consistent with the purpose of constructing the stormwater drainage facility ditch or channel," and also directs that BBRSA "may take and use therefrom any and all earth, stone, gravel, timber, and other materials for construction and maintenance purposes from said property." The BBRSA attorney believes that the ruling only prevents BBRSA from conveying the dirt on the condemned land to third parties, which BBRSA never intended to do. Notwithstanding, should the BBRSA be unable to complete the Project for any reason, it remains legally obligated to pay back all loan funds disbursed; repayment is not conditioned on a successful Project.

**Current Status:**

To date, CWCB has disbursed \$1,387,679 in loan funds to BBRSA. These funds were used for the acquisition cost for the five parcels needed to be obtained for the Project. BBRSA currently has a right of possession to all property necessary for the Project. BBRSA received bids and approved entering into construction contracts with the selected contractors at its July 22, 2015 Board meeting. The CWCB Finance staff continues to closely monitor the Project and will work with the BBRSA to confirm the Project can be successful.

For an additional reference, in 2014, BBRSA put together a document that directly responded to 14 objections made by Mr. Sutherland's, objections he still largely maintains to this day. That document is attached to this packet.

Encl: BBRSA Specific Issues and Responses to Mr. Sutherland  
Sample E-mails from Mr. Sutherland

ec: James Eklund, CWCB Director  
Casey Shpall, Attorney General's Office  
Susan Schneider, Attorney General's Office





## ATTACHMENT 4

### SPECIFIC ISSUES AND RESPONSES

#### SUMMARY LISTING

#### 1. SPECIFIC ISSUES AND RESPONSES

##### Issue

The BBRSA was only established to allow more development in the region.

##### Response

Flooding and stormwater drainage problems have long plagued the Boxelder Creek watershed, particularly the developing area from just north of the Town of Wellington, Colorado to just south of Timnath, Colorado. Major floods have occurred in 1909, 1922, 1930, 1937, 1947, 1963, 1967 and 1969. In 1947, the *Fort Collins Coloradoan* included a headline that read "Violent Rainstorm Floods Large Area; Crop Losses Heavy". As much as five (5) inches of rain fell northwest of Wellington, washing out bridges and flooding crops. Nearly 1,000 acres of grain, alfalfa and corn crops were damaged. Heavy rains caused Boxelder Creek to overflow its banks again in 1967 and resulted in the death of a mother and her three daughters. The woman and her daughters drove into the flooded creek where it passed over a county road southwest of Wellington. Floods that summer destroyed county bridges seven times. The BBRSA was established to protect life safety, reduce 100-Year floodplain extents, protect existing structures (including schools and critical facilities), protect existing residences and businesses, reduce flood overtopping of 33 roads and 4 irrigation canals, reduce the costs to construct new stormwater infrastructure, improve emergency response, and reduce flooding on currently undeveloped areas that will be developed in the future.

##### Issue

The BBRSA does not have the legal authority to collect stormwater service and plant investment fund (PIF) fees.

##### Response

Article V of the BBRSA Intergovernmental Agreement outlines the provisions by which the BBRSA is authorized and required to impose rates, fees and charges on property within the BBRSA Service Area to fund the regional stormwater improvements.

##### Issue

The BBRSA does not have the legal authority to acquire real estate by eminent domain through the process of condemnation.

##### Response

The power of eminent domain for the Authority stems from two independent sources. The Authority is created pursuant to C.R.S. § 29-1-203 and C.R.S. § 29-1-204.2, which allows any combination of municipalities, special districts and other political subdivisions of the states, which includes counties, to form a water resources or drainage authority through contract between the parties for the purpose of developing water resources or drainage facilities. *See* C.R.S. § 29-1-204.2(1). By entering into the Intergovernmental Agreement for Stormwater Cooperation and Management ("Agreement"), the City of Fort Collins, the Town of Wellington and Larimer County formed the Authority in conformance with C.R.S. §29-1-204.2. It should also be noted that the Agreement is also the type of agreement authorized by C.R.S. § 29-1-203 for the formation of an Intergovernmental authority.

The Authority also has an independent power of condemnation as a result of its creation as an intergovernmental entity pursuant to C.R.S. § 29-1-203. C.R.S. § 29-1-203 allows counties and municipalities to contract with one another to create governmental entities to carry out agreed-upon functions. As pointed out previously, the Agreement is the type of contract

contemplated by C.R.S. § 29-1-203. One of the powers granted by the signatories is the power to condemn property for public use. Agreement, Art. III, Section 3.01(f). This power includes the ability to acquire any interest in property, including a fee interest. As pointed out in *Durango Transportation, Inc. v. City of Durango*, 824 P.2d 48 (Colo. App. 1991), when an entity is created by governmental agreement, it has all of the powers authorized to each of the participants to the agreement. See *Durango Transportation* at p. 51. Each of the signatories to the Agreement has the power to condemn property for public purposes including drainage. Wellington is a statutory municipality with the power of condemnation granted by C.R.S. § 31-35-402(1)(a). Larimer County is granted the power to condemn for water and drainage facilities by C.R.S. § 30-11-107(1)(w). The City of Fort Collins has the power to condemn for public use as granted by Art. IV, Sec. 14 of its Charter. Since the power to condemn property for water and drainage purposes is common to all of the signatories to the Agreement, the Authority may exercise the power to condemn any interest in property.

#### Issue

The BBRSA Board of Directors does not vote to go into executive session.

#### Response

The executive sessions are listed on the agenda for each Board meeting. The Board has voted whether or not to go into Executive Session every time. This is documented in the meeting minutes for every Board meeting. The BBRSA Manager reads the relevant CRS provisions to the Board of Directors prior to every Executive Session. The Executive Session is recorded in accordance with state law.

#### Issue

The City of Fort Collins is violating its Home Rule Charter by paying the debts and liabilities (i.e. stormwater service and PIF fees) of private parties (property owners within the BBRSA Service Area). The City of Fort Collins has not contracted with the BBRSA.

#### Response

Article V, Section 5.04 of the BBRSA Intergovernmental Agreement specifically outlines and states that the BBRSA members have the option to pay the BBRSA directly in lieu of having the BBRSA collect fees. The Intergovernmental Agreement does not deprive any Member of its inherent power to charge for stormwater services and facilities within its boundaries.

#### Issue

The BBRSA Board of Directors never adopted or approved fee schedules.

#### Response

The BBRSA Board of Directors adopted fee schedules for both stormwater service fees and stormwater system development fees by Resolution 2008-1 and Resolution 2008-2, respectively on December 8, 2008. Photocopies of the resolutions are provided as Attachment E.

#### Issue

The City of Fort Collins has not properly budgeted for or audited the funding provided to pay the stormwater service and PIF fees to the BBRSA.

#### Response

The City has budgeted for the payment of these fees to the BBRSA as part of its normal budgeting cycle. Please reference Attachment F which shows that the BBRSA funds were included in the City's 2013-14 Budgeting for Outcomes process.

#### Issue

The BBRSA has not followed proper statutes because it has issued Letters of Intent to acquire and is proceeding with condemnation and it has not voted to proceed with condemnation.

#### Response

The BBRSA Board has not started condemnation proceedings. It does not have to vote prior to sending the Notices of Intent to acquire. If negotiations fail, or if it appears that they will, the BBRSA Board would have to vote prior to proceeding with

the use of eminent domain.

Issue

The BBRSA regional stormwater improvement projects are taking a substantial amount of agricultural land out of production.

Response

This is inaccurate. The only project that directly impacts agricultural land is the East Side Detention Facility (now known as the Gray Lakes Detention Facility). The existing “Day” parcel comprises 205 Acres, of which 192 acres are farmland. Approximately 149 Acres of the parcel is currently in the 100-Year floodplain. Construction of the detention reservoir requires the acquisition of 57 Acres which reduces the amount of land available for agricultural use to 135 Acres. All of the remaining agricultural land will have been removed from the 100-Year floodplain and will not be subject to flood damage during a storm event. It is also important to note that the same land could also be developed on in the future if the property owner so chooses.

Issue

The CWCB will not approve the proposed loans to the BBRSA because the BBRSA must already own the property in fee simple. CWCB loans cannot be used for property acquisition.

Response

This is inaccurate. The CWCB has confirmed that funds are available for land acquisition but cannot be used for the legal costs associated with the condemnation process. Further discussions are anticipated with CWCB in early January 2014 to clarify and finalize the loan funding approach and process.

Issue

The BBRSA is no longer following the original Master Plan and therefore the proposed improvements are not in alignment with the original intent.

Response

This is inaccurate. It is important to note that the Original Master Plan was a conceptual document. The potential use of the Gray Lakes site (upstream of County Road 50) is actually included in the original Boxelder Creek Master Plan as Alternative 5. The Selected Alternative (5A) from the Master Plan proposed the regional detention storage be located at the “Edson Reservoir” location upstream of County Road 60. During the course of design, it was determined that the improvements as originally envisioned in the original Master Plan would need to be modified based on design constraints, construction feasibility and impacts and costs. As is the case with all such efforts, the final design sometimes necessitates changes to the original concept as design efforts and site investigations become more refined. As a result, the final proposed use of the Gray Lakes site for construction of the regional detention facility both meets the physical constraints and is in keeping with the alternative solutions outlined in the original Master Plan.

Issue

The Timnath Development Authority cannot legally contribute funds to the BBRSA projects.

Response

The Revised Timnath Urban Renewal Plan points out the need to address the floodplain issue on Boxelder Creek as part of the Plan Objectives. It further states that TDA may enter into agreements with other public bodies pursuant to Urban Renewal Law. The “Cooperation Agreements may provide, without limitation, for financing, for construction of public improvements, for administration, for technical assistance and for other purposes.”

Issue

The BBRSA and TDA are in violation of various TABOR guidelines.

Response

This is inaccurate. BBRSA and TDA are public entities without taxing power and are therefore not subject to TABOR.

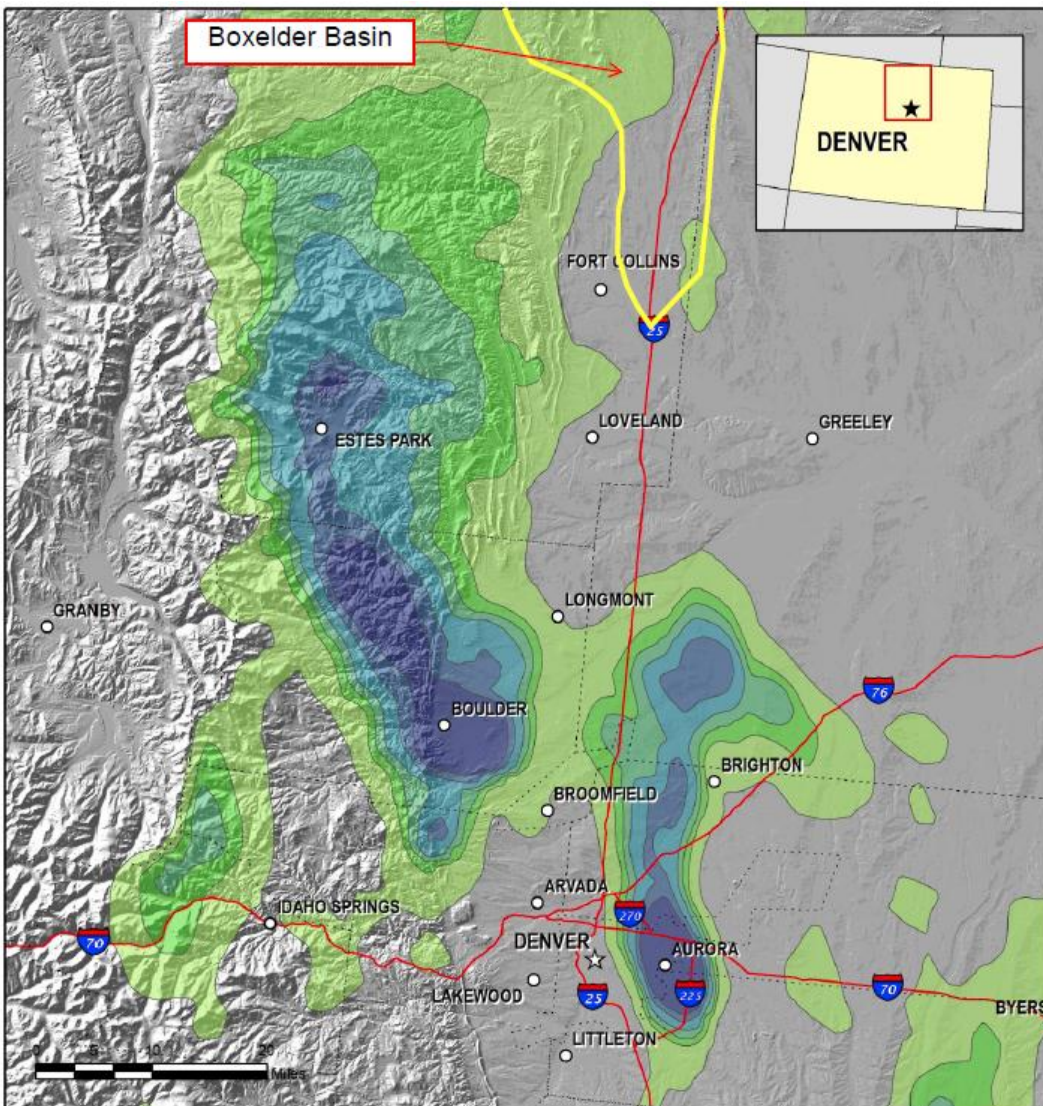


### Issue

In September 2013 we experienced the 100-year event along the Front Range of Colorado. The Boxelder Basin had no significant flooding issues, therefore, why are the proposed regional drainage improvements needed?

### Response

This is inaccurate. Although there were areas which experienced the 100-year event and even areas that experienced the 500-year event, the Boxelder Basin was not one of them. Post flooding analysis by both NOAA and the National Weather service has revealed that sizable portions of the Boxelder Basin experienced rainfall amounting to the 10-year storm or less. See the Exhibit on the next page. Explanation of legend: 1/10 = 10 year storm, 1/100 = 100year storm, etc. There is therefore, still the need to construct the proposed regional drainage improvements.



### Colorado Flood Event, 9-16 September 2013 Annual Exceedance Probabilities (AEPs) for Worst Case 24-hour Rainfall

Hydrometeorological Design Studies Center  
Office of Hydrologic Development, National Weather Service  
National Oceanic and Atmospheric Administration



<http://www.nws.noaa.gov/ohd/hdsc/>

Created 17 September 2013

Precipitation frequency estimates are from NOAA Atlas 14, Volume 8, Version 2.  
Rainfall values come from 6-hour multi-sensor data.

- > 1/10
- 1/50 - 1/10
- 1/100 - 1/50
- 1/200 - 1/100
- 1/500 - 1/200
- 1/1000 - 1/500
- < 1/1000



STATE OF  
COLORADO

Hernandez - DNR, Jonathan <jonathan.hernandez@state.co.us>

## Larimer County legal tom foolery.

**Eric Sutherland** <sutherix@yahoo.com>

Tue, Nov 12, 2013 at 3:25 PM

Reply-To: Eric Sutherland <sutherix@yahoo.com>

To: "cityleaders@fcgov.com" <cityleaders@fcgov.com>, "sroy@fcgov.com" <sroy@fcgov.com>, "cdaggett@fcgov.com" <cdaggett@fcgov.com>

Cc: "Jonathan Hernandez - DNR" <jonathan.hernandez@state.co.us> <jonathan.hernandez@state.co.us>, "Kirk" <Kirk.Russell@state.co.us> <Kirk.Russell@state.co.us>, Casey Shpall <Casey.Shpall@state.co.us>, Susan Schneider <Susan.Schneider@state.co.us>, "johnsosw@larimer.org" <johnsosw@larimer.org>, "haagjs@larimer.org" <haagjs@larimer.org>

Dear Steve and Carrie, (FC city attorneys)

When it is your turn to explain the travesty of the Boxelder to your Board, could you please do us all the favor of not bring this kind of stinky stuff into the house?

Maybe you could think for a second .. the old souls that you are terrorizing with threats of condemnation ... they are people.

Margaret Griffin's husband who purchased their land fought for his country in world war II. He is not with us anymore. Is this how you reward the memory of his service?

The Johnson/Haag team ain't got much slam these days. At the very best, they sought to trump Constitutional law with a statute that does not apply to the Boxelder in a manner that is contrary to the direction provided by the courts.

Eric

----- Forwarded Message -----

**From:** Eric Sutherland <sutherix@yahoo.com>

**To:** Steve Johnson <johnsosw@co.larimer.co.us>

**Cc:** "larueds@co.larimer.co.u" <larueds@co.larimer.co.u>; "haagjs@larimer.org" <haagjs@larimer.org>; "jrhftc@hotmail.com" <jrhftc@hotmail.com>; "tdonnelly@larimer.org" <tdonnelly@larimer.org>; "rcunniff@fcgov.com" <rcunniff@fcgov.com>; "ghorak@fcgov.com" <ghorak@fcgov.com>; "datteberry@fcgov.com" <datteberry@fcgov.com>; "ksampley@fcgov.com" <ksampley@fcgov.com>; "melsways2@yahoo.com" <melsways2@yahoo.com>; "joseyie@larimer.org" <joseyie@larimer.org>; "tcrabb@psdschools.org" <tcrabb@psdschools.org>; "lhoffmann@larimer.org" <lhoffmann@larimer.org>; "petersmr@larimer.org" <petersmr@larimer.org>; "sanderlr@larimer.org" <sanderlr@larimer.org>

**Sent:** Tuesday, November 12, 2013 12:59 PM

**Subject:** Re: Boxelder Questions

County Commissioner Steve Johnson,

Oh my heavens. My bad. Golly did I screw up.

What I had meant to ask for was an unimpeachable affirmative

defense of the actions that have been taken or contemplated. I would also be willing to settle for a defensible position.

I am very sorry to have wasted both our time here. please read..from CRS 29-1-203

having the power to so approve.

... and

any agency of the state or political subdivision (except home rule cities) must have expressed or necessarily implied authority to exercise power of eminent domain. BoCC vs. IREA (1980)

Besides, the Boxelder was not organized under 203. That might have been a better way to cowardly outsource the objectionable and unpopular activity of condemning land, but no one thought to do it that way. The Boxelder was organized under 204.2. It is considered a political subdivision of state government. The powers of eminent domain derive from Art.II of the Colorado Constitution and have been well defined by the courts. What you are suggesting here is absurd. At the very best, you seek to trump Constitutional law with a statute that does not apply to the Boxelder in a manner that is contrary to the direction provided by the courts.

(Have I ever recommended that you consider alternate legal counsel?

I recently made such a recommendation to the Poudre School District BofEd.)

As far as demands for payment... that is probably heading to court.

Please try and bring something that is not so easily picked apart as what you have parroted here. i.e. make it interesting for us.

As a suggestion, you might think about explaining why the money has never been budgeted or audited by Larimer County.

Deni, as you have obviously circulated Mr. Johnson's errant attempts at re-legislating the past in conformance with some alternate universe of law amongst the participants of the Laporte pizza gigs, please feel free to do the same with this email. There are a few of the attendees that are not on my bcc list.

In the end .. all irritated sarcasm aside .. this hamfisted misuse of the law is costing both public treasure and the good will of the people of Larimer County. You really, truly ought to think about knocking it off.

Eric

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**From:** Steve Johnson <[johnsosw@co.larimer.co.us](mailto:johnsosw@co.larimer.co.us)>

**To:** Eric Sutherland <[sutherix@yahoo.com](mailto:sutherix@yahoo.com)>

**Sent:** Tuesday, November 12, 2013 10:08 AM

**Subject:** Boxelder Questions

Eric:

You asked two questions at my citizen meeting last Wednesday that I agreed to provide a response to.



1. Does the Boxelder Stormwater Authority have condemnation power?

Yes it does. CRS 29-1-204.2 **"Establishment of separate governmental entity to develop water resources, systems, facilities, and drainage facilities....(3) The general powers of such entity shall include the following power....(f) to condemn property for use as rights-of-way..."**

In addition, C.R.S. 29-1-203 authorizes public entities to cooperate and contract to perform any function and exercise any power that each of them have individually--in this case all parties that form the authority have condemnation authority. Most importantly, C.R.S. 29-2-204.2 provides that the Authority is a separate governmental entity and is a political subdivision and public corporation of the state and has all the privileges, and rights of a public body politic and corporate. As a political subdivision of the state, the Authority has the right of condemnation to carry out the provisions of 29-2-204.2 that authorizes the Authority to **acquire**, construct, manage and maintain water and drainage facilities.

2. Does the County have the authority to collect fees for the Boxelder Authority and lien property in the even of non-payment?

Yes it does. As in the previous discussion, State statute authorizes the County to manage storm water itself, or delegate such authority by agreement. Under a separate State statute, the County is authorized to partner with other governmental entities to form a Storm Water Authority. Pursuant to the combination of these authorities, the County, Fort Collins, and Wellington formed the Boxelder Authority through an IGA. This IGA authorizes Boxelder to manage storm water in the Boxelder Basin and establish fees to fund such management. The County and the Authority by virtue of that delegation have fee collecting authority.

Regarding liens, Pursuant to state law (30-20-420), fees charged in connection with storm water facilities, if delinquent, can be certified for collection and "shall" become a lien on the property and collected in the same manner as taxes.

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Steve Johnson  
Larimer County Commissioner Dist. 2  
follow me on Facebook at: <http://www.facebook.com/home.php#!/pages/Steve-Johnson-Larimer-County-Commissioner/338760390694>  
Larimer County Information: [www.larimer.org](http://www.larimer.org)

STATE OF  
COLORADO

Hernandez - DNR, Jonathan &lt;jonathan.hernandez@state.co.us&gt;

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## BBRSA is doomed by financial/legal problems

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Eric Sutherland &lt;sutherix@yahoo.com&gt;

Tue, Jun 30, 2015 at 1:16 PM

Reply-To: Eric Sutherland &lt;sutherix@yahoo.com&gt;

To: "illanas@fioreandsons.com" &lt;illanas@fioreandsons.com&gt;

Fiore and Sons, Low bidder on BBRSA projects

Although it hardly matters (because the BBRSA does not have enough money to pay for the project your firm bid on), the debt that is relied upon to pay for the BBRSA's projects is unconstitutional under TABOR.

The BBRSA is probably the frailest pork-barrel boondoggle ever cooked up. If your firm had completed even a cursory examination of the BBRSA's finances, it would be obvious that the bid amount you submitted is more than the BBRSA can afford. Things would be different if the BBRSA had not plowed through over \$3 million of other people's money in the past 3 years into designing a project it does not have enough money to complete.

Under the loan agreements executed by the BBRSA and the CWCB, all revenues from this point forward are obligated to debt service. That includes contributions for 2015 from Wellington, Larimer County and the TDA. Only Fort Collins submitted its annual contribution prior to the CWCB funding the land acquisition portion of the loan. Frankly, I fail to see how the BBRSA has enough cash on hand or anticipation of future revenues not obligated to debt service to make the 10% match required by the loan agreements.

Yet ... even if the financial mismanagement, greed and complete lack of public purpose associated with a publicly funded project is not enough to conflate the BBRSA ... the BBRSA does not have the authority to place thousands of property owners and the ratepayers of Fort Collins Utilities in debt for the next 20 years. The ability of a governmental entity to create debt has always been limited under the Colorado Constitution. The approval of TABOR by the citizens of Colorado in 1992 established more restrictive controls on debt with its requirements for voter approval.

Unknowingly, the BBRSA was attempting to slip past the prohibitions on creating debt established by TABOR and the Colorado General Assembly. The BBRSA is not an enterprise under TABOR. A water enterprise under TABOR must be wholly owned by a single district. See [SB93-130](#) or [CRS 37-45.1-103](#). Although the BBRSA has argued that it is both a district and an enterprise under TABOR, authorities such as *Campbell v. Orchard Mesa Irrigation* and *Olson v. Golden Urban Renewal* hold that it is not.

The attorneys and others that put the whole BBRSA debacle together had no idea of the existence of the law until I brought it to their attention. Evidence of this statement exists in multiple public records. I have attached one of them to this email. This file contains a Resolution passed by the Board of Directors of the BBRSA that simultaneously evidenced that the BBRSA was wholly owned by more than one district and claimed to be a TABOR enterprise under 37-45.1-103. Much later and following challenges to the constitutionality

of the debt, the BBRSA invented a theory that it was both a district and an enterprise under TABOR. However, reviewing the attached Resolution indicates that the BBRSA never contemplated themselves to be a district prior to the challenge.

You simply need to ask yourself ... how would you feel if 5 unelected people, most of whom do not pay any fees themselves, suddenly placed an encumbrance on your property that would require you to make payments for the next 20 years? For something that did not benefit you in the slightest? In such a way as to completely escape any sort of democratic control over the process? Even the ever-deceitful manager of the CWCB's finance division has admitted he would not appreciate this.

Now consider that the people driving all of this .. the folks that do stand to benefit .... are paying nothing. They have managed to get everyone else in the county to pay the cost of taking their property out of the floodplain for them.

If you think about it for just a few minutes, it is not hard to figure out why I prepared a complaint over a year ago to enforce TABOR in this situation. Since then, it has been interesting to watch the circus. A project that is undertaken under the auspices of public interest but is really driven entirely by greed will always generate confusion and conflict. Such is the case here. I thought about sending you the draft of the complaint, but it is really a moot issue because the project is financially unfeasible as things stand right now.

I am hopeful that your company can review this information and conclude that the BBRSA's goals are impossible at this time. Pursuing a contract based upon the bid you submitted will only place Fiore and sons in the middle of one of the most screwed up things Northern Colorado has ever seen.

Eric Sutherland  
Fort Collins, CO



**Loan Contract for ESDF\_Board Resolution.pdf**  
1977K

STATE OF  
COLORADO

Hernandez - DNR, Jonathan &lt;jonathan.hernandez@state.co.us&gt;

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## Larimer district judge reverses decision/ saves family farm.

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Eric Sutherland &lt;sutherix@yahoo.com&gt;

Mon, Jul 6, 2015 at 3:44 PM

Reply-To: Eric Sutherland &lt;sutherix@yahoo.com&gt;

To: Eric Sutherland &lt;sutherix@yahoo.com&gt;

8th District Court District Judge Thomas French has reversed his opinion in the condemnation of a 5th generation family farm that has been slated for destruction to build an unnecessary and expensive storm water detention facility. ( Ref. 14CV31057, previously consolidated with 14CV31053)

Originally, French had ruled that the condemnation of a right of way on the Day farm allowed the Boxelder Stormwater Authority (BBRSA) to take acres of dirt off of the farm to build a dam on another parcel of land. Now, French has come to his senses and realizes that a right of way does not grant title to property such as dirt. The Colorado General Assembly clarified the law in 2008 to assure this result.

The reversal of this decision effectively kills the Boxelder Stormwater Authority. The Boxelder did not have enough money to complete the project as it was. Bids for the destruction of the farm came in 25% higher than engineering estimates. The funds available to the BBRSA from loan agreements contracted with the Colorado Water Conservation Board (CWCB) are nowhere near enough to complete the project. Now, the BBRSA faces the need to purchase about one million dollars of construction materials that it had not budgeted for (if it can even find a seller.). It may not steal these materials from the farm it has condemned as it had planned.

Although the BBRSA's expensive Denver condemnation attorney vows to fight on, he hasn't a snowball's chance in hell of getting anything besides more fees payable to his firm. Judge French's amended decision is consistent with the letter and intent of a law that is not difficult to interpret and understand. It will not be disturbed.

### **CWCB TAKES A HUGE LO\$\$**

The big loser here is the Colorado Water Conservation Board, which has already funded \$1.4 million to the Boxelder to purchase property and other rights of way.

The CWCB staff acted in a greedy, irresponsible way throughout this process. CWCB had been alerted to the legal problems of the loan they were funding years ago. I even took the time to attend a meeting of the CWCB in Berthoud, CO to make sure there could be no mistake. The arrogant and inept legal counsel\* provided by the Attorney General's office to the CWCB dismissed the possibility that a right of way condemnation could not take minerals from a property. In a rush to fund the loan, the CWCB failed to wait until a post decision motion by the defendant had been resolved before writing a check.

\* Colorado Attorney General's Office attorneys: Susan Schneider, Casey Schpall

That \$1.4 million is money that the CWCB will never see again. Ironically, the same law that prevented the BBRSA from condemning the fee interest in the property (which would have conveyed title to the sub-surface minerals) also disallows the BBRSA from creating debt under TABOR. Because the funding of any part of the CWCB loans requires the BBRSA to dedicate all revenues to debt service, any and all payments now made to the BBRSA will be used to repay an unlawful debt. It is unlawful under Colorado law for a government to make demands of payment of anyone for the purposes of repaying an unlawful debt. Therefore, the people and businesses of Larimer County, Wellington and Fort Collins that were expected to pay for this scam can now be liberated of any obligation.

### **GOVERNMENT ATTORNEYS SEEN TO BE INEPT**

Fort Collins City Attorney Carrie Daggett

Larimer County Attorney Jeanine Haag

Wellington Town Counsel Brad March

The above named attorneys could not have made bigger fools out of themselves. The improbability of the condemnation/land acquisition scheme required to effect the plan for the BBRSA was brought to their attention in 2013. First, these attorneys argued that authority to condemn the fee interest in property had been conveyed to the BBRSA Board of Directors. That erroneous idea bit the dust when the BBRSA contracted with a Denver attorney to complete the condemnation. 100 years of case law holds that powers of condemnation may not be inferred or conveyed. However, the limitation on taking title to minerals with a right of way is every bit as impossible to overcome and now that oversight has crippled the project.

Interestingly, the post decision motion that led to the reversal of the decision was filed by the defendants on April 22, 2015. That was approximately one week prior to the CWCB funding the \$1.4 million for property acquisition. Despite the significant risk that A) Judge French would reverse himself or B) the matter would be appealed, no one showed the slightest measure of caution. A meeting of nearly every single official involved from all 4 public entities involved in the project occurred on May 6, yet the possibility that the dirt would not be available was never discussed.

### **MANAGER OF BBRSA ADMITTED PROJECT WOULD BE "DEAD IN THE WATER"**

When writing to Malcolm Murray, the Denver condemnation attorney, last March, Stan Meyers, the contracted General Manager of the BBRSA asked:

Do you think Judge French is aware of the fact that if we have to pay for the soil we are removing from Day's property that this project is dead in the water?

Note the assumptive tone in this question. It is as if Meyers had the understanding that Judge French's responsibility was to make sure his project succeeded, not follow the law.

Looking beyond this presumption, we can see that Meyers knew all along that getting the dirt for free was doubtful and risky. This did not stop him from spending millions of dollars on expensive consultants without getting unbiased legal counsel on the question.

### **BBRSA CONTINUES TO BE DISHONEST, DESTRUCTIVE AND UNNECESSARY SCAM**

Despite this setback, look for the BBRSA to continue in its efforts to privatize the profits and socialize the costs. The intended winners here are a handful of manipulators and their well



paid "professionals" tasked with completing this project. The losers will be everyone else in Larimer County who will have to pay the costs of this pork barrel debacle as well as the unsettling growth that is robbing Larimer County of its quality of life and higher taxes necessary to pay for it.

Eric Sutherland  
Fort Collins, CO