

**REVIEW DRAFT**

*I-5 Columbia River Crossing Partnership:  
Technical Analysis*

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Washington Laws and  
Regulations Affecting Project  
Concepts, Financing Options  
and Development Procedures:  
Part 1: Washington Statutes  
Governing the Imposition of  
Tolls

Technical Memorandum 8.5.1

Prepared by

Steven Siegel Consulting

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**Technical Memorandum No. 8.5.1: Washington Laws and Regulations Affecting Project Concepts, Financing Options and Development Procedures: Part 1: Washington Statutes Governing the Imposition of Tolls**

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**Technical Memorandum No. 8.5.1:  
Washington Laws and Regulations Affecting Project Alternatives,  
Financing Options and Development Procedures: Part 1: Washington  
Statutes Governing the Imposition of Tolls and Use of Toll Revenues**

**1. Background<sup>1</sup>**

There are four basic options for imposing tolls on the I-5 Bridge and/or I-205 (Glenn Jackson) Bridge:<sup>2</sup>

- ODOT imposes the toll(s)
- WSDOT imposes the toll(s)
- A joint entity established by agreement or state(s) legislation imposes the toll(s)
- A private entity contracted to design, build, operate, and finance a tolling project imposes the toll(s)

This memorandum assesses the Washington statutory provisions that govern WSDOT's authority to toll and use toll revenues, and to enter into agreements with private parties for toll bridges.

WSDOT's tolling authority is primarily set forth in three chapters of the Revised Code of Washington (RCW):

- Chapter 47.56 RCW: State Toll Bridges, Tunnels, and Ferries (herein referred to as RCW 47.56)
- Chapter 47.58 RCW: Existing and Additional Bridges (herein referred to as RCW 47.58)
- Chapter 47.46 RCW: Public-Private Transportation Initiatives (herein referred to as RCW 47.46 or the "PPI Act")

In addition to these statutory authorities, WSDOT's use of toll revenues is also governed by Article II, Section 40 of the Washington Constitution. The limitations set by the Washington Constitution were addressed in Technical Memorandum 8.3. Technical Memorandum 8.1 addressed the pertinent federal statutes, and Technical Memorandum 8.6.1 addressed ODOT's tolling authorities. Future technical memoranda will address WSDOT's and ODOT's authority to create various types of joint tolling entities.

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<sup>1</sup> ODOT and WSDOT are preparing to undertake environmental studies of Columbia River Crossing Project alternatives. A decision as to which, if any, of the tolling options will be included in the environmental studies will be made through "project scoping." A decision as to which, if any, tolling option will be recommended for implementation will occur at the conclusion of the environmental studies.

<sup>2</sup> This Technical Memorandum only addresses options regarding the authorities of the WSDOT tolling authority also exists for cities, counties, and other governmental entities.

## 2. Tolling Authority under RCW 47.56:

### 2.1 RCW System for Tolling Authority

Washington law empowers WSDOT<sup>3</sup>, port districts<sup>4</sup>, counties<sup>5</sup>, and regional transportation investment districts<sup>6</sup> to establish toll facilities. This Technical Memorandum focuses solely on the authorities of WSDOT.

WSDOT's tolling authority is granted in two basic categories<sup>7</sup>:

- "Toll bridges," which are bridges "*constructed or acquired under [RCW 47.56]*,"

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<sup>3</sup> RCW 47.56

<sup>4</sup> RCW 53.34.010. In addition to all other powers granted to port districts, any such district may, with the consent of the department of transportation, acquire by condemnation, purchase, lease, or gift, and may construct, reconstruct, maintain, operate, furnish, equip, improve, better, add to, extend, and lease to others in whole or in part and sell in whole or in part any one or more of the following port projects, within or without or partially within and partially without the corporate limits of the district whenever the commission of the district determines that any one or more of such projects are necessary for or convenient to the movement of commercial freight and passenger traffic a part of which traffic moves to, from, or through the territory of the district:

(1) Toll bridges;

(2) Tunnels under or upon the beds of any river, stream, or other body of water, or through mountain ranges.

In connection with the acquisition or construction of any one or more of such projects the port districts may, with the consent of the state department of transportation, further acquire or construct, maintain, operate, or improve limited or unlimited access highway approaches of such length as the commission of such district deems advisable to provide means of interconnection of the facilities with public highways and of ingress and egress to any such project....

<sup>5</sup> RCW 36.76.140. The county legislative authority may, by majority vote, and by submission to the voters under the same procedure required in RCW 36.76.090 and 36.76.100, issue general obligation bonds for the purpose of contributing money, or the bonds themselves, to the department to help finance the construction of toll bridges across topographical formations constituting boundaries between the county and an adjoining county, or a toll bridge across topographical formation located wholly within an adjoining county, which in the discretion of the county legislative authority, directly or indirectly benefits the county. The bonds may be transferred to the department to be sold by it for the purposes outlined herein. The bonds may bear interest at a rate or rates as authorized by the county legislative authority. Such indebtedness is subject to the limitations on indebtedness provided for in RCW 39.36.020(2).

<sup>6</sup> RCW 47.56.076. Upon approval of a majority of the voters within its boundaries voting on the ballot proposition, and only for the purposes authorized in \*RCW 36.120.050(1)(f), a regional transportation investment district may impose vehicle tolls on state routes where improvements financed in whole or in part by a regional transportation investment district add additional lanes to, or reconstruct lanes on, a highway of statewide significance. The department shall administer the collection of vehicle tolls on designated facilities unless otherwise specified in law, and the state transportation commission, or its successor, shall be the tolling authority. \*Reviser's note: RCW 36.120.050 was amended by 2003 c 350 § 4, changing subsection (1)(f) to subsection (1)(g).

<sup>7</sup> RCW 47.56.010

*upon which tolls are charged, together with all appurtenances, additions, alterations, improvements, and replacements thereof, and the approaches thereto, and all lands and interests used therefore, and buildings and improvements thereon”.*

- "Toll roads," which are "*express highway[s], superhighway[s], or motorway[s] at such locations and between such termini as may be established by law, and constructed or to be constructed as a limited access highway under the provisions of this chapter by the department, and shall include, but not be limited to, all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, toll houses, service areas, service facilities, communications facilities, and administration, storage, and other buildings that the department may deem necessary for the operation of the project...*"

It appears these two categories are intended to be exclusive of each other. That is a "toll bridge" is not a "toll road." This is a crucial distinction in that, under RCW 47.56.075:

*The department shall approve for construction only such toll roads as the legislature specifically authorizes or such toll facilities as are specifically sponsored by a regional transportation investment district, city, town, or county. [emphasis added].*

Thus, specific legislative authorization is only required for *toll roads* initiated by WSDOT, and not *toll bridges*<sup>8</sup>. Outside of this difference, toll roads are "*conducted in the same manner and under the same procedure as provided for the establishing, constructing, operating, and maintaining of toll bridges by the department, insofar as those procedures are reasonably consistent and applicable.*"<sup>9</sup> The remainder of this Technical Memorandum focuses on "toll bridges" and "toll tunnels," the options being considered for the Columbia River Crossing Project.

Two concepts included in the definition of "toll bridge" should be highlighted:

- First, "toll bridges" are bridges "*constructed or acquired*" under RCW 47.56. The conversion to toll bridges of existing bridges, which are neither being constructed nor acquired, are not covered by this definition. While, as discussed later, there are specific statutory provisions authorizing, for example, tolling of the existing I-5 Bridge as part of constructing a supplemental bridge in the I-5 corridor, these provisions would not permit the conversion of the I-205 Bridge to a toll facility.
- Second, "toll bridges" include "*approaches thereto.*" Case law in Washington has given broad, but not unlimited, definition to the phrase "approaches thereto." This issue is discussed later in this Technical Memorandum.

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<sup>8</sup> Although, as discussed later in this Technical Memorandum, it appears as though legislation may be needed to implement the Columbia River Crossing Project for other reasons.

<sup>9</sup> RCW 47.56.075

## 2.2 Authority of WSDOT to Establish, Construct, and Operate Toll Bridges and Toll Tunnels

WSDOT is authorized to provide for the “establishment and construction” of **toll bridges** and “*approaches thereto*” upon any public highway in Washington, including those that cross rivers constituting state boundaries, when the department determines it is necessary or advantageous and practicable in accordance with the provisions of RCW 47.56.<sup>10</sup> In making the determination that a potential toll bridge is “*necessary or advantageous and practicable*,” the feasibility of financing any toll bridge must be a primary consideration. WSDOT is authorized to finance and undertake the necessary examinations to make these determinations.<sup>11</sup>

WSDOT is authorized to enter into agreements with an adjoining state for the investigation of the feasibility of a toll bridge project crossing state boundaries.<sup>12</sup> WSDOT may use funds available to it to carry out such agreements and feasibility studies. And, the agreements may provide that if the study results in a toll bridge project, any advancement of funds by either state may be reimbursed out of any proceeds derived from the sale of bonds or out of tolls and revenues to be derived from the project.<sup>13</sup>

Except for projects undertaken as public-private initiatives under RCW 47.46, WSDOT has “*full charge*” of the design, construction, operation, and maintenance of all toll bridges and facilities.<sup>14</sup> Construction of toll bridges and related approaches must be accomplished by contract in the manner of state highway construction. WSDOT is also empowered to act and make agreements as may be necessary or desirable in connection with the construction, maintenance, operation, administration, and insurance of toll bridges.<sup>15</sup> The transportation commission has the authority to determine and establish the tolls and exercise all powers relating to the financing of all toll bridges and facilities.<sup>16</sup>

WSDOT is also, whenever it is considered necessary or advantageous and practicable, empowered to purchase bridges and their approaches.<sup>17</sup> With regard to the purchase of bridges, WSDOT is granted the same powers and obligations and must act in the same manner as provided for the construction of toll bridges.

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<sup>10</sup> RCW 47.56.040

<sup>11</sup> Id.

<sup>12</sup> RCW 47.56.042

<sup>13</sup> Id.

<sup>14</sup> RCW 47.56.030

<sup>15</sup> RCW 47.56.060

<sup>16</sup> RCW 47.56.030

<sup>17</sup> RCW 47.56.050

In addition, with the approval of the transportation commission, WSDOT may provide for the establishment, construction, and operation of **toll tunnels** and their connection with public highways of the state.<sup>18</sup> The examination and selection of toll tunnels are to be conducted in the same manner and under the same procedure as provided for the establishing, constructing, operating, and maintaining of toll bridges.<sup>19</sup>

### **2.3 Toll Rates and Use of Toll Revenues under RCW 47.56**

For toll bridges “*built under the terms of [RCW 47.56],*” toll rates and other charges are to be set by the commission.<sup>20</sup> The tolls and charges must be set at “*rates to yield annual revenue equal to annual operating and maintenance expenses including insurance costs and all redemption payments and interest charges of the bonds issued for any particular toll bridge or toll bridges as the bonds become due.*”<sup>21</sup>

When the transportation commission determines that a toll bridge should be constructed, all costs of construction, including right of way, survey, and engineering, is to be paid from any funds available for payment of such costs.<sup>22</sup> The transportation commission is empowered to authorize the issuance of revenue bonds to construct toll bridges in an amount not in excess of that estimated to be required for such construction.<sup>23</sup> To do so, the commission must adopt a resolution declaring that public interest and necessity require the construction of such toll bridge. Revenue bonds may be issued in such amounts as to provide sufficient funds for the construction of the bridge, and to pay interest on outstanding bonds issued for its construction during the period of actual construction and for six months after completion.<sup>24</sup>

The bond redemption and interest payments constitute the first priority on the use of toll proceeds and interest thereon.<sup>25</sup> Sinking funds created from toll revenues constitute a trust fund for the security and payment of such bonds and cannot be used or pledged for any other purpose as long as any of these bonds are outstanding and unpaid. Combining toll facilities, including toll bridges, with other toll facilities for the purpose of financing

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<sup>18</sup> RCW 47.56.070

<sup>19</sup> Id.

<sup>20</sup> RCW 47.56.240

<sup>21</sup> Id.

<sup>22</sup> RCW 47.56.120

<sup>23</sup> RCW 47.56.080

<sup>24</sup> RCW 47.56.140

<sup>25</sup> RCW 47.56.240

is prohibited, unless such facilities form a continuous project.<sup>26</sup> This provision, for example, would prohibit an integrated tolling program between the I-5 and I-205 Bridges

Generally, the costs of maintenance and operation of toll bridges must be paid periodically out of the revenues of the facility in which such costs were incurred. However, where a state toll facility is constructed under chapter 47.46 RCW adjacent to or within two miles of an existing bridge that was constructed under RCW 47.56, revenue from the toll facility may not be used to pay for costs of maintenance on the existing bridge.<sup>27</sup>

All tolls or other revenues received from the operation of a toll bridge constructed with the proceeds of bonds issued under RCW 47.56 must be deposited in a segregated account.<sup>28</sup> All interest earned on money deposited in the segregated account is credited to the account.<sup>29</sup>

During the period of construction and the proceeding six months, debt service on bonds sold for the construction of the toll bridge are paid from the money deposited in the segregated account.<sup>30</sup> The moneys remaining each year in the segregated account after payment of debt service are applied or held as provided in the proceedings authorizing the issuance of the bonds. If these proceedings do not stipulate how the surplus revenues must be held or applied, the surplus revenues may be used to pay any cost incidental to the construction, operation, and maintenance of the toll bridge, as WSDOT may determine.<sup>31</sup>

## **2.4 Statutory Provisions Relating to the I-5 Bridge**

RCW 47.56.310 - .343 authorized WSDOT to work with Oregon to construct the second (1960) span and reconstruct the original span of the I-5 Bridge between Vancouver and Portland. At this point, these provisions appear to be historical remnants, and not applicable to the current Columbia River Crossing Project. However, these statutes do provide some useful insights, and also could lead to unnecessary ambiguities if not properly addressed in any future legislation. Thus, they are briefly summarized below.

RCW 47.56.320 authorized a bi-state agreement that would allow both spans to be operated as a single toll bridge (similar to the Supplemental Bridge alternatives under consideration in the Columbia River Crossing Project):

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<sup>26</sup> RCW 47.56.070 *No toll facility, toll bridge, toll road, or toll tunnel, shall be combined with any other toll facility for the purpose of financing unless such facilities form a continuous project, to the end that each such facility or project be self-liquidating and self-sustaining.*

<sup>27</sup> RCW 47.56.245

<sup>28</sup> RCW 47.56.160

<sup>29</sup> RCW 47.56.180

<sup>30</sup> RCW 47.56.170

<sup>31</sup> Id



*“... the new bridge, including approaches, provided for herein shall be merged and consolidated with the existing interstate bridge, including its approaches, located between Vancouver, Washington and Portland, Oregon so that both bridges shall be and become a single toll facility.”*

RCW 47.56.330 delineated items that were required to be in the bi-state agreement, which included, among others, provisions that:

- (a) WSDOT<sup>32</sup> *“shall assume and have complete responsibility for the operation of both bridges and approaches thereto as a single toll facility except as to repair and maintenance...”*
- (b) WSDOT shall have *“full authority to impose and collect all toll charges from the users of said bridges and to disburse the revenue for the payment of expenses of maintenance and operation and repair thereof, all costs of constructing the new bridge and reconstructing and improving the existing bridge, and the payment of the principal of and the interest on the revenue bonds...”*
- (c) WSDOT *“shall provide for the issuance, sale and payment of revenue bonds payable solely from the revenue derived from the imposition and collection of tolls upon both bridges, and that such bonds shall be in such amounts as to provide funds with which to pay the costs of the design and construction of the proposed new bridge, including the approaches thereto in both states ... the reconstruction and alteration of the existing bridge and approaches thereto ... with the further provision that any sale of the bonds to be issued shall be approved by the Oregon state highway commission.”*
- (d) WSDOT, *“after consultation with the Oregon state highway commission, shall fix the classifications and amounts of tolls to be charged and collected from users of said toll facility with power after consultation with the Oregon state highway commission ... with the further provision that such toll charges shall be removed after all costs of construction of the new bridge and approaches thereto and the reconstruction and improvement of the existing bridge and approaches thereto... shall have been paid, and all of said revenue bonds ...shall have been fully paid and redeemed.”*

RCW 47.56.340 required that to

*“Both the bridges ...shall be operated as toll-free bridges whenever the costs of construction of the new bridge and approaches thereto and the reconstruction and improvement of the existing bridge and approaches thereto, including all incidental costs shall have been paid, and when all of said revenue bonds and interest thereon ...shall have been fully paid and redeemed.”*

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<sup>32</sup> The statute actually provided authority to the Washington toll bridge authority, which later was merged into WSDOT.

As discussed later in this Technical Memorandum, a remnant statute requiring a bridge to be “*toll-free*” invites legal challenge if not properly addressed in any new legislation potentially permitting such a bridge to be tolled.

### **3. Tolling Authority under RCW 47.58**

#### **3.1 Applicability of RCW 47.58**

RCW 47.58 provides an alternative authority for tolling bridges that is supplemental to other tolling authorities in Washington statutes.<sup>33</sup> It addresses toll bridge projects that include “*the construction of an additional toll bridge, including approaches, and the reconstruction of an existing adjacent bridge, including approaches, and the imposition of tolls on both bridges.*”<sup>34</sup> The existing bridge and new bridge cannot be more than two miles apart.<sup>35</sup> Financing and construction of such projects by WSDOT must first be “*specifically authorized*” by the legislature.<sup>36</sup> The authority provided by RCW 47.58 could, for example, be used to toll the existing I-5 Bridges with a new Supplemental Bridge alternative; but could not be used to additionally toll the I-205 Bridge.

#### **3.2 Preliminary Project Development under RCW 47.58**

WSDOT is authorized to study projects eligible under RCW 47.58 without specific legislative approval, and can recommend such projects to the legislature.<sup>37</sup> In fact, it is the “*duty*” of WSDOT “*to make any examination, investigation, survey, or reconnaissance*” to obtain information “*as to the necessity of the reconstruction or improvement of any such bridge and the expediency of constructing any such additional bridge.*”<sup>38</sup> The cost of any such studies and all preliminary expenses in the issuance of any revenue bonds are to be advanced by the governmental entity (i.e.; WSDOT, etc.), and these “*advances*” are to be reimbursed out of toll revenues or related bond proceeds.<sup>39</sup>

#### **3.3 Financing and Construction**

WSDOT is permitted to enter construction and related financing agreements for toll projects under RCW 47.58 only after the legislature specifically authorizes, as a single project, the construction of an additional toll bridge and the reconstruction of an existing

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<sup>33</sup> RCW 47.58.900

<sup>34</sup> RCW 47.58.010

<sup>35</sup> Id.

<sup>36</sup> RCW 47.58.090.

<sup>37</sup> Id.

<sup>38</sup> RCW 47.58.020

<sup>39</sup> Id.

adjacent bridge, including approaches, and the imposition of tolls on both bridges.<sup>40</sup> After such authorization:

*“The department has the right to impose tolls for traffic over the existing bridge as well as the additional bridge for the purpose of paying the cost of operation and maintenance of the bridge or bridges ... and creating a sinking fund for retirement of revenue bonds issued for account of such project ...”*<sup>41</sup>

WSDOT is granted “full charge” of (a) the construction of all such improvements and reconstruction work, and (b) the collection of tolls and other charges for services and facilities.<sup>42</sup> The transportation commission is granted the authority to fix toll rates and other charges, provided that such rates must yield annual revenue sufficient to pay all operating expenses and repayment of construction bonds.<sup>43</sup>

WSDOT is authorized to issue revenue bonds to pay costs of the construction of the new bridge, reconstruction of the existing bridge, and any related approaches.<sup>44</sup> Such revenue bonds may be paid by any available source to WSDOT, including toll revenues, but not from general funds. The amount of revenue bonds issued may include funds to pay any expenses incurred by WSDOT in connection with the issuance and sale of bonds, the preparation of surveys and estimates, making inspections, required reserves, and interest during the estimated construction period and the following six months.<sup>45</sup> The resolution providing for the issuance of revenue bonds must provide for setting aside the necessary amounts for operation, maintenance, and repair expenses.<sup>46</sup>

The tolls must terminate when the construction bonds and all other advances, if any, have been paid.<sup>47</sup>

#### **4. Tolling Authority under RCW 47.46: Public-Private Initiatives**

While the Public-Private Initiatives (PPI) Act, codified in RCW 47.46, is only applicable if a private partner approach is undertaken, its history, in particular the related legal challenges, provides good insight into statutory issues that may arise in the context of the

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<sup>40</sup> RCW 47.58.010

<sup>41</sup> Id.

<sup>42</sup> RCW 47.58.030

<sup>43</sup> Id.

<sup>44</sup> RCW 47.58.040

<sup>45</sup> RCW 47.58.050

<sup>46</sup> RCW 47.58.060

<sup>47</sup> RCW 47.58.030

Columbia River Crossing Project, even if undertaken as a public project. Thus, this history of the PPI Act and its legal challenges is summarized below.

#### **4.1 Evolution of Public –Private Initiatives**

In 1993 the PPI Act was enacted into law, and a program was created within WSDOT to implement the law. The goal of the act included enhancement of the State's ability to provide an efficient transportation system by supplementing state transportation funds with private funds.<sup>48</sup> The 1993 PPI Act authorized the secretary of transportation to select up to six "demonstration project" proposals from private entities to test the feasibility of using the private sector to undertake public projects on behalf of WSDOT. One year later, WSDOT issued a Request for Proposals (RFP) inviting private firms to submit proposed projects for consideration; six projects, one of which being the Tacoma Narrows Bridge Project (TNB Project), were selected and approved by the Transportation Commission. Over time five of the six demonstration projects were terminated for various reasons, resulting in only one project reaching the construction stage -- the TNB Project

The PPI Act has been amended several times since its initial enactment. The Legislature amended the PPI Act in 1995 requiring, among other things, a public involvement program, and an advisory election vote on projects that are challenged by petition of 5,000 signatures.<sup>49</sup> In 1996 the PPI Act was amended to require the advisory election be held on the preferred alternative identified under the State Environmental Policy Act<sup>50</sup> (SEPA).<sup>51</sup> The statutory amendments gave WSDOT no direction on how to administer the advisory elections, so WSDOT adopted administrative rules to set out how to do so.<sup>52</sup> After the 1996 legislative amendment calling for the advisory election to be on the "preferred alternative," WSDOT amended its rules to reflect that this would be the preferred alternative identified in the draft environmental impact statement (EIS).<sup>53</sup> In 1998 legislation passed providing sales tax deferrals on construction of the TNB project, requiring the initial round-trip toll to not exceed \$3, and providing \$50 million state contribution to the project.<sup>54</sup> In 1999 the Peninsula Neighborhood Association filed suit to stop the project alleging constitutional defects in the PPI Act and statutory violations by WSDOT in implementing the statute.

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<sup>48</sup> RCW 47.46.010.

<sup>49</sup> RCW 47.46.030(3), (11).

<sup>50</sup> RCW 43.21C

<sup>51</sup> RCW 47.46.030(4)

<sup>52</sup> WAC 468-105-010 through 468-105-080.

<sup>53</sup> WAC 468-105-020(11).

<sup>54</sup> Also in 1998 the advisory vote is held, with 53 percent of the voters in the affected area favoring the project.

## 4.2 State Supreme Court Decisions on Constitutionality of PPI Act and Enforceability of Tacoma Narrows Bridge Public-Private Agreement

In 2000 the Governor approved \$800 million in privately-issued tax exempt financing for TNB project. However, also in 2000, the State Supreme Court ruled as follows on the Peninsula Neighborhood Association's suit:<sup>55</sup>

- (a) The PPI Act's delegation of authority to identify toll bridges and set toll rates to WSDOT was not constitutionally prohibited, primarily because the provisions of the Act provided sufficient controls to avoid an improper delegation of legislative authority.
- (b) The Court rejected the argument on procedural grounds that WSDOT did not comply with the APA in adopting rules to implement the PPI Act.
- (c) WSDOT exceeded its statutory authority when it applied the PPI Act to develop a project that involves tolling the existing Tacoma Narrows Bridge. Because some of the issues relating to the third holding, above, relate to statutory issues that may need to be addressed for the Columbia River Crossing Project, it is instructional to review the case and its holdings. Accordingly, the Court's analysis is detailed below.

In the case, PNA argued that WSDOT exceeded its statutory authority in applying the PPI Act to develop a project that involves maintaining, operating, and tolling the existing Tacoma Narrows Bridge when state law provides that the existing bridge shall be toll free and operated, maintained, and repaired with state highway funds. Prior to the enactment of the PPI Act, there were three statutes addressing the existing Tacoma Narrows Bridge:

- RCW 47.56.270 stated, in relevant part: *The ...Tacoma Narrows bridge ...shall, upon completion, be operated, maintained, kept up, and repaired by the department ... and the cost of such operation, maintenance, upkeep, and repair shall be paid from funds appropriated for the use of the department for the construction and maintenance of the primary state highways of the state of Washington.* [Emphasis added.]
- RCW 47.56.240 states that it is the transportation commission that is "*empowered to fix the rates of toll and other charges for all toll bridges built under the terms of this chapter [RCW 47.56].*" The existing bridge was built pursuant to the terms of RCW 47.56, and therefore the transportation commission must set toll rates, not a private entity contracting with WSDOT. To the extent the agreement allows the private entity to establish toll rates on the existing bridge, WSDOT exceeded its statutory authority.

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<sup>55</sup> The State of Washington on the Relation of Peninsula Neighborhood Association v. The Department of Transportation; 142 Wn, 2d. 328 (November 2000).

- RCW 47.56.271 states, in relevant part: *The Tacoma Narrows bridge ... shall be operated and maintained by the department as a toll-free facility at such time as the present bonded indebtedness relating thereto is wholly retired and tolls equaling the present indebtedness of the toll bridge authority to the county of Pierce have been collected. It is the express intent of the legislature that the provisions of RCW 47.56.245<sup>56</sup> shall not be applicable to the Tacoma Narrows bridge.* [Emphasis added.]

WSDOT argued that the PPI Act and the statutes relating to the existing bridge can be reconciled and both given effect, and also argued that if they cannot be reconciled, the PPI Act should supersede preexisting statutes. Specifically, WSDOT maintained that the purpose of RCW 47.56.270 and .271 was to ensure that after the bonds were paid off the state would not continue to collect tolls to pay for maintenance and operation of the bridge or to create a revenue source for the state. In support of this, WSDOT claimed that RCW 47.56.271 did not prohibit WSDOT from undertaking a new project that will be financed through tolls; it merely prohibits WSDOT from reimposing tolls on the existing facility for the purpose of generating revenue for operation and maintenance in the absence of a new construction project. WSDOT also argued that the PPI Act implicitly repealed RCW 47.56.271.

The Court rejected WSDOT's arguments, finding that:

- RCW 47.56.270 and .271 address present bonded indebtedness and future operation and maintenance of the existing Tacoma Narrows Bridge. The statutes did not address future debt incurred to finance future capital improvements.
- RCW 47.56.271 the Legislature specifically excluded the existing Tacoma Narrows Bridge from RCW 47.56.245 (enacted in 1961), thus requiring that tolls be removed without the state recouping its project development costs for the bridge.
- The new bridge was not being proposed under chapter 47.58 RCW, so this statute allowing additional bridges to be built and paid for by tolling the existing bridge and the new bridge did not apply.
- Nothing in this statutory scheme indicated that the Legislature intended for a toll to be reimposed on the existing bridge to help finance the construction of a new

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<sup>56</sup> RCW 47.56.245 The department shall retain toll charges on all existing and future facilities until all costs of investigation, financing, acquisition of property, and construction advanced from the motor vehicle fund, and obligations incurred under RCW 47.56.250 and chapter 16, Laws of 1945 have been fully paid.

(1) Except as provided in subsection (2) of this section, with respect to every facility completed after March 19, 1953, costs of maintenance and operation shall be paid periodically out of the revenues of the facility in which such costs were incurred.

(2) Where a state toll facility is constructed under chapter 47.46 RCW adjacent to or within two miles of an existing bridge that was constructed under this chapter, revenue from the toll facility may not be used to pay for costs of maintenance on the existing bridge. RCW 47.56.245

bridge. Even if the existing Tacoma Narrows Bridge were allowed to have a toll reimposed, WSDOT still exceeded its statutory authority by entering into an agreement authorizing a private entity to determine the toll rate on the existing bridge.

- The agreement provides for tolling of the existing bridge and therefore violates the prohibition on tolls specified in RCW 47.56.245.
- RCW 47.56.271 states that the bridge will be "operated and maintained" as a toll-free facility. Because the agreement allowed for the imposition of a "round trip" toll rate, it violated the statutory mandate that the existing Tacoma Narrows bridge be toll free. Further, the agreement allowed the developer to elect to install and operate two-way electronic tolling, thereby permitting tolling of the existing bridge. Therefore, the agreement violated the prohibition on tolls specified in RCW 47.56.271.
- The PPI Act did not meet the "implicit repealer" test because nothing in the statute indicates it is meant to supersede or implicitly repeal RCW 47.56.270 and .271, and both RCW 47.56.271 and the PPI Act can be given effect because they do not conflict with each other.
- WSDOT exceeded its statutory authority to the extent the agreement allows for tolls to pay for the operation and maintenance of the existing bridge. The agreement required that the total revenues be applied to the maintenance, upkeep, and repair of both bridges. RCW 47.56.270 states that maintenance and operation is to be done from WSDOT highway funds. As a result, the agreement violated the statute stating the existing bridge will be operated and maintained as a toll-free facility.

In 2002, the legislature passed EHB 2723, which modified the PPI Act by authorizing state financing and administration of toll facilities, amending RCW 47.56.010, 47.46.030, 47.46.040, 47.46.050, 47.46.060, 47.56.030, 47.56.270, 47.56.271, 39.46.070, 47.56.245; and RCW 43.84.092; and adding new sections to chapter 47.46 RCW. EHB 2723 was aimed at removing impediments to construction of the second Tacoma Narrows Bridge, such as the prohibition against tolling the existing bridge, which resulted in the Court's ruling in 2000. Also in 2002, state bonds for the Tacoma Narrows Bridge Project were authorized for up to \$800 million, and \$49 million in state funding was reappropriated, for total project appropriations of \$849 million.

In 2002 Citizens Against Tolls (CAT), a nonprofit organization from Gig Harbor opposed to tolling the Tacoma Narrows Bridge project undertook legal action alleging that EHB 2723 violates various state laws and the state constitution. Specifically, CAT claimed that (1) Referendum 49 violates article VIII, section 1(i) of the state constitution because the amount of the debt established by Referendum 49 was not approved by three-fifths of

each legislative house<sup>57</sup>; (2) the use of toll revenue to pay off the bonds financing the Tacoma Narrows Bridge project violates RCW 47.10.846; (3) EHB 2723 violates article II, section 19 of the state constitution<sup>58</sup>; (4) the Design-Build Agreement and other personal service contracts related to the Tacoma Narrows Bridge project violate the state bidding laws; and (5) the Tacoma Narrows Bridge project violates the priority programming statute. The case was eventually heard by the State Supreme Court in 2004, which rejected all of CAT's alleged defects.<sup>59</sup>

### 4.3 Current Tolling Authority under RCW 47.46

Under the current statutes, as amended by EHB 2723, WSDOT may provide for the establishment and construction of state toll bridge facilities under agreements entered into with private parties to develop such facilities. A state toll bridge facility includes, but is not limited to, the construction of an additional toll bridge, including approaches, within two miles of an existing bridge, the imposition of tolls on both bridges, and the operation of both bridges as one toll facility.<sup>60</sup> A citizen advisory committee must be created for any project developed under RCW 47.46 that imposes toll charges.<sup>61</sup> The governor must appoint nine members to the committee, all of whom must be permanent residents of the affected project area. No toll charge may be imposed or modified unless the citizen advisory committee has been given at least twenty days to review and comment on any proposed toll charge schedule.

The commission is responsible for fixing the toll rates and other charges for toll bridges built under RCW 47.46 that are financed primarily by bonds issued by the state.<sup>62</sup> The toll charges must be imposed in amounts sufficient to: (a) provide annual revenue sufficient to provide for annual operating and maintenance expenses, except as provided in RCW 47.56.245, (b) make certain statutorily-required payments and the payment of

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<sup>57</sup> ARTICLE VIII, SECTION 1(i) The legislature shall prescribe all matters relating to the contracting, funding or refunding of debt pursuant to this section, including: The purposes for which debt may be contracted; by a favorable vote of three-fifths of the members elected to each house, the amount of debt which may be contracted for any class of such purposes; the kinds of notes, bonds, or other evidences of debt which may be issued by the state; and the manner by which the treasurer shall determine and advise the legislature, any appropriate agency, officer, or instrumentality of the state as to the available debt capacity within the limitation set forth in this section. The legislature may delegate to any state officer, agency, or instrumentality any of its powers relating to the contracting, funding or refunding of debt pursuant to this section except its power to determine the amount and purposes for which debt may be contracted.

<sup>58</sup> ARTICLE II, SECTION 19: BILL TO CONTAIN ONE SUBJECT. No bill shall embrace more than one subject, and that shall be expressed in the title.

<sup>59</sup> State Ex Rel. Citizens Against Tolls V Michael J. Murphy et al, 737452MAJ, Filed April 8, 2004

<sup>60</sup> RCW 47.46.080

<sup>61</sup> RCW 47.46.090

<sup>62</sup> RCW 47.46.100(1)



principal and interest on bonds issued for any particular toll bridge or toll bridges, and (c) repay the motor vehicle fund for any advances and payments.<sup>63</sup> In response to RCW 43.135.055, the transportation commission is authorized to increase bridge tolls in excess of the fiscal growth factor.<sup>64</sup>

The commission must retain toll charges on any existing and future facilities constructed under the PPI Act and financed primarily by bonds issued by the state until all costs advanced from the motor vehicle fund have been fully repaid, and obligations incurred in constructing that facility have been fully paid.<sup>65</sup> Upon satisfaction of these conditions the facility must be operated as a toll-free facility, and the operation, maintenance, and repair of the facility must be paid from funds appropriated to WSDOT.<sup>66</sup>

RCW 47.46.040 establishes the terms of agreements between WSDOT and a private party. Agreements may provide for private ownership of the projects during the construction period. After completion of the project, the agreement may provide for state ownership of the transportation project and lease to the private entity, or WSDOT can elect to provide for ownership of the facility by the private entity during the term of the agreement.<sup>67</sup> The state may lease each of the demonstration projects, or applicable project segments, to the private entities for operating purposes for up to fifty years.<sup>68</sup>

The department may exercise any power possessed by it to facilitate the development, construction, financing operation, and maintenance of transportation projects.<sup>69</sup> Agreements for maintenance services must provide for full reimbursement for services rendered by WSDOT or other state agencies.<sup>70</sup>

The plans and specifications for each PPI project must comply with WSDOT's standards for state projects.<sup>71</sup> Agreements must address responsibility for reconstruction or renovations that are required in order for a facility to meet all applicable state standards upon reversion of the facility to the state.<sup>72</sup>

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<sup>63</sup> RCW 47.46.100(3)

<sup>64</sup> RCW 47.46.120

<sup>65</sup> RCW 47.46.110

<sup>66</sup> Id.

<sup>67</sup> RCW 47.46.040(2)

<sup>68</sup> Id.

<sup>69</sup> RCW 47.46.040(3)

<sup>70</sup> Id.

<sup>71</sup> RCW 47.46.040(4)

<sup>72</sup> Id.

PPI agreements must include a process that provides for public involvement with respect to the development of the project.<sup>73</sup> The private entity must conduct a comprehensive public involvement process, and must establish a local involvement committee to act in an advisory capacity on all issues related to the development and implementation of the public involvement process.<sup>74</sup>

PPI agreements may authorize the private entity to lease the facilities and to impose tolls that allow a reasonable rate of return on the private investment.<sup>75</sup> PPI agreements must set a maximum development fee and, where appropriate, a maximum rate of return on investment, based on project and financing characteristics. If the negotiated rate of return on investment or development fee is not affected, the private entity may establish and modify toll rates and user fees.<sup>76</sup>

PPI agreements must require that the toll revenues be applied only to payment of: (a) the capital outlay costs for the project, (b) the reimbursement to the state for certain costs, (c) the establishment of a maintenance fund, and (d) a reasonable return on investment to the private entity.<sup>77</sup> A negotiated agreement cannot extend the term of the ownership or lease beyond the period of time required for payment of the private entity's capital outlay costs for the project under this subsection.<sup>78</sup>

The Washington Department of Revenue may, upon application and subject to certain requirements, grant a five-year tax deferral to the private entity developing a PPI project.<sup>79</sup> Interest is not charged on any taxes deferred for the period of deferral.

## **5. “Approaches Thereto”**

Washington’s tolling statutes, like those of many other states, are replete with granting authorities for toll bridges and “approaches thereto.” Thus, it is important to understand what constitutes “approaches.” This was at issue in the State Supreme Court’s 1938 holding in *State Ex Rel. Washington Toll Bridge Etc. v. Yelle*.<sup>80</sup>

The legal action in this case was instituted by the Washington toll bridge authority and the director of highways to compel the state auditor to approve certain vouchers, and

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<sup>73</sup> RCW 47.46.040(9)

<sup>74</sup> *Id.*

<sup>75</sup> RCW 47.46.050(2)

<sup>76</sup> *Id.*

<sup>77</sup> RCW 47.46.050(4)

<sup>78</sup> *Id.*

<sup>79</sup> RCW 47.46.060

<sup>80</sup> 197 Wash. 110

issue payment for services performed for the Lake Washington toll bridge. The state auditor gave as his reason for refusing to pay that the work was performed at locations so far removed from the projected bridge, both in physical distance and intrinsic characteristics, as to form no part of the bridge structures proper or approaches thereto within the meaning of the applicable statutory language (which is similar to the currently existing statutory language).

The “approaches” at issue in this case included a mile long twin-bore tunnel and the construction of an arterial highway for a distance something in excess of six thousand lineal feet on the west side of Lake Washington leading up to the bridge, most of it being very remote from the bridge. The approaches on the eastern side of the lake covered a distance of about three miles. The toll bridge project was to cost about \$8.4 million, of which \$3.75 million was the cost of two bridges, and \$4.65 million was the cost of the “approaches.”

In analyzing the case, the Court quoted several cases and legal treatises that expressed the Court’s general sentiments regarding “approaches,” including among others:

- An Ohio court analysis stating:<sup>81</sup> *"The language used in the submission of the \$7,000,000 bond issue to the people of Cleveland, which contained the phrase 'of erecting a bridge with the necessary approaches thereto,' was not accidental. There was a definite purpose in the use of said language. A bridge without adequate approaches, such as to assure the fullest and most convenient use of such bridge, would be of little avail and would almost defeat the purpose of its erection. Those who are by law directed and empowered to carry out the will of the people, as set forth in the language used in the submission of bond issues, are under a mandatory duty not only to build the bridge, but also to build the necessary approaches thereto in order to afford the fullest use of the ... bridge. A failure so to do on the part of the officers, whose duty it is to carry out the will of the people, would defeat in the main the principal purpose of the erection of the ... bridge, as it must be apparent that the bridge without the necessary approaches would be a useless structure . . . "* *"The question as to what are necessary approaches is a question of fact"*
- A New York case stating<sup>82</sup>: *"While it is true that the statute as well as the petition and other papers in the proceedings refer to the 'bridge and approaches,' it is clearly shown by the plans and maps on file that the term 'approaches' is applied not only to the physical structures immediately connected with the roadway of the bridge, but to those contiguous and converging streets and avenues through and over which the public are to gain access to the bridge. This use of the term 'approaches,' as applied to the physical conditions of the locus in quo, is no less accurate than the narrower definition contended for by the appellants would be, as*

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<sup>81</sup> State ex rel. Schaefer v. Zangerle; 43 Ohio App. 30, 182 N.E. 644

<sup>82</sup> In re New York, 174 N.Y. 26, 66 N.E. 584

*applied to a mere taking of lands for bridge approaches without any widening or changing of adjacent streets."*

- A legal treatise stating<sup>83</sup>: *"An 'approach' has been defined as an access or a way, passage, or avenue by which a place may be approached, from an engineering standpoint the 'approaches' to a bridge comprise the necessary traffic arteries and adjustment thereof, to develop its maximum traffic capacity, and it has been judicially declared that the approaches to a bridge comprise the traffic arteries leading to the ends of the bridge proper and such adjustment of the alignments and grades of such arteries in the immediate vicinity of such ends as is necessary to afford the maximum convenience of access and render available to the public the entire capacity of the bridge proper. However, what would be regarded as approaches would depend largely upon the demands of the traveling public and upon what would be reasonable under the circumstances and local situation in each case, and the determination of the question of how much of the embankment constitutes the approach, so as to be a part of the bridge, is generally a question for the jury. The question, it has been said, is more one of fact than of law."*

The Court noted that the then applicable Washington law<sup>84, 85</sup> vested the Toll Bridge Authority with broad discretion in the construction of toll bridges and their approaches. It should be noted that the current RCW 47.56.040 and RCW 47.56.060 provide the cited authorities to WSDOT; the language is otherwise the same as or materially similar to the 1937 laws. The Court went on to conclude:

*It was a manifest intention of the legislature to give to the authority all those powers necessary to cope with the intricate questions incident to our modern and complex problems of transportation, and to vest in the authority a wide discretion in the exercise of those powers. The court will not concern itself with the exercise of the discretion delegated to an administrative agency unless it appears that the agency has acted in bad faith or abused its discretion...*

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<sup>83</sup> 11 C.J.S. 984, SS 1

<sup>84</sup> Laws of 1937, chapter 173, p. 654 (Rem. Rev. Stat., Vol. 7-A, SSSS 6524-1 to 6524-21) "The Washington Toll Bridge Authority is empowered, in accordance with the provisions of this act, to provide for the \*establishing and constructing of toll bridges upon any public highways of this state together with approaches thereto wherever the same is considered necessary or advantageous\* and practicable for crossing any stream, body of water, gulch, navigable water, swamp or other topographical formation whether the same is within this state or constitutes a boundary between this state and an adjoining state or country. \*The necessity or advantage and practicability of any such toll bridge shall be determined by the Washington Toll Bridge Authority\* and the feasibility of financing any toll bridge in the manner provided by this act shall be a primary consideration and determined according to the best judgment of the Washington Toll Bridge Authority."

<sup>85</sup> Laws of 1937, chapter 173, p. 672, SS 17: "The Washington Toll Bridge Authority, the officials thereof and all state officials are empowered to do such acts and make such agreements not inconsistent with law as may be necessary or desirable in connection with the duties and powers conferred upon them respectively by law regarding the construction, maintenance, operation and insurance of such toll bridges . . ."

*We conclude that the determination of what constituted approaches was a question to be determined by the authority, acting within the discretion given it by the legislature; and, considering the extent of the project and the definite results sought to be accomplished, the authority did not abuse its discretion.*

In summary, the Court held that “approaches” were what the highway commission reasonably determines, provided such a determination is not arbitrary or capricious.

A 1955 Attorney General’s Opinion<sup>86</sup> shed further light on the limits of WSDOT’s authority to define “approaches.” The opinion addressed two questions regarding the Lake Washington Bridge:

- (a) Can an “approach” that is expressly identified in a statute be modified due to technical and engineering factors?
- (b) Can approaches identified in statute be constructed in stages that were not identified in the statute with the understanding that after payment therefore tolls would be continued to finance extension or new construction of the approaches set forth in statute?

In 1955 the then RCW 47.56.280 provided in relevant part that:

*“The Washington toll bridge authority is hereby directed to study, make surveys and, if found feasible, construct an additional bridge, including approaches thereto, across Lake Washington. \* \* \*”*

This language is essentially the same as that used in the bridge authorization statutes examined in the Yelle decision. Thus, under RCW 47.56.280 the bridge authority could have authorized the construction of any reasonable connections to insure a traffic flow sufficient to finance the project. However, the legislature chose to be more specific in this case by enacting RCW 47.56.300, which provided in relevant part that:

*“The approaches ... shall include all thoroughfares, tunnels, overpasses and underpasses necessary for the orderly and satisfactory flow of traffic between the additional Lake Washington bridge and the main business district of the city of Seattle. \* \* \*”*

Based on this language, the AG concluded that the bridge authority (now WSDOT) does not have the power to construct the “approaches” it desired, to the extent that they were inconsistent with that described in RCW 47.56.300:

*“Unless the language of that section [RCW 47.56.300] ... is meaningless (and we may not assume that it is; Guinness v. State, 40 Wn. (2d) 677) it prescribes*

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<sup>86</sup> AGO 55 57 No 127

*something more than a connection with arterials leading into the city. That language in fact seems clearly to require a comprehensive system of approaches from the business district of the city to the bridge... The west end of the proposed approach at Tenth Avenue North and Roanoke Street falls short of the business district by any test ... We conclude that an approach to intersect the proposed toll road at Tenth Avenue North and Roanoke would not satisfy the terms of RCW 47.56.300."*

In considering the issue of phasing the construction of approaches, the AG noted the Yelle court's conclusion that the "legislature intended to vest in the authority a wide discretion in matters pertaining to the construction, operation, maintenance and financing of toll bridges." It further noted that the then applicable RCW 47.56.300 provided in relevant part that:

*"\* \* \* the collection of tolls shall not be discontinued on the additional bridge until all such approaches have been constructed and paid for."*

This requirement does not compel completion of the entire project within a given period of time but simply provides that the approaches must be finished before the removal of tolls. While the statutory approaches must ultimately be constructed if the project is undertaken, the AG found nothing which would prevent advancement of the work by stages if practicable. As a result, it concluded:

*"... there is no express authority for stage construction but we believe that it can reasonably be implied from the broad powers granted in chapter 47.56 RCW, and in particular from RCW 47.56.060 ... It would involve subsequent financing, perhaps through a refunding issue; and hence does not differ greatly, if at all, in effect, from the power implied by the court [in Yelle]. The fact that the legislative intent and the extensive benefits resulting from the project can be achieved only by this means lends weight to that view. [Bracketed language added]."*

## **6. Issues for the Columbia River Crossing Project**

The issues presented to the Columbia River Crossing Project by the Washington tolling statutes depend on the tolling scenario and project alternative selected for implementation, if any, and the tolling organization selected for the bi-state project.<sup>87</sup> For example, if (a) a tolling scenario is selected that only tolls the I-5 Bridge (and not I-205 Bridge) and (b) the Replacement Bridge is selected for construction, there may no legal need for legislation; although it may be desired or politically mandated. On the other hand, if (a) a tolling scenario is selected that creates and integrated toll program of both the I-5 Bridge and the I-205 Bridge, and (b) the Supplemental Bridge is selected for construction, there would be a need for substantial legislation. The following delineates some of the key issues that would have to be considered:

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<sup>87</sup> Issues regarding the tolling organization will be addressed in a subsequent Technical Memorandum.

- The authority of WSDOT to toll bridges granted under RCW 47.56 relates only to bridges “constructed or acquired” under that chapter. Thus, tolling the I-205 Bridge, which was neither constructed nor acquired under RCW 47.56, would not be covered by this grant of authority. The authority to toll existing bridges with newly constructed bridges under RCW 47.58.010 and RCW 47.46.080 relate only to existing bridges within two miles of a newly constructed bridge, which also exclude the ability to toll the I-205 Bridge. Thus, legislation is required for any scenario in which WSDOT would toll the I-205 Bridge.
- Legislation will be required if it is desired to have an integrated tolling program with the I-5 Bridge and I-205 Bridge. For example, if legislation is sought amending RCW 47.56, it would have to avoid the prohibition of RCW 47.56.070 against combining toll projects for financing purposes.
- The proposed amendments must address the “toll-free” operation of the 1960 I-5 Bridge in RCW 47.56.340. This can be done by employing “notwithstanding” language or by deleting RCW 47.56.340, which would serve no purpose.
- While the Court has provided WSDOT with discretion in identifying the “approaches” to the bridge, there may be a need to broaden that authority. For example, the project ultimately approved could include a program of projects on I-5 and I-205 to be phased in over time. If so, WSDOT could reduce the risk of litigation by securing legislation expressly permitting this use of toll proceeds.
- While the AG opined that phasing was permitted under the general discretion afforded WSDOT, again the risk of litigation can be reduced by securing specific authority to phase the construction of the project.
- In pursuing new legislation, care must be taken in how such legislation is structured. There have been cases<sup>88</sup> where tolling legislation was declared unconstitutional because the toll road act violated Art. II, § 19, of the state constitution, which provides: “*No bill shall embrace more than one subject, and that shall be expressed in the title.*” This problem would occur, for example, if a single bill is proposed that includes a general tolling authority for any toll bridge project and specific toll bridge authority exclusive for the Columbia River Crossing Project.
- The ultimate resolution of the organizational structure for the construction and operations of the project may also necessitate legislation. For example, legislation would be required if it is desired to have a joint committee of ODOT and WSDOT setting toll rates, etc.

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<sup>88</sup> For example: *The Washington Toll Bridge Authority v. The State of Washington*, 49 Wn.2d 520 (1956), *The State of Washington, ex. rel. Washington Toll Bridge Authority v. Yelle*, 32 Wn.2d 13 (1948)