Technical Memorandum No. 8.1:
Analysis of Issues Affecting Columbia River Crossing Options caused by Federal Tolling Statutes

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Executive Summary

- Other than through a special federal statutory provision, there are two basic ways to make the I-5 and I-205 Bridges federally eligible for tolling: (a) meet one of the eligibility requirements in 23 USC 129(a)(1) or (b) be approved as an *Interstate Reconstruction and Rehabilitation Pilot Program* or *Value Pricing Pilot Program* project.

- All of the I-5 Bridge improvement options proposed for further study in the *Strategic Plan* constitute "replacement or reconstruction" of the bridge; making the bridge eligible under Federal statutes to be converted to a toll facility under 23 USC 129(a)(1)(C).

- If a decision is made to toll the facility:
  - -- Decisions regarding the amount of tolls charged are made by the States and subject to State laws, and require no FHWA review.
  - -- For toll facilities made eligible by Section 129(a)(1)(C), such as the I-5 Bridge, tolls may not be imposed prior to the award of the physical construction contract.
  - -- Decisions regarding whether tolls are collected in one or both directions of travel are at the discretion of the States.
  - -- While Federal statutes require toll proceeds be first used to pay certain bridge-related expenses, the States determine the use of any remaining toll proceeds and whether or not tolls terminate when project capital costs are paid.

- As a pre-requisite to converting the I-5 Bridge to a toll facility, the DOTs must enter into a tolling agreement with FHWA.

- Because the improvements to the I-205 Bridge are in the process of being prepared, it is difficult to determine the eligibility of tolling the I-205 Bridge under Federal statutes. Three options appear to exist for establishing the tolling eligibility of the I-205 Bridge:
  - -- Ensure that the improvement program for the I-205 Bridge constitutes "reconstruction" under FHWA regulations, making I-205 eligible for tolling under 23 USC 129(a)(1)(C);
  - -- Establish that the reconstructed I-5 Bridge works with the I-205 Bridge to "*serve together as one [bridge] to carry traffic on a single route*" within the meaning of 1996 FHWA guidance, making I-205 eligible for tolling under 23 USC 129(a)(1)(C); or
  - -- Seek approval of the I-205 Bridge as one of the previously mentioned pilot programs.

TECHNICAL MEMORANDUM NO. 8.1:
ANALYSIS OF ISSUES AFFECTING COLUMBIA RIVER CROSSING OPTIONS CAUSED BY FEDERAL TOLLING STATUTES

1. Introduction

This Technical Memorandum is prepared in compliance with Task 8.1 of Work Order No. 1, Amendment No. 1 of ATA 23483W1. It analyzes Federal statutes that allow federal-aid highways, in particular Interstate Highways, to be tolled, and considers their application with respect to tolling the I-5 Bridge and I-205 Bridge between Oregon and Washington. It must be noted that there have been no determinations to toll either the I-5 or I-205 Bridge. This analysis only considers whether there is federal authority allowing such tolling to occur. This analysis in no way is intended to imply that tolling one or both of these facilities will be done, or should be done.

Since 1916, the federal government has maintained a policy that required roads built with federal aid to be free of tolls. Historically, the federal government discouraged states from developing toll roads by disallowing toll roads from also having access to federal aid funds. Similarly, the federal government discouraged states from converting free facilities to toll roads by requiring States to repay any federal funds spent on a facility prior to its conversion to a toll facility.

Over the years some exceptions to the prohibition against tolling have been carved out, but the eligibility for tolling federal-aid facilities has been kept quite tight until the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). To this day, the fundamental federal statute relating to tolling federal-aid highways, set forth in 23 USC 301 (Freedom from Tolls), states:

> **"Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds**."

Thus, the federal authority allowing tolled facilities is granted by "exception" to the general Federal prohibition on tolled facilities. This Technical Memorandum examines the three "exceptions" in Federal statutes to the prohibition against tolling:

- 23 USC 129
- The Interstate System Reconstruction and Rehabilitation Pilot Program
- The Value Pricing Pilot Program

2. Historical Context

2.1 Overview

The paragraphs that follow present a chronology of key "exceptions" to the general prohibition against tolling, and establish the context for interpreting current Federal law.

2.2 1956 Highway Act

The Interstate Highway System was created by Congress in 1956 and intended as a toll-free system of highways. However, the 1956 Highway Act established a method for dealing with State toll roads that were to be incorporated into the Interstate System routes. These toll roads were signed as Interstate routes, but continued to collect tolls under agreements which specified that when the toll road bonds were paid off, the toll facilities would revert to toll-free status. The Connecticut Turnpike, Pennsylvania Turnpike, New Jersey Turnpike, and New York Thruway are some examples of toll roads that were included on the system. A total of about 2,230 miles of the 42,800 mile Interstate Highway System consists of toll roads brought into the system in this way.

2.3 Post-1956 Highway Act through 1987 Surface Transportation Act

Congress from time-to-time added exceptions to the toll prohibition, for example, one that allowed federal funds to be used to upgrade some two-lane toll roads incorporated in the Interstate System to the geometric and safety standards of Interstate highways. The Surface Transportation Assistance Act of 1978 contained a provision allowing segments of toll roads that were part of the Interstate System to qualify for Interstate 4R funding-money earmarked for resurfacing, restoring, rehabilitating, and reconstructing routes on the Interstate System. To qualify, the state authority responsible for the facility had to agree to remove all tolls once the costs associated with its construction, including debt service, had been satisfied. When such a "secretarial agreement" was signed, the segment subject to tolls immediately was figured into the state's eligible mileage and traffic calculations under the apportionment formula for the resurfacing money. [1]

The Surface Transportation and Uniform Relocation Assistance Act of 1987 provided a toll road pilot program in which nine States were given the authority to pursue development and construction of toll roads with up to 35 percent Federal-aid funds. Ultimately, three projects were constructed, and sufficient progress was demonstrated that Congress expanded the toll provisions.

2.4 ISTEA

In 1991, the U.S. Congress passed ISTEA. Section 1012 of ISTEA brought significant changes in federal policies toward toll roads. First, it established five broad categories of toll activities eligible for Federal-aid highway funding (codified as 23 USC 129(a)(1)):

[1] 23 USC 105, later recodified as § 119.

(a) Initial construction[2] of a toll highway, bridge, or tunnel not on the Interstate System;
(b) Reconstructing, resurfacing, restoring, or rehabilitating an existing toll highway, bridge, or tunnel;
(c) Reconstructing or replacing a toll-free bridge or tunnel and converting it to a toll facility; [3]
(d) Reconstructing a toll-free federal-aid highway, not on the Interstate System, and converting it to a toll facility; and
(e) Doing preliminary studies to determine the feasibility of one of the above

Second, ISTEA expanded the allowed uses of toll revenues:

(a) Toll revenues must be used first for debt service, reasonable return on private investment, and operation and maintenance of the tolled facility.
(b) At the option of the state, toll revenues in excess of those needed for the required uses may be used for any purpose authorized under Title 23.
(c) States may also determine whether a toll facility is to become free when debt is retired, at some future point in time, or whether tolls are to continue indefinitely.
(d) Federal-aid funds are allowed to be used on approved private toll facilities.

Third, ISTEA expanded the use of federal-aid funds in the implementation of toll facilities:

(a) It permitted states to lend the federal share of a project's cost to a public or private entity to build a toll facility; expanding the opportunities for states to engage in debt financing and clearing the way for greater investment by private firms in highway projects.
(b) It permitted states to count toward their matching-share requirement "toll revenues that are generated and used by public, quasi-public, and private agencies to build, improve, or maintain highways, bridges, or tunnels that serve the public purpose of interstate commerce." [4] With the "toll credit" provision, the legislation made toll roads more attractive to states and encouraged them to form partnerships with the private sector.

Fourth, ISTEA required that a "toll agreement" [5] be executed by the toll authority and FHWA if (a) Federal-aid funds are to be used to construct a toll facility, or (b) a free

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[2] For purposes of this exception, ISTEA defined *"initial construction"* to mean "*construction of a highway, bridge, or tunnel at any time before it is open to traffic and excludes any improvement to the facility after it is opened to traffic*." [codified as 23 USC 129(a)(8)]

[3] As discussed later in this memorandum, this provision (23 USC 129(a)(1)(C)) is the most relevant provision regarding the potential tolling of the I-5 and I-205 Bridges.

[4] Section 1044, 23 U.S.C. 120, 105 Stat. 1994

[5] Codified as 23 USC 129(a)(3).

highway, bridge, or tunnel previously constructed with Federal-aid highway funds is converted to a toll facility. The agreement must require that all toll revenues first be used for debt service, reasonable return on any private investment in the project, and all necessary operation and maintenance costs, including reconstruction, resurfacing, restoration, and rehabilitation. The agreement may also stipulate that any toll revenue in excess of these requirements can be used for any highway or transit purposes federal law authorizes as long as the state can certify annually that the toll facility is being adequately maintained.

2.5 FHWA's Test and Evaluation Project: TE-045 Innovative Financing

FHWA announced its Innovative Finance Program Test and Evaluation Project (TE-045) in a *Federal Register* notice dated April 8, 1994. TE-045 did not make new money available; instead it focused on fostering new, flexible financing strategies for existing transportation revenue sources. Financing concepts to be tested under TE-045 were to identified by States; however FHWA identified particular financing areas it was most interested in, including:

- Broader interpretation of loan provisions established under Section 1012 of the ISTEA, and codified under 23 USC 129;
- More flexible interpretation of Title 23 State matching requirements;
- Income generation possibilities for highway projects;
- Expanded interpretation of highway bond regulations to allow for innovative debt or credit enhancement instruments;
- Use of Federal aid to promote public-private partnerships; and
- Alternative revenue sources which could be pledged to repay highway debt and/or create revolving loan funds.

The program was established using statutory authority granted under 23 USC 307(a),which permits FHWA to engage in a wide range of research projects, including those related to highway finance. By using this authority, FHWA was able to waive selected policies and procedures so that specific transportation projects could be advanced through the use of non-traditional financing concepts.

As a result of the TE-045 activities, several innovative financing techniques have now been approved as standard features of the Federal-aid program, either by law or by administrative action. Those appearing to be particularly applicable to proposals to toll the Columbia River crossings are shown in the table below.

TE-045 Financing Concepts on Toll-Related Aspects of the Conventional Federal-Aid Highway Program

	Conventional Federal-Aid Program	TE-045 Financing Innovation
Section 129 Loans (*1)*	Section 1012(a) of ISTEA amended Section 129 of Title 23 of the U.S. Code to permit States to obtain Federal reimbursement for loans they make to toll projects. ISTEA Section 1012 placed restrictions on the terms of the loans and eligible uses of loan repayments.	States may initiate reimbursable loans to any project with a dedicated revenue stream (i.e., not necessarily tolls). Other flexibilities related to loan terms and institutional arrangements also expand the utility of Section 129 loans.
ISTEA Section 1044 Toll Credits	Section 1044 of ISTEA permits States to apply the value of certain highway expenditures funded with toll revenues toward the required State match on current Federal-aid projects. States may only substitute toll credits for State match if they demonstrate a "maintenance of effort" (MOE). The MOE test requires that a State's prior-year highway spending equaled or exceeded the average of the previous three years' expenditures.	The MOE requirement is relaxed such that States may offset State match with Section 1044 toll credits so long as they meet the test prospectively -- e.g., anticipated current-year expenditures meet an average of the three previous years' expenditure levels. States may elect to have the MOE test extend as much as one year into the future. In addition, credits earned in prior years no longer lapse.
Reimbursement of Bond Financing Costs	Federal-aid funds may be used to reimburse the cost of retiring the principal component of project debt for certain projects. Interest, issuance, and administrative costs are not eligible for Federal reimbursement, except for interest costs on Interstate construction projects.	Interest, issuance, and administrative costs are now eligible for reimbursement, in additional to principal payments.

(*1) Section 1012 of ISTEA amended Section 129 of Title 23 of the U.S. Code to permit States to obtain Federal reimbursement for loans to toll projects. Accordingly, the phrases "ISTEA Section 1012 loan" and "Section 129 loan" are interchangeable forms of reference to reimbursable project loans. The NHS Designation Act of 1995 subsequently amended Section 129 of Title 23 to allow States to offer loans to non-toll projects and to introduce additional flexibilities initially tested under TE-045.*

The National Highway System Designation Act of 1995

The NHS Act contained several innovative financing provisions. It continued the reforms of ISTEA, making toll roads more attractive to states by raising the federal share for toll facilities to 80 percent. [6] It also authorized several loan-related provisions, giving states an incentive to consider debt financing. The act provided greater latitude for states in making loans for projects, setting the terms of those loans, and using the repaid funds. Specifically, Section 1012 of ISTEA permitted states to lend their federal-aid funds to toll projects after obtaining approval from FHWA. The federal government still exercised control over such transactions, however, because under ISTEA, interest rates were set by federal regulation. The NHS Act gives states the flexibility to negotiate interest rates and other terms of the loans and to offer loans to projects with dedicated sources of revenue that do not include tolls. [7] As revenues from those projects repay the loans, states may use the funds to make grants or loans for additional projects without categorical restriction. .

The NHS Act also codified states' authority to use federal aid to pay for costs related to the issuing of bonds--not only the bond principal but other charges such as interest and bond insurance.[8] It also contained provisions that ratified several financing measures that the Federal Highway Administration had instituted on an experimental basis, as discussed in Section 2.5.

2.6 TEA-21

The Transportation Equity Act for the 21st Century (TEA-21) provided several new provisions that influenced Federal toll road policies. The Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) provided Federal credit assistance to major transportation investments of national importance. The TIFIA credit program was designed to fill market gaps and leverage substantial private co-investment, in particular for toll projects, by providing supplemental and subordinate capital. Qualified projects are evaluated by the Secretary of Transportation and selected based on the extent to which they meet other program objectives. Three types of assistance which may be useful to toll road financing are offered:

- Secured loans are direct Federal loans to project sponsors offering flexible repayment terms and providing combined construction and permanent financing of capital costs.
- Loan guarantees provide full-faith and credit guarantees by the Federal Government to institutional investors such as pension funds which make loans for projects.
- Standby lines of credit representing secondary lines of funding in the form of contingent Federal loans that may be drawn upon to supplement project revenues, if needed during the first 10 years of project operations.

[6] Section 313(a), 23 U.S.C. 129(a)(5), 109 Stat. 585
[7] Section 313, 23 U.S.C. 129(a)(7), 109 Stat. 585.
[8] Section 311, 23 U.S.C. 122, 109 Stat. 583

TEA-21 also created two pilot programs under which States may collect tolls on Interstate highways:

- **Value Pricing Pilot Program**: TEA-21 expanded upon the congestion pricing pilot program created under ISTEA. It allows FHWA to make agreements with up to 15 states, local governments, or other public authorities to establish, maintain, and monitor local "value pricing" programs.

- **Interstate Reconstruction and Rehabilitation Pilot Program**: for the purpose of reconstructing or rehabilitating the Interstate highway that could not be adequately maintained or functionally improved without the collection of tolls. A maximum of three projects may be included in the pilot program and they must be in different States. An agreement between the State and FHWA covering use of toll revenues must be executed for each Interstate toll pilot project.

These pilot programs are discussed further in Section 4 of this Technical Memorandum.

3. Application of 23 USC 129(a)(1) to Columbia River Crossing Options

3.1 Freedom from Tolls

As previously explained, the fundamental tolling provision in Federal statutes is set forth in 23 USC 301, which essentially prohibits tolling federal-aid highways and bridges unless the project is covered by an exception (i.e. one of the exceptions under 23 USC 129(a)(1) or one of pilot programs).

Any tolling scenario that could not qualify under one of these exceptions would carry with it significant federal funding implications. While there are relatively few precedents in this regard, they show that two things likely would be required: (1) a specific authorization from Congress to convert the road to a toll facility and (2) repayment of all federal funds used on the facility prior to initiation of toll collection or apportioned to the state as a result of the toll-free mileage being used in the apportionment formula for the state. Prior examples of these buy-out requirements relate to the Maine Turnpike and the Kennedy Memorial Highway (I-95 in Delaware and Maryland). While there has been no estimate of the federal funds used to build and operate the I-5 and I-205 Bridges, a "buy-out" approach to tolling these bridges is undoubtedly cost-prohibitive.

3.2 Toll Projects Authorized for Federal Participation under 23 USC 129

A Federal-aid highway project's eligibility for toll finance depends both on the type of facility and the nature of the project. Under 23 USC 129(a)(1), five categories of projects are eligible for Federal funds. [9]

[9] 23 USC 129(a)(1): Authorization for federal participation. – Notwithstanding section 301 of this title and subject to the provisions of this section, the Secretary shall permit Federal participation in –

Four of these categories are inapplicable to tolling the I-5 or I-205 Bridges:

1. 23 USC 129(a)(1)(A) allows federal aid to be used for initial construction of non-Interstate toll highways, bridges, and tunnels. Under 23USC129(a)(8) "initial construction" means "*the construction of a highway, bridge, or tunnel at any time before it is open to traffic and does not include any improvement to a highway, bridge, or tunnel after it is open to traffic*." Because this provision applies to "*non-Interstate highways, bridges and tunnels*," it is not applicable to the I-5 or I-205 Bridges.

2. 23 USC 129(a)(1)(B) allows federal aid to be for resurfacing, restoration, rehabilitation, and reconstruction (4R) of existing toll facilities. Because this provision applies to "*existing toll facilities*," it is not applicable to the I-5 or I-205 Bridges.

3. 23 USC 129(a)(1)(D) allows federal aid to be used for reconstruction of a non-tolled ("free"), non-Interstate highways, and conversion of the free facility to a toll facility. This option exists only for Federal-aid highways that are not on the Interstate system, and is not applicable to the I-5 and I-205 Bridges. [10]

4. 23 USC 129(a)(1)(E) allows federal aid to be used for preliminary studies to determine the feasibility of any of the toll construction activities allowed by other provisions of 23 USC 129. This provision allows federal funds to be used on tolling studies, such as the one currently being undertaken by ODOT and WSDOT, it does not permit the tolling of facilities.

However, 23 USC 129(a)(1)(C) allows federal aid to be used for reconstruction or replacement of a free Interstate or non-Interstate bridges and tunnels, and conversion of the free bridge or tunnel to a toll facility following the reconstruction or replacement. Because this provision allows a free Interstate bridge to be converted to a toll facility, it is the only provision that may be applicable to the I-5 and I-205 Bridges; provided that such bridges are "*reconstructed or replaced*" as part of the conversion. Thus, the key issues become:

(A) initial construction of a toll highway, bridge, or tunnel (other than a highway, bridge, or tunnel on the Interstate System) or approach thereto;

(B) reconstructing, resurfacing, restoring, and rehabilitating a toll highway, bridge, or tunnel (including a toll highway, bridge, or tunnel subject to an agreement entered into under this section or section 119(e) as in effect on the day before the date of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991) or approach thereto;

(C) reconstruction or replacement of a toll-free bridge or tunnel and conversion of the bridge or tunnel to a toll facility;

(D) reconstruction of a toll-free Federal-aid highway (other than a highway on the Interstate System) and conversion of the highway to a toll facility; and

(E) preliminary studies to determine the feasibility of a toll facility for which Federal participation is authorized under subparagraph (A), (B), (C), or (D); on the same basis and in the same manner as in the construction of free highways under this chapter.

[10] Conversion of free Interstate highway segments to tolled facilities is possible through a special pilot program described in the next section.

(a) What constitutes a "bridge" under this code provision, and

(b) What constitutes "*reconstructed or replaced*" in this context.

3.2.1 What Constitutes a Bridge?

Clearly, the river crossing options include bridges; that is not the issue. Rather, the issue at hand is whether, and to what extent, the improvements along I-5 and I-205 and the associated interchange improvements are "bridge" improvements (as opposed to "highway" improvements). This could affect whether the improvements to I-205 constitute "reconstruction" within the context of 23 USC 129(a)(1)(C); and therefore whether tolling is permitted under that statute. It also affects how such improvements should be addressed in the tolling agreement discussed in Section 3.2.2, in particular if they are funded with toll revenues.

It should be noted that the definitional issue of what constitutes a bridge or an approach to a bridge comes up when interpreting ODOT's and WSDOT's tolling authorities under their respective state laws. It is likely that each of these statutory frameworks has its own definitions, and possible that they conflict with each other. This Technical Memorandum No. 8.1 addresses only the Federal definitions. The state definitions will be addressed in future technical memoranda under this contract.

It also should be noted that the definition of bridge and an approach to a bridge may differ by the Federal statute being interpreted. 23 USC 129 does not proffer a definition of bridge or bridge approach, nor are there regulations or policy memoranda associated with this provision that speak to the definitional issues. However, this issue has been front and center with regard to the Highway Bridge Replacement and Rehabilitation Program (HBRRP). [11] This memorandum uses regulations and policy guidance[12] associated with HBRRP to frame the definitional issues associated with 23 USC 129. Thus, this analysis represents a starting-point; discussions with FHWA may modify the conclusions reached below.

As used in the Highway Bridge Replacement and Rehabilitation Program, a bridge is

> **"a structure, including supports, erected over a depression or an obstruction, such as water, a highway, or a railway, having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of the openings for multiple boxes; it may include multiple pipes where the clear distance between openings is less than half of the smaller contiguous opening**." [13]

This definition appears to limit the scope of a bridge to exclude, except a narrow sense, the approaches to the bridge. Nonetheless, there has been an on-going discussion

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[11] 23 USC 144.

[12] http://www.fhwa.dot.gov/bridge/memos.htm#hbrrp.htm

[13] 23 CFR 650D

between FHWA and the DOTs regarding the extent to which approaches are part of a bridge. This led to the inclusion of the following in a "*Non-Regulatory Supplement*" [14] being issued by FHWA regarding the Bridge Discretionary Program:[15]

> **5. USE OF HIGHWAY BRIDGE REPLACEMENT AND REHABILITATION PROGRAM (HBRRP) FUNDS FOR APPROACH ROADWAY CONSTRUCTION (23 CFR 650.413). The FHWA is concerned that in some instances approach roadway costs associated with HBRRP projects are excessive to the point of not falling within the congressional intent for the program "to improve deficient bridges." States and local entities are encouraged to use other categories of funds for approach roadways and miscellaneous non-bridge items. Also the FHWA Division offices are directed to:**
>
> **a. Review and revise policy relating to inclusion of approach roadway items in HBRRP projects to provide for more national uniformity in bridge program management and minimize approach roadway project costs. This action should result in a nationwide average of no more than 10 percent…**

This supplementary guidance on HBRRP may foreshadow an equally narrow view of what constitutes a bridge in the context of 23 USC 129(a)(1).

3.2.2 What Constitutes a "Reconstruction or Replacement"?

FHWA appears to accept an 'ordinary meaning' definition to the term "replacement."[16] With regard to describing an eligible "replacement" project under the HBRRP, FHWA regulations state: [17]

> **<u>Replacement</u>. Total replacement of a structurally deficient or functionally obsolete bridge with a new facility constructed in the same general traffic corridor. A nominal amount of approach work, sufficient to connect the new facility to the existing roadway or to return the gradeline to an attainable touchdown point in accordance with good design practice is also eligible. The replacement structure must meet the current geometric, construction and structural standards required for the types and volume of projected traffic on the facility over its design life.**

The definition or criteria for what constitutes "reconstruction" is more difficult to ascertain. Perhaps the most straight-forward explanation of what constitutes

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[14] See http://www.fhwa.dot.gov/legsregs/directives/fapg/0650dsup.htm

[15] FHWA also issued a policy guidance memorandum on May 15, 1992 (re: Use of Highway Bridge Replacement and Rehabilitation Program Funds for Approach Roadway Construction) wherein FHWA emphasized that "*Using HBRRP funds for an entire roadway project that happens to include an eligible deficient bridge is to be avoided*."

[16] Black's Law Dictionary, Sixth Edition, 1990; replace means to supplant with a substitute or equivalent; or, to take the place of.

[17] 23 CFR 650.405(b)(1)

"reconstruction" is provided in a May 1996 FHWA Policy Memorandum on the 23 USC 129(a)(1):

> **Examples of reconstruction would be widening existing bridges or tunnels to add lanes or providing a dual facility. On the other hand, certain types of work clearly do not meet the intent for reconstruction. For example, putting up toll booths, painting and updating bridge rail are not considered to be work that would qualify a bridge for conversion. Although these latter types of activities could be eligible for Federal participation as part of a reconstruction effort, in and of themselves, they are not viewed as reconstruction. The criteria of reconstruction could be satisfied by construction of a dual bridge or tunnel. The two bridges or tunnels do not have to be side-by-side; however, to be considered a dual facility, the new and existing bridge or tunnel must serve together as one to carry traffic on a single route.**[18]

Thus, given the examples set forth in this Guidance, it is clear that all of the bridge alternatives recommended for further study at the conclusion of the *I-5 Trade Corridor Strategic Plan* would qualify as either a replacement or reconstructed bridge; allowing the currently non-tolled bridge to be converted to a toll facility. But the Guidance does not expressly define "reconstruction," it merely gives examples of what is and what is not "reconstruction."

In order to convert I-205 to a toll facility, it too must qualify under 23 USC 129(a)(1)(C) or, as discussed later in this memorandum, as a pilot program. One way to do so is to ensure that the improvement program for the I-205 Bridge constitutes "reconstruction"[19] under Section 129(a)(1)(C). Pursuant to the 1996 Guidance cited above, if the improvements to the I-205 Bridge included "*widening existing bridges …to add lanes or providing a dual facility,*" the improvement would meet the criteria of 23 USC 129(a)(1)(C), and the 1-205 Bridge could be converted to a toll facility. But what if it did not include "*widening existing bridges …to add lanes or providing a dual facility,"* are there other types of improvements that would qualify the I-205 Bridge for conversion to a toll facility?

The answer appears to be 'yes,' but there is little clear guidance on what also might qualify. While the term "reconstruction" may have different meanings within different code provisions, it is instructional to consider how the term has been interpreted by FHWA in terms of the Highway Bridge Replacement and Rehabilitation Program (HBRRP), and Interstate Maintenance Program. Even this is difficult because prior to ISTEA there was no differentiation in eligibility or pro rata funding for the various

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[18] *Guidance on Section 313(a) of the NHS Act; Toll Facilities under Section 129(a) of Title 23***,** dated May 10, 1996

[19] "Reconstruction" is the only applicable criteria for I-205 because there is no consideration being given to replacing the bridge.

classes of Interstate Maintenance work, and. therefore FHWA did not a need to develop strict definitions of "resurfacing", "restoration", "rehabilitation" or "reconstruction." [20]

However, with the adoption of Section 1009(e) of ISTEA, which (a) eliminated "reconstruction" from eligibility under the Interstate Maintenance Program and (b) promoted maintenance of the Interstate System through resurfacing, restoration and rehabilitation, and preventive maintenance activities, some questions arose pertaining to the definitions for rehabilitation and reconstruction. Other programmatic changes raised categorical questions regarding "seismic retrofit" and "preventive maintenance." Later, in TEA-21, "reconstruction" was reincorporated in the Interstate Maintenance Program.

As a result of these events, FHWA issued a series of Policy Memoranda (i.e. Guidance) attempting to explain these changes, which shed light, but do not necessarily clearly define, the differences in these terms. The following paragraphs include the relevant parts of these Policy Memoranda, and deduce a set of criteria for what may constitute "reconstruction."

With regard to the HBRRP, FHWA issued a Policy Memorandum in March 1992 indicating that painting and seismic retrofitting of bridges do not constitute "reconstruction":

> **"The ISTEA of 1991 has revised Title 23, U.S.C. to allow Federal participation in bridge painting, seismic retrofitting, and application of calcium magnesium acetate to highway bridges. These items of work are now eligible for participation with bridge program funds. Bridge painting, seismic retrofitting, and calcium magnesium acetate application may be undertaken as sole work items or combined with other eligible work…<u>These tasks are not considered reconstruction</u> and are not subject to the 10-year rule…** [21]

Shortly after the above-mentioned HBRRP Guidance (May 1992), FHWA issued Guidance on the term "reconstruction" in the context of changes made by ISTEA to the eligibility requirements for funding from the Interstate Maintenance (IM) Program:[22]

> **Section 1009(e)(5) amends 23 U.S.C. 119(a) to permit the Secretary to approve IM funded projects for resurfacing, restoring, and rehabilitating routes on the Interstate System ...** *[note that reconstruction has been deleted by ISTEA]*

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[20] General definitions for pavement reconstruction and pavement rehabilitation (3R) are included in the "Pavement Policy" (23 CFR 626) which was established in 1988

[21] FHWA Policy Memorandum; *Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991-Bridge Painting, Seismic Retrofit, and Acetate Application*; March 17, 1992

[22] FHWA Policy Memorandum; 1991 Intermodal Surface Transportation Efficiency Act (ISTEA) Implementation Interstate Maintenance Program; May 21, 1992.

Section 1009(e)(3) amends Section 119(c) of Title 23 to establish types of work eligible for IM funding. The section has been interpreted to include as eligible, those work items which provide for 3R work on existing features on the Interstate route and its interchanges and grade separations within normal "touchdown limits." For example, the rehabilitation of existing roadside hardware may include IM funding for work such as bringing old guardrail up to current standards, maintenance of impact attenuators, refurbishing existing traffic control signs, pavement markings, and other devices, etc. However, excluded from eligibility for IM funding *[i.e. by the deletion of reconstruction]* **are all new work elements, such as new interchanges, new ramps, new rest areas, new noise walls, or other work which does not resurface, restore, or rehabilitate an existing element…**

Section 1009(a) prohibits IM funding for the portion of the cost of any project attributable to the expansion of the capacity of any Interstate highway or bridge, except for the addition of high-occupancy vehicle lanes or auxiliary lanes (such as truck climbing lanes).

In determining what portion of a project is eligible for IM funding and what portion is capacity expansion (and, therefore, not eligible for IM funds), the basic purpose of the project should be considered. If the project is a combination of preservation and capacity expansion, the cost should be split with 3R items eligible for IM funding and capacity expansion items eligible for other funds...

Section 1009(e)(4) amends 23 U.S.C. 119(e) to allow IM funding for preventative maintenance activities... Preventative maintenance includes activities such as sealing joints and cracks, patching concrete pavement, shoulder repair, and restoration of drainage systems which are found to be cost-effective projects resulting in extending the service life of pavements.

This provision has been extended administratively to allow IM funding for other preventative maintenance activities. Examples may include structure work such as crack sealing, joint repair, seismic retrofit, scour countermeasures and painting of steel members which are cost-effective in extending the service life of the structure.

Shortly after the above-mentioned IM Guidance was issued (July 1992), FHWA issued another Policy Memorandum further defining "preventive maintenance":

"We consider preventive maintenance to include roadway activities such as joint repair, pavement patching, shoulder repair, and restoration of drainage systems, and bridge activities such as crack

> **sealing, joint repair, seismic retrofit, scour countermeasures, and painting. Such work is eligible for Federal-aid participation where the work is determined to be cost-effective for preserving the pavement and bridge structure and extending the pavement and bridge life to at least achieve the design life of the facility.** [23]

Last in the line of FHWA Policy Memoranda being considered here, in August 1998 FHWA issued revised Guidance on the IM Program with the passage of TEA-21, which remade "reconstruction" an eligible activity for IM program funds:

> **"Prior to TEA-21, IM fund eligibility was limited to 3R work plus reconstruction of interchanges and overpasses. As a result, IM fund eligibility was not extended to general reconstruction or to the addition of new features. However, Section 1107(a) of TEA-21 modified 23 U.S.C. 119 and expanded IM eligibility to include the 4th R - "reconstruction." However, the prohibition against IM funding of added lanes previously contained in 23 U.S.C. 119(g) was renumbered by TEA-21 as 119(d) and retained. Therefore, the construction of new travel lanes other than high occupancy vehicle (HOV) lanes or auxiliary lanes continues to be ineligible for IM funding. Other reconstruction work, such as new interchanges, new rest areas, additional noise walls, etc. may now be funded with IM funds. Section 1107(a)(2) strikes 23 U.S.C. 119 (e), Preventative Maintenance. However, preventative maintenance activities for all features of an Interstate highway are eligible for IM funding under the general eligibility provisions for preventative maintenance established in 23 U.S.C. 116(d).**[24]

By collectively viewing these FHWA Policy Memoranda, one can deduce a set of conclusions regarding the types of improvements to the I-205 Bridge that would constitute "reconstruction":

- FHWA has not clearly defined "reconstruction," rather it explains what qualifies or what does not qualify as reconstruction on the basis of examples. In some cases these differentiations appear to be necessitated by other provisions of the particular code section being referenced, and may not constitute a general policy that FHWA would apply to 23 USC 129(a)(1)(C). For example, the HBRRP and IM programs classified "seismic retrofitting" separately from "reconstruction." But in both cases, this appears to result from language difficulties in the applicable ISTEA provisions; rather than by policy intent.

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[23] FHWA Policy Memorandum; Preventive Maintenance; July 27, 1992

[24] FHWA Policy Memorandum; *Interstate Maintenance Program TEA-21 Provisions, Implementing Guidance*; August 7, 1998

- In addition, it is not evident that FHWA seeks to define, for example, "preventive maintenance" and "reconstruction" in a way that makes these terms mutually exclusive of each other. For example, while "seismic retrofitting" has been defined by FHWA as "preventive maintenance," seismic retrofitting might require the reconstruction of a bridge structure. In such a case, FHWA could conclude that such an improvement could be classified as both "preventive maintenance" and "reconstruction."

- Under the 1996 Guidance, and "*widening existing bridges …to add lanes or providing a dual facility* would constitute "reconstruction." On the other hand, "*putting up toll booths, painting and updating bridge rail*" are not considered to be work that would qualify a bridge for conversion to a toll facility.

- However, under the 1998 Guidance, "reconstruction" does not require new improvements (in referring to ISTEA's deletion of "reconstruction" from the IM program, the 1998 Guidance wrote "*IM fund eligibility was not extended to general reconstruction or to the addition of new features.")*.

Before proceeding deeply into the conceptual designs for I-205 Bridge improvements, ODOT and WSDOT must reach agreement with FHWA that the improvements proposed to the I-205 Bridge constitute "reconstruction."

There are two other potential ways to secure eligibility to convert I-205 to a toll facility under Federal statutes. First, ODOT and WSDOT can pursue one of the pilot programs discussed later in this memorandum. Second, is to seek a determination that the replacement of supplemental bridge near I-5 meets the "reconstruction" requirement for I-205. It should be noted that the 1996 Guidance on 23 USC 129(a)(1) states *"The criteria of reconstruction could be satisfied by construction of a dual bridge or tunnel. The two bridges or tunnels do not have to be side-by-side; however, to be considered a dual facility, the new and existing bridge or tunnel must serve together as one to carry traffic on a single route."* Because I-5 and I-205 serve the same through (the region) trips, and can serve many of the same internal (to the region) trips, it can be argued that they "serve together as one." If FHWA would concur with such a determination, then the supplemental bridge near I-5 could qualify both I-5 and I-205 to convert to toll facilities. This merits discussion with FHWA.

3.3 Tolling Agreements

Reconstruction or replacement and conversion from a toll-free to toll bridge or tunnel previously constructed with Federal-aid funds can be accomplished with or without Federal-aid participation. In either case, a Section 129(a)(3) toll agreement will need to be executed prior to undertaking the conversion of the facility.[25, 26, 27] Similarly, a toll

[25] *Guidance on Section 313(a) of the NHS Act; Toll Facilities under Section 129(a) of Title 23***,** dated May 10, 1996

agreement is required if Federal-aid funds are used to construct a new toll facility. No model toll agreement has been developed, but the agreement must include five items:

(a) The Section 129(a)(1) category that permits tolling;

(b) A description of the toll facility covered by the agreement;

(c) A commitment that all revenues will be used for debt service, operations and maintenance, a reasonable return on private investment, and establishment of necessary reserve funds;

(d) If excess toll revenues are to be collected, a provision of how any excess toll revenues will be used; and

(e) A stipulation regarding FHWA's access to records.

The agreement must require that all toll revenues are used first for debt service, reasonable return on private investment, and operation and maintenance, including 4R work. At the option of the state, the agreement could also include a provision regarding toll revenues in excess of those needed for the required uses. This provision would entitle the state to use the excess revenues for purposes authorized under Title 23. Toll agreements executed prior to December 18, 1991, required the facility to become free when debt is retired. The current Section 129 toll agreement allows the state to determine whether a toll facility is to become free when debt is retired, or at some future point in time or whether tolls are to continue indefinitely.

3.4 Federal Share and Loans for Toll Projects under 23 USC 129

3.4.1 Federal Share

The Federal matching share for all expenditures on tolled facilities is up to 80 percent. [28] The maximum Federal share may not be adjusted in accordance with a sliding scale under 23 USC 120. In the case of privately owned facilities it is acceptable for the private owner to take responsibility for the non-Federal share of eligible project costs. Eligible

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[26] 23 USC 129(a)(3) states "Limitations on use of revenues. Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department) having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the tolled facility is being adequately maintained, the State may use any toll revenues in excess of amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title."

[27] No agreement is necessary for preliminary studies.

[28] 23 USC 129(5) states "Limitation on federal share. The Federal share payable for a project described in paragraph (1) *[i.e. a toll facility]* shall be a percentage determined by the State but not to exceed 80 percent."

expenditures include debt service, operations and maintenance, establishment of necessary reserve funds, and a reasonable return on private investment for projects that include private participation.

3.4.2 Loans

Section 129(a)(7)(A) allows the State to make loans to a public or private entity which is constructing, or proposing to construct, a toll (or non-toll) project that is eligible for Federal-aid funding (or a non-toll highway project with a revenue source specifically dedicated to support the project). [29, 30] Thus, Federal funds can participate in the construction of a toll facility either through a direct commitment of funds to the project (a regular Federal-aid construction project) or through a loan(s) to the public or private entity building the project. A State could also choose to use its Federal-aid funds to finance a portion of a project as a regular Federal-aid project and use a reimbursable loan for another portion of that project

The State may request authorization of a project for the purpose of making a loan to the public or private entity. The amount loaned by the State is considered an eligible Federal-aid project cost. The project or loan recipient selection process is governed by State law, and, it is the State's responsibility to ensure that the loan has been used for the purposes specified.

If a project meets the test for eligibility, a loan can be made at any time. The loan may be for any amount, provided the maximum Federal share of the total eligible project cost is not exceeded. Total eligible project cost is limited to the costs of engineering, right-of-way acquisition, and physical construction remaining to be accomplished at the time the FHWA authorizes the loan to be made. The amount cannot include the cost of work done prior to the loan authorization. A loan project can be authorized under the advance construction provisions of 23 U.S.C. 115 that apply to the type of Federal-aid funds being used. Apportionments from any program category may be committed to Section 129 loans as long as the project receiving the loan is eligible for funding from that program category. The State is considered to have incurred a cost at the time the loan, or any portion of it, is made. Federal funds are made available to the State at the time the loan is made.

The toll (or non-toll) project for which a State has requested Federal payment for a loan is viewed as a Federal-aid project subject to the same basic requirements and FHWA

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[29] FHWA Policy Memorandum; Loan Provisions under Section 129(a)(7) of Title 23 Guidance on Section 313(b) of the NHS Act; May 10, 1996

[30] 23 USC 129(7)(A) In general. A State may loan to a public or private entity constructing or proposing to construct under this section a toll facility or non-toll facility with a dedicated revenue source an amount equal to all or part of the Federal share of the cost of the project if the project has a revenue source specifically dedicated to it. Dedicated revenue sources for non-toll facilities include excise taxes, sales taxes, motor vehicle use fees, tax on real property, tax increment financing, and such other dedicated revenue sources as the Secretary determines appropriate.

oversight responsibilities which are being followed for comparable non-loan Federal-aid projects. [31] The State must ensure that the project is carried out in accordance with Title 23 and other applicable Federal laws, including any environmental and right-of-way provisions included in Federal law.

The only exception concerns procurement of consultants or contractors by a private entity or toll authority. If Federal funding involves a regular Federal-aid project, the consultants or contractors used on the Federal-aid project must be selected under the Brooks Act or Title 23 competitive bidding procedures, respectively. However, if the Federal-aid funding is only via a Section 129(a)(7) loan project to a private entity or toll authority, that entity is allowed to select the consultant or contractors in whatever manner it sees fit as long as the selection process follows State laws and procedures.

At a State's option, the amount of any loan eligible for Federal reimbursement under Section 129(a)(7) may be subordinated to any other debt financing for the project. [32]

Loans must be repaid to the State. The repayment must begin within 5 years after the project is completed and opened to traffic and must be completed within 30 years after the date Federal funds are authorized for the loan or first increment of the loan. [33] Interest on the loan is at or below market rates, as determined by the State, to make the project which is receiving the loan feasible. [34] The State may use repaid amounts for:

- Any project eligible under Title 23, or
- The purchase of insurance or for use as a capital reserve for other forms of credit enhancement for project debt in order to improve credit market access or to lower interest rates for projects eligible under Title 23. [35]

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[31] 23 USC 129(7)(B) Compliance with federal laws. As a condition of receiving a loan under this paragraph, the public or private entity that receives the loan shall ensure that the project will be carried out in accordance with this title and any other applicable Federal law, including any applicable provision of a Federal environmental law.

[32] 23 USC 129(7)(C) Subordination of debt. The amount of any loan received for a project under this paragraph may be subordinated to any other debt financing for the project.

[33] 23 USC 129(7)(E) Repayment. - The repayment of a loan made under this paragraph shall commence not later than 5 years after date on which the facility that is the subject of the loan is open to traffic. 23 USC 129(7)(F) Term of loan. - The term of a loan made under this paragraph shall not exceed 30 years from the date on which the loan funds are obligated.

[34] 23 USC 129(7)(G) Interest. - A loan made under this paragraph shall bear interest at or below market interest rates, as determined by the State, to make the project that is the subject of the loan feasible.

[35] 23 USC 129(7)(H) Reuse of funds. - Amounts repaid to a State from a loan made under this paragraph may be obligated –

(i) for any purpose for which the loan funds were available under this title; and

(ii) for the purchase of insurance or for use as a capital reserve for other forms of credit enhancement for project debt in order to improve credit market access or to lower interest rates for projects eligible for assistance under this title.

No Federal requirements attach to activities advanced with funds repaid to the State.

4. TOLL-RELATED PILOT PROJECTS

If a federal-aid facility is not eligible for tolling under the exceptions listed in 23 USC 129(a), then the only practical alternatives for Federal approval of tolling is to be an approved project in one of the toll-related pilot programs authorized under TEA-21, and its successor. The subsections below outline these programs, their requirements, and their possible application to the Columbia River crossing options.

4.1 Interstate Reconstruction and Rehabilitation Pilot Program

4.1.1 Program Overview

If selected as a pilot project, the Interstate Reconstruction and Rehabilitation Pilot Program allows a state to convert an existing free Interstate highway, bridge, or tunnel to a toll facility in conjunction with reconstruction or rehabilitation of the highway that cannot otherwise be improved without the collection of tolls.[36] Under this pilot program the U.S. Secretary of Transportation has authority to select up to three pilot projects. If selected as a pilot project, the tolling program must be conducted for a minimum of 10 years

The purpose of the program is to provide for the reconstruction or rehabilitation of Interstate highway corridors where work cannot be financially advanced without tolling the facility. Thus, candidate project must be for the conversion of a free Interstate highway to a toll facility in conjunction with needed reconstruction or rehabilitation. An analysis is needed to demonstrate that the facility could not be maintained or improved to meet current or future needs within the limits of the state's apportionments and allocations.

No new Federal funding is available for projects approved under this program. Since no additional Federal funding is authorized for this program, any project sponsor wishing to supplement toll revenues with Federal funds must use regular Federal-aid highway funding - except for funds from the Interstate Maintenance program category. By law, Interstate Maintenance funds cannot be used on any road approved under this pilot project.

Any Interstate highway segment is a candidate for this program so long as the project involves rehabilitation or reconstruction of a free facility and its conversion to a toll facility. Bridges or tunnels may be included in the segment, but are not specifically sought out under this program as 23 USC 129(a)(1) already allows states to convert “reconstructed” or “replaced” free bridges and tunnels to tolled facilities. However, this

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[36] § 1216(b) of TEA-21.

pilot program could allow a bridge to be converted to a toll facility if the bridge is only "rehabilitated," as opposed to "replaced" or "reconstructed."

Applications for the pilot program must: [37]

(1) Identify the proposed facility, along with its age, condition, and intensity of use;

(2) If it affects a metropolitan area, provide assurance that the Metropolitan Planning Organization (MPO) has been consulted concerning the placement of toll facilities and amount of tolls;

(3) Demonstrate through its analysis that the Interstate facility cannot be maintained or improved from current and future federal funds and highway funds from any other sources without toll revenues; and

(4) Provide a facility management plan covering an implementation plan for imposing the tolls, a schedule and financial plan for the toll-financed reconstruction or rehabilitation of the facility, a description of whether consideration will be given to privatizing the operational and maintenance aspects of the toll facility while retaining legal and administrative control, and other information deemed relevant.

Also, the state sponsoring the project must commit to using toll revenues for eligible uses, which comprise costs necessary to improve, operate, and maintain the facility; debt service; and a reasonable return on investment for any private party financing the project. Once renovation to the facility is complete, tolls must be collected for at least 10 years.

A project application may only be approved if FHWA determines that:

(1) The state cannot reconstruct or rehabilitate the facility using existing federal and other fund apportionments;

(2) The facility's age, condition, and intensity of use warrant collection of tolls;

(3) The state's implementation plan takes into account the interests of local, regional, and interstate travelers;

(4) The state's reconstruction or rehabilitation plan is reasonable; and

(5) The state gave reasonable preference to the use of a public toll agency with demonstrated capacity to build, operate, and maintain a toll expressway system meeting Interstate System criteria.

An approved project is subject to the same type of FHWA-state agreement with respect to dedication of toll revenue as noted above. During the term of the toll pilot, the facility is

[37] A *Federal Register* notice published on February 10, 1999 (Vol. 64, No. 27) provides detailed guidance on the pilot program.

no longer eligible to use federal funds under the Interstate Maintenance Program for the portion of the highway where tolls are being collected.

4.1.2 Potential Application of Interstate System Replacement and Rehabilitation Pilot Program to River Crossing Options

To date there has been one application for entry into the pilot program. Proposals for SAFETEA reauthorize the program and simplify the eligibility requirements. The new program would require states to show that tolling is the most efficient and economical way to finance the project. The previous program required that states prove that tolling was the only way to finance the interstate reconstruction or rehabilitation project. The new program would also require that the state agency collect tolls electronically and that the agency include a program to permit low-income drivers to pay a reduced toll amount.

Because the I-5 Bridge options would qualify for tolling under 23 USC 129(a)(1)(C), there is no need to consider the pilot program for the I-5 Bridge. If I-205 can also qualify for tolling under the same authority, there would similarly be no reason to consider this pilot program for I-205. However, if it is determined to toll the I-205 Bridge and the I-205 Bridge cannot qualify for tolling under 23 USC 129(a)(1)(C) because the associated improvements do not constitute "reconstruction" or "replacement," it may be possible to qualify such improvements as "rehabilitation" within the context of the pilot program. [38] Of course, the DOTs would have to demonstrate compliance with the other criteria for the pilot program; and that can have its own difficulties. Nonetheless, the Interstate System Replacement and Rehabilitation Program remains an option meriting continued consideration.

4.2 Value Pricing Pilot Program

TEA-21 expanded the congestion pricing pilot program created under ISTEA. It allows FHWA to make agreements with up to 15 states, local governments, or other public authorities to establish, maintain, and monitor local "value pricing" programs. [39] The authorization includes a limited amount of funds are available to help cover costs associated with pre-implementation activities for up to three years prior to a given project's implementation. Funding under this program is also available to reimburse eligible implementation costs for up to three years from the time the project is implemented. [40] The standard Federal share of costs for projects selected under this program is 80 percent.

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[38] 23 CFR 650.403(c), relating to the HBRRP, defines "rehabilitation" as "*The major work required to restore the structural integrity of a bridge as well as work necessary to correct major safety defects*." While this definition applies to a different statutory provision, it is illustrative of how "rehabilitation" differs from "reconstruction."

[39] P.L. 105-178, § 1216(a)

[40] A *Federal Register* notice published on May 7, 2001 (Vol. 66, No. 88) solicited applications for the Value Pricing Pilot Program and provides the particulars on the application process

Besides an exception to the existing general toll prohibition, the value pricing program provision of TEA-21 has another exception to permit the use of high-occupancy-vehicle (HOV) lanes by vehicles with fewer that two occupants as part of one of these approved value pricing programs. Federal law otherwise prohibits use of HOV lanes by vehicles with fewer that two occupants. [41]

Value pricing is not synonymous with tolling, for it can involve other kinds of charges that are similarly designed to influence drivers' behavior. Still, tolls continue to represent a pre-eminent tool in the value pricing arsenal.The key difference between a typical toll structure and a value pricing toll is variability. The key is for toll rates to vary with the level of congestion on the tolled roadway.

Public toll authorities as well as local, regional, and state sponsors of pricing projects designed to reduce congestion may apply for funding under the Value Pricing Pilot Program. Although public agencies must be the grant recipient of record and sign the project agreement with FHWA, it is acceptable for the project team to include private participants as well.

Candidate projects for this program should seek to reduce congestion through the use of pricing mechanisms. The types of programs FHWA has expressed interest in examining through this program include:

(1) Areawide Value Pricing
- Fees for entering an area ("cordon crossing charges") using electronic vehicle identification devices
- Charges for traveling on a network of metered routes within a defined area
- Areawide parking charges with variable fees targeted toward congestion reduction, or areawide parking "cash-out" programs which provide employees the option of trading in employer-provided parking spaces for cash

(2) Value Pricing on a Single Highway Facility, Route, or Corridor
- Pricing of key traffic bottlenecks, single traffic corridors, or single highway facilities, including bridges or tunnels
- Conversion of fees on existing toll facilities from fixed to variable rate structures, for example, the use of peak surcharges combined with off-peak discounts

(3) Value Pricing on Single or Multiple Lane Highways
- Charges for using newly-constructed or existing highway lanes during peak traffic periods, including fees that allow entry to HOV lanes by vehicles not meeting prescribed minimum occupancy requirements

(4) Pre-project Studies and Experiments
- Studies that assist governments in carrying out activities designed to lead to a value pricing project

[41] 23 USC 102

- Implementing and evaluating small-scale experimental projects with voluntary participants that are designed to demonstrate a new pricing technology or generate information about user responses to value pricing

(5) Innovative Pilot Tests

- Program participants are encouraged to develop new and innovative pricing approaches, including use of innovative electronic tolling technologies, satellite-based vehicle identification technologies, incorporating smog fees into variable road pricing strategies, or using different types of "auction" techniques for allocating entry permits or determining price levels

Legislation directs USDOT to give priority to proposals with the greatest potential to reduce congestion and advance current knowledge of price effects, operations, enforcement, revenue generation, equity, and monitoring and evaluation mechanisms. FHWA will also give priority to promising but untried technological, operational, and institutional innovations.

It is permissible for any value pricing project selected under this program to levy tolls on the Interstate system, notwithstanding the general prohibition on tolls on the Interstate system. Interstate toll projects approved under this program do not count against the three Interstate toll projects permitted under the Interstate Reconstruction and Rehabilitation Pilot Program described in the preceding section.

4.2.2 Potential Application of the Value Pricing Pilot Program to River Crossing Options

Proposals for SAFETEA/TEA-LU reauthorize and rename the pilot program. The maximum number of congestion pricing pilot projects is proposed to be raised to 25. The limit of 25 projects includes all projects previously approved under this section prior to the enactment of SAFETEA/TEA-LU that collect tolls. It would also require that any congestion pricing toll programs include a program for low-income drivers to pay a reduced toll.

As before, there is no need to consider the Value Pricing Pilot Program to toll the I-5 Bridge because it will clearly be eligible under 23 USC 129(a)(1)(C). This Pilot Program may be helpful to securing tolling approval for the I-205 Bridge, if it cannot be obtained under 23 USC 129(a)(1)(C). Unlike the Interstate Reconstruction and Rehabilitation Pilot Program, the Value Pricing Pilot Program does not require substantial physical improvements to the tolled facility. However, the requirements of the Value Pricing program may not be commensurate with the needs of the I-205 corridor. Should there be a determination to toll the I-205 Bridge and should such not be permitted under Section 129, a detailed assessment of the relative merits of the Interstate Reconstruction and Rehabilitation Pilot Program versus the Value Pricing Pilot Program will need to be undertaken to determine which, if either, pilot program should be pursued.