REVIEW DRAFT

I-5 Columbia River Crossing Partnership: Technical Analysis

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

Technical Memorandum 8.6.1

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Technical Memorandum No. 8.6.1:
Oregon Laws and Regulations Affecting Project Concepts, Financing Options and Development Procedures: Part 1: Oregon Statutes Governing the Imposition of Tolls

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To: Rob DeGraff, ODOT	**WOC No. 1-Amend. No. 2**
Dale Himes, WSDOT	**Task No. 8.6**
From: Steven M. Siegel, Siegel Consulting	**Product: TM 8.6.1**
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Executive Summary

- ODOT has the state[1] statutory authority to impose and collect tolls on the existing I-5 Bridge, potential new (supplemental or replacement) I-5 Bridge, and the existing I-205 Bridge.

- ODOT's authority to toll the I-5 Bridge and I-205 Bridge is derived from three separate statutes, two of which appear to grant ODOT two separate and potentially independent tolling authorities.[2] While it appears that these tolling authorities are intended to be independent and cumulative, there is doubt caused by potentially conflicting language. There may be need to clarify these authorities.

- ODOT has the state statutory authority to use revenues collected from tolling the I-5 Bridge and I-205 Bridge to construct, improve, operate, and maintain these bridges, freeways and other constitutionally allowed transportation projects or programs.

[1] The Federal authority to toll segments of the Interstate System is discussed in Tech. Memo. No. 8.1

[2] ORS 381, ORS 383, and Chapter 790 Oregon Laws 2003 (Innovative Partnership Act)

Technical Memorandum No. 8.6.1:
Oregon Laws and Regulations Affecting Project Alternatives, Financing Options and Development Procedures: Part 1: Oregon Statutes Governing the Imposition of Tolls and Use of Toll Revenues

1. Background

There are four basic options for imposing tolls on the I-5 Bridge and/or I-205 (Glenn Jackson) Bridge:[3]

- 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 Oregon's statutory and constitutional provisions that govern ODOT's authority to toll and use toll revenues. Technical Memorandum 8.1 addressed the pertinent federal statutes. Future technical memoranda will address WSDOT's authority to toll and use toll revenues, as well as the authority of ODOT and WSDOT to create a joint tolling entity or contract with a private tolling entity.

ODOT's authority to impose tolls and use toll revenues for Columbia River crossings is set forth in the state constitution and three statutes:

- ORS 381
- ORS 383
- Chapter 790 Oregon Laws 2003 ("Innovative Partnership Act")

In each of ORS 381 and ORS 383 there appears to be two separate grants of tolling authority. There is potentially conflicting language within some of these statutes that can be read as overlapping the other subject statutes.

The use of toll revenues is governed by the statures and the limitations in Section 3a of Article IX of the Oregon Constitution. There is a large body of court decisions and opinions issued by the Attorney General that shed light on the constitutional limitations. This will be addressed in a subsequent Technical Memorandum.

[3] This Technical Memorandum only addresses options regarding the authorities of the DOTs; tolling authority also exists for cities, counties, and other governmental entities.

2. Overview of ORS 381: Interstate Bridges

ORS 381 was enacted in 1953 to establish the authority to toll the initial interstate span between Portland and Vancouver as a way to finance the construction of the second span. ORS 381 establishes two seemingly distinct grants of tolling authority for the state, counties, and cities with regard to 'Interstate Bridges': [4]

- ORS 381.005 to 381.075 provides general authority with regard to Columbia River bridges.

- ORS 381.086 to 381.094 provides specific authorities for the 'existing' I-5 bridge (existing seemingly refers only to the single span existing between Portland and Vancouver in 1953, when the legislation was enacted).

ORS 381.080 establishes the relationship between these two parts of ORS 381, and the relationship with other tolling statutes, including the second part of ORS 381 (ORS 381.086 to 381.094):

> *381.080 ORS 381.005 to 381.075 as cumulative. The authority conferred by ORS 381.005 to 381.075 is cumulative and in addition and supplemental to the authority conferred by any other law.*

It is not clear as to whether the term "cumulative" is meant to say that these provisions are added to (i.e. overlay) the other statures, or whether this set of authority runs parallel to other independent sets of authority.

2.1 General Authority for Columbia River Bridges under ORS 381

ORS 381.005 provides ODOT the authority to own, operate, improve, and maintain bridges over the Columbia River. [5] ORS 381.070(1) and (3) allow ODOT to operate a bridge over the Columbia River as a toll facility, provided it was constructed or acquired under ORS 381.005 to ORS 381.080. [6]

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[4] This memorandum only focuses on authority granted to the state under ORS 381, and does not address the authority granted to other units of government by the statute.

[5] 381.005 Construction, acquisition and maintenance of Columbia River bridges. The Department of Transportation … may construct, reconstruct, purchase, rent, lease or otherwise acquire, improve, operate and maintain bridges over the Columbia River to the State of Washington.

[6] 381.070 Operation of bridge as free or toll bridge. (1) Any bridge constructed, purchased or otherwise acquired under ORS 381.005 to 381.080 may be operated free to the public or as a toll bridge…
(3) If any such bridge is operated as a toll bridge, then the Oregon Department of Transportation may … employ and pay the necessary help for the collection of tolls and may do anything and everything necessary for the proper and efficient operation of the bridge as a toll bridge.

If ODOT tolls a Columbia River Bridge, ORS 381.070(2) requires that the revenues from the tolls first be applied to the "*necessary operating and other appropriate or proper charges*" of the bridge, and the remainder divided equally between Oregon and Washington.[7] Thus, there is no requirement that toll revenues be only used for constructing and operating the toll facility. Because the relationship between tolling authorities under ORS 381 and the tolling authorities provided elsewhere in Oregon statute is ambiguous, it is not clear whether the "divided equally between Oregon and Washington" requirement for excess revenues would apply to tolling done under ORS 383 or the Innovative Partnership Act.

In addition, ODOT is authorized to use state highway funds or its federal funds to pay for the construction or operation of a tolled bridge, provided that it reimburses the state highway funds used for such purposes.[8] Further, in designing a new Columbia River bridge, ODOT can give design consideration to accommodate rail.[9] The rail traffic reference is to railroads, as evidenced in paragraph (2) of this subsection. While not expressly permitted, the authority to consider LRT in the design is not expressly prohibited. Given the multi-modal transportation charge to the department, it may be inferred that consideration of light rail in the design of a new bridge is authorized; although the use of state highway trust funds for such purpose would be restricted by Article IX, Section 3a of the Oregon Constitution.

ODOT is authorized, but not required, to enter into agreements with the State of Washington and private parties for the purpose of constructing and operating a Columbia River Bridge under ORS 381. [10] If ODOT enters into such agreements, the agreement must contain express provisions with respect to: [11]

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[7] 381.070(2) If any such *[i.e. Columbia River]* bridge is operated as a toll bridge, the revenues derived as a result of the tolls and charges collected shall, after deducting necessary operating and other appropriate or proper charges, be divided equally between the State of Oregon and the State of Washington**.**

[8] **381.020 Using funds available for bridge expenses; reimbursement.** The Department of Transportation may pay out of state highway funds or any other funds available to it any part of the cost of the construction, purchase, maintenance, operation, repair, reconstruction and improvement of any bridge mentioned in ORS 381.005 assessed and allocated to this state. In the event the bridge is operated as a toll bridge, then the share of toll revenues accruing to this state shall be applied by the department to reimburse the state highway funds for expenditures made in connection with the bridge.

[9] **381.045 Provision in bridge plans for rail traffic; contracting with railroad companies.** (1) Preparation of the specifications and designs of any bridge constructed under ORS 381.005 to 381.080 may give consideration to and include provisions for facilities and accommodations for traffic by rail as well as for traffic by motor vehicle, team, pedestrian or other regular highway traffic.

[10] 381.010 Agreements for carrying out powers. For the purpose of carrying out or putting into effect the right, power and authority granted by ORS 381.005 to 381.080 or any other law, the Department of Transportation in the name of the state may make and enter into agreements with:
(1) The Government of the United States or any of its agencies.
(2) The State of Washington.
(3) Any county, municipality, port or other political subdivisions or agencies of the State of Washington.
(4) Any county, municipality, port or any other political subdivisions of this state.
(5) Any persons, associations, corporations, domestic or foreign.

- The site of the bridge.
- The maximum financial obligation assumed by each of the contracting parties.
- The estimated cost of the structure with its approaches and connecting roads.
- The sources from which all the funds are to be obtained or derived.
- Whether the bridge is to be operated free to the public or as toll bridge.

2.2 Specific Authority to Toll the "Existing" I-5 Bridge under ORS 381

ORS 381.086 to 381.094 provides specific authorities for tolling the 'existing' I-5 bridge. These provisions seemingly refer only to the single span existing between Portland and Vancouver in 1953. For example, ORS 381.086 addresses the "bridge now existing," the "now" being the one span existing in 1953. It also references "the bridge" in the singular, where now two bridges exist. This appears to suggest that the provisions of ORS 381.086 to ORS 381.094 are historical remnants that are inapplicable to the current situation. Nonetheless, it remains on the books and needs to be considered.

Under 381.086, the existing I-5 bridge may be operated by ODOT "*as a toll bridge for the purpose of creating revenue to be used as set forth in ORS 381.092.*" ODOT is provided authority to toll a broad range of bridge users and impose franchise fees for use of the bridge. [12] The use of the revenues from these sources is limited to bridge and approach construction, operation and maintenance. [13] The duration of tolls imposed by ODOT on the existing I-5 bridge under ORS 381 is limited to the term of the construction bonds for the new bridge. [14]

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[11] 381.015 Contents of agreement. Any agreement made or contract entered into pursuant to the authority of ORS 381.005 to 381.080 shall, among other things, contain express provisions with respect to:
(1) The site of the bridge.
(2) The maximum financial obligation assumed by each of the contracting parties.
(3) The estimated cost of the structure with its approaches and connecting roads.
(4) The sources from which all the funds are to be obtained or derived.
(5) Whether the bridge is to be operated free to the public or as toll bridge.
(6) Any other appropriate matters or provisions consistent with the prudent principles of economy and good business.

[12] 81.088 Tolls and franchise fees. The Department of Transportation may impose and collect tolls and franchise fees for the use of said bridge by all vehicles, pedestrians, public utilities and telecommunications utilities, including power, light, telephone and telegraph wires, and water, gas and oil pipes.

[13] 381.092 Uses of tolls and fees collected. The revenues derived from the imposition and collection of tolls and franchise fees for the use of said bridge shall be used for the purpose of paying the cost and incidental expenses of construction of a new bridge, including approaches thereto, across the Columbia River adjacent to said existing interstate bridge, including payment of principal, interest and financing costs of bonds issued for the purpose of obtaining funds for the construction of said new bridge, and the cost of maintaining and operating both of said bridges while said bridges are operated as toll bridges

[14] **381.094 Operation of bridge as free bridge.** The said existing interstate bridge shall be operated as a free bridge whenever all bonds and interest thereon issued for the purpose of obtaining funds to be used for construction of a new bridge adjacent to said existing interstate bridge have been paid.

While ORS 381 permits toll revenues to be used to construct "approaches" to the bridge, the term "approaches" may be interpreted narrowly. For example, in a Washington case based on since rescinded statutes, the court held that the legislature had granted the broad discretion in determining the nature and extent of the approaches for any given toll bridge, subject to review only for abuse. [15] That said, it is questionable that the term "approach," even broadly interpreted, would encompass, for example, the Columbia Boulevard interchange improvement that is currently under consideration.

3. Overview of ORS 383: Toll Roads and Toll Bridges

Like ORS 381, ORS 383 contains two distinct sets of statutory authority:

- ORS 383.001 to ORS 383.027, which is headed "Toll Roads" in the statutes, grants broad tolling authority for "tollways" and "tollway projects." While headed as "Toll Roads," these authorities can also apply to "toll bridges."

- ORS 383.310 to ORS 383.380, which is headed "Toll Bridges" includes various procedural requirements and limitations which would not have any practical affect State projects (but would affect toll projects by other units of governments or private entities). These sections do not grant the state any additional authority to toll or use toll revenues.

The relationship between ORS 383.310-ORS 383.380 and other tolling authorities is set forth in two subsections:

- ORS 383.310: which states "It is lawful to construct, maintain and operate toll bridges upon state highways in the manner set forth in and pursuant to … ORS 383.315 to 383.380, **and not otherwise**.

- ORS 383.315 which creates the exception that "nothing in ORS 383.315 to 383.380 applies to toll bridges constructed, maintained, or operated under the provisions of ORS 383.003 to 383.027."

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[15] State ex rel. Washington Toll Bridge Authority v. Yelle, 197 Wash. 110. The Yelle case involved approaches for the first Lake Washington bridge, described in 197 Wash. at page 127:

> "*The so-called approach contemplates a one-fourth 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 so-called approaches on the eastern side of the lake cover a distance in excess of sixteen thousand lineal feet, about three miles.*"

The court decided that such approaches did not constitute an abuse of discretion in the circumstances, and pointed out, at page 117 of 197 Wash., that:

> "*It is not only proper, but also very necessary, to extend the arterial bridge approaches to encourage the flow of traffic to and over the bridge*."

Thus, ORS 383.315 to 383.310 applies to projects or bridges tolled under ORS 381 and the Innovative Finance Act, but not to the tollways or tollway projects described in ORS 383.002 to 383.0027. [16]

3.1 Tollway Authority under ORS 383.001 to 383.027

The provisions of Chapter 383 address "tollways" and "tollway projects." A "tollway" is *"any roadway, path, highway, bridge, tunnel, railroad track, bicycle path or other paved surface or structure specifically designed as a land vehicle transportation route, the construction, operation or maintenance of which is wholly or partially funded with toll revenues resulting from an agreement under ORS 383.005"*. [17]

A "tollway project" is *"any capital project involving the acquisition of land for, or the construction, reconstruction, improvement, installation, development or equipping of, a tollway, related facilities or any portion thereof."* [18] Unlike ORS 381, ORS 383 expressly permits transit elements within a tollway project. [19]

Thus, the authorities provided under ORS 383 emanate from the "agreement" that is required to designate a facility as a "tollway" or "tollway project." The types of agreements that qualify under ORS 383.005 are broad; ranging from design-build contracts to financing agreements. [20] There are several elements of a qualified "tollway project" agreement to note:

- The agreement or arrangement may be with *"any one or more private entities or units of government, or any combination thereof."* Under ORS 383.003(7) a "unit of government" means any "*department or agency of the federal government, any*

[16] Recall that ORS 383.315 to 383.380 has no practical affect on projects undertaken by the State.

[17] ORS 383.003(5)

[18] ORS 383.003(6)

[19] ORS 383.013 Tollway design….(2)…The department shall consider the present and future needs of local transit authorities and whether the proposed tollway project should be expanded to include the acquisition of land or rights of way for future mass transit needs or for future expansion due to projected population growth.

[20] 383.005 Agreements for tollway projects; operation of projects**.** (1) For purposes of the acquisition, design, construction, reconstruction, operation or maintenance and repair of tollway projects, the Department of Transportation may enter into any combination of contracts, agreements and other arrangements with any one or more private entities or units of government, or any combination thereof, including but not limited to the following:

(a) Design-build contracts *with private…;*

(b) Lease agreements, lease-purchase agreements and installment sale arrangements…;

(c) Licenses, franchises or other agreements for the … operation or maintenance of a tollway project;

(d) Financing agreements for a tollway project pursuant to which the department makes any loan, grant, guaranty or other financing arrangement with a private entity or unit of government; and

state, or …department thereof, and any city, county, district, port or other public corporation ..."

- The agreement or arrangement must be for "*the acquisition, design, construction, reconstruction, operation or maintenance and repair of tollway projects…[emphasis added].*"

If a facility is a tollway, ORS 383.005(2) provides ODOT (directly or through other entities) clear authority to impose and collect tolls on tollway projects. [21] The proceeds of these toll collections can be used: [22]

- To finance preliminary studies and reports for any tollway project;
- To acquire land to be owned by the state for tollways …;
- To finance the construction, renovation, operation, improvement, maintenance or repair of any tollway project;
- To make grants or loans to a unit of government for tollway projects…

The use of the terms "any tollway project" and "projects" in ORS 383.009 provides ODOT the authority to use revenues in the State Tollway Account for projects other than the facility from which the tolls were collected, provided the project receiving such funds is a "tollway project." Recall that a tollway project is "*any capital project involving … a tollway, related facilities or any portion thereof.*" However, the inclusion of "related facilities" does not provide much flexibility regarding the use of toll proceeds. [23]

Thus, there are only two basic criteria for a bridge or highway to be a tollway: (a) it must be constructed, operated, or maintained with toll revenues, and (b) the toll revenues must result from a qualified agreement. Clearly a bi-state agreement to construct and toll a bridge would make such a bridge a "tollway" and its construction a "tollway project." But would the needed improvements to I-5 and interchanges along I-5 in the vicinity of a tolled Interstate Bridge also be classified as a tollway project?

Recall that a "tollway" is *"…a land vehicle transportation route … wholly or partially funded with toll revenues resulting from an agreement under ORS 383.005"*. Thus, it is possible that an agreement between Oregon and Washington to construct a toll bridge and highway and interchange improvements along I-5 in the vicinity of the bridge, all paid by the proceeds of tolling the bridge, would constitute a "tollway" because (a) it is the

[21] ORS 383.005 (2) The department may operate tollway projects and impose and collect tolls on any tollway project the department operates. Any private entity or unit of government that operates a tollway project pursuant to an agreement with the department may impose and collect tolls on the tollway project.

[22] ORS 383.009

[23] ORS 383.003(3) "Related facility" means any real or personal property that:(a) Will be used to operate, maintain, renovate or facilitate the use of the tollway; (b) Will provide goods or services to the users of the tollway; or(c) Can be developed efficiently when tollways are developed and will generate revenue that may be used to reduce tolls or will be deposited in the State Tollway Account.

subject of a qualified agreement and (b) all of the facility improvements in the agreement are to be paid with toll proceeds. As part of a tollway project, the improvements to and along I-5 would be eligible to be paid with toll revenues from the bridge. This interpretation is not without doubt, an Attorney General's Opinion or judicial validation should be sought prior to pursuing this approach.

ORS 381.070(2) may (depending on the interpretation given to "cumulative" as discussed above) require that the net revenues after operations (and other appropriate and proper charges) be divided equally between Oregon and Washington, would apply to a "tollway" (under ORS 383) across the Columbia River. The share of excess toll proceeds going to Washington would not be subject to the limitations placed on such revenues in Oregon, but would be subject to limitations in Washington law.

3.2 The Procedural Requirements and Limitations of 383.310 to ORS 383.380

As state earlier, ORS 383.310 to 383.380:

- Does not apply to tollway projects under ORS 383.001 to 383.027
- Appears to be required for toll projects authorized under ORS 381 and the Innovative Partnership Act.

These provisions relate to:

- Requiring local governments and private entities to obtain the permission of Department of Transportation for toll bridges.
- Requiring the sale (under certain conditions) to ODOT of toll facilities constructed under the tollway provisions that are owned by local governments or private entities.
- Procedural requirements regarding bridge plans, inspections, and record-keeping.
- Requiring that toll rates be determined by ODOT.

These provisions have little impact on projects undertaken by the State, and are not addressed further in this memorandum.

4. Overview of Tolling under Chapter 790 of Oregon Laws 2003; the Innovative Partnership Act of 2003 (IPA)

The tolling authority provided under the IPA appears broader than that provided by the two other statutory mechanisms; but like the others it suffers from ambiguity. Section 4(4) of IPA expressly exempts projects advanced under IPA from the requirements of ORS 383.003 to 383.027. [24] As before, the provisions of ORS 383.310 to ORS 383.380 may apply in addition to the IPA provisions, but they are of little consequence here. The provisions or ORS 381 may also apply, and that could create some ambiguity, which is addressed later in this memorandum.

[24] Section 4(4) The provisions of ORS 383.003 to 383.027 do not apply to any tollway project entered into under sections 1 to 13 of this 2003 Act

4.1 Tollway Authority under IPA

As with the tollway statutes under ORS 383, the tolling authority under IPA emanates from an "agreement" under Section 4 of the Act. An "agreement" is a "*written agreement, including but not limited to a contract, for a transportation project that is entered into under section 4 of this 2003 Act*." [25] A "transportation project" is "*any proposed or existing undertaking that facilitates any mode of transportation in this state*." [26] The IPA authorizes ODOT to: [27]

> (a) Enter into <u>any agreement</u> or any configuration of agreements relating to transportation projects with any private entity or unit of government [28]... The subject of agreements entered into under this section <u>may include, but need not be limited to</u>, planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing and operation of transportation projects.
>
> (b) Include in any agreement entered into under this section <u>any financing mechanisms</u>, <u>including but not limited to</u> the imposition and collection of franchise fees or <u>user fees</u> and the development or use of other revenue sources.

Taken together, these provisions provide broad authority. It appears that so long as, for example, ODOT and WSDOT enter into an agreement, the agreement can (a) cover any type of transportation project regardless of mode, location, type, or amount, and (b) employ an financing mechanism, including but not limited to tolls.

However, there is an ambiguity. Section 3 of the Act requires ODOT to establish the Innovative Partnership Program (IPP), and proscribes a process for receiving and evaluating proposals. Specifically, ODOT-IPP is authorized to: [29]

> (a) Solicit concepts or proposals for transportation projects from private entities and units of government.
>
> (b) Accept unsolicited concepts or proposals for transportation projects from private entities and units of government.

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[25] 790 Oregon Laws 2003, Section 2(1).

[26] 790 Oregon Laws 2003, Section 2(3).

[27] 790 Oregon Laws 2003, Section 4(1).

[28] Under 790 Oregon Laws 2003, Section 2(4) a "unit of government" means "any department or agency of the federal government, any state or any agency, office or department of a state …or intergovernmental entity …"

[29] 790 Oregon Laws 2003, Section 3(3).

> (c) Evaluate the concepts or proposals received under this subsection and select potential projects based on the concepts or proposals. The evaluation under this paragraph shall include consultation with any appropriate local government, metropolitan planning organization, or area commission on transportation.

Thus, under IPA, ODOT may solicit or accept an unsolicited proposal for a project, but the statute does not contemplate a proposal initiated by ODOT or cooperatively initiated by ODOT and WSDOT. Further, Section 4(4) of the Act states in relevant part:

> *Following an evaluation by the department of concepts or proposals submitted under subsection (3) of this section, and the selection of potential transportation projects, the department may negotiate and enter into the agreements described in section 4 of this 2003 Act for implementing the selected transportation projects*

Thus, ODOT "may" enter into the required agreement "following": (a) an evaluation of solicited or unsolicited proposal, and (b) the selection of the potential transportation project. Section 4(6) provides additional procedural requirements for entering a qualified agreement; including OTC approval, certain contract provisions, and a report on promotion of competition among subcontractors. [30]

Apparently ODOT may not enter the agreement required to authorize tolling under IPA, even if the agreement is only with WSDOT, without meeting these pre-requisites. Under Section 4(3) ODOT can enter into a "working agreement" or "coordinating agreement" with WSDOT without meeting the two pre-requisites, but these agreements can only "*carry out the joint implementation of any transportation project selected under section 3*." [31] Thus, these "working" and "coordinating" agreements cannot be the primary provider of the tolling authority.

Clarification of these conclusions should be obtained from the AG's Office. If it is interpreted that such steps are a pre-requisite to entering a contract with WSDOT, the project development process will have to be reoriented to comply with this requirement. That is, the development process would have to accommodate receipt by ODOT of a

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[30] (6)(a) The department may not enter into an agreement under this section until the agreement is reviewed and approved by the Oregon Transportation Commission.
(b) The department may not enter into, and the commission may not approve, an agreement under this section for the construction of a public improvement as part of a transportation project unless the agreement provides for bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the project.
(c) Before presenting an agreement to the commission for approval under this subsection, the department must consider whether to implement procedures to promote competition among subcontractors for any subcontracts to be let in connection with the transportation project. As part of its request for approval of the agreement, the department shall report in writing to the commission its conclusions regarding the appropriateness of implementing such procedures.

[31] Section 4(3) The department may, either separately or in combination with any other unit of government, enter into working agreements, coordination agreements or similar implementation agreements to carry out the joint implementation of any transportation project selected under section 3 of this 2003 Act.

tolling proposal from WSDOT and its subsequent evaluation by ODOT under the IPP rules implementing the statute.

Section 4(2) of the IPA specifies eight elements that must be incorporated in an eligible agreement "among the public and private partners." [32] The Act does not appear to require these elements in agreements between only public partners. It does, however, provide for agreements between ODOT and other units of government which designate a "district" within which funds received through a qualified agreement must be spent. [33]

Subsequent to entering a qualified agreement, revenues received by ODOT from the funding mechanism established in the agreement (i.e. tolling) are required to be deposited in the "State Transportation Enterprise Fund." [34] Separate accounts are established in

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[32] Section 4(2) The agreements among the public and private sector partners entered into under this section must specify at least the following:

(a) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;

(b) How the partners will share management of the risks of the project;

(c) How the partners will share the costs of development of the project;

(d) How the partners will allocate financial responsibility for cost overruns;

(e) The penalties for nonperformance;

(f) The incentives for performance;

(g) The accounting and auditing standards to be used to evaluate work on the project; and

(h) Whether the project is consistent with the plan developed by the Oregon Transportation Commission under ORS 184.618 and any applicable regional transportation plans or local transportation system programs and, if not consistent, how and when the project will become consistent with applicable plans and programs.

[33] SECTION 11. An agreement among the Department of Transportation and other units of government may create a new district, or designate a previously existing district, that includes any or all of the territory within the geographic boundaries of any or all Oregon counties in which a transportation project is located, and may require that all revenues from franchise fees, other user fees or other revenue sources collected within the district in connection with the transportation project be used exclusively for the benefit of the district.

[34] SECTION 6. (1) The State Transportation Enterprise Fund is established separate and distinct from the General Fund. Interest earned by the State Transportation Enterprise Fund shall be credited to the fund.

(2) The following moneys shall be deposited into the State Transportation Enterprise Fund:

(a) Proceeds from bonds or other financing instruments issued under the provisions of sections 1 to 13 of this 2003 Act;

(b) Revenues received from any transportation project developed under the program established under section 3 of this 2003 Act; and

(c) Any other moneys that are by donation, grant, contract, law or other means transferred, allocated or appropriated to the fund.

(3) Moneys in the State Transportation Enterprise Fund are continuously appropriated to the Department of Transportation for the purpose of carrying out the provisions of sections 1 to 13 of this 2003 Act and implementing all or portions of any transportation project developed under the program established under section 3 of this 2003 Act.

(4) Moneys in the State Transportation Enterprise Fund that are transferred from the State Highway Fund or from any one of the sources that comprise the State Highway Fund as specified in ORS 366.505 and that are revenue under section 3a, Article IX of the Oregon Constitution, may be used only for purposes authorized by section 3a, Article IX of the Oregon Constitution.

(5) The department shall establish a separate account in the State Transportation Enterprise Fund for each

the Fund for each project undertaken pursuant to a qualified agreement. Funds in an account may be spent in accordance with the terms of the qualified agreement. Thus, unlike tollway projects under ORS 383, the IPA permits great flexibility with regard to the use of toll revenues.

While agreements and projects undertaken under IPA are exempt from the provisions of ORS 383, it is possible that the provisions of ORS 381.005 to ORS 381.080 may overlay those of the IPA.[35] If so, this would require agreements executed and projects undertaken pursuant to the IPA to:

- Divide net revenues equally between Oregon and Washington;
- Reimburse the state highway trust fund for any expenditures made from the fund on behalf of the tolled bridge; and
- Other procedural requirements.

5. Conclusion

The authority to toll the Columbia River Bridges can come from Oregon or Washington statutes. This Technical Memorandum only addresses Oregon statutes; a future Technical Memorandum will address Washington statutes.

Oregon statutes provide several authorities for tolling the I-5 and I-205 Bridges, each with their own particular requirements, attributes, and ambiguities. While it is my opinion that the conclusions provided in this Technical Memorandum are sound, some are not without doubt caused by the cited ambiguities. These ambiguities can be clarified through Attorney General Opinions, judicial validations, or, in some cases, by simultaneously meeting the requirements of multiple statutes, where that is not a problem.

While the IPA provides the broadest flexibility, that flexibility comes with certain procedural requirements. Whether the tolling of the Columbia River bridges should be done under the authority granted by IPA must be determined by weighing the requirements against the flexibility.

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transportation project that is undertaken under the program established under section 3 of this 2003 Act. Except as provided in subsection (4) of this section, the department may pledge moneys in the State Transportation Enterprise Fund to secure revenue bonds or any other debt obligations relating to the transportation project for which the account is established.
(6) Moneys in an account established under subsection (5) of this section shall be used as provided in any agreement applicable to the transportation project for which the account is established

[35] This assumes the remainder of ORS 381, relating to the construction of the second span of the I-5 Bridge, is no longer applicable.