



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

September 19, 2013

F.J. Kenney
Rear Admiral, U.S. Coast Guard
Judge Advocate General and Chief Counsel
2100 Second Street SW
Washington, DC 20593-7121

Re: Columbia River Crossing: United States Coast Guard General Bridge Permit Application

Dear Rear Admiral Kenney:

By letter dated September 11, 2013, you have requested my opinion on the legal authority of the Oregon Department of Transportation to pursue the Columbia River Crossing Project (“CRC”), for which the States of Oregon and Washington have submitted an Application for a General Bridge Permit to the United States Coast Guard. A similar letter was sent to the Washington Attorney General.

In making this request, the letter states that recent events and information have raised questions “regarding authority to locate and construct the CRC on the Washington side of the river.” Specifically, the letter explains that during the Coast Guard’s permit application review, you have been informed that the Washington legislature “did not provide any funding to continue working on [the CRC]” and that responsibility for the initial phase of the project would be handled by the Oregon Department of Transportation. You make this request under the authority of 33 CFR 115.30, which provides that: “[A]n opinion of the Attorney General of the State as to the sufficiency of State authority for the construction of the bridge is acceptable to the Coast Guard in doubtful cases.”

Please accept this response in furtherance of and in support of the Columbia River Crossing General Bridge Permit Application, currently pending before the U.S. Coast Guard.¹ We acknowledge the tremendous work that has already been done by the Oregon Department of Transportation (“ODOT”) and the Washington Department of Transportation (“WSDOT”) in the

¹ The Oregon statutes referenced in this letter are appended as Exhibits A and B.

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Application, including the assurances and information that contained in the application record. We also anticipate continuing our productive relationship with the Washington Attorney General's Office, including the attorneys representing WSDOT, on issues of Washington law and its interpretation.

Oregon's Authority To Construct The Columbia River Crossing Bridge

The State of Oregon has a long history of construction and operation of bridges over the Columbia River, in cooperation with the State of Washington. The CRC, also known as the I-5 Bridge Replacement Project, is the most recent bridge project to be proposed on the Columbia River. The CRC, as originally conceived, was to have been jointly-funded by the States of Oregon and Washington. With the adjournment of the 2013 Washington legislature without having taken up a transportation revenue package that would have funded Washington's contribution to the project, ODOT informed the Coast Guard on September 5, 2013, of its intent to deliver the project's first phase under Oregon's leadership.

A bi-state bridge project of this nature implicates key attributes of state sovereignty. As originally proposed and in its current approach, ODOT is authorized to enter into intergovernmental agreements with the State of Washington and its Executive Branch agencies to assure that Washington laws and procedures are addressed appropriately. Use of cooperative agreements between governmental entities is customary for such bi-state projects.

Oregon statutes establish ODOT's authority for construction and operation of interstate bridges, including bridges that span the Columbia River. Oregon Revised Statutes ("ORS") 381.005, 381.010 and 366.205 authorize ODOT to construct, reconstruct, improve, operate and maintain, bridges over the Columbia River, and to enter into agreements with the State of Washington for that purpose.

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.

As a result of House Bill 2800 (2013), Oregon Laws 2013, chapter 4 (hereafter, "HB 2800"), the 2013 Oregon Legislative Assembly amended ORS chapter 381 to clarify Oregon's authority to carry out the CRC project. Section 2 provides as follows:

SECTION 2. The Legislative Assembly finds that it is in the interests of this state to undertake the Interstate 5 bridge replacement project, a bistate, multimodal corridor improvement project between the Washington State Route 500 interchange with Interstate 5 in Vancouver, Washington, and the Victory Boulevard interchange with Interstate 5 in Portland, Oregon. The project includes:

- (1) New multimodal river crossings;
- (2) Replacement, modification and removal of the existing Interstate 5 bridges;
- (3) Improvements to existing interchanges; and
- (4) Multimodal improvements to facilitate travel in the bistate corridor.²

These statutes unambiguously establish ODOT's authority to construct and operate the CRC, and to enter into agreements with the State of Washington for that purpose. The states are in the initial stages of drafting the required Intergovernmental Agreement ("IGA") for development, construction, operations, and maintenance of the CRC project's initial phase. Certain amendments to HB 2800 and the companion ODOT bond bill, are needed for ODOT to fund the project, but I understand this to be beyond the scope of the U.S. Coast Guard's inquiry. Therefore, our response addresses the Coast Guard questions about Oregon's legal authority.

RESPONSE TO QUESTIONS

- 1. If the proposed CRC Bridge and its approaches are going to be built solely by Oregon, what is the legal mechanism or mechanisms by which Oregon would seek authorization to use, or obtain ownership of, lands shoreward of the river on the Washington side? Is the authority to implement such mechanism(s) under the sole control of the Executive Branch, or is action by the Oregon Legislature required? What is the process for seeking and accepting the described property rights, and is it different for lands owned by Washington State and privately-held lands? Are there additional Oregon environmental, permitting, or other processes, not already completed in connection with the CRC Bridge, that would be required before such authorization could be sought? (For example, would acquiring land in Washington State require a separate State NEPA process?) When will the processes authorizing Oregon to use or control land in Washington State be completed, or what is the anticipated timeline? What are the legal instruments that will be used to confirm and memorialize such land use/transfer arrangements?**

RESPONSE:

Authority for ODOT to acquire real property necessary for the CRC is addressed in § 4 of HB 2800, which amends ORS 381.005, as follows:

² Washington law similarly defines the "Columbia River Crossing project" as "the bistate, multimodal corridor improvement program between the state route number 500 interchange in Vancouver, Washington and the Victory Boulevard interchange in Portland, Oregon." Revised Code of Washington ("RCW") 47.56.890.

381.005. (1) The Department of Transportation in the name of the state may construct, reconstruct, purchase, rent, lease or otherwise acquire, improve, operate and maintain bridges over the Columbia River.

(2) Notwithstanding the designation of state highways within this state under ORS 366.005 and 366.220, *the department may acquire real property necessary for the Interstate 5 bridge replacement project, together with approaches and connecting roads, on both sides of the Columbia River.* For the purposes of the Interstate 5 bridge replacement project, the Oregon Transportation Commission by resolution may designate additional approaches, connecting roads and related facilities within the Interstate 5 corridor on both sides of the Columbia River as a part of the Oregon state highway system. (Emphasis added.)

There are two ways that land may need to be acquired for any bridge construction project. In most cases, property is acquired by an arms-length sale transaction. ODOT has the authority to buy land in Oregon and Washington under HB 2800 and ORS 366.320. ODOT would acquire property through a deed. No additional environmental review or approvals are required to purchase property in an arms-length transaction.

ODOT does not have the authority to condemn property in Washington. If ODOT is unable to obtain property by voluntary sale, ODOT may enter into an agreement with the State of Washington for WSDOT to exercise its powers of eminent domain to acquire the property through condemnation. There are some differences between the Oregon and Washington eminent domain processes. While my office's review of Washington law suggests to us that WSDOT may act within its existing statutory authority to condemn property for CRC without further action by its legislature, this requires confirmation from the Washington Attorney General. Property obtained by WSDOT for highway right-of-way would require WSDOT to execute long-term leases or grant other long-term permits of occupancy of WSDOT highway right-of-way property to ODOT to locate Oregon highway improvements thereon. To the best of our knowledge, no further environmental review or approvals will be required for property obtained by condemnation and subsequent long-term lease in accordance with the laws of Washington. However, we are informed by ODOT that WSDOT's engineering and design approval of proposed highway improvements will be required in order to authorize leases or occupancy permits to ODOT for WSDOT right-of-way. Obtaining WSDOT reviews for this purpose will be included in an IGA between the States.

An IGA between the States must include a mechanism for acquiring real property necessary for the bridge, together with approaches and connecting roads. As previously discussed, execution of such an agreement is within ODOT's statutory authority and requires no further authorization from the Oregon Legislative Assembly. Likewise, ODOT has statutory authority to purchase real property necessary for the CRC, together with approaches and connecting roads, on both sides of the Columbia River. No further authorization is required from the Oregon Legislative Assembly.

- 2. For submerged lands on the Washington side of the Columbia River, what is the legal mechanism or mechanisms by which Oregon would seek authorization to use such submerged lands? Is the authority to implement such mechanisms under the sole control of the Executive Branch, or is action by the Legislature required? What is the process for seeking and accepting the rights to use Washington's submerged lands? Are there additional Oregon environmental, permitting or other processes, not already completed in connection with the CRC Bridge, that would be required before such authorization could be sought? (For example, would gaining use of submerged land in Washington State require a separate State NEPA process?) When will the processes authorizing Oregon to use or control Washington's submerged lands be completed, or what is the anticipated timeline? What are the legal instruments that will be used to confirm and memorialize such land use/transfer arrangements?**

RESPONSE:

Under their respective legal authorities, both States have established frameworks and procedures for the occupation, use, and disposition of submerged and submersible lands within their respective jurisdictions. As discussed below, no further Oregon legislative action is required to authorize ODOT's seeking all necessary submerged and submersible lands leases and other permits from either the State of Oregon or the State of Washington.

The law and procedures for occupying submerged and submersible state lands is similar between the two States. For example, in Oregon, the Department of State Lands ("DSL") manages the state-owned submerged and submersible lands under the policy direction of the State Land Board. DSL is part of the Executive Branch of government in Oregon. DSL has adopted administrative rules that establish the mechanism by which ODOT would apply for, and obtain, an authorization to use the submerged and submersible lands within the Columbia River for bridge construction. ODOT has utilized this process many times to obtain authorization for its bridges and other structures occupying submerged and submersible lands and has a close working relationship with the DSL. Under Oregon Administrative Rules ("OAR") chapter 141, division 122, DSL authorizes use of Oregon submerged and submersible lands for a bridge via an easement. An easement from DSL would condition the applicant to comply with applicable state regulatory requirements and local land use laws. For the CRC Project, state regulatory requirements include compliance with the Oregon Removal-Fill Law, Clean Water Act Section 401 Water Quality Certification and state fish passage laws. Environmental review is well underway and is expected to be completed in the near future.

Similarly, Washington has in place a legal framework for the management and disposition of its submerged and submersible lands. In Washington, submerged and submersible lands of the state (commonly referred to as aquatic lands) are managed by the Washington Department of Natural Resources ("WDNR"). WDNR is part of the Executive Branch of government in Washington. Although, ultimately, it will be for WDNR and the Washington Attorney General's Office to provide the definitive statement in answer to the questions raised

relative to the use of the aquatic lands on the Washington side of the Columbia River, our review of Washington's statute and rules do not reveal any obvious impediments to ODOT obtaining the authorizations necessary for bridge construction.

We understand that there are two pathways for ODOT to acquire the right to use the aquatic lands of the Columbia River under Washington's jurisdiction. First, WDNR has the authority to grant rights-of-way (easement) for bridges over and across state-owned aquatic lands under Rev. Code Wash. ("RCW") 79.110.100 – 79.110.140 and Wash. Admin. Code ("WAC") 332-30. As with Oregon, WDNR has a well-developed and definitive administrative process in place to apply for, and obtain, an easement over aquatic lands. Second, RCW 47.12.026 authorizes WSDOT to acquire easements for highways and toll facilities on, over, and across the beds of navigable waters under the jurisdiction of WDNR. Were WSDOT to acquire such an easement, ODOT could acquire rights therein through an assignment of the same or through a cooperative agreement with WSDOT. It is anticipated that the process to acquire an interest in Washington's aquatic lands, through one of the two methods discussed above, will be commenced in November 2013. I am informed that that application process will take approximately eight to nine months, with a decision expected no later than August 2014.

My office's review of the pertinent Washington legal authorities suggests that no further Washington legislative action is required to authorize ODOT's use of aquatic lands in Washington for the bridge. However, this requires confirmation by the Washington Attorney General. WDNR's authorization will require Washington State Environmental Policy Act ("SEPA") review. The CRC Project co-sponsors previously completed a Final Environmental Impact Statement ("FEIS") under 40 CFR §§ 1500-1508, which WSDOT adopted, subject to a concurrent public review process by the Washington Department of Ecology. The project has obtained Clean Water Act § 401 Water Quality Certifications from the Washington Department of Ecology and the Oregon Department of Environmental Quality. We are also informed that the project applied for a Hydraulic Permit from the Washington Department of Fish and Wildlife under RCW 77.55.021 in January 2013 and that a permitting decision is anticipated in November 2013. We are further informed that ODOT will submit an application for a Substantial Shoreline Development Permit to the City of Vancouver under RCW 90.58.140 in December 2013 and that ODOT anticipates a decision in May 2014.

- 3. If Oregon is also to be solely responsible for the operation and maintenance of the proposed CRC Bridge, what is the legal mechanism or mechanisms by which Oregon will accept sole operational control? Is the authority to implement such mechanism(s) under the sole control of the Executive Branch, or is action by the Legislature required? What is the process for that action(s) and when will it be completed?**

RESPONSE:

Relying on the authorities discussed above, ODOT may enter into an IGA with WSDOT that allocates between the two states maintenance and operation duties for the permitted project elements in a manner that allows the State of Oregon to meet legal requirements.

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ODOT's present statutory framework authorizes certain cross-border activities by ODOT, as well as the allocation of certain project management, construction, operations, and maintenance duties of interstate bridges. We note that the allocation of bridge maintenance, operations, repair, replacement, and other responsibilities by agreement between the States is not unprecedented. To illustrate, the States share operations and maintenance duties on several bridges across the Columbia River, three of which are on the Federal Interstate Highway System, including the existing I-5 bridges. In short, the States have a long history of cooperatively maintaining and operating Columbia River bridges and allocating these responsibilities by agreement under their existing statutory authority. The States are in initial discussions regarding the execution of one or more IGAs for development, construction, operations, and maintenance of the CRC project's initial phase.

CONCLUSION

It is the opinion of this office that the State of Oregon has sufficient legal authority to enter into agreements and seek the necessary easements and property interests with the State of Washington and private parties. Further, it is our opinion that ODOT and WSDOT may allocate operation and maintenance duties for the CRC Bridge and related improvements by agreement. The Oregon Attorney General cannot opine as to the extent of Washington state agency authority. While our review of Washington statutory authority gives us some confidence that the State of Washington can, without further action by its legislature or additional appropriation of funds, take certain key measures to facilitate Oregon's proposal to construct the initial phase of the project, only the Washington Attorney General can provide reliable legal opinions that confirm the scope of this authority.

I appreciate the opportunity to respond to your questions and hope that our responses are helpful to the U.S. Coast Guard's review of the Bridge Permit Application. If I can be of any further assistance, please do not hesitate to contact my office.

Sincerely,



Ellen F. Rosenblum
ATTORNEY GENERAL

ER1:ERH:nog/Justice #4601207
Enclosure
c w/enc: Bob Ferguson, WA AG