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GENERAL COUNSEL DIVISION

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MEMORANDUM

DATE: September 12, 2013

TO: Matthew Garrett, Director
Oregon Department of Transportation

FROM: Ethan R. Hasenstein, Assistant Attorney General
Government Services Section *EH by LRS*

SUBJECT: I-5 Bridge Replacement Project/Columbia River Crossing: Tolling Authority
DOJ File No.: 731020-GG0641-11

INTRODUCTION

The Oregon Department of Transportation (“ODOT”) is engaged in further planning to pursue the I-5 Bridge Replacement Project (“IBRP”), also known as the Columbia River Crossing (“CRC”), under Oregon project and financial leadership.¹ We have previously discussed the context and background of the State of Oregon’s proposal to finance and construct the initial phase of the project in a memorandum to ODOT Director Matthew Garrett dated September 12, 2013. The purpose of this memorandum is to address additional questions of legal authority related to highway tolling.

One of the fundamental assumptions underlying the finance plan for the project is the use of toll-backed bonds that finance construction, repaid by the electronic collection of toll revenues. If it is granted legislative authorization to assume project and financial leadership of the CRC, ODOT must determine how to administer an electronic toll system and ensure a flow of funds to Oregon to meet its toll-backed bond covenants. ODOT asked our office to review ODOT’s fundamental legal authority related to tolling. ODOT and the Oregon State Treasurer

¹ In many legal issues affecting this project, the State of Washington and Oregon and Washington local governments remain important partners. The Oregon Department of Justice anticipates continuing its productive relationship with the Washington Attorney General’s Office, including the attorneys representing the Washington Department of Transportation on issues of Washington law and its interpretation, as well as counsel for the affected local governments.

have also asked for our evaluation of mechanisms and legal structures that would assure the flow of toll revenues to the State of Oregon. The following analysis addresses the primary legal authority issues. As ODOT planning progresses, it is fair to assume that more specific legal questions may arise that will benefit from a more specific legal review.

DISCUSSION

A. Oregon has authority to toll the CRC Project.

The Oregon Legislative Assembly has provided ODOT and the Oregon Transportation Commission (“OTC”) with authority to construct “tollway projects” and fund them. Under ORS 383.005, ODOT may operate tollway projects and impose and collect tolls on any tollway project that ODOT operates. In addition, a private party or unit of government that operate a tollway project under an agreement with ODOT may impose and collect tolls on the project. ORS 303.005. A “tollway project” is “any capital project involving the acquisition of land for, or the construction, * * * or equipping of, a tollway, related facilities or any portion thereof.” ORS 383.003(10). A “tollway” is any “* * * 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 or which is wholly or partially funding with toll revenues resulting from an agreement under ORS 383.005.” ORS 383.004(8).

To implement its clear statutory authority to toll the I-5 bridges as part of the CRC project, ODOT must identify and develop a toll-setting and -collection framework. ORS 383.005 lists a number of agreements that are necessary to construct or operate a tollway project. Those agreements include “any combination of contracts, agreements and other arrangements with any one or more private entities or units of government * * * including, but not limited to * * * : Design-build contracts with private entities, * * * agreements for periodic or long-term operation or maintenance of a tollway project, * * * financing agreements for a tollway project * * * ; and agreements for purchase or acquisition of fee ownership, easements, rights of way or any other interest in land upon which a tollway project is to be built.” Essentially, if ODOT enters into contracts to construct a bridge with the intent that it be funded through tolls, then ODOT has the authority to establish a tolling mechanism and to impose and collect tolls on the project.

In addition, House Bill 2800, passed in the 2013 Legislative Session,² authorizes, but does not require, the OTC to enter into agreements with the State of Washington “relating to establishing, reviewing, adjusting and collecting tolls” specifically for the Interstate 5 bridge replacement project. HB 2800, Section 8(1). This authority appears to be in addition to, and not in lieu of, the general authority provided in ORS 383.005 with respect to establishing tolls for tollway projects.³ Therefore, ODOT may establish tolls for the Columbia River bridges independent of any agreement with the State of Washington under ORS 383.005, but if needed, it may also enter into an agreement with Washington with respect to the Columbia River bridges related to the tolling of the CRC

² Oregon Laws 2013, Chapter 4.

³ This conclusion is bolstered by HB 2800 § 7 providing that “Section 8 * * * is added to and made a part of ORS 383.003 to 383.075.” These statutes in ORS Chapter 383 establish Oregon tollway authority.

project. There is no language or other indication in HB 2800 that the authority granted in that bill was intended to limit the broad authority provided in ORS 383.005.

The limitations placed on the State's authority to impose tolls are set forth in ORS 383.004. That statute prohibits a toll from being "established unless the [OTC] has reviewed and approved the toll." ORS 383.004 lists a number of factors that the OTC must consider when establishing tolls for a tollway project such as the costs of construction and operation of the project, the debt incurred to fund the project, period of time for which the project will be tolled and the method of collecting the tolls. House Bill 2800 also addresses factors that the OTC must consider when approving a toll for the Columbia River bridges. The OTC "shall consider the factors listed in ORS 383.004 and traffic demand management." HB 2800, Section 8(2). The Legislative Assembly instructed in HB 2800 that the tolls for the project must be sufficient to, among other things, repay the debt issued to finance the project, pay for maintenance and operation of the project and fund certain reserves.

B. A cooperative interstate legal structure would ensure sufficient flow of toll revenue to Oregon.

It is essential for ODOT to develop an interstate legal structure that ensures minimal disruption or impairment of the flow of toll revenue from the project to the State of Oregon. We see at least two areas that this interstate legal structure should address in order to provide adequate assurances for financing purposes. First, to the degree possible given other transportation planning and programming priorities, traffic flow to and through the tollway must remain unimpaired. Second, there must be a mechanism by which both states cooperatively enforce violations of the tolling state's toll laws by the neighboring state's drivers.

With respect to traffic flow, we believe that the federal oversight and coordination requirements of federal highway-funding programs and ongoing cooperation between ODOT and Washington State Department of Transportation ("WSDOT") related to CRC reduce the likelihood of sudden, disruptive decreases in traffic volumes from WSDOT projects in the interstate highway corridor. Regarding toll violation enforcement, it will be incumbent on ODOT to identify affirmative toll enforcement structures in cooperation with the State of Washington that will assure the flow of toll revenue to Oregon from non-compliant Washington drivers.

1. Federal law pertaining to interstate highways

Subject to certain narrow exceptions, federal law generally prohibits the tolling of a highway that is part of the interstate system. 23 USCA § 301 (2013). As you know, the bridges over the Columbia River support Interstate 5 which is federally-regulated highway. Therefore, federal law must also allow Oregon to independently establish tolls on the project.

It is our understanding that for the I-5 bridge replacement project, ODOT is relying on 23 USC § 129 (2012), as amended by Public Law 112-141, the Moving Ahead for Progress in the 21st Century Act (MAP-21). Under MAP-21, states may toll a federally-funded interstate highway without entering into an agreement with the federal government if the tolling is to provide funding

for construction or reconstruction of a bridge project. Under MAP-21, although the State of Oregon is no longer required to enter into a tolling agreement with the U.S. Department of Transportation (USDOT), the project is still subject to federal oversight and audit requirements. *Id.*

Under MAP-21, tolling to finance the bridge construction could be done by the State of Oregon, the State of Washington or both entities, as long as the purpose of the tolling is to finance construction and maintenance of the bridges. *Id.* Once USDOT has given its permission to the State of Oregon to toll for construction of the bridges under MAP-21, however, it is unlikely USDOT would permit the State of Washington in the foreseeable future to impose additional tolls on the bridges or enter into a major project that would substantially interfere with the operation of the Columbia River bridges. Because the proposed bridges will connect an interstate highway, the project will be subject to a great deal of federal oversight. For instance a federal interstate highway must meet federally established access, safety, design and environmental standards. 23 USCA § 103, 109, 111, 303, 315 (2012). The plans and specifications for any proposed projects by a state on the interstate system must be submitted to the USDOT for approval. 23 USCA § 103, 106, 119 (2012).

In addition, the Portland and Vancouver metropolitan regions are subject to federal oversight and approval with respect to their overall transportation planning, development of new projects and funding of those projects. Both Portland and Vancouver are subject to federal laws requiring a metropolitan planning organization for each area. 23 USC § 134(d) (2012). In addition, each state must develop a long range transportation plan that takes into account the metropolitan areas. 23 USC § 135 (2012). The metropolitan planning organizations must coordinate with their respective states in the development of statewide transportation improvement plans. 23 USC § 134, 135 (2012). The plans are intended to function as part of an intermodal system, not just for each metropolitan area but also as part of a transportation system for their respective states and the United States. 23 USCA § 134(c), 135(a)(2) (2012). Congress has instructed the USDOT to encourage each Governor in multistate metropolitan areas to provide coordinated transportation planning for the entire metropolitan area and to consult with other state and local officials responsible for transportation planning to coordinate metropolitan and statewide transportation plans. 23 USC § 134(f), (g) (2012).

Major transportation projects that are within statewide and metropolitan transportation plans must be submitted to the USDOT and must separately identify regionally significant projects, such as the Columbia River bridges. 23 USC § 134(j), 135(g) (2012). Major projects must be in the long-range transportation plan and approved by the federal government in order to receive a significant amount of federal funding. *Id.* It seems unlikely that the USDOT would approve a major project in the Washington plan without taking into account any negative impact on an already established an approved project such as the Columbia River bridges, particularly when both states have already included the bridges in their previously submitted statewide plans.

For all of these reasons, federal law likely would prevent or substantially limit the State of Washington from taking unilateral action to toll any Washington elements of the interstate highway system if it would interfere with the operations of the newly constructed Columbia River

bridges, including bridges crossing the Columbia River in the Portland/Vancouver metropolitan area or undertaking some other form of major federally-funded project.

2. Toll payment recovery and toll violation enforcement

Toll collection and enforcement is an inevitable aspect of electronic toll systems. To the extent that vehicles using the bridges will be Washington-registered, the State of Oregon needs a legal structure with the State of Washington to prevent toll “leakage.” In other words, Oregon needs Washington’s assistance in recovering unpaid tolls and civil penalties imposed on Washington toll violators.

One common enforcement tool used in multi-state tolling schemes is the use of reciprocal vehicle registration holds by which the neighbor state through statute or agreement agrees to put a hold on vehicle owner’s registration when it receives information from the tolling state that the vehicle has accrued unpaid electronic tolls and any other administrative penalties or fees imposed by the tolling state. The Washington Department of Licensing (“DOL”) is Washington’s vehicle registration and driver licensing authority. Revised Code of Washington (RCW) 46.01.030, 46.01.040. Unlike Oregon’s DMV, DOL is not a component of the state’s Department of Transportation. In our review of Washington’s vehicle-registration statutes, we were unable to identify a specific statutory authorization expressly directing DOL to hold or suspend a Washington vehicle registration upon receipt from ODOT of information indicating the vehicle had violated an electronic toll on the I-5 Bridge. In HB 2800 § 10(5), Oregon enacted such authority at the behest of Washington when it was conceived that WSDOT would be the primary tolling authority for the bridge. Oregon’s proposal to fund and construct the initial phase, issuing all toll-backed debt, reverses that assumption. Enactment of similar legislation in Washington is optimal. In addition, DOL could engage in a rulemaking to add other states to the definition of “jurisdictions” from which DOL receives notices of violations and issues license and registration holds and suspensions. Washington Administrative Code (WAC) 308-96A-005(16); WAC 308-96A-350.

However, it may be possible for the States to create by agreement the interstate vehicle registration hold mechanism for which Washington statutes and rules do not specifically provide. Washington state agencies have general authority to enter into cooperative agreements with other states to jointly or mutually perform those lawful functions of the agency, comparable to ORS chapter 190. RCW 39.34.030. Specifically, DOL has express authority to enter into reciprocal vehicle registration agreements with other states. RCW 46.85.020. Oregon DMV has corresponding authority under ORS 802.500. Washington’s stated reciprocity policy is “to promote and encourage the fullest possible use of its highway system by authorizing the making and execution of vehicle reciprocal or proportional registration agreements, arrangements and declarations with other states, provinces, territories, and countries with respect to vehicles registered in this and such other states, provinces, territories, and countries thus contributing to the economic and social development and growth of this state.” RCW 46.85.010. RCW 46.85.040 authorizes DOL to enter into such reciprocity agreements for the purpose of “provid[ing] that vehicles properly registered or licensed in this state when operated upon highways of such other jurisdiction shall receive exemptions, benefits, and privileges of a similar

kind or to a similar degree as are extended to vehicles properly registered or licensed in such jurisdiction when operated in this state.” Further, “[a]greements, arrangements or declarations made under the authority of [RCW 46.85] may include provisions authorizing the department to suspend or cancel the exemptions, benefits, or privileges granted thereunder to an owner who violates any of the conditions or terms of such agreements, arrangements, or declarations or who violates the laws of this state relating to motor vehicles or rules and regulations lawfully promulgated thereunder.” RCW 46.85.090.

We recommend that the State of Oregon seek the enactment of Washington legislation comparable to HB 2800 §10(5). In lieu of or in addition to such a statutory change, we also recommend that ODOT pursue a reciprocity agreement under existing Oregon and Washington statutory authority. Our preliminary assessment of Washington law is that such an agreement is possible, but reliable legal opinions on the scope of Washington’s authority may only be obtained from the Washington Attorney General. We recommend that Oregon Executive Branch officials work with their counterparts in the State of Washington to obtain legal opinions from the Washington Attorney General confirming DOL’s authority to enter into an interstate agreement or amend an existing vehicle registration reciprocity agreement to require that the DOL hold or suspend Washington vehicle registrations upon notice from ODOT that a Washington vehicle has been involved in a violation of Oregon’s electronic tolling system. Our office has made an initial contact with DOL’s assigned counsel to prompt a discussion of these legal issues, but the motivation for the Washington Attorney General’s Office to engage on these issues must come from its client.

CONCLUSION

The State of Oregon has the basic statutory framework in place to authorize ODOT and OTC to toll the CRC highway bridge spans. Further, we see important opportunities for continued bi-state cooperation, as well as federal coordination, to minimize disruption to the flow of toll revenue to the State of Oregon. However, key tolling enforcement issues still require resolution to prevent toll revenue leakage. We recommend the execution of interstate agreements that establish a coordinated framework for toll-setting, toll operations, and toll enforcement that safeguards the integrity of an ODOT CRC tolling program.

We also think it likely that Washington law permits the State of Washington to participate in such a bi-state legal framework. Again, we emphasize that the State of Washington, despite its legislature’s adjournment of its 2013 session without having taken up a transportation revenue package that would have funded its financial contribution to the project, is a necessary partner in developing and implementing an Oregon tolling framework for the CRC. However, as with our prior advice, our conclusions and recommendations come with important qualifications. Chiefly, the legal viability of proposals to continue to pursue a cooperative framework without Washington’s present financial participation requires the Washington Attorney General’s review. We will continue to engage on these issues with our colleagues in the Washington Attorney General’s Office.