# CRC OWNERSHIP AGREEMENT STRUCTURE ANALYSIS

November 28, 2006

Columbia River CROSSING

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# 1. Interstate Agreement Guidelines

## 1.1 Executive Summary

Washington and Oregon will require an interstate agreement defining how the new Columbia River Crossing (CRC) Project at I-5 between Portland and Vancouver will be constructed, financed, operated and maintained. The purpose of this paper is to explore the types of agreements into which the states can choose to enter, in addition to the issues that each agreement structure brings forth. There are two basic types of interstate agreement: the first is an Intergovernmental Agreement (IGA) between the state Departments of Transportation (DOTs), sometimes referred to as a "joint powers" or bi-state agreement, which lays out the powers and duties of each state as well as those of any new public entity created to manage the project. The second is an Interstate Compact, used primarily when there is actual or potential encroachment by the states into areas of federal jurisdiction. A compact will require approval by both state legislatures and then by Congress. Essentially, there is one absolute difference between the two types of agreement: the Compact form, because it is federal law, can establish special federal laws that apply to and benefit the project. Beyond that, any differences among agreements arise from different terms that the types of agreements tend to contain.

This examination of the options available to the two states presents an approach for evaluating which agreement structure is most appropriate for the CRC project. It does so by first developing and applying a set of evaluation criteria against which the relative merits of the two approaches can be assessed. Of the eleven criteria questions that are raised in this paper, the issues deemed most relevant are those that deal with tolling policy, institutional risk management, integration of transit elements (both construction and operation) into the highway facility, and a general concern of retention of control.

Upon examination, it has become evident that an IGA structure would be favored by the states, but that additional analysis and discussion will be required to address some key issues. This paper concludes with the recommendation on a series of actions the DOTs should undertake to advance a decision on how an IGA can be best structured to the benefit of the state DOTs. These include:

a) An analysis of factors which may compel the use of an Interstate Compact.

b) Development of mitigation measures that would improve the effectiveness and flexibility of an interstate agreement of either type.

c) Consideration of means of separating the bridge project from other institutional considerations that could delay the adoption of an interstate agreement.

## 1.2 Introduction

Washington and Oregon will require an interstate agreement(s) that defines how the new highway bridge structure at the I-5 Columbia River crossing, referred herein as the Columbia

River Crossing Project (CRC) will be constructed, financed, operated and maintained. There are two basic ways such an agreement can be structured, and within each basic structure are two ownership options.

### 1.2.1 Bi-State Agreement

The first agreement structure available for consideration is an Intergovernmental Agreement (IGA) between the two state DOTs, sometimes referred to as a "joint powers" or bi-state agreement. A bi-state agreement is structured so that the responsibilities of project financing, facility design and construction, and finally operations and maintenance (O&M) are clearly assigned. The agreement is generally structured to operate within the bounds of existing state legislation, and requires little federal involvement. Within this agreement type exists two ownership options: single state ownership and joint ownership.

In the single state arrangement, one state will assume the responsibilities for project development and O&M, with a cost sharing agreement in place that generally divides costs 50/50. Local examples of projects delivered and maintained under this arrangement include the Lewis & Clark Bridge and The Dalles Bridge, both projects along the Columbia River portion of the Oregon-Washington border.

Within a joint ownership arrangement, the two states divide the development and O&M responsibilities, often by assigning those responsibilities to an agency housed entirely within the jurisdiction of one of the states. It is this arrangement that is most common in the Pacific Northwest, represented by the Astoria-Megler Bridge, the Interstate Bridge, and the Glenn L. Jackson Memorial Bridge on the Oregon-Washington border and five separate bridges on the Oregon-Idaho border.

### 1.2.2 Interstate Compact Agreement

The second agreement structure option is an Interstate Compact. Interstate Compacts are required for certain types of agreements between states under the "Compact Clause" of the U.S. Constitution. Most of the Interstate Compacts currently in effect, however, do not fall under the Compact Clause but have been undertaken for other reasons. A Compact is called for primarily when extensive federal involvement is required, or when there is actual or potential encroachment by the states into areas of federal jurisdiction. The participation of federal interests requires that the Compact agreement not only be approved by the individual legislatures of the participatory states, but also by Congress. Congressional consent of an interstate agreement transforms it into federal law; however, regardless of Congressional consent, whether one state could unilaterally remove itself from the agreement will depend on the terms of the agreement. Another attribute of an Interstate Compact is that it can serve as the federal authorization for a project, such as a new bridge, and could allow for provisions not currently considered elsewhere in federal statute.

A Compact can be structured in a joint ownership arrangement, calling for division of project responsibilities between the two states, usually using existing staff and agency resources. This type of Compact allows the individual states to retain authority over defined areas of responsibility. However, the lack of a single administrative entity can make cost and resource sharing difficult, and can complicate dispute resolution. There are no examples of this structure

in the Pacific Northwest, but it has been used on the Missouri River Toll Bridge between Missouri and Kansas, and on the Delaware River Turnpike Toll Bridge between Pennsylvania and New Jersey.

The second Compact structure is in the form of an independent entity, such as the Port Authority of New York / New Jersey. Often, these entities carry multiple project and/or operational responsibilities, such as multiple crossings, bi-state transit operations, and ferry service. Additionally, tolls are often a source of revenue for capital and O&M expenses. As an independent entity, this structure allows for greater focus to be placed on accomplishing the stated goals and streamlines decision processes, with less concern for loss of control by either state.

### 1.2.3 Approach

The differences between the two types of bi-state structures and the differences between the two types of interstate compacts are not significant relative to the general focus of this discussion; rather, the discussion here will focus on the differences and similarities between the primary bi-state and interstate compact approaches.

This paper is intended to assist the DOTs in determining which approach is most appropriate for the CRC project. It does so by developing a set of evaluation criteria against which the relative merits of the two approaches can be considered. These criteria relate to four aspects of project delivery: (1) Speed of delivery and schedule adherence; (2) Retention of control over certain state objectives, policies and programs; (3) Flexibility in managing risk; and (4) Enhanced financial capacity.

The discussion portion of this paper is organized in six sections. Section 1.3 discusses the proposed evaluation criteria and their likely importance to project implementation and the DOTs. Section 1.4 describes the two approaches to an interstate agreement in sufficient detail to appreciate how each might affect the criteria. More complete legal discussions of the two approaches are contained in other technical memoranda. Both states have statutory provisions regarding the formation of special purpose government entities which could affect the form of an interstate agreement. Section 1.5 is an assessment of the relative merits of the two approaches assessed against the evaluation criteria. Section 1.6 discusses operational options for transit service on the bridge under either type of interstate agreement. Section 1.7 contains conclusions and recommendations derived from the above analysis.

## 1.3 Evaluation Criteria

### 1.3.1 Speed of Delivery and Schedule Adherence

#### 1.3.1.1 Project Benefit Stream

The CRC is a project of major economic importance. Vehicular delay to trucks and autos is already severe and is projected to increase significantly, creating an expensive bottleneck to regional and interstate travel and commerce. The sooner the project is completed, the sooner the region can begin to enjoy the economic benefits of reduced vehicular delay. One evaluation

factor, therefore, is: *Does one form of interstate agreement provide a higher likelihood of faster project delivery?*

#### 1.3.1.2 Project Financing

Certain aspects of project financing for the CRC project may be quite time sensitive. Several federal transportation programs (e.g., High Priority Projects, Projects of National and Regional Significance, National Corridor Infrastructure Improvement Program) offer the potential for large ($100 + million) federal contributions to the project. These programs, however, are typically fully earmarked in transportation reauthorization acts, which are adopted on a six-year cycle. Congress usually wants assurance that the funds can be spent over the life of the bill. While not as predictable, large state contributions to the project may be tied to discrete funding packages in which funded projects must be identified by name. Consequently, another evaluation factor should be: *Does one form of interstate agreement offer a higher probability of schedule predictability and adherence?*

#### 1.3.1.3 Project Development Continuity

The project development process developed by the DOTs for the CRC project assumes a smooth and timely transition from preparation of the Environmental Impact Statement (EIS) through preliminary and final design to construction. Undue delays can jeopardize the validity of some of this work, primarily the EIS, and the significant state investment in it. An appropriate evaluation factor may be: *Does one form of interstate agreement offer a higher likelihood of a seamless project development process?*

### 1.3.2 Retention of Control Over State Objectives, Policies and Programs

#### 1.3.2.1 Interstate Highway System Performance

The Interstate Highway System is a critical component of the economies of Washington and Oregon. I-5 has been identified by Congress as a "Corridor of National Significance". Interstate Highways are the responsibility of the states; federal planning regulations mandate a variety of factors state DOTs must consider to ensure efficient interstate travel and intercity connectivity. Determination of investment needs of the National Highway System, of which the Interstate Highway System is a part, is charged to the states, even in metropolitan areas. Consequently, the DOTs may wish to retain control over the interstate highways crossing the Columbia and an evaluation factor may be: *Does one form of interstate agreement better ensure adequate state control over Interstate Highway System performance?*

#### 1.3.2.2 Tolling Policy

Both Washington and Oregon are in the formative stages of developing state tolling policies. Each state has limited experience with tolling projects and is developing parameters for tolling projects both statutorily and by Transportation Commission policy. Certain aspects of tolling, however, still face a degree of uncertainty regarding public and legislative acceptance, such as the tolling of existing capacity, congestion pricing or value pricing, all of which may be applicable to the CRC project. Further, the public purpose for tolling has been limited to revenue generation for needed projects. The introduction of other public objectives, such as demand management, growth management or environmental enhancement, is likely to require considerable public debate. Last, the project may benefit from consistent tolling policies in each

state. Unsure of public reaction to such proposals, the states may prefer to retain control over tolling policies, as opposed to delegating this authority to local government entities, hence: *Does one form of interstate agreement better ensure a consistent, publicly acceptable consideration of tolling for the CRC project?*

#### 1.3.2.3 Public-Private Partnerships

Both states have new Public Private Partnership (PPP) programs; Oregon's initial legislation was enacted in 2003 and new legislation was enacted in Washington in 2005. Given the size and complexity of most PPPs for transportation projects, the DOTs are proceeding deliberately in developing and managing their programs. They are attempting to coordinate agency procedures to be best reflective of certain distinctions in state enabling legislation and adopted administrative rules. The CRC project is a potential PPP. It may be beneficial, therefore, for the DOTs to retain control over project management, at least through construction. An evaluation factor then is: *Does one form of interstate agreement better provide for an acceptable Washington and Oregon PPP procurement?*

#### 1.3.2.4 Debt Retirement and Revenue Sharing

Previous Columbia River toll bridges jointly constructed by the DOTs have (a) removed the tolls when the bonds sold to finance the bridges were retired and (b) shared the toll revenues, after expenses, evenly. There are certain obvious virtues to these provisions when tolling is put forth primarily as a funding mechanism for the project. The states may prefer to follow historical precedent for the CRC project. Thus: *Does one form of interstate agreement better accommodate state preferences on toll removal and revenue sharing?*

### 1.3.3 Flexibility

#### 1.3.3.1 Completion risks

A large engineering project like the CRC project faces some risks of completion. The project may have engineering difficulties, contractors may confront unusual problems and equipment may not perform as expected. *Is one form of interstate agreement superior to the other in managing completion risks?*

#### 1.3.3.2 Market Risks

Assuming some reliance on toll receipts, the project will confront some uncertainty in projections of overall population, economic growth and forecast demand. The financial viability of the project will also be contingent on the accuracy of construction cost assumptions. Last, depending upon the degree of private sector involvement, the project will face certain financial risks in attracting lenders and investors and maintaining an ability to restructure financial arrangements in the event of unexpected changes in cash flows. *Is one form of interstate agreement superior to the other in managing market risks?*

#### 1.3.3.3 Institutional Risks

The CRC project will be an expensive and environmentally challenging project which may involve new forms of tolling and toll collection, innovative finance mechanisms and a unique

form of private sector participation. All of these factors suggest the possibility of public opposition and the risk state and local governments may want changes to the project triggered by economic or political shifts. *Does one form of interstate agreement offer greater potential for accommodating institutional risks?*

### 1.3.4 Extended Tolling Capacity

The federal government posture on tolling is changing. The basic federal policy (23 USC 301) is a general prohibition of tolling on federal-aid highways. A number of exemptions, however, have been enacted. The reconstruction of the I-5 bridges as a toll project is clearly authorized under federal statutes, however the simultaneous tolling of I-205, if deemed desirable by the states, may not be legal. There may be ways to address this issue including authorizing a particular tolling application to I-205 as a component of an Interstate Compact, but there are other methods available through the federal government as well that are addressed in Section 1.5.4.1. Another evaluation factor, therefore, may be: *Does one form of interstate agreement offer broader tolling opportunities for the CRC project?*

## 1.4 Institutional Approaches

This section addresses existing state law that would influence ownership structure choices; however, it is likely that any structure solution chosen would require legislative changes in both Oregon and Washington; as such, such legislation should be tailored to the desired ownership structure.

### 1.4.1 Interstate Intergovernmental Agreement: Oregon

#### 1.4.1.1 Basic Authority

ODOT's authority to enter into agreements with WSDOT is obtained through ORS 190.110 which authorizes a state agency to cooperate by agreement with an agency of another state. Given the state's long history with interstate bridges, including toll bridges, the basic authority of ORS 190 is expanded upon in ORS Sections 381 and 383. ORS Section 367.806, while aimed at enabling Public-Private Partnerships, may also be broad enough for an ODOT – WSDOT agreement.

#### 1.4.1.2 Contents

Interstate agreements under ORS 381 must specify:

a) The site of the bridge.

b) The maximum financial obligation assumed by each of the contracting parties.

c) The estimated cost of the structure with its approaches and connecting roads.

d) The sources from which all the funds are to be obtained or derived.

e) Whether the bridge is to be operated free to the public or as a toll bridge.

f) Any other appropriate matters or provisions consistent with the prudent principles of economy and good business.

#### 1.4.1.3 Special Conditions and implementation issues

ORS 381 also authorizes ODOT to enter into an agreement with WSDOT or any other properly designated authority to collect tolls on the bridge or hire another entity to manage the tolling program. If Oregon needs to issue some form of tax-exempt government bonds to finance all or a portion of the state's contribution to the project, then ODOT will have to obtain legislative budget authority. ODOT also possesses the authority to enter into Public Private Partnerships and obtain private funding under the toll road statute (ORS 383.001 to 383.027) or under the Oregon Innovative Partnership Program (OIPP) authorization (ORS 367.806). This latter authorization would enable a long-term franchise-type agreement. Last, in spite of the general authority provided in the statutes, the size and importance of previous Columbia River bridges have dictated independent project authorizations by the Oregon Legislature.

For any toll project, it would be desirable to clarify that tolls are not subject to the ORS 291.055 limitations on government charges and to provide for electronic toll enforcement.

### 1.4.2 Interstate Intergovernmental Agreement: Washington

#### 1.4.2.1 Basic Authority

The basic authorization for WSDOT to enter into an interstate agreement with ODOT for the CRC project is conferred by RCW 39.34 which allows state agencies to enter into "cooperative agreements" or "joint powers agreements" with other states. Authorization for the CRC project comes in general from RCW 47.04.080 which empowers WSDOT to "join financially or otherwise with any other state" for the construction, operation or maintenance of any bridge or other structure for the continuation of any state highway across any body of water.

#### 1.4.2.2 Contents

Interstate agreements under RCW 39.34 must specify:

a) Its duration.

b) The organization, composition and nature of any separate legal or administrative entity created with its delegated powers.

c) Its purpose.

d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget.

e) Methods for terminating the agreement and for disposing of property if necessary.

f) Any other necessary and proper matters.

#### 1.4.2.3 Special Conditions and Implementation Issues

a) If a separate entity is not created by the agreement, it must also provide for an administrator or joint board responsible for administering the cooperative undertaking. The board must have agency representation. The agreement must describe the manner of acquiring, holding and disposing of property used in the project.

b) RCW 47.56.031 states that ”no tolls may be imposed on new or existing highways and bridges without specific legislative authorization, or upon a majority vote of the people within the boundaries of the unit of government empowered to impose tolls.”

c) The Washington State Transportation Commission has sole authority to set tolls and has no power to delegate this authority to another public entity (RCW 47.56.030).

d) RCW 47.46.090 requires the formation of a local citizen advisory committee to the Transportation Commission for any toll project. No toll can be imposed or modified unless the advisory committee has at least 20 days to review and comment upon the toll schedule.

e) Which Washington statutes would control financing the CRC project is not presently clear. However, Washington statute does effectively preclude private debt financing and, therefore, certain types of PPPs. RCW 47.29.060(3) states that any transportation project “owned, leased, used or operated by the state, as a public facility, if indebtedness is issued, it must be issued by the state treasurer….”

## 1.5 Assessment of Interstate Agreement Options

The ideal form of an interstate agreement governing the CRC project will depend ultimately upon the full set of objectives and relevant conditions established by the states for the project. Presently these cannot be fully anticipated. As such, the following assessment must be done in a more general way. It is possible, however, to identify factors which could play a role in any subsequent decision and these may be included in the discussion that follows. These include:

- *Legislative cycles* – The biennial Oregon legislative cycle and the length of federal transportation reauthorizations are predictable and likely to be factored into any project timing decisions.
- *Election cycles* – State elections can change the make-up and attitudes of both the executive and legislative branches. Local enabling elections, if required, have their own set of timing constraints and risks.
- *Controversy* – The more controversial an issue, the less certain a positive outcome can be achieved in a timely manner.
- *Introduction of additional parties* – All things equal, multiparty negotiations can be expected to be more difficult than two party ones.

### 1.5.1 Speed of Delivery and Schedule Adherence

#### 1.5.1.1 Project Benefit Stream: Does one form of interstate agreement provide a higher likelihood of faster project delivery?

The long lead time of a project as large as the CRC project would seem to allow for either approach. Both agreement types will require a considerable amount of time for negotiations between the two states and all interested parties, including the state Departments of Transportation, city governments, the local transit agencies, and others. Additionally, the Interstate Compact structure will, as previously discussed, require congressional approval. Congress meets annually and could act promptly on an Interstate Compact following state adoption. This assumes a coordinated legislative effort at both the state and federal levels in order to remove any uncertainty over congressional approval of certain agreement conditions; however, this effort of coordination itself will require additional time, and if Congress objects to the terms of the Compact, renegotiations by the parties described above would be required. This uncertainty in the approval process will result in an assumption of a requirement of greater approval time for the Compact structure.

***Verdict: The Interstate Agreement type provides a higher likelihood of faster project delivery.***

#### 1.5.1.2 Project financing – Does one form of interstate agreement offer a higher probability of schedule predictability and adherence?

Previous state authorizations for Columbia River bridges, general or project specific, have accorded the DOTs considerable flexibility in negotiating financial terms while concurrently retaining a degree of legislative oversight. This may be an important factor for the CRC project, an expensive, high exposure project, which may require large financial contributions from the states.

The introduction of a third party special district, if at all controversial, prior to a full reconciliation of project financial terms conceivably could impede needed state contributions or undermine DOT/legislative relations.

There are ways to clearly define financial terms in Interstate Compacts and thereby limit state financial liability. The issue here is one of timing. It is likely that an institutional arrangement which warranted an Interstate Compact might contain more exacting terms than a bi-state IGA similar to those used for previous bridges; such complexities could conceivably cause the approval process to be lengthier for the Compact type.

That said, while the negotiation period required by the two structure types might differ as described in Section 1.5.1.1, once an agreement is reached, there is no evidence that the resulting structure of one type provides advantages over the other.

***Verdict:***

- ***Prior to agreement execution, an IGA offers a higher probability of schedule predictability and adherence.***

- ***Subsequent to execution of an agreement, neither structure offers a higher probability of schedule predictability and adherence.***

#### 1.5.1.3 Project Development Continuity – Does one form of interstate agreement offer a higher likelihood of a seamless project development process?

The conclusion here is similar to, if not stronger than, the one above. The simpler the institutional arrangement for building the bridge, the higher the likelihood of a seamless development process that avoids redundancy.

***Verdict: an IGA offers a higher likelihood of a seamless project development process.***

### 1.5.2 Retention of Control Over State Objectives, Policies and Programs

#### 1.5.2.1 Interstate Highway System Performance – Does one form of interstate agreement better ensure adequate state control over Interstate Highway performance?

An IGA will most likely be limited to formal inclusion of only two parties, the Oregon and Washington state DOTs. As such, they would certainly cede little, if any, control over the performance and development of the I-5 corridor. A compact, however, by its very nature calls for the inclusion of additional parties, most notably the federal government. As a result, adding additional interests to the agreement results in potentially less control for the states. Careful structuring of the compact would be required to allow the states to retain the controls that they desire.

***Verdict: an IGA better ensures adequate state control over Interstate Highway performance.***

#### 1.5.2.2 Tolling Policy – Does one form of interstate agreement better ensure a consistent, publicly acceptable consideration of tolling for the CRC project?

Neither Oregon nor Washington presently can be considered to have comprehensive tolling policies, though Washington is currently in the process of setting a local toll policy for the Tacoma Narrows Bridge. To date each state has considered a limited number of tolling applications and policy objectives. Similarly, the metropolitan planning process in the Portland-Vancouver area is still in the formative stages of incorporating tolling considerations into regional transportation plans. As individual tolling projects in each state advance, legislative interest in various aspects of tolling is likely to increase. The benefit of a consistent state policy has already been identified in Washington and will likely be addressed in Oregon.

In this formative stage of state tolling policy the issue before the states regarding the CRC project is their degree of willingness to delegate responsibility for tolling decisions to a separate local entity. In addition to the regional economic importance of I-5, which could be adversely affected by tolling regimes on the bridge, legislators and their constituents may have strong feelings about the appropriateness of certain toll applications and policy objectives.

Congressional attitudes on tolling are changing as well. There is some possibility, therefore, that any state desired adjustments to various tolling provisions could be made more difficult with an Interstate Compact and congressional involvement.

***Verdict: neither agreement better ensures a consistent, publicly acceptable consideration of tolling for the CRC Project.***

#### 1.5.2.3 Public-Private Partnerships – Does one form of interstate agreement better provide for an acceptable Washington and Oregon PPP procurement?

The public-private partnership statutes in both Oregon and Washington do not limit the use of PPPs to the state DOTs, as other government entities are eligible through agreements with their respective DOT. This applies to both special districts and public authorities as described above. Therefore, insofar as the terms of any interstate agreement are in accord with existing statutes or the provisions of any new project authorization legislation, one form does not appear superior to the other. An Interstate Compact, however, could make it more difficult for the states to alter the terms of any public-private partnership unless the terms allowed for mutually agreeable amendments or terminations without additional congressional involvement.

***Verdict: neither form of interstate agreement better provides for an acceptable Washington and Oregon PPP procurement.***

#### 1.5.2.4 Debt Retirement and Revenue Sharing - Does one form of interstate agreement better accommodate state preferences on toll removal and revenue sharing?

Similar to previous discussion points above, the inclusion of additional parties as part of a compact agreement can potentially increase the complexity in resolving this issue, whereas an IGA allows the two states to retain control over this issue based on their current and future preferences.

***Verdict: an IGA may better accommodate state preferences on toll removal and revenue sharing.***

### 1.5.3 Flexibility

#### 1.5.3.1 Completion risks – Is one form of interstate agreement superior to the other in managing completion risks?

The powers accorded any entity managing the project are typically those conferred upon the units of government that are part of the agreement. The form of the interstate agreement should have no effect, therefore, upon managing completion risks.

***Verdict: neither form of interstate agreement is superior to the other in managing completion risk.***

#### 1.5.3.2 Market Risks – Is one form of interstate agreement superior to the other in managing market risks?

The assignment of some financial responsibility to an interstate special district as a third party to the project financing plan conceivably could increase market risk. Again, this would seem to be an issue which could be resolved in the terms of any interstate agreement if the states are willing to assume the same degree of financial liability as under a two party agreement.

***Verdict: neither form of interstate agreement is superior to the other in managing market risks.***

#### 1.5.3.3 Institutional Risks – Does one form of interstate agreement offer greater potential for accommodating institutional risks?

By not requiring Congressional concurrence, an IGA, all things equal, provides the states greater freedom to cope with major changes in economic or political circumstances. A well drafted agreement can provide significant flexibility but not every possible circumstance can be foreseen and, thus, at the extreme an IGA provides greater flexibility.

***Verdict: an IGA offers only a slightly greater potential for accommodating institutional risks.***

### 1.5.4 Enhanced Financial Capacity

#### 1.5.4.1 Does one form of interstate agreement offer broader tolling opportunities for the CRC project?

Assuming it would be desirable to toll I-205 concurrently with a new CRC project and (1) tolling I-205 was deemed to be allowable under federal statute and (2) toll receipts from I-205 could be applied to the construction of the CRC project, then the financial capacity of the states to fund the project could be significantly enhanced.

As per previous technical memoranda, the federal Value Pricing Pilot Program is the one existing program which would enable the tolling of I-205 and provide the opportunity to transfer significant funds to the CRC project. Use of this program requires both approval by FHWA and the application of fixed variable (time-of-day) tolls.

Another possibility is to seek approval for tolling I-205 as a component of the CRC project under an FHWA experimental program called SEP-15. This is a special project intended to "encourage tests and experimentation in the entire development process for transportation process". To date this program has not been used in a manner which would authorize the tolling of I-205, but the administration has clearly signaled its willingness positively consider a variety of approaches to tolling. FHWA's position could be determined through a SEP-15 request.

Another approach, relating to interstate agreements, is to include the tolling of I-205 in an Interstate Compact, which upon adoption by Congress would provide needed authorization.

There is no assurance, however, that Congress would be willing to include such a provision in an Interstate Compact. Tolling existing capacity on the Interstate System, even for a single case like the I-205 Bridge, is likely to be controversial. In SAFETEA-LU Congress consciously opted to limit the tolling of existing capacity to particular circumstances defined in several pilot programs rather than enacting broader approval.

A related question is whether an Interstate Compact could be used to provide other federal benefits to the project not available through normal legislative vehicles. As above, there is no assurance Congress would demonstrate such a willingness. It seems at least likely that Congress or the administration would object to bypassing well established committee practices or regulatory procedures.

***Verdict: neither form of interstate agreement offers broader tolling opportunities for the CRC project.***

## 1.6 Transit Considerations

Both Oregon and Washington authorize transit districts to enter into contracts or IGAs with public agencies in other states. Tri-Met and CTRAN have been operating coordinated bus service across the Columbia River in the I-5 corridor for years on such a basis.

Oregon's authority is provided in ORS 267.200(8). In Washington RCW 39.34 provides general joint power authority to public agencies, including transit agencies.

In the mid-1990s the Portland/Vancouver region considered constructing the South/North LRT project across the Columbia River. At that time Tri-Met and CTRAN proposed to manage the construction and operation of the new line through the "Columbia River Light Rail Transit Authority" established by an Interstate Compact. The Oregon Legislature ratified the compact (ORS 391.301). Washington did not adopt the compact after project funding was defeated in Clark County. It appears that an Interstate Compact was chosen as the preferred means of interstate agreement in order to enhance project stability by requiring congressional concurrence to any change in terms. It is yet to be determined whether the same level of concern would exist for the type and level of transit service that is operated on the new CRC project. Similarly to be determined is whether the highway and transit components of the project would have to be part of the same interstate agreement or whether separate agreements, as is the case today, could suffice.

## 1.7 Conclusions and Recommendations

### 1.7.1 Conclusions

There are only a few key distinctions between an IGA and an Interstate Compact for construction and management of the CRC project.

The most important difference is the inclusion of Congress as a partner to the agreement. Congressional involvement conceivably could make both initial agreement adoption and subsequent adjustments to the agreement more difficult. Most Interstate Compacts are designed to allow changes mutually acceptable to both states. There is, however, no assurance Congress always remains a passive partner and there are nationwide examples of Congress playing a assertive role in Compact deliberations.

Some loss of flexibility may be viewed as a virtue in that it can, depending on the terms of the agreement, provide a greater guarantee of project continuity without subsequent interference from a variety of potential causes. Regional transit agencies apparently found this an important consideration for the South/North LRT project. Conversely, congressional involvement can be viewed as an unnecessary sacrifice of state control. Oregon and Washington did not feel the need for an Interstate Compact for previous Columbia River bridges.

Another difference is the fact that an Interstate Compact serves as the federal authorization for the project which conceivably could enhance project implementation and financing, although this is by no means assured.

Application of the evaluation factors illustrates the likely greater importance to project implementation of the type of government entity established to manage the project than the type of interstate agreement *per se*. A major virtue of previous state managed Columbia River bridges was that the managing entity existed for a single purpose: management of the respective bridge crossings. The tolling authority established for the last I-5 bridge, for instance, was only concerned with the construction, financing and operation of the bridge and then went out of existence once the financing was complete.

More than anything else, the avoidance of additional political issues associated with the project may be the key to timely adoption of an interstate agreement. To successfully implement the project, the states will have to resolve a number of potentially controversial issues regarding the bridge's design, environmental effects, tolling, utility to public transit and financing, among others. The project development process is designed to systematically resolve most of these issues locally and thereby simplifying subsequent legislative authorizations. The process is not designed to resolve fundamental questions of regional governance. The introduction of such issues to the project, unless expeditiously resolved, may impede adoption of an interstate agreement.

### 1.7.2 Recommendations

The discussion to this point leads to a likely conclusion that an Intergovernmental Agreement structure will allow the states to retain the greatest amount of control over the project's development and management, and is therefore the structure preferred over the Interstate Compact structure. There are issues, however, that the states would need to address to ensure that an IGA is favorably structured. These issues will most effectively be addressed through legislation in each state that allows the interested parties to structure the agreement most effectively.

#### 1.7.2.1 Analysis of factors which may affect the structure of an Intergovernmental Agreement

a) Tolling I-205 – The DOTs should explore how the facility could be tolled without an Interstate Compact though either the Value Pricing Pilot Program or SEP-15.

b) Transit Requirements – The transit component to the project may be critical to its success and the DOTs must be sensitive to the potential need for an Interstate Compact for the expansion of transit service across the river, a desire which may be politically and not legally motivated.

#### 1.7.2.2 Development of mitigation measures

Many of the possible state concerns discussed previously can be met through specific agreement conditions which could be applicable to either an IGA or Interstate Compact. The project team can begin exploring the importance of issues, such as:

- Interstate Highway performance
- Tolling
- Revenue sharing and debt retirement
- Incorporation of transit facilities and their operation
- Management of PPPs, and developing agreement language reflective of their concerns.

#### 1.7.2.3 Consideration of Means of Project Separation

It may be possible to develop ways of isolating the construction of the bridge from the broader set of political issues involved in a public discussion of more complex institutional arrangements. This could include (a) a legal analysis of the ability to use separate interstate agreements for the highway and transit components of the project and (b) an exploration of ways to exclude, either temporarily or permanently, the Interstate bridges from the powers of any newly authorized special district.