



COLORADO

Department of Transportation

Division of Accounting and Finance

4201 East Arkansas Avenue, Room 262
Denver, CO 80222

MEMORANDUM

TO: TRANSPORTATION COMMISSION
FROM: MARIA SOBOTA CHIEF FINANCIAL OFFICER
CC: DAVID SPECTOR, DIRECTOR OF HIGH PERFORMANCE TRANSPORTATION ENTERPRISE
DATE: JANUARY 21, 2016
SUBJECT: APPROVAL OF INTRA-AGENCY AGREEMENT BETWEEN CDOT AND HPTE FOR I-25 NORTH EXPRESS LANES PROJECT

Purpose

To review and discuss key details with the Transportation Commission (TC) of the Department's intent to enter into an Intra-Agency Agreement (IAA) with the High Performance Transportation Enterprise (HPTE) in order to provide credit support for a commercial loan financing the I-25 North, Segment 3, Express Lanes Project.

Action

Department Staff is seeking TC approval of the resolution authorizing the proposed IAA between the Colorado Department of Transportation (CDOT) and HPTE.

Background

In November 2015, staff presented and sought feedback from the TC around the issue of filling the existing funding gap on I-25 North, Segment 3, Project. Staff recommended that private financing be considered as a primary option for funding on corridors that are able to generate adequate revenue through the collection of user-fees. As such, staff proposed to fill the funding gap for the project using a loan financing structure similar to the one approved by the TC for the I-70 Peak Period Shoulder Lane (Mountain Express Lanes) in December 2014.

Based on the feedback from the TC in November 2015, CDOT and HPTE staff researched and developed a finance plan for the I-25 North, Segment 3, Project that included the use of a commercial loan. With the funding plan identified, staff returned in December 2015 for TC approval of a resolution authorizing CDOT to pursue an Intra-Agency Agreement with HPTE, whereby HPTE can request, and the Transportation Commission will agree to make, one or more loans from the state highway fund to satisfy any of HPTE's payment obligations under the proposed commercial loan, or to fund HPTE's operational and maintenance responsibilities with respect to the Segment 3 Project. Action was requested in December 2015 in order to receive authorization from the Federal Highway Administration (FHWA) and meet the Project advertising date of January 7, 2016.

HPTE will be entering into a loan agreement with Banc of America Preferred Funding Corporation (BAML) for \$35.0 million. The loan will be used to cover the payment of the lawful expenses and costs of planning, designing, engineering, acquisition, installation or construction of the Segment 3 Project. With the commercial loan now secured, the Department is proposing to enter into an IAA in order to formalize its credit support to HPTE. Under the proposed IAA, HPTE would be able to request financial support from the Transportation Commission to assist HPTE in fulfilling its payment obligations under the Segment 3 Loan Agreement as well as meeting its operations and maintenance obligations for the constructed express lanes. While the IAA allows HPTE to request TC support, revenue projections for the corridor exceed the debt repayment projection, even presuming an increase in interest rates. Consequently, it would not be likely for HPTE to need to call on CDOT for credit support.



Key Details

Below is a summary of several key areas that are important for the Commission to take into consideration while reviewing the attached IAA (Attachment A) and resolution (Attachment B). The IAA and resolution:

- (1) Incorporate an allocation of financial responsibility related to Operations & Maintenance (O&M).
 - a. HPTE is responsible for operating and maintaining the constructed I-25 North, Segment 3, Express Lanes and CDOT maintains O&M responsibility for the general purpose lanes. O&M costs will be based on the total number of vehicles using all lanes along the I-25 North, Segment 3. HPTE's portion of O&M costs will be calculated using total number of revenue generating vehicles traveling on the tolled express lane, while CDOT's portion will be calculated using all other non-revenue vehicles and vehicles traveling in the general purpose lanes.
- (2) Recognize that future Transportation Commissions will not be bound by budgetary and policy decisions made by the current TC.
 - a. Stipulates that the current TC cannot allocate and transfer future state highway funds for a loan to HPTE.
 - b. Sets forth that any decision as to whether or not to allocate and transfer such funds to HPTE shall be made by the Transportation Commission in the year in which the HPTE request occurs.
- (3) Stipulate that in the event that the Transportation Commission elects to make a loan to HPTE in order to satisfy any of the payment obligations under the Segment 3 Loan Agreement, CDOT can, but is not required to, fund such a loan using Federal-aid highway funds to assist HPTE in fulfilling its payment obligations. However, per direction from FHWA, CDOT may not use Federal-aid highway funds to satisfy any expenses related to the operations and maintenance of the I-25 North, Segment 3, Express Lanes.

The loan agreement is between HPTE and BAML and is being presented to the HPTE board for formal approval. However, the loan agreement is incorporated as Exhibit B to the IAA and contains important provisions affecting CDOT's backup commitments under the IAA. It is provided for Transportation Commission review at <https://www.codot.gov/about/transportation-commission/meeting-agenda.html>.

Key Benefits

- Approval of the IAA will reinforce the mutually beneficial partnership between CDOT and HPTE while simultaneously securing more favorable loans terms for HPTE.
- It is expected that the extension of the current I-25 managed lanes will provide a benefit to CDOT and the State of Colorado by mitigating congestion, improving travel times along the corridor and ultimately promote a healthy multi-modal system.

Options and Recommendations

1. Approve the IAA between CDOT and HPTE in support of the I-25 North, Segment 3, Express Lanes Project. (STAFF RECOMMENDATION)
2. Do not approve and request additional information next month in February 2016.
3. Reject the IAA and recommend that HPTE explore alternative methods for credit support.

Next Steps

If approved, the attached IAA will be executed.

Attachments

Attachment A: I-25 North Express Lanes Project (Segment 3) Intra-Agency Agreement

Attachment B: Resolution Approving the Intra-Agency Agreement between the Colorado Department of Transportation and the High Performance Transportation Enterprise for the I-25 North Express Lanes Project (Segment 3)



I-25 NORTH EXPRESS LANES PROJECT (SEGMENT 3)

INTRA-AGENCY AGREEMENT

THIS INTRA-AGENCY AGREEMENT (this “Agreement”) is made this ___ day of January, 2016 by and between the STATE OF COLORADO for the use and benefit of the COLORADO DEPARTMENT OF TRANSPORTATION (“CDOT”) and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, a government-owned business and a division of CDOT (“HPTE”). CDOT and HPTE are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

RECITALS

A. CDOT is an agency of the State of Colorado authorized pursuant to Section 43-1-105, C.R.S. to plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local and other state agencies.

B. The Transportation Commission of Colorado (the “Transportation Commission”) is the budgetary and policy making body for CDOT with all powers and duties granted by the Colorado General Assembly pursuant to Section 43-1-106, C.R.S.

C. HPTE was created pursuant to Section 43-4-806(2), C.R.S. as a government-owned business within CDOT to pursue innovative means of completing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system, can feasibly be commenced in a reasonable amount of time, and will allow more efficient movement of people, goods, and information throughout Colorado.

D. CDOT and HPTE are currently working in cooperation on the planning, implementation and operation of a transportation infrastructure project generally consisting of the completion of one new tolled express lane in each direction on I-25 from 120th Avenue to E-470 (the “I-25 North Express Lanes Project (Segment 3)” or the “Segment 3 Project”).

E. CDOT has requested HPTE’s involvement in the Segment 3 Project for the variety of benefits CDOT will receive from implementing tolling on the I-25 North Express Lanes Project (Segment 3), including, but not limited to, allowing CDOT to better manage congestion over the long term on the portion of the Interstate 25 where the Segment 3 Project is located (“I-25 Segment 3”) and providing the traveling public with the choice of a new travel lane with more reliable and efficient travel times.

F. HPTE is authorized pursuant to Section 43-4-806(2)(c)(I), C.R.S. to impose user fees on the traveling public for the privilege of using surface transportation infrastructure, and is further authorized pursuant to Section 43-4-806(2)(c)(III), C.R.S. to contract with any

governmental or non-governmental source of funding for loans to be used in support of HPTE's functions.

G. Consistent with HPTE's statutory purpose as a government-owned business and enterprise for purposes of Article X, Section 20 of the State Constitution, which provides services to CDOT in exchange for reasonable compensation, and in order to support CDOT's efforts to finance the Segment 3 Project, HPTE has entered into a Loan Agreement (the "Bank Loan Agreement") with Bank of America, N.A., (the "Bank") dated as of the date hereof and attached hereto as **Exhibit B**, pursuant to which HPTE will borrow money to fund the payment of certain lawful expenses and costs of planning, designing, engineering, acquisition, installation or construction of the Segment 3 Project, and other lawful expenses and costs related thereto.

H. Under the Bank Loan Agreement, HPTE agrees to pledge to the Bank, for repayment of the amounts financed under the Bank Loan Agreement and any other amounts that are owing to the Bank from time to time thereunder, all amounts received by HPTE from tolls, rates and other user fees imposed by HPTE pursuant to Section 43-4-806(2)(C)(I), C.R.S., for the privilege of traveling on the Segment 3 Project (the "Gross Revenues"), except to the extent otherwise provided for in the Bank Loan Agreement.

I. Pursuant to Section 43-4-806(4), C.R.S., the Transportation Commission may authorize the transfer of money from the state highway fund to HPTE to defray expenses of HPTE and, notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, such a transfer shall constitute a loan from the Transportation Commission to HPTE and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution.

J. In consideration of the various terms, covenants, and conditions set forth herein, including the benefits that CDOT will receive as a result of the Segment 3 Project, CDOT and HPTE have agreed to enter into this Agreement pursuant to which HPTE can request financial support from the Transportation Commission to assist HPTE in fulfilling its obligations with respect to HPTE Bank Loan Obligations or HPTE O&M Obligations (as such terms are hereinafter defined) in the event the Gross Revenues are insufficient, or projected to be insufficient, to satisfy HPTE's obligations.

K. HPTE recognizes and acknowledges that any such financial support shall be in the form of a CDOT Backup Loan (as defined and further described in Section III below) from the Transportation Commission to HPTE pursuant to Section 43-4-806(4), C.R.S. The Transportation Commission may, in its sole and absolute discretion, but is not obligated to, make a CDOT Backup Loan. If the Transportation Commission elects not to make a CDOT Backup Loan, such an election will not, by itself, result in a default of HPTE under the Bank Loan Agreement.

L. CDOT and HPTE further desire to enter into this Agreement to define their respective roles and responsibilities with respect to cooperation on the operation and

maintenance of the Segment 3 Project and the adjacent I-25 general purpose lanes, and to allocate the costs related thereto.

M. This Agreement is executed by HPTE under the authority of Sections 29-1-203 and 43-4-806(6)(h), C.R.S., and by CDOT under the authority of Sections 43-1-110 and 43-1-116, C.R.S.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS, AND THE VARIOUS TERMS, COVENANTS, AND CONDITIONS SET FORTH HEREIN, AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, THE PARTIES TO THIS AGREEMENT HEREBY AGREE AS FOLLOWS:

TERMS AND CONDITIONS

I. CONSTRUCTION OF THE PROJECT

1. Project Budget. CDOT is primarily responsible for the capital costs of the Segment 3 Project. Notwithstanding the foregoing, in consideration of the various benefits HPTE receives by implementing a user fee system on the I-25 North Express Lanes Project (Segment 3), HPTE has agreed to contribute a portion of the amounts deposited into the I-25 North Express Lanes Project Account (Segment 3) under the Bank Loan Agreement toward the construction of the Segment 3 Project, in full satisfaction of any obligations HPTE might have with respect to such construction. CDOT represents that such contribution, equal to the loan proceeds initially deposited into the I-25 North Express Lanes Project Account (Segment 3) under the Bank Loan Agreement, less working capital fees and other reasonable costs and expenses of HPTE, together with available CDOT moneys, is sufficient to complete the I-25 North Express Lanes Project (Segment 3) on or before August 30, 2018. HPTE's contributions to the Segment 3 Project may be applied to any lawful cost or expense related to the implementation of the Segment 3 Project, including reimbursement to HPTE for overhead and administration costs incurred in conjunction with the implementation of the Segment 3 Project.

2. CDOT Responsibilities. Except as otherwise specifically identified as a responsibility of HPTE in Paragraph 3 of this Section, CDOT shall be responsible for the construction of the Segment 3 Project, including, but not limited to, the following:

a. CDOT will contract for the design and construction of the Segment 3 Project as generally described and approved in the Record of Decision dated December 2011 issued by the Federal Highway Administration as required for the I-25 North Express Lanes Project (Segment 3) pursuant to 42 U.S.C. § 4321, *et seq.*

b. CDOT will coordinate with HPTE, when necessary, on the underlying procurement process of the Segment 3 Project and will be responsible for ensuring

compliance with Federal Disadvantaged Business Enterprise requirement in contracts for the Segment 3 Project.

c. CDOT will provide design and construction management for the Segment 3 Project and will oversee the contractor who shall perform the construction in accordance with the approved design plans and/or administer the construction all in accordance with the construction contract. Such administration shall include, but not be limited to, inspection and testing; approving sources of materials; performing required plant and shop inspections; documentation of contract payments; preparing and approving pay estimates; preparing, approving and securing the funding for contract modification orders and minor contract revisions; processing contractor claims; construction supervision; and meeting requirements of the FHWA/CDOT Stewardship Agreement and applicable federal and State laws and regulations.

d. CDOT will be responsible for acquiring all rights of way, if any, necessary for the Segment 3 Project and for compliance with the Uniform Federal Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601, *et seq.*) requirements.

e. If necessary, CDOT will be responsible for obtaining the proper clearance or approval from any utility company, which may become involved in the Segment 3 Project.

f. CDOT shall ensure that all work in connection with the Segment 3 Project is done in accordance with the requirements of the current federal and State environmental regulations including the National Environmental Policy Act of 1969 (42 U.S.C. § 4321, *et seq.*), as applicable.

g. In the event the Segment 3 Project involves modifications of a railroad company's facilities whereby the related work is to be accomplished by railroad company forces, CDOT shall make timely application to the Public Utilities Commission requesting its order providing for the installation of the proposed improvements and not proceed with that work without compliance. CDOT shall also establish contact with the railroad company involved for the purposes of complying with applicable provisions of 23 CFR 646, subpart B, concerning federal aid projects involving railroad facilities.

h. CDOT will maintain all documents related to the construction of the Segment 3 Project and make them available for inspection and review by HPTE and all federal agencies with an interest in the Segment 3 Project for a period of not less than three years after the completion of the work.

i. CDOT will be responsible for the costs associated with any transponders (other than the single occupancy vehicle transponders) that are necessary to allow high

occupancy vehicles to use the I-25 North Express Lanes Project (Segment 3) free of charge.

j. CDOT may be responsible for all other items in the Memorandum of Understanding by and between CDOT and HPTE, dated September 30, 2013, as may be amended from time to time (the “MOU”) identified as the responsibility of CDOT’s Office of Major Project Development.

3. HPTE Responsibilities. HPTE shall be specifically responsible for the following with respect to the construction of the Segment 3 Project:

a. HPTE will be responsible for the contracting necessary to implement a user fee system, including paying for the costs of single occupancy vehicle transponders and all tolling equipment, software and related installation, including, but not limited to, any obligations to the E-470 Public Highway Authority (“E-470”) related to the implementation of a new user fee system for the Segment 3 Project under the Managed Lanes Tolling Services Agreement between HPTE and E-470, dated May 7, 2015, as may be amended from time to time (the “TSA”).

b. HPTE may be responsible for other items identified in the MOU as a responsibility of HPTE.

II. OPERATIONS AND MAINTENANCE OF THE PROJECT

1. Overview and Costs. The I-25 North Express Lanes Project (Segment 3) is being constructed adjacent to the I-25 general purpose lanes (within I-25 Segment 3, referred to herein as the “I-25 General Purpose Lanes”), and the Parties recognize the need to cooperate in carrying out the related operations and maintenance for the Segment 3 Project and adjacent general purpose lanes. To that end, the Parties agree to cooperate in ensuring that the operations and maintenance are performed and agree to the division of costs as set forth in this Agreement. As a general matter, HPTE shall be responsible for operating and maintaining the I-25 North Express Lanes Project (Segment 3) (including contracting for tolling services and tolling enforcement), and CDOT shall be responsible for operating and maintaining the I-25 General Purpose Lanes. It is the intent of the Parties that, except as specifically provided otherwise herein, CDOT shall perform such operations and maintenance of both the I-25 North Express Lanes (Segment 3) and the I-25 General Purpose Lanes, subject to reimbursement from HPTE for HPTE’s proportionate share of the overall operations and maintenance expenses, as further described herein.

2. HPTE License. In consideration of the various benefits CDOT will receive as a result of the Segment 3 Project, CDOT hereby provides to HPTE a perpetual, non-exclusive, non-terminable license over, under, upon and in the site of the Segment 3 Project (the “License”) for HPTE to operate the I-25 North Express Project (Segment 3). CDOT acknowledges and agrees that HPTE may sublicense the License as needed to fulfill its obligations hereunder.

Subject to the License, CDOT reserves the right of use, occupancy and ownership over, under, upon and in the lands comprised of the I-25 North Express Lanes Project (Segment 3).

3. Cost Allocation. Except as otherwise provided herein, the Parties agree to allocate costs based on a proportion of the total number of vehicles using all lanes within I-25 Segment 3, with HPTE's portion being calculated to include all vehicles obligated to pay a user fee within the Segment 3 Project, whether or not such user fee is actually collected, and CDOT's portion being calculated to include all other vehicles within I-25 Segment 3, including, for certainty, high-occupancy vehicles (the "Pro-Rata O&M Cost Calculation"). For illustrative purposes only, if the total cost of operating and maintaining the portion of I-25 constituting Segment 3 is \$100,000 per month, and 20% of the total vehicle count consisted of vehicles obligated to pay a user fee, HPTE would be responsible for \$20,000 of such operations and maintenance costs. The Pro-Rata O&M Cost Calculation shall apply to CDOT's costs incurred with respect to: (i) snow and ice removal services; (ii) courtesy patrol; (iii) pavement resurfacing, life-cycle and capital maintenance, to the extent such activities reasonably include both the Segment 3 Project and the I-25 General Purpose Lanes; (iv) lane striping and lane sweeping/cleaning; and (v) any other operations and maintenance expense CDOT and HPTE agree in good faith is most fairly allocated utilizing the Pro-Rata O&M Cost Calculation method.

4. CDOT O&M Obligations. The Pro-Rata O&M Cost Calculation shall not apply to those operations and maintenance costs existing and regularly funded by CDOT prior to the implementation of the I-25 North Express Lanes Project (Segment 3), and for which the addition of the I-25 North Express Lanes Project (Segment 3) results in a *de minimus* impact on overall operations and maintenance expenses with I-25 Segment 3. Such costs include, but are not limited to, CDOT's costs incurred with respect to: (i) repair and replacement of guardrail; (ii) repair and replacement of lighting fixtures; (iii) contracts with the State Patrol for safety enforcement within the corridor (but exclusive of additional enforcement contracted by HPTE for toll evasion enforcement); and (iv) pavement maintenance on the general purpose lanes.

5. HPTE O&M Obligations. HPTE shall be solely responsible for costs incurred with respect to: (i) toll processing and collection; (ii) Level I and Level II maintenance of toll equipment; (iii) contracts for toll evasion enforcement with the State Patrol or other law enforcement entity; (iv) pavement maintenance in the I-25 North Express Lanes Project (Segment 3); and (v) HPTE overhead and administrative costs related to the operations and maintenance of the I-25 North Express Lanes Project (Segment 3). Such costs, together with those costs attributable to HPTE under the Pro-Rata O&M Cost Calculation, shall constitute the "HPTE O&M Obligations."

6. Invoicing. To the extent either Party provides services to the other (either through a third party or directly) that results in one Party covering the costs that is agreed to be the responsibility of the other, the Party covering such costs will invoice the other and such invoice shall include a reasonably detailed breakdown of the costs for which the invoicing Party is seeking reimbursement.

7. Reconciliation; O&M Shortfall; Performance. CDOT shall submit to HPTE on or before January 15 and July 15 of each year an invoice describing the HPTE O&M Obligations due to CDOT with respect to the I-25 North Express Lanes Project (Segment 3) for the prior six month period. HPTE will then cause such amounts to be remitted (consistent with the provisions of the Bank Loan Agreement) within 45 days of receipt of CDOT's invoice. To the extent the Gross Revenues (as they are first required to be applied in the Bank Loan Agreement) are inadequate in any fiscal year to cover the HPTE O&M Obligations, HPTE may request a CDOT Backup Loan to fund such shortfall. Notwithstanding such shortfall in the availability of Gross Revenues to cover the HPTE O&M Obligations, CDOT agrees that it shall continue to perform operations and maintenance of both the I-25 North Express Lanes Project (Segment 3) and the I-25 General Purpose Lanes.

III. CDOT BACKUP LOAN OBLIGATIONS

1. HPTE Bank Loan Obligations. The Bank Loan Agreement, attached hereto as **Exhibit B**, contains obligations of HPTE to pay to Bank the principal of and interest on, and certain other amounts with respect to, the loan made by the Bank pursuant to the Bank Loan Agreement (the "HPTE Bank Loan Obligations"). The HPTE Bank Loan Obligations and the HPTE O&M Obligations are referred to collectively herein as the "HPTE Payment Obligations."

2. The Transportation Commission has reviewed the Bank Loan Agreement and is aware of the HPTE Bank Loan Obligations. On or before September 15 of the immediately preceding fiscal year, HPTE shall estimate whether and in what maximum amount it may be necessary for HPTE to request that CDOT provide financial support to fulfill an HPTE Payment Obligation in any fiscal year, it being understood that any such financial support shall be in the form of a loan from CDOT to HPTE pursuant to Section 43-4-806(4), C.R.S. (a "CDOT Backup Loan"). HPTE shall notify the Executive Director in writing as to the estimated maximum amount, if any, that is expected to be payable in the succeeding fiscal year to satisfy the HPTE Payment Obligations in excess of the amount of Gross Revenues anticipated to be generated by the I-25 North Express Lanes Project (Segment 3) in such fiscal year, and such maximum amount (the "CDOT Backup Loan Set Aside") shall be included in the budget request to the Transportation Commission for an allocation of moneys in the state highway fund for such purpose.

3. HPTE may also, at any time during any fiscal year, notify the Executive Director in writing that HPTE desires that CDOT make CDOT Backup Loans for projected HPTE Payment Obligations in an amount that exceeds any CDOT Backup Loan Set Aside that the Transportation Commission has previously allocated for such fiscal year. In such event, the Executive Director shall submit a supplemental budget request to the Transportation Commission at its next regularly scheduled meeting for an allocation or supplemental allocation of moneys in the state highway fund for the purpose of making additional CDOT Backup Loans to HPTE in such fiscal year in an amount equal to the amount set forth in the notice delivered by HPTE to the Executive Director pursuant to this Section.

4. Moneys allocated by the Transportation Commission to make CDOT Backup Loans shall be transferred to HPTE (or, subject to the terms of the Bank Loan Agreement, at HPTE's discretion) and shall be used by HPTE to satisfy the HPTE Payment Obligations, as they become due.

5. Notwithstanding any other provision hereof:

a. CDOT and HPTE agree and acknowledge that the Transportation Commission has no obligation to allocate funds to make CDOT Backup Loans in any fiscal year and the decision whether or not to allocate funds, and the amount, if any, of funds allocated, to make CDOT Backup Loans in any fiscal year shall be made annually at the sole and absolute discretion of the Transportation Commission;

b. CDOT and HPTE further agree and acknowledge that notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, any CDOT Backup Loan made hereunder shall, in accordance with Section 43-4-806(4), C.R.S., constitute a loan and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the State Constitution or as defined in Section 24-77-102, C.R.S.;

c. Prior to allocating any funds to make CDOT Backup Loans in any fiscal year, CDOT shall determine that such authority exists in the law and that a sufficient unencumbered balance remains available in Fund 400 for CDOT Backup Loans in an amount equal to the amount of funds so allocated; and

d. If an allocation by the Transportation Commission shall have been made, CDOT Backup Loans shall be made up to the amounts requested by HPTE as set forth above.

e. No CDOT Backup Loan shall be repaid earlier than the date on which all HPTE Bank Loan Obligations are satisfied or, if the Bank Loan Agreement has been refinanced, the date on which all HPTE Bank Loan Obligations are satisfied.

6. Any CDOT Backup Loans made to HPTE in support of either HPTE Bank Loan Obligations or HPTE O&M Obligations shall be authorized by and subject to a separate Transportation Commission Resolution and shall be evidenced by one or more loan agreements in substantially the form attached hereto as **Exhibit A** (a "CDOT Backup Loan Agreement"), with terms consistent with the terms contained herein. In particular, having regard to the requirement that the CDOT Backup Loans shall not be repaid prior to satisfaction of the HPTE Bank Loan Obligations and any similar obligations incurred by HPTE under any future refinancing of the Bank Loan Agreement, the Parties agree to cooperate in good faith to determine a reasonable repayment schedule for each CDOT Backup Loan.

IV. DEFAULTS, TERMINATION AND REMEDIES

1. Default; Cure. The failure of either Party to fulfill its obligations to perform in accordance with the terms of this Agreement shall constitute a breach of this Agreement. Subject to the requirements of Section V.1., the non-breaching Party shall thereupon have the right to terminate this Agreement for cause by giving written notice to the other Party of its intent to terminate, and at least thirty (30) days' opportunity to cure the default or show cause why termination is not otherwise appropriate; provided, however that such breaching Party shall not be in default under this Agreement if it has promptly commenced a cure of such nonperformance and is diligently pursuing the same. Any finding of nonperformance and failure to cure under this Paragraph shall be referred for dispute resolution as provided for in Paragraph 3 of this Section IV prior to any termination becoming effective.

2. Default for Non-payment. If HPTE fails to repay any CDOT Backup Loan in accordance with the applicable CDOT Backup Loan Agreement, and upon notice to HPTE and failure by HPTE to cure within thirty (30) days thereof, CDOT may, at its option: (i) terminate its commitment to consider making future CDOT Backup Loans hereunder; (ii) declare the entire principal amount of all CDOT Backup Loans then outstanding immediately due and payable; or (iii) take any other appropriate action available at law or in equity; provided, however, that no CDOT Backup Loan, or interest thereon, shall be repaid at any time there are amounts outstanding under the Bank Loan Agreement. Notwithstanding the exercise of any of the remedies above, HPTE shall not be relieved of liability to CDOT for any damages sustained by CDOT by virtue of any breach of this Agreement by HPTE.

3. Dispute Resolution. Any dispute concerning the performance of this Agreement shall be resolved at the lowest staff level possible, and shall first be referred to the Director of the CDOT Office of Major Project Development and the HPTE Operations Manager. Failing resolution by such officers, the escalation process shall be: (i) CDOT Chief Engineer and HPTE Director; (ii) CDOT Executive Director and HPTE Director; and (iii) Transportation Commission and HPTE Board of Directors.

V. GENERAL PROVISIONS

1. Effective Date; Term. This Agreement shall be effective as of the date of the date first written above and shall continue until the earlier of (i) the useful life of the project; (ii) the date HPTE no longer operates the I-25 North Express Lanes Project (Segment 3); and (iii) the Parties mutually agree to terminate the Agreement. Notwithstanding any other provision of this Agreement to the contrary, the Parties shall not terminate this Agreement while HPTE Bank Loan Obligations remain outstanding pursuant to the Bank Loan Agreement.

2. Modification. This Agreement is subject to such modifications as may be required by changes in federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this Agreement on the effective date of such change as if fully set forth herein. Except as specifically provided otherwise herein, no modification of this Agreement shall be effective unless agreed to in writing

by both parties in an amendment to this Agreement that is properly executed and approved in accordance with applicable law.

3. Severability. The terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof. The waiver of any breach of a term hereof shall not be construed as a waiver of any other term, or the same term upon subsequent breach.

4. Notices. All communications relating to the day-to-day activities for the work shall be exchanged between representatives of CDOT and HPTE. All communication, notices, and correspondence with respect to the performance of this Agreement shall be addressed to the individuals identified below. Either Party from time to time, designate in writing new or substitute representatives.

If to CDOT:

Brett J. Johnson, Director
CDOT, OMPD
4201 E. Arkansas Ave. Room 158
Denver, CO 80222
Email: brett.j.johnson@state.co.us

If to HPTE:

David I. Spector, Director
HPTE
4201 E. Arkansas Ave. Room 230
Denver, CO 80222
Email: david.spector@state.co.us

5. Maintenance of Records. Each Party shall maintain all books, documents, papers, accounting records and other evidence pertaining to the Segment 3 Project including, but not limited to, any costs incurred during the construction, operation and maintenance of the Segment 3 Project, and make such materials available to the other Party upon reasonable request.

6. Successors and Assigns. Except as otherwise provided herein, this Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns.

7. No Third Party Beneficiaries. No third party beneficiary rights or benefits of any kind are expressly or impliedly provided herein. It is expressly understood and agreed that the enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement, shall be strictly reserved to the Parties hereto, and nothing contained in this Agreement shall give or allow any such claim or right of action by the Bank or any other third person.

8. Governmental Immunity. Notwithstanding any other provision of this Agreement to the contrary, no term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the Colorado Governmental Immunity Act, Sections 24-

10-101, *et seq.*, C.R.S., or the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, as applicable, as now or hereafter amended.

9. Adherence to Laws. At all times during the performance of this Agreement, the Parties shall strictly adhere to all applicable federal and state laws, rules, and regulations that have been or may hereafter be established, including, but not limited to state and federal laws respecting discrimination and unfair employment practices.

10. Availability of Funds. All payments pursuant to this agreement are subject to and contingent upon the continuing availability of funds appropriated for the purposes hereof. If any of said funds become unavailable, as determined by CDOT, either Party may immediately terminate or seek to amend this agreement, subject to the provisions set forth in Section V.1. hereof.

11. Choice of Law. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this Agreement. Any provision of this Agreement, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this Agreement to the extent that the Agreement is capable of execution.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

STATE OF COLORADO
JOHN W. HICKENLOOPER, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHAILEN P. BHATT
Executive Director
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE Director

APPROVED:

CYNTHIA H. COFFMAN
Attorney General

By: _____
ASSISTANT ATTORNEY GENERAL

[Signature page to I-25 North Express Lanes Project (Segment 3) Intra-agency Agreement.]

Resolution #TC-

Approving an Intra-Agency Agreement between the Colorado Department of Transportation and the Colorado High Performance Transportation Enterprise for the I-25 North Express Lanes Project (Segment 3)

WHEREAS, pursuant to Section 43-1-106(8), C.R.S, the Transportation Commission is responsible for formulating the general policy with respect to the management, construction, and maintenance of public highways and other transportation systems in the state; and

WHEREAS, the Transportation Commission promulgates and adopts all budgets for the Colorado Department of Transportation (“CDOT”) and state transportation programs; and

WHEREAS, the General Assembly created the Colorado High Performance Transportation Enterprise (“HPTE”), pursuant to Section 43-4-806, C.R.S., as a government-owned business within CDOT to pursue innovative means of more efficiently financing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system; and

WHEREAS, HPTE is authorized, pursuant to Section 43-4-806(2)(c)(I), C.R.S., to impose user fees on the travelling public for the privilege of using surface transportation infrastructure; and

WHEREAS, CDOT, in partnership with HPTE, is undertaking the I-25 North Express Lanes Project (Segment 3) (the “Segment 3 Project”) to complete, implement and operate one new tolled express lane in each direction between approximately 120th Avenue and E-470; and

WHEREAS, the Transportation Commission supports the Segment 3 Project and recognizes the benefits it provides to the State, which include, but are not limited to, improving travel times, managing congestion in the I-25 North Corridor, and providing travelers with a choice of a new travel lane; and

WHEREAS, HPTE will enter into a loan agreement with Bank of America, N.A. (the “Segment 3 Loan Agreement”) pursuant to which HPTE will borrow money to fund the payment of the lawful expenses and costs of planning, designing, engineering, acquisition, installation or construction of the Segment 3 Project and other lawful expenses and costs related thereto (“Segment 3 Loan”); and

WHEREAS, in connection with the Segment 3 Loan, HPTE will pledge to Bank of America, N.A. the user-fee revenues collected by HPTE from the Segment 3 Project as further detailed in the Segment 3 Loan Agreement; and

WHEREAS, pursuant to Section 43-4-806(4), C.R.S., the Transportation Commission may authorize the transfer of money from the state highway fund to HPTE to defray expenses of HPTE; and

WHEREAS, together with HPTE's approval of the Segment 3 Loan Agreement, HPTE has requested that CDOT enter into that certain I-25 North Express Lanes Project (Segment 3) Intra-Agency Agreement with HPTE (the "Segment 3 Intra-Agency Agreement") pursuant to which HPTE can request, and the Transportation Commission will agree to consider making, but is not obligated to make, one or more loans from the state highway fund to satisfy any of HPTE's payment obligations under the Segment 3 Loan Agreement, or to fund HPTE O&M Project Expenses (as such term is defined in the Segment 3 Intra-Agency Agreement), in the event user fee revenues are insufficient, or projected to be insufficient, to satisfy HPTE's obligations; and

WHEREAS, any loan that CDOT provides HPTE under the Segment 3 Intra-Agency Agreement shall, notwithstanding any state fiscal rule or generally accepted accounting principle that could otherwise be interpreted to require a contrary conclusion, constitute a loan from the Transportation Commission to HPTE and shall not be considered a grant for purposes of Section 20(2)(d) of Article X of the state Constitution; and

WHEREAS, the Transportation Commission recognizes and respects the legal principle that it cannot bind future Transportation Commissions with respect to budgetary and policy decisions, recognizes it cannot agree, in advance, to allocate and transfer state highway funds for a loan to HPTE, and agrees that any decision as to whether or not to allocate and transfer such funds for such purposes shall be made by the Transportation Commission, in its sole discretion, in the year in which the HPTE request occurs; and

WHEREAS, in the event the Transportation Commission elects, in its sole and absolute discretion, to make a loan to HPTE to satisfy any of the payment obligations under the Segment 3 Loan Agreement, CDOT can, but is not required to, fund such a loan using Federal-aid highway funds to assist HPTE in fulfilling its payment obligations under the Segment 3 Loan Agreement, but CDOT may not use Federal-aid highway funds to satisfy any HPTE O&M Project Expenses of the Segment 3 Project.

NOW THEREFORE BE IT RESOLVED, the Transportation Commission hereby approves and authorizes CDOT to enter into the Segment 3 Intra-Agency Agreement with HPTE in substantially the form presented to the Transportation Commission and authorizes the CDOT Executive Director or his delegee to execute the Segment 3 Intra-Agency Agreement with such changes therein and additions thereto, not inconsistent with this Resolution, as are approved by the CDOT Executive Director or his delegee (whose signature thereon shall constitute conclusive evidence of such approval).

BE IT FURTHER RESOLVED, the Transportation Commission hereby approves and authorizes the Segment 3 Loan Agreement in substantially the form approved by the HPTE Board of Directors and appended to the Segment 3 Intra-Agency Agreement, with such changes therein and additions thereto, not inconsistent with this Resolution, as are approved by the CDOT Executive Director or his delegee, which changes can include an increase or decrease in (i) the initial interest rate charged for the Segment 3 Loan so long as the initial interest rate for the Segment 3 Loan does not exceed 3%, provided that such rate may increase under certain circumstance as provided in the Segment 3 Loan Agreement; and (ii) the principal amount of the Segment 3 Loan so long as such principal amount does not exceed \$35 million.

BE IT FURTHER RESOLVED, the Transportation Commission hereby authorizes the CDOT Executive Director, the CDOT Chief Financial Officer, or any other officer of CDOT to execute and deliver such certificates and other documents and take such other actions as may be necessary or convenient to the accomplishment of the purposes of this Resolution, including, without limitation, the delivery of closing certificates and other documents required to be delivered by CDOT, if any, under the provisions of the Segment 3 Loan Agreement.

Herman Stockinger, Secretary
Transportation Commission of Colorado

Date