

MEMORANDUM

TO: Joint Transportation Committee

FROM: Pacifica Law Group LLP

DATE: September 23, 2021

SUBJECT: Options under Washington State Law for Formation of Bistate Bridge Authority to Replace the Hood River Bridge

Introduction; Scope of Memorandum

Pursuant to Section 204(2) of Wash. Laws ch. 333 (2021), the Legislature appropriated funds for the Joint Transportation Committee to contract for a legal consultant to analyze and recommend options for the formation of a bistate bridge authority for the purpose of constructing, financing, operating and maintaining a new replacement bridge over the Columbia River near Hood River connecting Klickitat County in Washington to Hood River County in Oregon. The consultant was permitted to confer with the Hood River Bistate Working Group to understand the work and analysis that has been completed. The proviso noted that the Washington Interlocal Cooperation Act, Chap. 39.34 RCW (the “ICA”), authorizes public agencies to contract with other public agencies via interlocal agreements that enable cooperation among the agencies to perform governmental activities and deliver public services, including agreements with public entities in other states, and that such interstate agreements are deemed interstate compacts. The legal analysis is required to identify and recommend alternative and/or additional statutory authority that would be necessary to allow for the formation of a local government bistate bridge authority or governance structure for the Hood River Bridge replacement that at a minimum may: (a) issue bonds for bridge construction; (b) collect tolls; and (c) secure and administer state or federal grants and loans. The legal analysis is required to be presented to the Transportation Committees of the Legislature by September 30, 2021.

Authors

The Washington State Attorney General’s Office and the Washington State Legislature contracted with Pacifica Law Group LLP (“Pacifica”) to prepare the report, under Pacifica’s existing contact with these agencies to provide advice related to bonds and debt. Pacifica attorneys (and special assistant attorneys general) Stacey Lewis, Alison Benge, Deanna Gregory, and Tobias Tobler have authored this report. In addition to serving as bond counsel to a number of local and regional entities that issue tax-exempt bonds to finance public infrastructure projects, Pacifica has represented Washington local governments in the formation of a number of entities under the ICA including the South Correctional Entity, the King County Regional Homelessness Authority, Snohomish County 911, and the Puget Sound Emergency Radio Network. Pacifica also represents the Northeast King County Regional Public Safety Communications Agency, the Clark Regional

Services Agency, and eCityGov Alliance.ⁱ This experience with the legal requirements applicable to the issuance of local government bonds as well as the formation of interlocal government entities informs this report.

Review Process

Report authors conferred with the Hood River Bistate Working Group members (consisting of the City of Bingen, City of White Salmon, and Klickitat County in Washington, and the City of Hood River, Hood River County, and Port of Hood River in Oregon) to understand the work and analysis that has been completed. The report authors acknowledge the assistance and cooperation of the Hood River Bistate Working Group and their consultants in sharing information regarding the project, potential entity structures, and governance considerations as well as comparable projects and entities (including bistate entities) in the United States. In addition to reviewing this material, the report authors reviewed the ICA, other Washington laws allowing for formation of local or regional entities to finance public infrastructure projects, and the structure and characteristics of a range of such local and regional entities. As a result of this review, this report identifies and recommends alternative and/or additional statutory authority necessary to allow for the formation of a local government bistate bridge entity to issue bonds for the Hood River bridge project, collect tolls, and secure and administer state or federal grants and loans. In addition, the report notes additional statutory authority necessary for the entity to issue its bonds on a tax-exempt basis as well as provisions to provide the entity with comparable public accountability and tax treatment as a municipal corporation.

Authority to Form a Regional Entity under the Interlocal Cooperation Act

General authority. The ICA authorizes any two or more “public agencies” to enter into agreements with one another for joint or cooperative action to exercise any power, privilege or authority of the public agencies. “Public agency” includes “any agency, political subdivision, or unit of local government of this state including, but not limited to, municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state.”ⁱⁱ The broad definition of public agency allows for joint undertakings among local governments of Washington and another state, and would allow local government members of the Hood River Bistate Working Group to agree to form an entity to undertake a project to construct, finance, operate and maintain a Hood River replacement bridge.

The ICA provides that, in the event the interlocal agreement is between one or more public agencies of Washington and one or more public agencies of another state, the interlocal agreement has the status of an “interstate compact,” elevating the agreement to one between Washington and Oregon as states and implicating the requirements applicable to interstate compacts.ⁱⁱⁱ To address the potential State role in enforcing an interstate compact, the ICA provides that “in any case or controversy involving performance or interpretation thereof or liability thereunder, the public agencies party thereto shall be real parties in interest and the state may maintain an action to recoup or otherwise make itself whole for any damages or liability which it may incur by reason of being joined as a party therein.”^{iv}

Types of entities. An interlocal agreement under the ICA may provide for the formation of a separate legal or administrative entity for the joint undertaking. The precise organization,

composition, and nature of any separate legal or administrative entity created under the ICA must be specified in the interlocal agreement, and may include a Washington nonprofit corporation, a partnership, or a limited liability company.^v Separate legal entities that are not additionally incorporated as a Washington nonprofit corporation, a partnership or a limited liability company are frequently referred to in their formation interlocal agreement as separate governmental administrative agencies. If the interlocal agreement does not establish a separate legal entity, the joint or cooperative undertaking may be undertaken by an administrator or a joint board.^{vi} Washington local governments have undertaken a number of joint or collective undertakings and, in some cases, have formed separate legal entities for this purpose.

Potential limitations. Although the ICA allows formation of a separate legal entity which may take the form of a nonprofit corporation, partnership or limited liability company, it currently does not specifically authorize the formation of a separate legal entity in the form of a public corporation or corporation for municipal purposes with authority to impose tolls and to issue tax-exempt bonds (including bonds to evidence federal or state loans) paid from toll revenues. In addition, in order to provide authority under Washington (and parallel authority under Oregon law) to allow the local governments to enter into merely an interlocal agreement with other local governments including a cross border interlocal agreement, rather than to enter into an agreement that binds the states themselves in an interstate compact, the interstate compact provision of the ICA would need to be amended to provide that flexibility (or the entity would need to be formed under a new or other amended statute rather than the ICA).

Authority to Toll. The replacement bridge project is expected to be financed with revenue bonds paid from toll revenues; accordingly, it is important that the formed entity has clear authority to impose tolls, and to adjust toll rates from time to time as necessary, to pay the bonds and satisfy debt service coverage and other bond covenants. Under the ICA, public agencies may form a separate legal entity with the authority to undertake joint projects the public agencies themselves can undertake. Only certain public agencies, however, are specifically authorized to impose tolls under current law.^{vii} For example, with the consent of the State Department of Transportation, Washington port districts may toll bridges.^{viii} Consistent with RCW 47.56.850, any port district toll must, however, first be reviewed and approved by the State Transportation Commission if the toll, or change in toll rate, would have a significant impact on the operation of any state facility.^{ix} Likewise, cities and counties may form transportation benefit districts with the power to impose tolls with the approval of a majority of the voters in the district.^x Given this specific, limited authority, and the general requirement for State Transportation Commission review, a legislative amendment is needed to authorize an entity formed jointly by cities, counties and port districts to impose and adjust bridge tolls as necessary to pay the entity's bonds.

Authority to Issue Tax-Exempt Bonds. It is also important that the formed entity has clear authority to issue bonds and that the formed entity is eligible to issue bonds on a federally (and in the case of Oregon, state) tax-exempt basis.^{xi} An entity formed by cities, counties, and port districts can issue bonds on a tax-exempt basis if the formed entity is either a political subdivision or a "constituted authority."^{xii} For purposes of Section 103 of the Internal Revenue Code, a political subdivision is defined as "any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit."^{xiii} The three generally recognized sovereign powers are the power to tax, the police power and the power of eminent domain.^{xiv} Delegation of an insubstantial amount of one of the powers will generally not be sufficient to establish status as a political subdivision.^{xv} A formed entity that

is granted the substantial power of eminent domain would constitute a political subdivision able to issue tax-exempt bonds on its own behalf.

Section 1.103-1(b) also provides that an obligation issued on behalf of any governmental unit by a constituted authority empowered to issue such an obligation is the obligation of such a unit and therefore qualified to be issued on a tax-exempt basis. “Constituted authorities” are entities specifically authorized by state law to issue bonds on behalf of political subdivisions of a state, among other specific powers granted to such entities in order to further public purposes.^{xvi} For example, in IRS Revenue Ruling 57-187, the IRS held that an entity with the following characteristics was a constituted authority that could issue tax-exempt bonds on behalf of a political subdivision:

1. the political subdivision approved the creation of the issuer and the form of the issuer’s certificate of incorporation;
2. the board of directors of the issuer was elected by the governing body of the political subdivision and served without compensation;
3. the issuer’s corporate powers included the power to acquire, improve, maintain, equip, and furnish projects; to lease such projects and collect rent; to sell and convey any and all of its property whenever the board of directors find such action to be in furtherance of the purposes for which it was organized; and to issue bonds for the purpose of carrying out any of its powers;
4. all bonds were payable solely out of revenues and receipts derived from the leasing or sale of its projects;
5. the political subdivision was not liable for the payment of principal or interest on any of the bonds;
6. the issuer was exempt from all state taxation, and interest on bonds issued was exempt from state taxes;
7. the issuer was a nonprofit corporation and no part of its net earnings inured to the benefit of any private person; and
8. upon dissolution of the issuer, the title to all property owned by it vested in and became the property of the political subdivision in which the issuer is located.^{xvii}

A legislative amendment is needed to allow cities, counties and ports to form an entity for a joint action and make clear that the entity is either a political subdivision (by authorizing, for example, the entity to exercise the sovereign power of eminent domain) or a constituted authority empowered to issue bonds for the joint undertaking.

Authority to Form a Regional Entity under Other Statutes

As noted above, Washington local governments have by interlocal agreement agreed to undertake joint projects under the ICA. A number of other Washington statutes allow local governments to form a separate legal entity for the specific purpose of owning, constructing, operating or financing specific types of public projects. The following are examples of separate legal entities that may be formed for particular types of joint municipal projects.

Port Development Authorities. One or two large port districts (meeting statutory population thresholds) have the authority under RCW 53.57.020 to form port development authorities solely for the limited purpose of managing maritime activities of the port district or districts (including

administering federal grants and issuing bonds). The Northwest Seaport Alliance is a port development authority formed by two port districts.

Public Facilities Districts. Under Chap. 35.57 RCW, contiguous cities and counties may together form a public facilities district to own, construct, operate and finance one or more “regional centers.” Regional centers include certain convention, conference and special events centers. Public facilities districts have the authority to issue tax-exempt bonds, and enter into federal and state loans and grant agreements, for this limited purpose.

Joint Municipal Utility Service Utility (“JMUSA”). Under Chap. 39.106 RCW, cities, towns, counties, water-sewer districts, public utility districts, other special purpose districts, municipal corporations, or other units of local government of Washington or another state that provide utility services, and any Indian tribe recognized as such by the United States government, may agree to form an authority to own, construct, finance and operate utility services that their members may provide. Once formed, the authority is a municipal corporation,^{xviii} and is authorized to administer state, federal and private grants and to issue tax-exempt bonds.^{xix}

Transportation Benefit Districts. Cities and counties may form transportation benefit districts (a “TBD”) under Chap. 36.73 RCW. A TBD may be formed as a regional entity, and include area within more than one county, city, port district, county transportation authority, or public transportation benefit area, if the legislative authority of each participating jurisdiction has agreed to the inclusion as provided in an interlocal agreement adopted pursuant to the ICA.^{xx} TBDs are formed as quasi-municipal corporations with tolling and bonding authority.^{xxi}

Joint Operating Agencies. Two or more cities or public utility districts or combinations of cities and public utility districts may form an operating agency (a “JOA”) to own, construct, finance and operate electric generation and/or transmission facilities.^{xxii} JOAs are formed as municipal corporations with bonding authority.^{xxiii}

Recommendations for Alternative or Additional Statutory Authority

As demonstrated by the array of entities authorized to be formed under Washington law to finance public projects with regional benefits, including by agreement among public entities of Washington or another state, there are a number of alternative approaches to authorizing the formation of an entity for the Hood River Bridge project. Each of the identified statutes could, with legislative amendments, be a vehicle for providing the necessary authority for the project. None of the statutes clearly provides all of the necessary authority without legislative amendment.

The ICA allows Washington public agencies and political subdivisions of another state to form a separate legal entity to complete an interlocal project, but the types of entities permitted to be formed are limited. Legislative amendments would be required to allow local governments to form a separate legal entity in the form of a public corporation or corporation for municipal purposes. In addition, amendments are required to provide the entity with tolling authority and to make clear that the formed entity is a constituted authority or political subdivision authorized to issue tax-exempt bonds. More fundamentally, the ICA is a vehicle for local governments to do jointly what each can do individually. Because cities, counties and port districts do not all have authority to impose tolls (and to adjust such tolls from time to time as necessary to generate revenues to pay bonds), the underlying local government tolling authority would need to be amended for an interlocal entity formed under the ICA to have the requisite authority. Likewise,

because the ICA requires that any interlocal agreement that includes public agencies of another state be treated as an interstate compact, the ICA would need to be amended to provide flexibility for local government public agencies to enter into an agreement without elevating the agreement to one between the states as states and therefore implicating the states in any enforcement action. It may be more appropriate to provide (or amend) separate statutory authority for formation of a local government entity by a group of Washington and Oregon counties, cities and port districts to provide the requisite authority for local governments to enter into cross-border, interlocal agreements to form a local government entity under the local governments' respective state laws for the purpose of financing regional bridge projects with toll revenue bonds.

All of the other existing specific statutes allowing for formation of a regional entity limit the types of local governments that can participate (e.g., port development authorities) or the types of facilities that can be financed (e.g., JMUSAs or public facilities districts) in a manner that would not allow a group consisting of cities, counties and ports from Washington and Oregon to jointly form an entity to finance a bridge project. These specific statutes do, however, provide models for joint formation of regional entities, including in the case of the JMUSA statute bistate entities, to finance particular types of public infrastructure projects. In some cases, the formed entity has broader or different powers than the cities, counties or other local governments that formed the entity. For example, public facilities districts have specific sales tax authority not granted to the forming members, and transportation benefits also have specific tax and tolling authority. The statutes allowing for formation of a special purpose regional entity not only provide a model for various local governments to form an entity with additional powers related to financing a particular type of project, they also provide statutory clarity regarding structure and purpose that entities formed under the broader, more generic ICA may not. That clarity may be helpful in communicating the nature and authority of the entity to various audiences, including ratings agencies and bond investors.

Whether the Legislature proceeds to amend the ICA to allow cities, counties and ports to enter into an agreement to form jointly a public corporation with authority to impose tolls and issue tax-exempt bonds or whether the Legislature adopts a separate stand-alone statute authorizing cities, counties and ports to enter into an agreement to form jointly a public or municipal corporation with this authority, the following provisions should be considered for inclusion:

- Provide for formation:
 - o Include general, not special, legislation to allow formation of a public corporation or corporation for municipal purposes in compliance with the requirements of Article II, Section 28 (prohibiting special legislation granting corporate powers and privileges) and Article XI, Section 10 (requiring that corporations for municipal purposes be created by general not special laws);
 - o Identify eligible members, to include Washington and Oregon cities, counties and port districts;
 - o Specify the local action that forms public corporation, for example, execution and filing of a formation agreement among the members. The formation agreement may include a charter for the public corporation; and
 - o Provide a timeframe within which any challenge to the formation must be brought.
- Specify the public purpose (to own, finance and operate public bridge and related facilities).

- Designate the entity as a public corporation or corporation for municipal purposes.^{xxiv}
- Make clear that the entity has no authority to tax or impose special assessments.
- Note application of laws applicable to public entities for clarity:
 - Tort liability (Chap. 4.96 RCW);
 - Requirements concerning local government audits by the state auditor and applicable accounting requirements (Chap. 43.09 RCW);
 - The public records act (Chap. 42.56 RCW);
 - Prohibitions on using facilities for campaign purposes (RCW 42.17A.555);
 - The open public meetings act (Chap. 42.30 RCW);
 - The code of ethics for municipal officers (Chap. 42.23 RCW);
 - Local government whistleblower protection laws (Chap. 42.41 RCW); and
 - Consider whether the same exemptions from property tax, leasehold excise tax and other tax exemptions that apply to PDAs and other municipal entities will apply to the public corporation (see e.g., RCW 35.21.755).
- Provide for governance by a board appointed by the public agency members, and provide for appointment and removal by these members with or without cause (for example, as set forth in the formation agreement).
- Provide general corporate powers (e.g., to contract, sue and be sued).
- Provide authority regarding ownership and operation of property, and authorize the transfer of real or personal property or services to the entity with or without consideration.
- Authorize the board to impose and adjust tolls (without further approval), collect toll revenues and pledge toll revenue.
- Authorize the issuance of revenue bonds:
 - Specify status either as political subdivision (if the entity has a substantial power of eminent domain) or constituted authority for purposes of issuance of tax-exempt bonds;
 - Authorize revenue bonds paid from gross or net revenues deposited to a special fund;
 - Authorize pledge of toll and other revenue to the payment of bonds;
 - Provide that upon the pledge of such revenues, bond owners have a perfected statutory lien on the pledged revenue without further filing or other steps (and protecting bond owners from impairment of contract, including impairments resulting from future legislative amendments);
 - In companion Oregon legislation, make clear that revenue bonds issued by the public corporation are not subject to Oregon referendum procedures in ORS 287A.150(2) to (6), and make clear the status of the entity as a public body, the obligations of which are exempt from Oregon income taxes under ORS 287A.345;
 - Recite that all revenue bonds of the public corporation are special limited obligations of the public corporation; and
 - Recite that there is no recourse to members, except by express agreement. Require that all revenue bonds include a recital establishing that the bond, note, or evidence of indebtedness is not an obligation of any member or any state, and that

neither the faith and credit, nor the taxing power of any state, any subdivision or agency of the state, or any member is pledged to pay the principal, interest, or premium, if any, on the bond, note, or evidence of indebtedness.

- Authorize the entity to receive and administer federal, state and other grants and loans.
- Consider application of procurement requirements, including in connection with public-private partnerships.
- Consider whether the entity will have power of eminent domain.
- Consider whether the agreement will have the status of an interstate compact (i.e., an agreement between the states as states).
 - o If the agreement will have the status of an interstate compact, the Oregon legislation also will need to allow for this status. In addition, the legislation will need to address the right of the State to be made whole for any damages or liability that it may incur by being joined as a party to the agreement.
- Confirm that the legislation is substantially similar to the Oregon legislation so that both the Washington and Oregon local government entities are authorized to form an entity by interlocal agreement with the requisite statutory authority.
- Provide for the disposition of net assets on dissolution or insolvency to the members or to the municipality in which the entity is located.
- Note that the powers conferred are supplemental.

Report authors have reviewed and provided comment on draft legislation prepared by the Hood River Bistate Working Group that provides new, standalone authority for cities, counties and ports to enter into an interlocal agreement to form a public corporation to accomplish a project such as the Hood River bridge project. The draft legislation takes into consideration the points noted above.

ⁱ In addition to entities formed under the ICA, other entities formed under other statutory authority to complete joint projects include South Sound 911, Seattle Southside Regional Tourism Authority, and public facilities districts, among others.

ⁱⁱ RCW 39.34.020(1).

ⁱⁱⁱ RCW 39.34.040. See also J. Litwak, *State Border Towns and Resiliency: Barriers to Interstate Intergovernmental Cooperation*, 50 IDAHO L. REV. 193, 201–07 (2014), Vol. 50, No. 2 (Sept. 2014) (discussing the various issues raised by interlocal cooperation laws that deem an interlocal agreement among local governments to have the status of an interstate compact).

^{iv} RCW 39.34.040.

^v RCW 39.34.030(3).

^{vi} RCW 39.34.030(4)(a).

^{vii} RCW 47.56.031 provides that “[n]o tolls may be imposed on new or existing highways or 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.”

^{viii} RCW 53.34.010.

^{ix} RCW 53.34.010.

^x RCW 36.73.040. Note that, consistent with RCW 47.56.850, the toll must be reviewed and approved by the State Transportation Commission if the toll, or change in toll rate, would have a significant impact on the operation of any state facility.

^{xi} See 26 U.S. Code § 103. Pursuant to ORS 287A.345, interest on bonds of a public body is exempt from personal income tax under ORS chapter 316. This report does not address what constitutes a “public body” under Oregon law.

^{xii} For example, a single city or county can form a public corporation or authority under RCW 35.21.730 et seq. (the “PDA Act”) as a constituted authority to issue tax-exempt bonds to finance the project (if the project otherwise

qualifies for tax-exempt financing). Because only a single city or county may form a PDA under the PDA Act, a group of cities, counties and port districts are not able to jointly form a PDA under the PDA Act. One city or county may agree under the ICA to form a PDA for a joint project, but this approach may be considered cumbersome and requires one of the city or county members to alone take on formation and oversight of the PDA. See RCW 35.21.745.

^{xiii} Prior Treasury Regulation § 1.103-1(b). Note, this regulation predates the current Tax Code but continues to serve as guidance.

^{xiv} See *Commissioner v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945).

^{xv} See *Philadelphia National Bank and Philadelphia National Corp. v. United States*, 666 F.2d 834 (2d Cir. 1981) (holding that a minimal grant of police power was not sufficient to establish that Temple University was a political subdivision of the Commonwealth of Pennsylvania). See also IRS Revenue Ruling 77-165. The IRS found that the right to exercise the power of eminent domain in specific projects designated by the legislature was not a substantial power of eminent domain. See also PLR 201104020. The IRS held that an Authority did not have the substantial power of eminent domain when exercise of the power was subject to consent of the city council.

^{xvi} Prior Treasury Regulation 1.103-1(b); see also *Philadelphia National Bank*, 666 F.2d at 842 (a “...duly ‘constituted authority’ is a wholly governmentally controlled entity, performing a wholly governmental function, and it is created to be in effect the alter ego of the governmental unit.”).

^{xvii} These factors have been described slightly differently in various pieces of guidance from the IRS. See also Rev. Rul. 60-248, 1960-2 C.B. 35; PLR 200307004; TAM 200646017.

^{xviii} RCW 39.106.030(2).

^{xix} RCW 39.106.040.

^{xx} RCW 36.73.020(2).

^{xxi} RCW 36.73.040; RCW 36.73.070. See also Public Transportation Benefit Areas formed under Chap. 36.57A RCW and Regional Transit Authorities formed under Chap. 81.112 RCW.

^{xxii} RCW 43.52.360.

^{xxiii} RCW 43.52.360; RCW 43.52.3411.

^{xxiv} See H. Spitzer, *A Local Government By Any Other Name*, Proceedings of the Washington State Association of Municipal Attorneys (Fall 2009), available at <https://mrsc.org/getmedia/D2F2FDF4-9C9C-4D03-8945-0A107182A50B/wsama534-7.aspx> (recommending that “municipal corporation” become the standard classification for the wide range of local government entities created under Washington law).