

No. 40521-1-II

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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WASHINGTON OFF HIGHWAY VEHICLE ALLIANCE, NMA TRAIL  
DIVISION, DAVID S. BOWERS, KATHLEEN J. HARRISON, JON  
O'BRIEN, and KURT J. KOOTNEKOFF,

Appellants,

v.

STATE OF WASHINGTON, JAMES L. MCINTIRE, in his capacity as  
Treasurer thereof, STATE OF WASHINGTON STATE PARKS AND  
RECREATION COMMISSION, and REX DERR, in his capacity as  
Director thereof,

Respondents.

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**WASHINGTON OFF HIGHWAY VEHICLE ALLIANCE, NMA  
TRAIL DIVISION, DAVID S. BOWERS, KATHLEEN J.  
HARRISON, JON O'BRIEN, and KURT J. KOOTNEKOFF'S  
REPLY BRIEF**

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**TABLE OF CONTENTS**

Summary of Argument .....1

Argument .....3

I. COLLATERAL ESTOPPEL CANNOT BAR THIS COURT’S  
CONSIDERATION OF THE MERITS.....3

    A. The Issues Are Not “Identical”.....3

    B. There Is No “Privity” for Purposes of Collateral  
    Estoppel, and No Case for “Virtual Representation.”.....4

    C. Application of Collateral Estoppel Would Be Unjust  
    and Contrary to the Public Interest. ....9

II. THE LEGISLATURE MAY NOT DISBURSE A  
“REFUND” BY RE-APPROPRIATING IT TO COVER  
BUDGET SHORTFALLS.....10

    A. The Legislature Is Without Power to Define  
    “Refund” to Include the Challenged Appropriation. ....10

    B. The *NMA* Case Is Not Controlling.....14

    C. Other Legislative Appropriations Cannot Turn This  
    One into a “Refund”.....18

Conclusion .....21

## TABLE OF AUTHORITIES

### Cases

<i>Belas v. Kiga</i> , 135 Wn.2d 913 (1998) .....	14
<i>Beres v. United States</i> , 92 Fed. Cl. 737 (2010) .....	8
<i>Everett v. Perez</i> , 78 F. Supp.2d 1134 (E.D. Wash. 1999) .....	8
<i>Garcia v. Wilson</i> , 63 Wn. App. 516, P.2d 964 (1991) .....	5
<i>Kennedy v. City of Seattle</i> , 94 Wn.2d 376 (1980) .....	9
<i>Northwest Motorcycle Ass'n v. State Interagency Comm'n for Outdoor Recreation</i> , 127 Wn. App. 408 (2005), <i>rev. denied</i> , 156 Wn.2d 1008 (2006) .....	<i>passim</i>
<i>In re Coday</i> , 156 Wn.2d 485 (2006) .....	6
<i>In re Hendrickson</i> , 12 Wn.2d 600 (1942) .....	19
<i>Pannell v. Thompson</i> , 91 Wn.2d 591 (1979) .....	12
<i>Southcenter Joint Venture v. National Democratic Policy Committee</i> , 113 Wn.2d 413 (1989) .....	9

*State ex rel. Heavey v. Murphy*,  
138 Wn.2d 800 (1999) .....13, 14

*Stevens County v. Futurewise*,  
146 Wn. App. 493 (2008)  
*rev. denied*, 165 Wn.2d 1038 (2009) .....5, 7

**Constitution, Statutes, and Rules**

Washington Const. Article II, § 40 ..... *passim*

RCW 34.05.570(1)(a) .....10

RCW 34.05.570(4)(C)(i).....10

RCW 46.09.170(1).....1, 11, 15, 16, 18

RCW 46.09.170(2)(a)-(c).....18

RCW 46.09.179(2)(c) .....16, 19

RCW 46.09.250 .....18

RCW 46.09.280 .....17

RCW 46.09.900 .....18

**Other Authority**

Webster’s Third New International Dictionary (1993).....12

## Summary of Argument

The gist of Respondents' argument is that once the Legislature declared in RCW 46.09.170(1) that "the state treasurer shall refund from the motor vehicle fund one percent of the motor vehicle fuel tax revenues," the Legislature could do whatever it wanted with that money, because it was a "refund as authorized by law" within the meaning of Article II, § 40(d) of the Washington Constitution. It is a dark day indeed when the Attorney General of the State of Washington can stand before the Courts of Washington asserting that a "refund" of taxes can mean spending them at the whim of the Legislature. The Attorney General asks, in substance, for this Court to render the solemn Constitutional limitations on the use of fuel excise tax revenues a dead letter.

The Attorney General first suggests that this Court is bound by collateral estoppel from considering the question presented by virtue of *Northwest Motorcycle Association v. Interagency Commission for Outdoor Recreation*, 127 Wn. App. 408 (2005), *rev. denied*, 156 Wn.2d 1008 (2006) (the "*NMA* case"). But the *NMA* case could not have answered the question whether "this appropriation" was lawful (*cf.* Respondents' Brief ("Resp. Br.") at 1), because the *NMA* Court did not have "this appropriation" before it. Respondents acknowledge that "the purpose of [the] current appropriation is different from the one in *NMA*",

but claim this difference is immaterial based on a post-judgment Legislative statement that the “park system operations and maintenance appropriation benefited nonhighway recreational fuel excise taxpayers”. (*Id.*) Collateral estoppel, however, requires identical issues and identical parties, and there can be no issue preclusion here, especially with respect to appellants who had nothing to do with the prior litigation.

As to the merits, the Legislature is without power to re-define Article II, § 40’s requirement of a “refund” to mean anything other than returning the funds “to those people who used the gasoline,” *NMA*, 127 Wn. App. at 415. This Court might follow *NMA* to find that a carefully-crafted grantmaking program to provide specific benefits to the specific taxpayer classes was at least arguably a “refund”, but re-appropriations out of the NOVA program to pay the salaries of Parks employees providing benefits to all Washingtonians (and not off-road vehicle (ORV) interests who used the gasoline) do not constitute “refunds” to those paying the taxes by any reasonable construction of the word. Appellants’ challenge does not require this Court to set aside the NOVA program and “decades of nonhighway fuel excise tax refund practice” (Resp. Br. 35); only the most recent Legislative diversion of those NOVA program funds is before the Court for review.

## **Argument**

### **I. COLLATERAL ESTOPPEL CANNOT BAR THIS COURT'S CONSIDERATION OF THE MERITS.**

Three out of the four requirements for application of the doctrine of collateral estoppel are absent here: the issues are not “identical”; there are parties before the Court not “in privity with a party to the prior litigation”; and application of the doctrine would “work an injustice”.

(*See* Resp. Br. 26 (quoting *Rains v. State*, 100 Wn.2d 660, 665 (1983)).)

#### **A. The Issues Are Not “Identical”.**

Respondents read the *NMA* case as permitting the Legislature to disburse “refunds” to any and all persons, by any and all means, without regard to the relationship between such expenditures and the class of taxpayers paying the taxes. (Resp. Br. 14.) But interpreting *NMA* to allow the Legislature to disburse the refund “as it sees fit” (*NMA*, 127 Wn. App. at 416), without regard for limited context which in the *NMA* Court made this remark, is not reasonable. As set forth in Point II(B), the *NMA* Court was addressing the constitutionality of grants made through the NOVA program, not general appropriations to Parks.

Respondents cite no case, and Appellants are aware of none, where a Constitutional challenge to one statute is regarded as “identical” to a Constitutional challenge to another, different statute. The doctrine of

collateral estoppel is not satisfied with a mere “similarity” of issues; it requires the “identical” issue to be determined. Whether the Legislature may re-appropriate NOVA program funds for the benefit of boaters and park users generally is manifestly not an *identical* issue to whether the funds may be used to build and maintain ORV trails and nonmotorized recreational facilities. Appellants in substance admit that collateral estoppel cannot apply when they characterize the statutes as “substantially similar” (Resp. Br. 27) rather than “identical”.

It is only by mischaracterizing the issue determined in the *NMA* case well beyond the specific ruling into the general proposition that the Legislature can “refund” excise tax revenues to anyone and everyone that the issues can be mischaracterized as “identical”.

**B. There Is No “Privity” for Purposes of Collateral Estoppel, and No Case for “Virtual Representation.”**

Even if the Northwest Motorcycle Association were collaterally estopped by virtue of its participation in the *NMA* case—and it should not be—the remaining appellants cannot be considered to have been “in privity” with Northwest Motorcycle Association.<sup>1</sup>

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<sup>1</sup> Respondent’s assertion that Mr. Stuck, “the President of Appellant Washington Off-Highway Vehicle Alliance (WOHVA), challenged the 2003-04 appropriations” (Resp. Br. 13) is somewhat misleading in that WOHVA did not then exist.

Lacking any conventional privity relationship, Respondents analogize to *Garcia v. Wilson*, 63 Wn. App. 516 (1991), a case in which a passenger injured in an auto accident sought damages from the driver of the other car. She had testified in a prior case brought by her driver, wherein the Court had found that her driver was travelling at excess speeds with no headlights, and that the other driver was not negligent.

The *Garcia* Court relied upon a narrow exception to the privity requirement, so-called “virtual representation”. *Id.* at 521. As *Garcia* explains,

“This doctrine allows collateral estoppel to be used against a nonparty when the former adjudication involved a party with substantial identity of interests with the nonparty. Of course, such preclusion must be applied cautiously in order to insure that the nonparty is not unjustly deprived of her day in court. Therefore, cases which have utilized the doctrine have developed a number of factors which, in essence, insure that the nonparty has had a vicarious day in court.

“The primary factor to be considered is whether the nonparty in some way participated in the former adjudication, for instance as a witness. The issue must have been fully and fairly litigated at the former adjudication. That the evidence and testimony will be identical to that presented in the former adjudication is another important factor. Finally, there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene but presents no valid reason for doing so.”

*Id.* at 521-22; *see also Stevens County v. Futurewise*, 146 Wn. App. 493, 508 (“Washington courts apply this [virtual representation] doctrine only

when the nonparty participated in the former adjudication . . . and when there is evidence that the subsequent action ‘was the product of some manipulation or tactical maneuvering’” (quoting *Garcia*), *rev. denied*, 165 Wn.2d 1038 (2009). Respondents do not even attempt that the circumstances here support “virtual representation,” for there is no dispute that three or more appellants had nothing to do with the former litigation.

Respondents also claim that these “parties assert interests as part of a purported class,” citing cases involving elections and land use decisions. (Resp. Br. 28.) *In re Coday*, 156 Wn.2d 485 (2006), involved a citizen contesting an election who told the Court to “utilize the evidence from the [prior] case” and that she did “not have the legal resources or any desire to waste the Court’s time by reintroducing relevant evidence and testimony already covered in the [prior] case”. *Id.* at 501 n.3. The Court articulated a special *res judicata* rule (not collateral estoppel on issues) based on the fear of “numerous election contests being conducted in multiple jurisdictions, which could result in conflicting verdicts, ongoing uncertainty in the outcome of elections, and the needless expenditure of judicial resources”. *Id.* at 502 n.4. The rule of *In re Coday* has no application when one citizen challenges one statute, and another citizen subsequently challenges a different statute.

*Stevens County v. Futurewise*, 146 Wn. App. 493 (2008), involved a citizen activist, Ms. Wagenman, who challenged a Stevens County ordinance and failed. A citizens group, Futurewise, “had contact with Ms. Wagenman during the adoption proceedings for Title 13, shared her concern with the county’s compliance with GMA, and admittedly provided her advice on occasion . . .”. *Id.* at 504. Indeed, Futurewise publicly claimed credit for helping “local activists” such as Ms. Wagenman. *Id.* at 504-05. However, such conduct was not sufficient to show that “Futurewise participated in Ms. Wagenman’s litigation or engaged in tactical maneuvering. Consequently, virtual representation is not applicable.” *Id.* at 508.

Here, in an effort to demonstrate participation or tactical maneuvering, the State devotes three pages of its brief to confidential, attorney-client privileged materials that were erroneously posted in a non-password protected area of WOHVA’s website (they are no longer posted where the public may access them). The Superior Court declined to rule on Appellants’ objection to the admission of such evidence because the Superior Court determined not to consider the evidence. (Verbatim Report of Proceedings, Mar. 5, 2010, at 10-11; CP725.) No evidence was offered to authenticate this evidence beyond the declaration of Respondents’ attorney who downloaded it, and even if that were sufficient

to authenticate it, it is manifestly only admissible against Appellant WOHVA (it is hearsay, and could at best be considered the admissions of a party opponent).

There is no dispute that three individual appellants had nothing to do with the *NMA* case (CP637; CP658; CP677), and there is no admissible evidence tying them in any way to any actions of any other appellants. Nor is there any sense in which the three individual appellants could be analogized to *Futurewise* or any other assertedly “maneuvering” litigant, because they had no role in the prior litigation whatsoever.

In order for Respondents to prove “virtual representation,” “there *must* be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene”. *Everett v. Perez*, 78 F. Supp.2d 1134, 1140 (E.D. Wash. 1999) (quoting *Garcia*, 820 P.2d at 967; emphasis in original). Here, the separation between the suits resulted from the Legislature’s decision to expand yet further its unconstitutional conception of an Article II, § 40 “refund” to mean any appropriation to backfill budgetary shortfalls, not “co-plaintiffs conspir[ing] to use two possible proceedings to gain a tactical advantage,” *Beres v. United States*, 92 Fed. Cl. 737, 761 (2010) (applying Washington law). There is simply

no sense in which appellants Harrison, Kootnekoff and O'Brien controlled the prior litigation; they had nothing to do with it.

**C. Application of Collateral Estoppel Would Be Unjust and Contrary to the Public Interest.**

Individual appellants Harrison, Kootnekoff, and O'Brien all offered testimony as to the injustice of barring their claims on account of the prior *NMA* litigation. (CP638; CP659; CP678.) Respondents complain that their testimony was not "substantive" (*see* Resp. Br. 22), but that is because Respondents stipulated as to their standing (CP549-50), and there is and was no dispute as to the massive loss of ORV recreational opportunities arising from the Legislature's unlawful re-appropriation of the funds.

Finally, the Washington Supreme Court has repeatedly rejected attempts to apply the doctrine of collateral estoppel where, as here, "an important question of public law" is involved. *Kennedy v. City of Seattle*, 94 Wn.2d 376, 379 (1980) (applying doctrine to assess constitutionality of a Seattle ordinance despite prior determination with almost identical parties); *see also Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wa.2d 413, 419 (1989) (applying doctrine to assess same first amendment rights on same piece of private property). The effectiveness of the People's Constitutional limitations on the

Legislature's spending power is manifestly an important question of public law which merits full consideration by this Court.

**II. THE LEGISLATURE MAY NOT DISBURSE A "REFUND" BY RE-APPROPRIATING IT TO COVER BUDGET SHORTFALLS.**

As Respondents acknowledge, Appellants challenge expenditures by Parks as unconstitutional pursuant to RCW 34.05.570(4)(C)(i), and "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity" (RCW 34.05.570(1)(a)). While there are cases suggesting that the Legislature, like a common criminal, is to be regarded as innocent of contravening Constitutional limitations unless its transgressions are proven beyond a reasonable doubt, that doctrine has no preclusive force where the Constitutional provision is unambiguous and the Legislative scheme plainly contravenes it.

**A. The Legislature Is Without Power to Define "Refund" to Include the Challenged Appropriation.**

At the outset, it is misleading to characterize the intent behind Article II, § 40(d) as misuse of "*highway-related*" fuel tax revenues. (Resp. Br. 5.) The plain language of Article II, § 40(d) covers "all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel," and there is not a hint of any holding in the numerous cases construing this provision that some of these taxes may

somehow be deemed “non-highway-related” and thereby outside the Constitutional protections. (*See also* CP604 (Voter’s Pamphlet complains that “. . . in excess of \$10,000,000 of your gas tax money was diverted away from street and highway improvement and maintenance for other uses).)

Nor is there any hint in the language or history of the provision that its purpose was to “ensure that fees and taxes *generated by users of public highways, roads and streets* were used only to improve and maintain those transportation systems”. (Resp. Br. 6; emphasis added.) The manifest purpose was to dedicate the voters’ “gas tax money” to “highway purposes”. It is obvious that the original purpose of the refund language in Article II, § 40(d) was to limit the expenditures to the improvement and maintenance of highways, or return the taxes collected to those who paid them.

Nevertheless, Respondents assert that once the Legislature declared fuel excise tax revenues to be “refunded” pursuant to RCW 46.09.170(1), any “decision regarding the expenditure of tax refunds ‘comes within [the Legislature’s] plenary power of taxation’”. (Resp. Br. 32 (quoting *NMA*, 127 Wn. App. at 416).) In substance, Respondents urge this Court to hold that an abstract declaration that amounts in the highway fund are “refunded” then permits the Legislature to do whatever

it wants with the money. This demonstrates a profound disrespect for the very ideal of Constitutional limitations on legislative action.

It is certainly true, as Respondents point out, that “[t]he decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative”. (Resp. Br. 32 (quoting *Pannell v. Thompson*, 91 Wn.2d 591, 599 (1979).) But as the *Pannell* case went on to explain in the next sentence “[w]e will not direct the Legislature to act in this regard *unless creation of a program and/or the funding thereof is constitutionally mandated.*” *Pannell*, 91 Wn.2d at 599 (emphasis added). Article II, § 40 constitutes a constitutional mandate that any fuel tax revenues not expended on highways be “refunded”; it is a constitutional mandate for a program of *refunds*, not a blank check for expenditures of any sort.

Thus this Court must police the Legislature’s disbursement of the “refund” to assure that the legislative scheme is consistent with the Constitutional requirement that the monies be “refunded”. The parties seem to be in agreement with the declaration in the *NMA* case that:

“The phrase ‘refunds authorized by law for taxes paid on motor vehicle fuels’ is unambiguous. A refund is generally ‘a sum that is paid back.’ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1910 (1993). Article II, section 40 merely provides that this sum must be authorized by law and that it is paid back from taxes paid for gasoline. The clear inference is that *the sum should be returned to those people who used the gasoline for nonhighway purposes.*”

*NMA*, 127 Wn. App. at 415 (emphasis added).

The Constitutional requirement to assure that “the sum should be returned to those people who used the gasoline” amply distinguishes this case from all those cited by Respondents. For example, in *State ex. rel. Heavey v. Murphy*, 138 Wn.2d 800 (1999), a taxpayer challenged the Legislature’s decision to deposit motor vehicle excise tax “tab” revenues (“MVET revenue”) into the motor vehicle (highway) fund, despite the proviso at the end of Article II, § 40 declaring that it did not apply to certain vehicle-related fees. The Court explained that:

“If, as a result of this proviso, this language does not ‘apply to’ or ‘include’ MVET revenue, the logical import of such an exception is that the deposit of MVET revenue into the motor vehicle fund is simply not *required* and its expenditure is *not limited* by the terms of the enacting clause. It is not reasonable, however, to believe that where a practice is *not required* it is necessarily *forbidden*, or that, quite paradoxically, by expressly *not being limited* the expenditure of MVET revenue is somehow *limited*”. *Id.* at 812-13 (emphasis in original).

It was this Legislative action—to put monies *into* the highway fund—that was held within the “plenary power” of the Legislature with respect to taxation.

Here, by contrast, there is “conflict with some *specific* or *definite* provision of the constitution” (*id.* at 813; emphasis in original): the Legislative decision to give the monies to Parks employees conflicts with the Constitutional command to use the monies for highway purposes, or

return them to the taxpayers. Put another way, “the Legislature possesses a plenary power in matters of taxation *except as limited by the Constitution*,” *Belas v. Kiga*, 135 Wn.2d 913, 919 (1998) (emphasis added), and here the Constitution expressly limits the Legislature’s plenary powers.

Respondent’s suggestion that “the Legislature retained the power to determine the amount, timing *and use* of any amount refunded from the motor vehicle fund to a general fund account” (Resp. Br. 35; emphasis added) essentially says that the Legislature can call *any* spending scheme a “refund” without violating Article II, § 40. Such a position is flatly contrary to the Supreme Court’s prior holding with respect to this provision that “the constitution does not grant to the legislature the power or authority, to define by legislative enactment, the meaning and scope of a constitutional provision”. *Murphy*, 138 Wn.2d at 810 (quoting *Washington State Highway Comm’n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 222 (1961)). The Legislature is simply without power to redefine “refund,” for purposes of Article II, § 40, as “appropriations providing some general benefit to taxpayers”.

**B. The NMA Case Is Not Controlling.**

It is true that to the extent the Courts of Washington determine to let the Legislature depart from the simple, common sense meaning of

“refund” to mean something other than returning monies directly to individual taxpayers, the Courts will inevitably have to “evaluate whether each particular spending purpose to which a legislature chooses to apply the RCW 46.09.170(1) refund provides a sufficient benefit to underlying taxpayers” (Resp. Br. 35). The *NMA* Court manifestly believed that its holding was limited to a finding that “the Legislature’s dispersal of that refund *through NOVA* for the benefit of the affected taxpayers comes within its plenary powers of taxation,” 127 Wn. App. at 416 (emphasis added); *see also id.* at 415 (“our only concern is whether the funds transferred to the NOVA program qualify as refunds authorized by law”). At the time the *NMA* Court made its holding, the Legislature had innovated beyond disbursement of the “refund” through the NOVA program, but the *NMA* Court did not understand itself to be approving any such innovative appropriation; the question presented was whether the Legislature could direct the refund to “recreational trails that cannot be used by motorized vehicles”, *NMA*, 127 Wn. App. at 410, in the context of the NOVA program.

This Court faces a clear record completely untethered to the specific factual record, including the fuel use study, upon which the *NMA* Court relied to sustain NOVA program spending. The language of the Legislative appropriation does not even attempt to return the funds to the

affected taxpayers. Rather, its purpose is plain from the statutory language: “to the state parks and recreation commission for maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users”. (CP63 (§ 944(4).)

There is no dispute that:

- Not one dime of the appropriation will in fact be spent on “improv[ing] accessibility for boaters and off-road vehicle users”—it will all be spent for salaries of Park employees;
- ORV users can access but a single facility within the entire State of Washington providing benefits to them, which benefits they already fund through other Legislative direction of the RCW 46.09.170(1) “refund” amount (RCW 46.09.170(2)(c)); and
- Because of the challenged re-appropriation, amounting to 58.5% of the “refunded” taxes, all ORV benefits from the NOVA program ceased.

In short, the only way “*the sum [may be said to] be returned to those people who used the gasoline for nonhighway purposes,*” *NMA*, 127 Wn. App. 415, is the notion that paying the salaries of Parks employees might somehow return benefits to nonmotorized recreationalist taxpayers who might someday visit the parks.

Beyond a reasonable doubt, this renders the Constitutional requirement of a refund meaningless. If the Legislature can arbitrarily *exclude* an entire class of taxpayers (ORV interests such as Appellants) from the refund, it is no refund at all.<sup>2</sup> And if the Legislature can arbitrarily *include* entire classes besides “those people who used the gasoline” (*NMA*, 127 Wn. App. at 415)—here Washingtonians generally and even boaters already entitled to a refund—it is no refund at all. And if the Legislature can “return sums of money” to taxpayers by paying the salaries of its employees who might or might not even be working to provide benefits to those paying the gasoline taxes, it is no refund at all.

This is a far cry from the carefully-crafted grantmaking program upheld in *NMA*, where specific grants to Parks were for specific benefits to recreational interests, subject to continuous planning and review to maintain a “refund” distribution of benefits. *See* RCW 46.09.280 (provisions to “ensure that overall expenditures reflect consideration of the

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<sup>2</sup> Respondents devote considerable effort to demonstrating that only 20% of the motor vehicle excise tax revenues were associated with motorized recreational activities of the sort in which petitioners are interested. While petitioners do not agree with the methodology used to come to this conclusion, the history demonstrates that the Legislature until the present case made an effort to comply with the Constitutional command that “the funds should be returned *to those people* who used the gasoline,” *NMA*, 127 Wn. App. at 415 (emphasis added), and not others. There is no dispute the presently-challenged appropriation abandons any effort to target the benefits to those paying the taxes.

results of the most recent fuel use study”); RCW 46.09.250 (statewide plan). If this re-appropriation of NOVA funds is approved, the Legislature will be able to “refund” these funds to backfill any particular budgetary shortfalls in any agencies arguably providing “benefits” to affected taxpayers. No taxpayers will have any incentive to support any future “refund” programs because any restrictions on spending purposes will be meaningless.

**C. Other Legislative Appropriations Cannot Turn This One into a “Refund”.**

Respondents focus on the fact that the Legislature has taken some of the RCW 46.09.170(1) refund amount (41.5%) and appropriated it for various purposes not challenged in this or any other action. *See* RCW 46.09.170(2)(a)-(c). Respondents cite no case, and Appellants are aware of none, where the Legislature has been permitted to cure some breach of Constitutional restrictions by identifying an offsetting action somewhere else. Here, the Legislature expressly intended to permit specific challenges to specific provisions of this program, rather than the program generally. *See* RCW 46.09.900 (“If any provision of this 1971 amendatory act, *or its application to any person or circumstance is held invalid*, the remainder of this 1971 amendatory act, or the application of the provision to other persons or circumstances is not affected”) (emphasis

added). This is in accord with general rules of judicial review that permit this Court to review the constitutionality of portions of a statute without striking down the legislative scheme as a whole. *In re Hendrickson*, 12 Wn.2d 600, 609 (1942). The specific sums here appropriated do not constitute a “refund” under any reasonable interpretation of the word, and cannot become “refunds” because of what is done with other sums.

For example, Respondents cite RCW 46.09.179(2)(c), which permitted two percent of the one percent of excise tax revenues “refunded” to be “credited to the ORV and nonhighway vehicle account and administered by the parks and recreation commission solely for the acquisition, planning, development, maintenance and management of ORV, nonmotorized, and nonhighway road recreation facilities”. (*See* Resp. Br. 10 (referring to this provision).) There has been no challenge to this provision, which expressly limits the expenditure to specific purposes related to the affected taxpayers. Respondents also cite a single \$325,000 appropriation to Parks “to construct and upgrade trails and trail-related facilities for both motorized and nonmotorized uses within state parks”. (Resp. Br. 13 (citing Laws of 2003, 1<sup>st</sup> Spec. Sess., ch. 26, § 366(2)).) But this appropriation was also expressly tied to specific purposes related to the affected taxpayers.

The present appropriation, by contrast, has not even the fig leaf of any limitation to benefits to a significant percentage of affected taxpayers, and is manifestly intended for the benefit of Washingtonians generally—and further for the benefit of boat owners who already enjoy the right to refunds on their excise taxes. The Legislature’s extraordinary post-judgment attempt to declare that the re-appropriation “will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities” (Resp. Br. 25 (quoting ESSHB 6444 § 936(4)).) cannot retroactively turn the re-appropriation into a refund. The post-judgment declaration even re-affirmed that the funds are to be spent for the benefit of Washingtonians (and others) who may even claim refunds under existing law (the boaters).

Respondents also argue that the appropriation only involves the “excess fund balance” in the NOVA account (Resp. Br. 19), a term which Respondents assert “refers to any amount that the Legislature deems unnecessary for the grant program” (*id.* at 12 n.31). *But the very notion of appropriating amounts “deemed unnecessary for the grant program” is incompatible with terming the appropriation a “refund”.* As emphasized in the *NMA* case, refund means that “the funds should be returned to those people who used the gasoline,” *NMA*, 127 Wn. App. at 415. To the extent that the Legislature finds that it is not necessary to “refund” the

funds, *it is no longer refunding them, it is re-appropriating them.* It was, of course, precisely to prevent re-appropriation of the fuel excise tax revenues that the People enacted Article II, § 40.

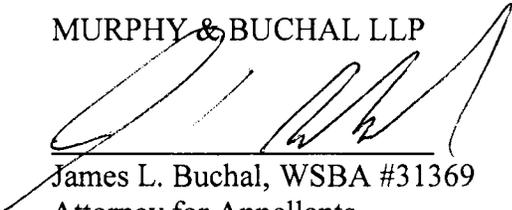
Certainly there can be no insinuation that the funds are “excess” insofar as the fuel tax revenues collected have been fully “refunded” to the taxpayer, because it is undisputed that the Appellant taxpayers, the minority motorized interests, are receiving nothing at all from the NOVA program.

### **Conclusion**

For the foregoing reasons, and the reasons set forth in the opening brief, the judgment of the Superior Court should be reversed, and the case remanded for further proceedings.

Dated: September 21, 2010.

MURPHY & BUCHAL LLP



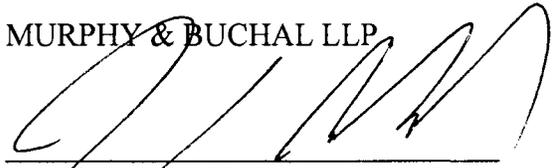
James L. Buchal, WSBA #31369  
Attorney for Appellants



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