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COURT OF APPEALS

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No. 40521-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WASHINGTON OFF-HIGHWAY VEHICLE ALLIANCE;
NORTHWEST MOTORCYCLE ASSOCIATION (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; WASHINGTON STATE PARKS AND
RECREATION COMMISSION, and REX DERR, in his capacity as
Director thereof,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATED ISSUES RELATING TO APPELLANTS’ ASSIGNMENT OF ERROR.....	2
III.	STATEMENT OF THE CASE	3
	A. Summary	3
	B. The Motor Fuel Excise Tax	4
	C. The Legislature Has a Long-Standing Practice of Refunding Taxes Paid on Fuel Used for Recreational Purposes off the Highway System and Spending These Sums on Recreational Facilities Likely to Benefit Such Taxpayers.....	7
	1. 1964—Fuel Excise Tax Refund for Marine Recreational Facilities	7
	2. 1971—Legislature Enacts ATV Act	8
	3. 1977—Legislature Amends the ATV Act to Include Additional “Off-Road Vehicles”	8
	4. 1986—Legislature Again Expands the Definition of Nonhighway Vehicle	9
	5. 2001—Legislature Requires an Independent Fuel Study.....	10
	6. 2003—Legislature Provides That Some NOVA Program Funds Can Be Used Solely for Nonmotorized Recreational Uses.....	12
	D. The NMA and Mr. Stuck Sue to Block the 2003-04 “Excess Fund Balance” Appropriations to Parks and Natural Resources	13

E.	The Legislative History Between Lawsuits	15
F.	Washington’s State Park System	16
G.	The 2009-11 “Excess Fund Balance” Appropriation.....	17
H.	Parks’ Spending Plans for the \$9.56 Million NOVA “Excess Fund Balance” Appropriation	20
I.	The Current Lawsuit	21
J.	The 2010 Amendment to the 2009-11 Appropriation.....	24
IV.	ARGUMENT	25
A.	Appellants Are Identical to the Petitioners in <i>NMA</i> for Collateral Estoppel Purposes and Should Be Barred From Relitigating the Constitutionality of RCW 46.09.170(1).....	26
B.	If This Court Reaches the Merits, It Should Apply the Deferential Review of <i>NMA</i> and Hold That This Appropriation for Park System Maintenance and Operations Also Falls Within the Legislature’s Plenary Power to Disburse the RCW 46.09.170(1) Refund and Is Therefore Consistent With Article II, Section 40	30
1.	Standard of Review	30
2.	Appellants Fail to Meet Their Heavy Burden of Proving the Appropriation Unconstitutional Beyond a Reasonable Doubt.....	33
V.	CONCLUSION	42

TABLE OF AUTHORITIES

Cases

<i>Belas v. Kiga</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998).....	32
<i>City of Walla Walla v. \$401,333.44</i> , 150 Wn. App. 360, 208 P.3d 574 (2009).....	26
<i>Everett v. Perez</i> , 78 F. Supp. 2d 1134 (E.D. Wash. 1999).....	29
<i>Garcia v. Wilson</i> , 63 Wn. App. 516, 820 P.2d 964 (1991).....	28
<i>In re Coday</i> , 156 Wn.2d 485, 130 P.3d 809 (2006).....	28
<i>In re Matteson</i> , 142 Wn.2d 298, 12 P.3d 585 (2000).....	25, 33
<i>Mutual of Enumclaw Ins. Co., v. State Farm Mutual Automobile Ins. Co.</i> , 37 Wn. App. 690, 682 P.2d 317 (1984).....	29
<i>Nw. Motorcycle Ass'n v. State Interagency Comm. for Outdoor Rec.</i> 127 Wn. App. 408, 110 P.3d 1196 (2005), <i>review denied</i> , 156 Wn.2d 1008 (2006).....	passim
<i>Pannell v. Thompson</i> , 91 Wn.2d 591, 589 P.2d 1235 (1979).....	32, 41
<i>Pierce Cy. v. State</i> , 150 Wn.2d 422, 78 P.3d 640 (2003).....	25
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	25
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	26, 27

<i>Retired Pub. Employees Coun. v. Charles,</i> 148 Wn.2d 602, 62 P.3d 470 (2003).....	32
<i>Seattle-First Nat'l Bank v. Kawachi,</i> 91 Wn.2d 223, 588 P.2d 725 (1978).....	26
<i>State ex rel. Heavey v. Murphy,</i> 138 Wn.2d 800, 982 P.2d 611 (1999).....	6, 32, 33
<i>State ex rel. O'Connell v. Slavin,</i> 75 Wn.2d 554, 452 P.2d 943 (1969).....	32
<i>Stevens Cy. v. Futurewise,</i> 146 Wn. App. 493, 192 P.3d 1 (2008).....	28
<i>WA Fed'n of State Employees v. State,</i> 127 Wn.2d 544, 901 P.2d 1028 (1995).....	32
<i>WA Water Jet Workers Ass'n v. Yarbrough,</i> 151 Wn.2d 470, 90 P.3d 42 (2004).....	32

Statutes

RCW 34.05	25
RCW 34.05.558	31
RCW 34.05.566(4).....	31
RCW 34.05.570	25
RCW 34.05.570(1)(a)	31
RCW 34.05.570(4).....	30
RCW 34.05.570(4)(c)(i).....	31
RCW 34.05.574	31
RCW 43.88.020(23).....	20

RCW 43.88.110(1).....	37
RCW 43.88.110(7).....	38
RCW 43.88.290	20, 38
RCW 46.09	41
RCW 46.09.020	33
RCW 46.09.020(13).....	3
RCW 46.09.020(2).....	15
RCW 46.09.020(7).....	4
RCW 46.09.165	37
RCW 46.09.170	8, 34, 38
RCW 46.09.170(1).....	passim
RCW 46.09.170(1) and (2)	37
RCW 46.09.170(2).....	9, 15, 37
RCW 46.09.170(2)(d).....	19
RCW 46.09.170(4).....	24
RCW 46.09.280	10, 12
RCW 46.10.150	3
RCW 46.68.080	3
RCW 79A.05.135.....	16
RCW 79A.05.305(1).....	16
RCW 79A.05.305(4).....	16

RCW 79A.25.030-.080	7
RCW 79A.25.070.....	7
RCW 82.36.280	3

Other Authorities

ESSB 6446 § 303	24
ESSHB 6444 § 936(4)	25
Initiative Measure No. 215	7
Restatement (Second) of Judgments § 39.....	29
Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805 (1985).....	26, 27

Session Laws

Laws of 1923, ch. 81, § 4.....	5
Laws of 1933, ch. 8.....	5
Laws of 1933, ch. 65, § 5.....	5
Laws of 1943, ch. 84, § 5.....	5
Laws of 1965, ch. 5.....	7
Laws of 1971, 1st Ex. Sess., ch. 47.....	8
Laws of 1971, 1st Ex. Sess., ch. 47, §§ 20-21	8
Laws of 1971, 1st Ex. Sess., ch. 47, §§ 21-22, 27	8
Laws of 1977, 1st Ex. Sess., ch. 220.....	8
Laws of 1977, 1st Ex. Sess., ch. 220, § 14.....	9

Laws of 1986, ch. 206, § 1.....	9
Laws of 1986, ch. 206, § 8.....	9
Laws of 1986, ch. 206, § 13.....	10
Laws of 2001, 2nd Spec. Sess., ch. 8, § 346.....	10
Laws of 2003, 1st Spec. Sess., ch. 26, § 365(3).....	12
Laws of 2003, 1st Spec. Sess., ch. 26, § 366.....	12
Laws of 2003, 1st Spec. Sess., ch. 26, §§ 366(1) and (2).....	13
Laws of 2003, ch. 185, § 1.....	12
Laws of 2003, ch. 185, § 2.....	12
Laws of 2004, ch. 105, § 5.....	12
Laws of 2007, ch. 241, §§ 15, 16(2)(d).....	15
Laws of 2007, ch. 522, § 953(4).....	15
Laws of 2009, ch. 564, §§ 303, 307, and 308.....	19
Laws of 2009, ch. 564, § 304.....	19
Laws of 2009, ch. 564, § 308.....	18
Laws of 2009, ch. 564, § 944(2)(a), (c).....	19
Laws of 2009, ch. 564, § 944(4).....	18

Constitutional Provisions

Article II, Section 40.....	passim
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I. INTRODUCTION

One percent of the state's annual motor vehicle fuel excise tax revenue is identified as a nonhighway recreational fuel tax refund. In 2009, the Legislature appropriated a portion of this refund for the purpose of operating and maintaining the state park system or providing increased access for boaters and off-road vehicle users. The question in this case is whether this appropriation is a valid use of the motor vehicle fund, or runs afoul of article II, section 40 of the Washington Constitution.

This question was correctly answered by Division III of this Court in *Nw. Motorcycle Ass'n v. State Interagency Comm. for Outdoor Rec. (NMA)*.¹ That court held that an appropriation for the construction and operation of nonmotorized trails within the same state park system, funded by the same tax refund, satisfied the requirements of article II, section 40(d) of the Washington Constitution.

Although the purpose of current appropriation is different from the one in *NMA*, that small difference is immaterial to the legal analysis. The Legislature explicitly found that this park system operations and maintenance appropriation benefited nonhighway recreational fuel excise taxpayers. That finding is well-supported by the record. If this Court

¹ 127 Wn. App. 408, 110 P.3d 1196 (2005), *review denied*, 156 Wn.2d 1008, 132 P.3d 146 (2006).

reaches the merits, it should apply the deferential review of the *NMA* opinion and hold that this appropriation is also constitutional.

Respondents (hereinafter, the State) respectfully submit, however, that this Court need not reach the merits because Division III already decided Appellants' issues in a case involving substantially the same parties. This case is, in essence, the *NMA* case in a different venue. Like the *NMA* case, this case is prosecuted by the Northwest Motorcycle Association (NMA) and its officers, a group that has long been involved in the political and legal battles over the use of the nonhighway recreational fuel tax refund. They have previously made the same arguments they make here to two superior courts and one appellate panel and have failed to convince a single judge. Nor could they convince the Supreme Court that the lower court judges had erred.

II. RESTATED ISSUES RELATING TO APPELLANTS' ASSIGNMENT OF ERROR

Appellants assign error to the entry of the order denying their summary judgment motion and granting the State's motion. However, Appellants' four issues derive from their perception of the legal reasoning underlying the trial court's summary judgment order. None of that reasoning is reflected in the order. In any event, this Court now stands in the shoes of the Superior Court and conducts a de novo review of the

administrative record. Consequently, the unstated reasoning underlying Judge McPhee's ruling is irrelevant to this appeal.

Instead, the issues are:

1. Are these Appellants barred by principles of collateral estoppel from re-litigating the constitutionality of the RCW 46.09.170(1) refund?
2. If not, does article II, section 40(d) prohibit the Legislature from appropriating a portion of the nonhighway recreational fuel tax refund for park system maintenance and operations and for increased access for boaters and off-road vehicle (ORV²) users?

III. STATEMENT OF THE CASE

A. Summary

Since before passage of the Eighteenth Amendment to the Washington Constitution, the Legislature has authorized refunds of excise taxes paid on motor fuel used "off-road" for various purposes. The refund mechanism in RCW 46.09.170(1) is similar to that utilized to refund excise taxes on other uses of nonhighway fuel.³ Over the years, the Legislature has used the RCW 46.09.170(1) refund to fund projects deemed likely to provide outdoor recreational opportunities for the relevant taxpayers. Initially, the projects were limited to ORV facilities. However, after a 2003 study found that 80 percent of the refunded tax was

² The current definition of ORV is set out in RCW 46.09.020(13).

³ *E.g.*, RCW 82.36.280 (individual refund for certain nonhighway vehicle users); RCW 46.10.150 (refund for fuel tax deemed paid by snowmobile users to "snowmobile account" in state treasury); RCW 46.68.080 (refund of sums deemed paid by residents of island counties to county treasurer).

paid by recreationalists in pursuit of nonmotorized activities, the Legislature began funding nonmotorized outdoor recreational opportunities. The appropriation at issue here continues the practice of using the RCW 46.09.170(1) refund to provide and maintain outdoor recreational opportunities deemed likely to benefit the underlying taxpayers. It is similar in all significant respects to the appropriation approved by the *NMA* court and is consistent with the restrictions of article II, section 40.

B. The Motor Fuel Excise Tax

Since 1921, Washington has levied an excise tax on the sale, distribution, or use of motor vehicle fuel. The Legislature has long distinguished between tax revenue generated by fuel used on state highways, county roads, and city streets (so called “highway” uses) and tax revenue related to fuel consumed on other “nonhighway roads.”⁴

Sometimes the Legislature authorized refunds of taxes paid on fuel used for such nonhighway purposes. The first refund statute appeared just

⁴ Presently “nonhighway road” is defined as:
[A]ny road owned or managed by a public agency or any private road for which the owner has granted an easement for public use for which appropriations from the motor vehicle fund were not used for (a) original construction or reconstruction in the last twenty-five years; or (b) maintenance in the last four years.
RCW 46.09.020(7).

two years after the tax.⁵ As of 1943, users of motor vehicle fuel on nonhighway roads could claim individual tax refunds.⁶

By the 1940s, many Washington citizens were concerned about the use of *highway-related* fuel tax revenues for purposes other than building or improving roads and highways.⁷ In 1944, the voters adopted the Eighteenth Amendment, which reads in full:

All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:

- (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
- (b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;
- (c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for

⁵ Laws of 1923, ch. 81, § 4.

⁶ Laws of 1943, ch. 84, § 5.

⁷ At the time, fuel excise tax revenues were spent for such varied purposes as unemployment relief. *See* Laws of 1933, ch. 8; Laws of 1933, ch. 65, § 5.

which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section:

Provided, That this Section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

Wash. Const. art. II, § 40 (Amendment 18) (emphasis added).

Article II, section 40 is similar to constitutional provisions enacted by many other states in the 1940s.⁸ 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.⁹ It accomplishes that goal by placing revenue from these taxes into the motor vehicle fund and limiting expenditures from the fund to “highway purposes.”¹⁰

Subsection (d) of the Eighteenth Amendment preserved the Legislature’s power to refund motor vehicle fuel taxes paid into the motor vehicle fund. It did so by defining such refunds as a “highway purpose.”

⁸ CP 604.

⁹ *NMA*, 127 Wn. App. at 414.

¹⁰ *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 812, 982 P.2d 611 (1999).

C. The Legislature Has a Long-Standing Practice of Refunding Taxes Paid on Fuel Used for Recreational Purposes off the Highway System and Spending These Sums on Recreational Facilities Likely to Benefit Such Taxpayers

As shown in the remainder of this section, for more than 40 years, the Legislature¹¹ has refunded a portion of the motor vehicle fuel excise tax paid by nonhighway recreational fuel users to improve, operate, and maintain outdoor recreational facilities likely to be used by such taxpayers. It has used a mix of direct appropriations to various state agencies and a competitive grant program to disburse the refund. The Legislature has often changed the allocation between direct appropriations and the grant program.

1. 1964—Fuel Excise Tax Refund for Marine Recreational Facilities

Motor fuel excise tax refunds were used to create public recreational facilities as early as 1964, when the people passed Initiative Measure No. 215, the “Marine Recreation Land Act.”¹² This law set aside unclaimed boat fuel excise tax refunds to buy or improve land bordering on or providing access to fresh or salt water suitable for recreational use by watercraft.¹³ The initiative also established the Interagency Committee on Outdoor Recreation (Interagency Committee).

¹¹ In one case, the law was enacted by the people exercising the initiative power.

¹² Laws of 1965, ch. 5, codified as RCW 79A.25.030-.080.

¹³ RCW 79A.25.070.

2. 1971—Legislature Enacts ATV Act

The practice of using the fuel excise tax refund generated by off-highway recreationalists to improve or maintain recreational facilities for motorized activities began in 1971 when the Legislature enacted the “ATV or All Terrain Vehicles Act.”¹⁴ This law required the licensing, registration, and regulation of all terrain vehicles (ATV). It required that a portion of the registration fees, as well as revenue generated by fuel excise taxes paid by ATV users, be distributed by the Interagency Committee.¹⁵ The ATV Act eliminated individual fuel tax refunds for ATV users and provided for a periodic determination of the amount of motor vehicle fuel used by ATVs. The state treasurer was then required to use that figure to determine how much of the motor vehicle fuel excise tax revenue should be transferred to the Interagency Committee.¹⁶

3. 1977—Legislature Amends the ATV Act to Include Additional “Off-Road Vehicles”

In 1977, the Legislature replaced the term “ATV” with “off-road vehicle” and “nonhighway vehicle.”¹⁷ In doing so, it expanded the types of fuel uses that were considered “nonhighway” uses. Also, that year for the first time, the Legislature appropriated portions of the refund amount

¹⁴ Laws of 1971, 1st Ex. Sess., ch. 47.

¹⁵ Laws of 1971, 1st Ex. Sess., ch. 47, §§ 21-22, 27, codified at RCW 46.09.170.

¹⁶ Laws of 1971, 1st Ex. Sess., ch. 47, §§ 20-21.

¹⁷ Laws of 1977, 1st Ex. Sess., ch. 220.

to state agencies other than the Interagency Committee and for recreational purposes other than ORV trails.¹⁸ The Interagency Committee grant program received 51½ percent of the refund, 25 percent went to the Department of Natural Resources (Natural Resources) for nonhighway roads and recreation facilities, 3½ percent went to the Department of Fish and Wildlife (Fish and Wildlife) for the same purpose, and the remaining 20 percent to Natural Resources for ORV facilities.¹⁹

4. 1986—Legislature Again Expands the Definition of Nonhighway Vehicle

In 1986, the Legislature again expanded the definition of “nonhighway vehicle,” to include typical passenger cars operating on nonhighway roads or trails.²⁰ The legislation defined “nonhighway road” to include public roads that were not built or maintained with appropriations from the motor vehicle fund.²¹

This 1986 legislation created two accounts in the state treasury, “the ORV and nonhighway vehicle account” and the “nonhighway and off-road vehicle activities” or NOVA program account.²² As of 1986, 40 percent of the nonhighway recreational fuel tax refund was credited to

¹⁸ Laws of 1977, 1st Ex. Sess., ch. 220, § 14.

¹⁹ *Id.*

²⁰ Laws of 1986, ch. 206, § 1.

²¹ *Id.*

²² Laws of 1986, ch. 206, § 8. The allocation of the annual refund amount between these two accounts is accomplished by RCW 46.09.170(2).

the “ORV and nonhighway vehicle account” to be administered by Natural Resources for ORV recreational facilities, nonhighway roads, and nonhighway road recreation facilities, 3½ percent went to the same account to be administered by Fish and Wildlife for the same purpose, and 2 percent went to the same account to be administered by the Washington State Parks and Recreation Commission (Parks) for the same purpose. The remaining 54½ percent of the refund went to the Interagency Committee grant program. Finally, the 1986 legislation instructed the Interagency Committee to:

[E]stablish a committee of nonhighway road recreationists, including representatives of organized ORV groups, to provide advice regarding the administration of this chapter.

Laws of 1986, ch. 206, § 13, codified as RCW 46.09.280.

5. 2001—Legislature Requires an Independent Fuel Study

To address concerns that ORV facilities and activities received too much of the refund benefits, in the 2001 capital budget, the Legislature appropriated \$175,000 for a study to determine the relative proportion of the motor vehicle fuel excise tax revenues that was attributable to various classes of vehicles operating off-road or on nonhighway roads for recreational purposes.²³

²³ Laws of 2001, 2nd Spec. Sess., ch. 8, § 346.

Hebert Research, Inc. completed the study on February 4, 2003.²⁴ The cornerstone of the study was a fuel use survey that was mailed to licensed motor vehicles owners throughout the state.²⁵ The survey results showed that a total of 25.6 million gallons of motor vehicle fuel was estimated to have been consumed on “back roads” or “off of roads”²⁶ during the one-year study period.²⁷ Of this total, only 5.1 million gallons (or 20 percent of the total) were used for motorized recreational activities (e.g., off road motorcycles, snowmobiles, ATVs, and 4x4s); 7.8 million gallons (30.4 percent of the total) were associated with nonmotorized recreational activities (e.g., hiking, mountain biking, horseback riding, and cross-country skiing); and 12.7 million gallons (49.6 percent of the total) were used for other recreational activities such as camping, sightseeing, hunting, and fishing.

In other words, the fuel study showed that 80 percent of the motor vehicle fuel used for recreational purposes on nonhighway roads was burned in conventional passenger vehicles by people traveling to and from nonmotorized recreational activities. Therefore, because the motor fuel excise tax is levied on each gallon of fuel sold, the study results

²⁴ CP 104.

²⁵ CP 108.

²⁶ The designations used in the study correspond to “nonhighway road” and “trails” in the statutory nomenclature. CP 110.

²⁷ CP 105.

demonstrated that nonmotorized recreationalists pay 80 percent of the tax that comprises the RCW 46.09.170(1) refund.

6. 2003—Legislature Provides That Some NOVA Program Funds Can Be Used Solely for Nonmotorized Recreational Uses

The 2003 Legislature responded to the study results in two primary ways. First, it broadened the composition of the nonhighway and off-road vehicle advisory committee to include proportional representation of all recreational interests identified in the fuel use study.²⁸ This advisory committee, along with legislators, land managers, state agencies, and law enforcement interests, was directed to “review the existing nonhighway and off-road vehicle distribution formulas and policies . . . and develop recommendations for statutory changes . . . by January 1, 2004.”²⁹ Second, the Legislature explicitly authorized spending for projects intended for exclusively “nonmotorized recreational uses.”³⁰

The 2003 Legislature appropriated the “excess fund balance” in the NOVA program account to the Interagency Committee, Natural Resources, Fish and Wildlife, and Parks.³¹ This “excess fund balance” appropriation had the effect of reducing the Interagency Committee’s

²⁸ Laws of 2003, ch. 185, § 1, amending RCW 46.09.280.

²⁹ Laws of 2003, ch. 185, § 2.

³⁰ Laws of 2003, 1st Spec. Sess., ch. 26, § 365(3).

³¹ Laws of 2003, 1st Spec. Sess., ch. 26, § 366. The use of the phrase “excess fund balance” to describe an amount appropriated directly to agencies first appeared in 2004. Laws of 2004, ch. 105, § 5. The phrase refers to any amount that the Legislature deems unnecessary for the grant program.

grant program in favor of direct appropriation to the specified state agencies. For 2003-05, the “excess” fund balance appropriation³² for the Department of Natural Resources and Parks was as follows:

(1) \$450,000 of the appropriation is provided solely to maintain and operate existing ORV and other recreation facilities, including ORV campgrounds, on lands managed by the department of natural resources for the fiscal year ending June 30, 2004.

(2) \$325,000 of the appropriation is provided solely to the state parks and recreation commission to construct and upgrade trails and trail-related facilities for both motorized and nonmotorized uses within state parks.

D. The NMA and Mr. Stuck Sue to Block the 2003-04 “Excess Fund Balance” Appropriations to Parks and Natural Resources

In 2003, Appellant Northwest Motorcycle Association and Mr. Byron Stuck,³³ the President of Appellant Washington Off-Highway Vehicle Alliance (WOHVA), challenged the 2003-04 appropriations as an unconstitutional expenditure of fuel excise tax revenue.³⁴ In particular, they attacked the appropriation for “nonmotorized” recreational facilities within the state park system. The Honorable Michael E. Cooper characterized the issue for decision in that case as whether the bill was unconstitutional to the extent it authorizes the State to expend gasoline

³² Laws of 2003, 1st Spec. Sess., ch. 26, §§ 366(1) and (2).

³³ Mr. Stuck is also a member of the NMA. CP 556.

³⁴ The procedural history of the litigation is summarized in the *NMA* opinion. 127 Wn. App. at 411-12.

excise tax funds to construct, operate or maintain facilities for “nonmotorized recreational uses.”³⁵ Judge Cooper rejected Petitioners’ article II, section 40 arguments, ruled that the appropriations were constitutional and dismissed the petition.³⁶ The NMA and Mr. Stuck appealed that order to Division III.

Division III unanimously affirmed Judge Cooper.³⁷ That Court described the “sole issue on appeal” as:

[W]hether those portions of RCW 46.09.170 authorizing the use of the refund from the gasoline excise tax to construct and maintain nonmotorized recreation trails and facilities are unconstitutional.³⁸

The Court first noted that the answer to that question depended only on “whether the funds transferred to the NOVA program qualif[ied] as refunds authorized by law.”³⁹ It held that the:

[A]nnual one percent withdrawal from the motor vehicle fund (an estimate of the taxes paid for nonhighway gasoline use) falls within the refund authorized by article II, section 40. The legislature’s dispersal [*sic*] of that refund through NOVA for the benefit of the affected taxpayers comes within its plenary powers of taxation. We find nothing in article II, section 40 that specifically prohibits

³⁵ CP 591.

³⁶ *Id.* at 592-93 (Judge Cooper held that “refunds authorized by law for taxes paid on motor vehicle fuels is specifically denoted a highway purpose. The NOVA motor vehicle fuel excise tax refund, as provided by RCW 46.09.170(1), is such a refund and is . . . presumed to be constitutional.”).

³⁷ *NMA*, 127 Wn. App. at 408.

³⁸ *Id.* at 412.

³⁹ *Id.* at 415.

the legislature from dispersing [*sic*] the “refund” as it sees fit.⁴⁰

The Washington Supreme Court denied NMA’s motion for discretionary review.⁴¹

E. The Legislative History Between Lawsuits

In 2007, the Legislature replaced the Interagency Committee with the Recreation and Conservation Funding Board (Board) as the administrator of NOVA grants.⁴² The corresponding operating budget bill continued the practice of direct NOVA appropriations to several state agencies (Natural Resources, Fish and Wildlife, and Parks) along with an appropriation for the now Board-administered competitive grant program. The Legislature again authorized the appropriation of the “excess fund balance” in the NOVA account without subjecting the appropriation to the strictures of RCW 46.09.170(2). But this time, the excess fund balance appropriation went to “the department of natural resources for planning and designing consistent off-road vehicle signage and department-managed recreation sites, and for planning recreation opportunities on department-managed lands in the Reiter Block and Ahtanum state forest.”⁴³

⁴⁰ *Id.* at 416 (internal citations omitted).

⁴¹ 156 Wn.2d 1008 (2005).

⁴² Laws of 2007, ch. 241, §§ 15, 16(2)(d), amending RCW 46.09.020(2).

⁴³ Laws of 2007, ch. 522, § 953(4).

F. Washington's State Park System

The state park system consists of about 120 parks and 143 recreational sites located throughout Washington. The land within each is “set apart and dedicated as public parks and parkways for the benefit and enjoyment of all the people of this state.”⁴⁴ Each park is managed to “[m]aintain and enhance ecological, aesthetic, and recreational purposes.”⁴⁵ The parks are required to “[p]rovide a variety of recreational opportunities to the public, including but not limited to use of developed recreation areas, trails, and natural areas.”⁴⁶

The rich variety of outdoor recreational opportunities available in the state parks is depicted in the table included in the record at CP 635-36 (attached as Appendix A). The park system plays a vital role in the state's effort to improve public outdoor recreational opportunities.⁴⁷ Given the varied opportunities available and the geographic diversity of the locations, it is not surprising that much of the outdoor recreation on Washington public lands occurs within the state park system.⁴⁸ The parties have stipulated that “[v]irtually all of the state parks feature

⁴⁴ RCW 79A.05.135.

⁴⁵ RCW 79A.05.305(1).

⁴⁶ RCW 79A.05.305(4).

⁴⁷ CP 174, 176, 190.

⁴⁸ *Id.*

‘nonmotorized recreational facilities’ within the meaning of RCW 46.09.020.’⁴⁹

As shown above,⁵⁰ historically Parks has received a direct appropriation of the tax. It has also successfully competed for more than \$3 million of the grant money administered by the Board.⁵¹ Parks has used NOVA grants to improve a trail at Beacon Rock State Park and to plan a wildlife trail at Leadbetter Point State Park.⁵² Parks has used NOVA grants for 18 nonmotorized trail projects such as elements of the Iron Horse trail and cross-country ski facilities at Mt. Spokane.⁵³ Parks has also spent over \$1.2 million of NOVA grant money improving off-road vehicle facilities at Riverside State Park.⁵⁴

G. The 2009-11 “Excess Fund Balance” Appropriation

Due in part to the worldwide recession, the 2009 Legislature faced a well-publicized revenue shortfall.⁵⁵ Numerous state programs and agency budgets were reduced significantly as a result. Based on the Governor’s initial proposed budget, Parks anticipated the potential closure

⁴⁹ CP 99.

⁵⁰ See pp. 10, 12-13, *supra*.

⁵¹ CP 388-89.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ CP 471-72.

of 15 parks and an environmental learning center as well as other program reductions.⁵⁶

By the end of the 2009 session, the Legislature had reduced Parks' general fund appropriation by \$52 million from the previous biennium.⁵⁷

Consistent with past practice, in a separate section of the budget bill, the Legislature authorized the appropriation of the "excess fund balance" in the NOVA account:

[T]o the department of natural resources to install consistent off-road vehicle signage at department-managed recreation sites, and to implement the recreation opportunities on department managed lands in the Reiter block and Ahtanum state forest, and to the state parks and recreation commission for maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users. This appropriation is not required to follow the specific distribution specified in subsection (2) of this section.⁵⁸

The Department of Natural Resources received a \$982,000 appropriation.⁵⁹ Parks received the \$9.56 million appropriation that is the subject of this suit.⁶⁰ Parks understood that these funds were intended to replace part of the reduction in its general fund appropriation.⁶¹

⁵⁶ CP 473-75.

⁵⁷ CP 477.

⁵⁸ Laws of 2009, ch. 564, § 944(4).

⁵⁹ Laws of 2009, ch. 564, § 308.

⁶⁰ *Id.* § 303.

⁶¹ CP 477.

Notably, the appropriation at issue here involves only the “excess fund balance” in the NOVA account. For this biennium, the Board also received a \$1,062,000 appropriation from the NOVA account for its grant program.⁶² That appropriation *is* subject to the distribution provision of RCW 46.09.170(2)(d) (i.e., not less than 30 percent for ORV facilities, etc.).

Another important fact is that only a portion of the money transferred by RCW 46.09.170(1) flows to the NOVA account.⁶³ A full 41½ percent of the refund is credited to the “ORV and nonhighway vehicle account” for distribution directly to Natural Resources, Fish and Wildlife, and Parks.⁶⁴ For this biennium, Natural Resources received an appropriation of \$4,236,000, Fish and Wildlife received \$415,000, and Parks received \$239,000 from that account.⁶⁵ Any of those funds may be used for “the acquisition, planning, development, maintenance, and management” of ORV facilities and programs. Thus, when Appellants say that the ORV community receives no “benefit” from the refund for 2009-

⁶² Laws of 2009, ch. 564, § 304.

⁶³ As the chart on p. 8 of Appellants’ Opening Brief depicts, only 58.5 percent of the RCW 46.09.170(1) refund amount is credited to the NOVA program account. The remainder is credited to the ORV and nonhighway vehicle account.

⁶⁴ Laws of 2009, ch. 564, § 944(2)(a), (c).

⁶⁵ *Id.* §§ 303, 307, and 308.

11,⁶⁶ they ignore the fact that all of these other sums appropriated from the RCW 46.09.170(1) refund can be used for ORV purposes.

H. Parks' Spending Plans for the \$9.56 Million NOVA "Excess Fund Balance" Appropriation

State agencies must spend their appropriations according to any terms, limits, or conditions imposed by law.⁶⁷ Shortly after a new biennium begins, each state agency must prepare a written plan for the expenditure of most funds appropriated to it by the Legislature. These plans are part of the "allotment of appropriation."⁶⁸ Among other things, allotments provide a tool for the Legislature, the Office of Financial Management, and the public to monitor compliance with appropriation conditions.

Parks' detailed expenditure plan for the \$9.56 million appropriation shows that it will spend the money on the maintenance and operation of state park facilities.⁶⁹ Parks allocated the entire amount to compensate the employees who enforce the rules, clean the restrooms, and, generally, maintain and operate the parks.⁷⁰ Such compensation constitutes about 70 percent of the operations and maintenance budget for the parks system and the \$9.56 million represents approximately

⁶⁶ Appellants' Opening Brief at 26.

⁶⁷ RCW 43.88.290.

⁶⁸ RCW 43.88.020(23).

⁶⁹ CP 382.

⁷⁰ CP 631-32.

13 percent of the employee salary and benefit burden for parks operations and maintenance.⁷¹ As Appellants point out, Parks does not intend to spend the NOVA funds on the ORV facility at Riverside Park.⁷² This is because Parks intends to use its appropriation from the “ORV and nonhighway vehicle account” for that purpose.⁷³ Nonetheless, the NOVA appropriation will fund the operations and maintenance of the parks and campground at Riverside Park, which are used by the users of the ORV facility.⁷⁴ The \$9.56 million appropriation enabled the agency to avoid closing any park facilities.⁷⁵

I. The Current Lawsuit

This case is an attempt by Appellant NMA and Mr. Stuck to obtain a “do over” of their unsuccessful 2005 litigation in a different venue. The NMA claims to represent the interests of ORV users. It monitors the “expenditure of funds pursuant to RCW 46.09.170.”⁷⁶ It opposes “expenditures on trails that cannot be used by motorized off-road vehicles.”⁷⁷

⁷¹ CP 632. The state budget and accounting system lacks an object code corresponding to improved access for boaters and ORV users, but some of these employees will be working on those tasks.

⁷² Appellants’ Opening Brief at 26.

⁷³ CP 632.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ CP 558.

⁷⁷ *Id.*

Appellant WOHVA is purportedly comprised of a collection of individuals and interest groups, one of which is the NMA. Mr. Byron Stuck is the president of WOHVA. Mr. Stuck is also a member of the NMA and was an individual petitioner in the *NMA* case.⁷⁸ Mr. Tod Peterson is the chairman of WOHVA's political action committee and the NMA's legislative director. He submitted an affidavit in the *NMA* case. Mr. Stuck and Mr. Peterson submitted the only substantive declarations for the Appellants in this case.⁷⁹

This time around, Mr. Peterson and Mr. Stuck developed their litigation strategy during WOHVA executive board meetings. At the April 20, 2009, meeting, Mr. Peterson said that if his legislative lobbying efforts were unsuccessful, he would support "filing a lawsuit and completely dismantling the NOVA program."⁸⁰ At a May 18 meeting, the political action committee reported that "James Buchal has been hired as our attorney for our lawsuit against the State of Washington for the Theft [*sic*] of the NOVA funds. *NMA is the official party who hired him. . .*"⁸¹

⁷⁸ CP 556.

⁷⁹ The other individual Appellants submitted identical, carefully worded declarations that said they had not participated in the previous case. CP 637-39, 658-60, 677-79.

⁸⁰ CP 685.

⁸¹ Mr. Buchal was counsel to the NMA and Mr. Stuck in the previous litigation.

At this time we will be pursuing the defense that the theft of the funds goes against the Washington State Constitution.”⁸²

During the June 15 meeting, WOHVA’s treasurer reported that *the NMA had donated \$2,000 as startup money for its legal fund.*⁸³ At the same meeting, Mr. Peterson reported that “Thurston county [*sic*] has been tentatively chosen as the venue for the lawsuit against the state. *We will need to find co-plaintiffs that reside in Thurston County* that uses [*sic*] the public lands for riding. Vickie and Dale Gray might be able to suggest some people who would be able to file as co-plaintiffs.”⁸⁴

At the July 20 meeting, Mr. Peterson reported that the “[n]ext critical step is to identify individual plaintiffs from Thurston County. At this time only Dave Bowers is 100 percent. . . . We should get four more ASAP. **If this drags out too long, we may need to reconsider the county selection. I think that getting Snohomish County plaintiffs would be easy, but lawyer travel costs would be much higher and our chances in court may be slightly worse.**” He concluded by committing to contact Jon O’Brien, Katie Harrison, and Dave Bowers “about becoming individual plaintiffs for the lawsuit.”⁸⁵ In the same meeting, Mr. Stuck “suggested that **WOHVA take over the payment of the**

⁸² CP 688 (emphasis added).

⁸³ CP 691.

⁸⁴ *Id.* (emphasis added).

⁸⁵ CP 698.

lawyer from the NMA. NMA will then donate funds to WOHVA as needed in the future.”⁸⁶

During the August 17 meeting, Mr. Peterson reported that “[o]ur attorney . . . is working on putting together our lawsuit . . . [and that] Dave Bowers, Katie Harrison, Jon O’Brien and Kurt Kootnekoff *have been selected as individual co plaintiffs.*”⁸⁷ The September meeting minutes discuss strategy for the lawsuit and describe efforts to locate evidence.⁸⁸ In an October 5 press release, Mr. Peterson announced that WOHVA had “teamed up with the Northwest Motorcycle Association” to file this lawsuit.⁸⁹

J. The 2010 Amendment to the 2009-11 Appropriation

Judge McPhee heard the parties’ cross-motions for summary judgment on March 5, 2010. He granted the State’s motion and denied Appellants’ motion. After the summary judgment order was entered, the Legislature again amended RCW 46.09.170(4)⁹⁰ to confirm that the appropriation benefited the particular taxpayers who are recreational users of nonhighway fuel:

During the 2009-2011 fiscal biennium, the legislature may appropriate such amounts as reflect the excess fund balance

⁸⁶ *Id.* (emphasis added).

⁸⁷ *Id.* (emphasis added).

⁸⁸ CP 701.

⁸⁹ CP 703.

⁹⁰ The appropriation language was not changed. ESSB 6446 § 303.

in the NOVA account to the department of natural resources to install consistent off-road vehicle signage at department-managed recreation sites, and to implement the recreation opportunities on department-managed lands in the Reiter block and Ahtanum state forest, and to the state parks and recreation commission. The legislature finds that the appropriation of funds from the NOVA account during the 2009-2011 fiscal biennium for maintenance and operation of state parks ((and)) or to improve accessibility for boaters and off-road vehicle users at state parks will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities. ((This appropriation is)) The appropriations under this subsection are not required to follow the specific distribution specified in subsection (2) of this section.

ESSHB 6444 § 936(4) (quoting bill in drafting format).⁹¹

IV. ARGUMENT

Appellants brought their action as a petition for judicial review of agency action and have cited the Administrative Procedure Act, RCW 34.05 (APA), as the basis for the court's jurisdiction.⁹² In this appeal of a summary judgment order dismissing the petition, this Court sits in the same position as the Superior Court and applies the standards of review in RCW 34.05.570 directly to the agency record.⁹³ This Court should affirm the order if the State is entitled to judgment as a matter of law. *Pierce Cy. v. State*, 150 Wn.2d 422, 429, 78 P.3d 640 (2003).

⁹¹ Subsequent enactments that clarify an earlier statute can be applied retrospectively. *In re Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000).

⁹² CP 10.

⁹³ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

A. Appellants Are Identical to the Petitioners in *NMA* for Collateral Estoppel Purposes and Should Be Barred From Relitigating the Constitutionality of RCW 46.09.170(1)

The doctrine of collateral estoppel or issue preclusion bars relitigation of issues decided in a prior adjudication. It differs from res judicata in that instead of preventing a second assertion of the same cause of action it bars a second litigation of the same issue. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 226, 588 P.2d 725 (1978). The doctrine applies if the follow four conditions are met:

- (1) The issue decided in the prior adjudication is identical to the one presented in the present action;
- (2) The earlier adjudication resulted in a final judgment on the merits;
- (3) The party against whom the bar is asserted was a party to or in privity with a party to the prior adjudication;
- (4) Application of the doctrine will not work an injustice on the party against whom the doctrine is to be applied.

Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

The doctrine promotes legal certainty and finality by curtailing repetitive litigation of the same legal issue. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 829 (1985). Whether collateral estoppel is properly applied is a question of law. *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 365, 208 P.3d 574 (2009).

In this case, the question of whether the Legislature could appropriate a portion of the annual fuel tax refund in RCW 46.09.170(1) for nonmotorized outdoor recreational purposes was decided by Division III in the earlier case. *NMA*, 127 Wn. App. at 416.⁹⁴ In that case, the court determined that the “annual one percent withdrawal from the motor vehicle fund . . . falls within the refund authorized by article II, section 40” and that the Legislature could disburse the refund as it deemed appropriate. The refund statute (RCW 46.09.170(1))⁹⁵ and the constitutional provision are unchanged since the prior litigation. Although this park system appropriation is substantially similar to the appropriation in that case, under the *NMA* analysis, the specific purpose of the appropriation is irrelevant. Therefore, the first two conditions for applying collateral estoppel—a prior judgment that encompasses the same legal issue—are met in this case.

Turning to the third element, for collateral estoppel purposes, identity of the parties is a matter of substance. Parties who are nominally different may be the same in legal effect.⁹⁶ Collateral estoppel may be

⁹⁴ The court below apparently recognized that because the prior adjudication resulted in an appellate decision, application of collateral estoppel would have been somewhat of an academic exercise and it did not address this issue. Instead, it applied the precedent of that prior appellate decision.

⁹⁵ Copies of the statute as codified in 2004 and 2009 are attached as Appendix B.

⁹⁶ *Rains v. State*, 100 Wn.2d at 664; Trautman, *supra*, at 821.

used against an entity that was not a party to the former adjudication if that entity shares a substantial identity of interests with the previous litigants. *Garcia v. Wilson*, 63 Wn. App. 516, 520, 820 P.2d 964 (1991).

The NMA was a named party in both cases and so that petitioner is obviously identical. WOHVA and the individual Appellants contend that they are not identical to the parties who prosecuted the *NMA* case because they were not named parties to the previous suit. But where, as here, parties assert interests as part of a purported class, strict identity is not required. See *In re Coday*, 156 Wn.2d 485, 501, 130 P.3d 809 (2006); *Stevens Cy. v. Futurewise*, 146 Wn. App. 493, 505, 192 P.3d 1 (2008) (applying the rule from voter challenges to a land use case, but holding that the parties' interests were not sufficiently identical). Appellants agreed below that the rule from *Futurewise* should be applied here.⁹⁷

However, here a different result follows. Unlike the situation in *Futurewise*, Appellants have not identified individual legal interests distinct from those asserted in the earlier case. Rather, all of the Appellants here assert the same legal interest as those in *NMA*—that of ORV users who purchase nonhighway fuel for recreational purposes and want no part of the RCW 46.09.170(1) refund spent for exclusively

⁹⁷ CP 669.

nonmotorized facilities. In other words, Appellants here assert precisely the same interest identified and advanced by the *NMA* plaintiffs.

Moreover, as the meeting minutes show with regard to this litigation, Appellant WOHVA is indistinguishable from the NMA and its officers, Stuck and Peterson. “A person who is not a party but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.” *Mutual of Enumclaw Ins. Co., v. State Farm Mutual Automobile Ins. Co.*, 37 Wn. App. 690, 693, 682 P.2d 317 (1984) (citing Restatement (Second) of Judgments § 39); *see also Everett v. Perez*, 78 F. Supp. 2d 1134, 1138 (E.D. Wash. 1999) (noting that Washington courts find privity where a person who is not a party substantially controls the litigation). The record shows⁹⁸ that the parties substantially in control of this case, Mr. Stuck, Mr. Peterson, and the NMA, are the parties who substantially controlled the last case.

In this case, they selected and paid the attorney, decided upon the legal theory, and selected the venue. In an attempt to avoid the preclusive effect of their previous, unsuccessful litigation, they then went hunting for “co-plaintiffs” located in their chosen venue, and after those co-plaintiffs were found, filed this lawsuit. To be sure, their complaint added the name

⁹⁸ See pp. 21-24, *supra*.

of a different association and four additional individual plaintiffs, but in all matters of substance, the people controlling this litigation are the same people who controlled the last case.

With respect to the final collateral estoppel element, because Appellants' constitutional arguments were fully considered by Division III in *NMA*, it is just to apply collateral estoppel in this case. Division III properly concluded that the RCW 46.09.170(1) refund is a "refund authorized by law" and that article II, section 40(d) did not restrict the Legislature's power to determine the amount, timing, and purpose of the refund. The Supreme Court declined to review that holding. The prior adjudication should be respected and serial relitigation, such as Appellants are attempting here, should be rejected. This Court should hold that this suit is barred by collateral estoppel and refuse to revisit the merits of Appellants' claim.

B. If This Court Reaches the Merits, It Should Apply the Deferential Review of *NMA* and Hold That This Appropriation for Park System Maintenance and Operations Also Falls Within the Legislature's Plenary Power to Disburse the RCW 46.09.170(1) Refund and Is Therefore Consistent With Article II, Section 40

1. Standard of Review

Because there was no rulemaking or adjudicative proceeding in this case, the agency action must be challenged under the "other agency action" section, RCW 34.05.570(4). In such cases, a court may grant

relief for persons aggrieved by the performance of an agency action if the court determines that the action is unconstitutional.⁹⁹

In all APA challenges, “[t]he burden of demonstrating the invalidity of agency action is on the party asserting the invalidity.”¹⁰⁰ The reviewing court can affirm or reverse the agency action, remand the matter to the agency, or enter a declaratory judgment.¹⁰¹ In most situations, the court reviews a challenge under the APA based on the record compiled by the agency and transmitted to the court.¹⁰²

In this case, the agency “action” must be Parks’ expenditure of the portion of the \$9.56 million appropriation that is comprised of motor fuel excise taxes and/or the ministerial account transfer that the Treasurer is required to perform. It appears, however, that Appellants are primarily concerned with the Legislature’s appropriation instead of the agency actions required to execute that appropriation.¹⁰³ Because Appellants challenge legislative action, they face a heavy burden of proof.

“[T]he power of the Legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is

⁹⁹ RCW 34.05.570(4)(c)(i).

¹⁰⁰ RCW 34.05.570(1)(a).

¹⁰¹ RCW 34.05.574.

¹⁰² RCW 34.05.558. Here, however, as contemplated by RCW 34.05.566(4), the parties agreed that the record would be comprised of the documents attached to the Stipulation and any other documents submitted in support of the State’s summary judgment motion. CP 96-97.

¹⁰³ Appellants do not assert that Parks’ plan of expenditure is inconsistent with the appropriation. Appellants’ Opening Brief at 24-25.

prohibited by the state or federal constitutions.” *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). “[A] statute is presumed to be constitutional, and the party seeking to overcome that presumption must meet the heavy burden of proving unconstitutionality beyond a reasonable doubt.” *Retired Pub. Employees Coun. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003), citing *WA Fed’n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995). Judicial deference is particularly appropriate in tax matters where “[t]he Legislature possesses a plenary power. . . .” *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808-09, 982 P.2d 611 (1999), quoting *Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998). A decision regarding the expenditure of tax refunds “comes within [the Legislature’s] plenary power of taxation.” *NMA*, 127 Wn. App. at 416; see also *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) (“The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.”).

When construing constitutional provisions, courts first look to the plain language of the text and give that language a reasonable interpretation. *WA Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). Although the determination of the meaning and scope of a constitutional provision is a judicial function, a court cannot declare a statute invalid unless it conflicts with a specific or

definite provision of the state constitution. *Heavey*, 138 Wn.2d at 813. “Whenever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.” *In re Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000).

2. Appellants Fail to Meet Their Heavy Burden of Proving the Appropriation Unconstitutional Beyond a Reasonable Doubt

In its review of the merits, the Court may note that the parties agree on some key facts about the RCW 46.09.170(1) refund:

- The refund is comprised of a portion of the total motor vehicle fuel excise tax paid.¹⁰⁴
- The amount refunded annually (approximately one percent of the total motor fuel excise tax collected) is less than the total motor vehicle fuel excise tax paid by nonhighway recreational users.¹⁰⁵
- The refunded amount is deposited into two separate accounts in the state general fund.¹⁰⁶
- Virtually all state parks include nonmotorized recreational facilities within the meaning of RCW 46.09.020.¹⁰⁷

From that common ground, the parties diverge regarding the meaning of the *NMA* opinion. In the *NMA* opinion, Division III properly applied the presumption of constitutionality to the appropriation for nonmotorized trails and concluded that the arguments advanced by the

¹⁰⁴ CP 97.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ CP 99.

NMA failed to overcome its burden of proof. That court acknowledged its duty to construe the Constitution while properly deferring to the Legislature’s plenary powers of taxation and appropriation. *NMA*, 127 Wn. App. at 414, 416. The court construed the phrase “refund authorized by law” consistent with the plain meaning of the phrase. *Id.* at 415.

However, Appellants say that the *NMA* decision must be read one of two ways. In their view, either (1) the Court abdicated its duty to construe article II, section 40(d); or (2) it made the existence of a “detailed plan set forth in RCW 46.09.170 to link particular refund benefits to particular fuel taxes paid” an essential requirement of the holding.¹⁰⁸ Regardless, here Appellants urge this Court to adopt a different dictionary definition of “refund” than the one utilized by the *NMA* court and then to conduct a de novo evaluation of whether this appropriation would satisfy the new definition.¹⁰⁹ According to Appellants, the dictionary definition used in by the *NMA* court is inconsistent with the purpose of the article II, section 40 and worse, it enables the wholesale diversion of highway fuel tax revenues by unscrupulous legislators.

But, the purpose of the constitutional amendment was to reserve *highway* revenues for *highway* purposes. The “refunds authorized by law” phrase reaffirmed that the amendment was intended to preserve the

¹⁰⁸ Appellants’ Opening Brief at 9-10.

¹⁰⁹ Appellants’ Opening Brief at 18.

practice of refunding some amounts, including nonhighway related fuel taxes, under terms set by the Legislature. The use of that phrase meant 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. Appellants have not shown that the *NMA* court's analytical approach offended the plain language of article II, section 40(d). Nor have they provided any good reason why decades of nonhighway fuel excise tax refund practice should be called into question.

Appellants' focus on defining the "refund" part of the "refunds authorized by law" phrase as narrowly as possible is part of their attempt to erode the judiciary's traditional deference to the legislature in tax matters. Their suggestion that courts should 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 is antithetical to the legislature's power in this area being "plenary."

Well-established constitutional precedent requires that the Court reject Appellants' invitation to substitute its judgment for that of the Legislature.¹¹⁰ Instead, the Court should presume that the park system operations and maintenance appropriation is constitutional. It should then

¹¹⁰ See pp. 30-33, *supra*.

evaluate whether the arguments advanced by Appellants overcome that presumption to demonstrate beyond a reasonable doubt that the appropriation conflicts with a specific and definite provision of article II, section 40.

As part of their efforts, Appellants argue that the appropriation at issue here is distinguishable from that approved in *NMA* for various reasons. First, they assert that because Parks used the appropriation to pay employee salary and benefits, it is a “general payroll expenditure not related to the provision of specific benefits to those paying the tax.”¹¹¹ This tautological assertion does nothing to advance Appellants’ argument. There is no dispute that the maintenance and operations budget for the park system is largely comprised of employee salaries and benefits and that such spending is within the purpose of the appropriation.¹¹²

Or, to look at it differently, expenditure records for ORV-related appropriations would undoubtedly show that much of those funds were spent on the salaries and benefits of the people who build, operate, and maintain those facilities. To the extent that a “definitive provision” of article II, section 40(d) requires that the appropriation benefit the underlying taxpayers, the focus of the constitutional inquiry should be on the purpose of the appropriation—not the agencies’ detailed plan to spend

¹¹¹ Appellants’ Opening Brief at 18.

¹¹² CP 631-32.

the appropriation. The money may be spent on employee salaries and benefits or on materials, contractors, legal costs, supplies, utility costs, or anything else necessary to carry out the purpose.¹¹³

Appellants' second contention is that this appropriation differs from that in *NMA* because this one was "diverted" out of the NOVA program to Parks.¹¹⁴ However, that contention is factually incorrect. The appropriation at issue in *NMA* also went directly to Parks. In reality, both appropriations were made from the NOVA account, RCW 46.09.165.¹¹⁵ Both appropriations were exempted from the restrictions of RCW 46.09.170(2) and neither was subject to Interagency Committee or Board oversight.¹¹⁶ Thus, there is no factual basis for Appellants' assertion that grant oversight or the parameters of the NOVA grant program were any part of the court's holding in the *NMA* case, much less that such considerations were integral to the holding. There is also no legal basis for Appellants' suggestion that additional agency oversight is essential because each state agency must comply with the terms of its

¹¹³ RCW 43.88.110(1).

¹¹⁴ Appellants' Opening Brief at 23.

¹¹⁵ RCW 46.09.170(1) and (2) direct the Treasurer to transfer the money from the motor vehicle fund to the general fund accounts. The "ORV and nonhighway vehicle" account and the "nonhighway and off-road vehicle activities" account are both within the general fund.

¹¹⁶ The appropriation at issue here was at least the third "excess fund balance" appropriation that went directly to state agencies in lieu of the grant program. *See* pp. 12-13, 15, 18, *supra*.

appropriations.¹¹⁷ The Governor and the Office of Financial Management already review agency expenditure plans to ensure consistency with the purpose of the appropriation.¹¹⁸

Third, Appellants say that the Legislature did not use the word “refund” in the appropriation bill.¹¹⁹ Although this is a true statement, its constitutional significance is not readily apparent. The statute that accomplishes the “refunding” of the money from the motor vehicle fund to the general fund is RCW 46.09.170(1). As mentioned elsewhere, that statute has not been changed since the *NMA* case. Of course, each biennium the Legislature may appropriate those refunded amounts for specified purposes. Considered as a whole, the statutory scheme in RCW 46.09.170 shows that challenged appropriations are from accounts funded by the RCW 46.09.170(1) refund. Appellants present no compelling reason that article II, section 40(d) requires any more than that.

Fourth, Appellants assert that the “purpose of the appropriation cannot be characterized as highway purposes.” This too fails to advance the argument because as the *NMA* court explained, if the expenditure is a refund authorized by law it is a “highway purpose” as the phrase is

¹¹⁷ RCW 43.88.290.

¹¹⁸ RCW 43.88.110(7).

¹¹⁹ Appellants’ Opening Brief at 24, 26.

defined in article II, section 40.¹²⁰ As was the situation in *NMA*, all of the article II, section 40 cases cited by Appellants in their opening brief deal with the question of whether a specific spending purpose constitutes a highway purpose. None of those cases addresses whether an appropriation is a “refund authorized by law.” The *NMA* opinion is the only published decision construing subsection (d) of article II, section 40.

Fifth, Appellants appear to contend again that the appropriation cannot be a refund authorized by law because it is not spent exclusively on ORV or motorized recreational purposes.¹²¹ This argument was explicitly rejected by the *NMA* court when it held that the refund could be spent on exclusively *nonmotorized* trails within the park system. Moreover, if the Constitution really requires that every dollar of the RCW 46.09.170(1) refund benefit every taxpayer who purchased fuel for nonhighway recreational purposes, spending for the motorized facilities that Appellants prefer would appear to be unconstitutional as well.¹²²

Notwithstanding extensive argument, Appellants provide no legal authority for their contention that the appropriation to Parks is

¹²⁰ *NMA*, 127 Wn. App. at 414-15.

¹²¹ Appellants’ Opening Brief at 24, 25, 26.

¹²² The State must acknowledge that any refund plan, which does not require return of the tax paid directly to the taxpayer, is subject to attack for providing an allegedly insufficient benefit to the underlying taxpayer. However, Appellants cannot argue that such plans are unconstitutional without threatening the disproportionate benefits they already receive from the programs funded by the RCW 46.09.170(1) refund.

unconstitutional. Their claim simply cannot be squared with a specific or definite provision within the constitutional text. Nor do they cite to anything in the record to support their factual assertions. On the other hand, the record is full of information demonstrating that the nonhighway fuel taxpayers use the sort of recreational opportunities available at the state park system. It also shows that the park system already contains numerous facilities funded by the RCW 46.09.170(1) refund and other nonmotorized facilities of the type included in the definition of nonhighway recreational facility. Indeed, virtually every park in the system contains nonmotorized recreational facilities. The record shows that without the challenged appropriation, some of those parks would have been closed, which would have rendered at least some of those nonmotorized recreational facilities unavailable to anyone. Though Mr. Stuck and Mr. Peterson deny that they personally benefit, it is hardly farfetched for the Legislature to conclude that funding a portion of a park system that provides the same outdoor recreational activities funded by the NOVA program would benefit at least some of the recreational nonhighway fuel taxpayers.¹²³

This is because people traveling along a forest service road to reach their favorite huckleberry picking site are recreational users of

¹²³ CP 190.

nonhighway fuel. So too are those who travel to watch wildlife, fish, hike, climb, bike, swim, photograph, ride horses, or engage in any of the other nonmotorized outdoor recreational opportunities reachable via the back roads of Washington. The state park system provides these very recreational opportunities.¹²⁴ Indeed, despite having the smallest land base of any natural resource agency, state parks receive the most concentrated use.¹²⁵

Spending decisions in times of limited resources involve trade-offs between competing needs.¹²⁶ In our constitutional system, the Legislature is the institution empowered to make those decisions. *Pannell*, 91 Wn.2d at 599. It is not irrational for legislators to conclude that in time of reduced revenue, the maintenance and operation of existing outdoor recreation facilities should take priority over the construction of new facilities or that state facilities should have a higher priority than those operated by the federal government.¹²⁷

Appellants clearly wish for a return to 1971, when only motorized ATV interests were considered in RCW 46.09. Nearly 40 years of

¹²⁴ CP 99, 635-36.

¹²⁵ *Id.*

¹²⁶ Appellants assume that if the \$9.56 million had not been appropriated to the park system, it would have gone to ORV projects. There is no basis for that assumption. For example, as it did in 2003-04, the Legislature could have appropriated the money directly to Parks for nonmotorized projects or it could have left the money unappropriated or used it for another purpose. *E.g.*, *Pannell*, 91 Wn.2d at 599.

¹²⁷ Appellants presented evidence showing that some federal ORV facilities would receive less NOVA money for 2009 than in years past. CP 80-92.

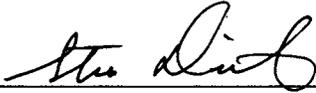
legislative history has produced a program that is much broader and more inclusive than the original ATV program. Although the Legislature has moved toward a more equitable spending program since the publication of the fuel tax study, ORV interests continued to receive funding at least proportional to their fuel tax contributions. Even in these extraordinary times, for this biennium, about half of the funds are legally available to fund their projects.

V. CONCLUSION

For the reasons set forth above, Appellants have not met the heavy burden of proving the 2009 appropriation unconstitutional beyond a reasonable doubt. The Court should reject Appellants' constitutional challenge to the 2009 Legislature's appropriation of a portion of the RCW 46.09.170(1) refund for park system operation and maintenance, and affirm the summary judgment order.

RESPECTFULLY SUBMITTED this 23rd day of August, 2010.

ROBERT M. MCKENNA
Attorney General



STEVE DIETRICH
WSBA No. 21897
Senior Counsel
Attorneys for Respondents

APPENDIX A

APPENDIX B

(f) On lands not owned by the operator or owner of the nonhighway vehicle upon the shoulder or inside bank or slope of any nonhighway road or highway, or upon the median of any divided highway;

(g) On lands not owned by the operator or owner of the nonhighway vehicle in any area or in such a manner so as to unreasonably expose the underlying soil, or to create an erosion condition, or to injure, damage, or destroy trees, growing crops, or other vegetation;

(h) On lands not owned by the operator or owner of the nonhighway vehicle or on any nonhighway road or trail, when these are restricted to pedestrian or animal travel; and

(i) On any public lands in violation of rules and regulations of the agency administering such lands.

(2) It is a misdemeanor for any person to operate any nonhighway vehicle while under the influence of intoxicating liquor or a controlled substance. [2003 c 377 § 1; 1979 ex.s. c 136 § 41; 1977 ex.s. c 220 § 10; 1972 ex.s. c 153 § 12; 1971 ex.s. c 47 § 17.]

Rules of court: *Bail in criminal traffic offense cases—Mandatory appearance—CrRLJ 3.2.*

Effective date—Severability—1979 ex.s. c 136: See notes following RCW 46.63.010.

Purpose—1972 ex.s. c 153: See RCW 79A.35.070.

46.09.130 Additional violations—Penalty. (1) No person may operate a nonhighway vehicle in such a way as to endanger human life.

(2) No person shall operate a nonhighway vehicle in such a way as to run down or harass any wildlife or animal, nor carry, transport, or convey any loaded weapon in or upon, nor hunt from, any nonhighway vehicle except by permit issued by the director of fish and wildlife under RCW 77.32.237: PROVIDED, That it shall not be unlawful to carry, transport, or convey a loaded pistol in or upon a nonhighway vehicle if the person complies with the terms and conditions of chapter 9.41 RCW.

(3) For the purposes of this section, "hunt" means any effort to kill, injure, capture, or purposely disturb a wild animal or bird.

(4) Violation of this section is a gross misdemeanor. [2004 c 105 § 4; (2004 c 105 § 3 expired July 1, 2004); 2003 c 53 § 233; 1994 c 264 § 35; 1989 c 297 § 3; 1986 c 206 § 7; 1977 ex.s. c 220 § 11; 1971 ex.s. c 47 § 18.]

Rules of court: *Bail in criminal traffic offense cases—Mandatory appearance—CrRLJ 3.2.*

Expiration dates—Effective dates—2004 c 105 §§ 3-6: "(1) Section 3 of this act expires July 1, 2004.

(2) Section 4 of this act takes effect July 1, 2004.

(3) Section 5 of this act expires June 30, 2005.

(4) Section 6 of this act takes effect June 30, 2005." [2004 c 105 § 11.]

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Effective date—1986 c 206: See note following RCW 46.09.020.

46.09.140 Accident reports. The operator of any nonhighway vehicle involved in any accident resulting in injury to or death of any person, or property damage to another to an apparent extent equal to or greater than the minimum amount established by rule adopted by the chief of the Washington state patrol in accordance with chapter 46.52 RCW, or a person acting for the operator shall submit such reports as are

required under chapter 46.52 RCW, and the provisions of chapter 46.52 RCW applies to the reports when submitted. [1990 c 250 § 25; 1977 ex.s. c 220 § 12; 1971 ex.s. c 47 § 19.]

Severability—1990 c 250: See note following RCW 46.16.301.

46.09.150 Motor vehicle fuel excise taxes on fuel for nonhighway vehicles not refundable. Motor vehicle fuel excise taxes paid on fuel used and purchased for providing the motive power for nonhighway vehicles shall not be refundable in accordance with the provisions of RCW 82.36.280 as it now exists or is hereafter amended. [1977 ex.s. c 220 § 13; 1974 ex.s. c 144 § 1; 1972 ex.s. c 153 § 13; 1971 ex.s. c 47 § 20.]

Purpose—1972 ex.s. c 153: See RCW 79A.35.070.

46.09.165 Nonhighway and off-road vehicle activities program account. The nonhighway and off-road vehicle activities program account is created in the state treasury. Moneys in this account are subject to legislative appropriation. The interagency committee for outdoor recreation shall administer the account for purposes specified in this chapter and shall hold it separate and apart from all other money, funds, and accounts of the interagency committee for outdoor recreation. Grants, gifts, or other financial assistance, proceeds received from public bodies as administrative cost contributions, and any moneys made available to the state of Washington by the federal government for outdoor recreation may be deposited into the account. [1995 c 166 § 11.]

46.09.170 Refunds from motor vehicle fund—Distribution—Use. (Expires June 30, 2005.) (1) From time to time, but at least once each year, the state treasurer shall refund from the motor vehicle fund one percent of the motor vehicle fuel tax revenues collected under chapter 82.36 RCW, based on a tax rate of: (a) Nineteen cents per gallon of motor vehicle fuel from July 1, 2003, through June 30, 2005; (b) twenty cents per gallon of motor vehicle fuel from July 1, 2005, through June 30, 2007; (c) twenty-one cents per gallon of motor vehicle fuel from July 1, 2007, through June 30, 2009; (d) twenty-two cents per gallon of motor vehicle fuel from July 1, 2009, through June 30, 2011; and (e) twenty-three cents per gallon of motor vehicle fuel beginning July 1, 2011, and thereafter, less proper deductions for refunds and costs of collection as provided in RCW 46.68.090.

(2) The treasurer shall place these funds in the general fund as follows:

(a) Thirty-six percent shall be credited to the ORV and nonhighway vehicle account and administered by the department of natural resources solely for acquisition, planning, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities, and information programs and maintenance of nonhighway roads;

(b) Three and one-half percent shall be credited to the ORV and nonhighway vehicle account and administered by the department of fish and wildlife solely for the acquisition, planning, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities and the maintenance of nonhighway roads;

(c) Two percent shall 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; and

(d) Fifty-eight and one-half percent shall be credited to the nonhighway and off-road vehicle activities program account to be administered by the committee for planning, acquisition, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities, and for education, information, and law enforcement programs. During the fiscal year ending June 30, 2004, a portion of these funds may be appropriated to the department of natural resources to maintain and operate existing ORV and other recreation facilities, including ORV campgrounds, for the state parks and recreation commission to construct and upgrade trails and trail-related facilities for both motorized and nonmotorized uses, and for other activities identified in this section. The funds under this subsection shall be expended in accordance with the following limitations, except that during the fiscal year ending June 30, 2004, funds appropriated to the committee from motor vehicle fuel tax revenues for the activities in (d)(ii) of this subsection shall be reduced by the amounts appropriated to the department of natural resources and the state parks and recreation commission as provided in this subsection:

(i) Not more than thirty percent may be expended for education, information, and law enforcement programs under this chapter;

(ii) Not less than seventy percent may be expended for ORV, nonmotorized, and nonhighway road recreation facilities. Except as provided in (d)(iii) of this subsection, of this amount:

(A) Not less than thirty percent, together with the funds the committee receives under RCW 46.09.110, may be expended for ORV recreation facilities;

(B) Not less than thirty percent may be expended for nonmotorized recreation facilities. Funds expended under this subsection (2)(d)(ii)(B) shall be known as Ira Spring outdoor recreation facilities funds; and

(C) Not less than thirty percent may be expended for nonhighway road recreation facilities;

(iii) The committee may waive the minimum percentage cited in (d)(ii) of this subsection due to insufficient requests for funds or projects that score low in the committee's project evaluation. Funds remaining after such a waiver must be allocated in accordance with committee policy.

(3) On a yearly basis an agency may not, except as provided in RCW 46.09.110, expend more than ten percent of the funds it receives under this chapter for general administration expenses incurred in carrying out this chapter.

(4) During the 2003-05 fiscal biennium, the legislature may appropriate such amounts as reflect the excess fund balance in the NOVA account to the interagency committee for outdoor recreation, the department of natural resources, the department of fish and wildlife, and the state parks and recreation commission. This appropriation is not required to follow the specific distribution specified in subsection (2) of this section. [2004 c 105 § 5. Prior: 2003 1st sp.s. c 26 § 920; 2003 1st sp.s. c 25 § 922; 2003 c 361 § 407; 1995 c 166 § 9; 1994 c 264 § 36; 1990 c 42 § 115; 1988 c 36 § 25; 1986 c 206

(2004 Ed.)

§ 8; 1979 c 158 § 130; 1977 ex.s. c 220 § 14; 1975 1st ex.s. c 34 § 1; 1974 ex.s. c 144 § 3; 1972 ex.s. c 153 § 15; 1971 ex.s. c 47 § 22.]

Expiration dates—Effective dates—2004 c 105 §§ 3-6: See note following RCW 46.09.130.

Expiration date—Severability—Effective dates—2003 1st sp.s. c 26: See notes following RCW 43.135.045.

Severability—Effective date—2003 1st sp.s. c 25: See notes following RCW 19.28.351.

Findings—Part headings not law—Severability—2003 c 361: See notes following RCW 82.36.025.

Effective dates—2003 c 361: See note following RCW 82.08.020.

Purpose—Headings—Severability—Effective dates—Application—Implementation—1990 c 42: See notes following RCW 82.36.025.

Effective date—1986 c 206: See note following RCW 46.09.020.

Effective date—1975 1st ex.s. c 34: "This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1975." [1975 1st ex.s. c 34 § 4.]

Purpose—1972 ex.s. c 153: See RCW 79A.35.070.

46.09.170 Refunds from motor vehicle fund—Distribution—Use. (Effective June 30, 2005.) (1) From time to time, but at least once each year, the state treasurer shall refund from the motor vehicle fund one percent of the motor vehicle fuel tax revenues collected under chapter 82.36 RCW, based on a tax rate of: (a) Nineteen cents per gallon of motor vehicle fuel from July 1, 2003, through June 30, 2005; (b) twenty cents per gallon of motor vehicle fuel from July 1, 2005, through June 30, 2007; (c) twenty-one cents per gallon of motor vehicle fuel from July 1, 2007, through June 30, 2009; (d) twenty-two cents per gallon of motor vehicle fuel from July 1, 2009, through June 30, 2011; and (e) twenty-three cents per gallon of motor vehicle fuel beginning July 1, 2011, and thereafter, less proper deductions for refunds and costs of collection as provided in RCW 46.68.090.

(2) The treasurer shall place these funds in the general fund as follows:

(a) Thirty-six percent shall be credited to the ORV and nonhighway vehicle account and administered by the department of natural resources solely for acquisition, planning, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities, and information programs and maintenance of nonhighway roads;

(b) Three and one-half percent shall be credited to the ORV and nonhighway vehicle account and administered by the department of fish and wildlife solely for the acquisition, planning, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities and the maintenance of nonhighway roads;

(c) Two percent shall 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; and

(d) Fifty-eight and one-half percent shall be credited to the nonhighway and off-road vehicle activities program account to be administered by the committee for planning, acquisition, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities and for education, information, and law enforcement pro-

grams. The funds under this subsection shall be expended in accordance with the following limitations:

(i) Not more than thirty percent may be expended for education, information, and law enforcement programs under this chapter;

(ii) Not less than seventy percent may be expended for ORV, nonmotorized, and nonhighway road recreation facilities. Except as provided in (d)(iii) of this subsection, of this amount:

(A) Not less than thirty percent, together with the funds the committee receives under RCW 46.09.110, may be expended for ORV recreation facilities;

(B) Not less than thirty percent may be expended for nonmotorized recreation facilities. Funds expended under this subsection (2)(d)(ii)(B) shall be known as Ira Spring outdoor recreation facilities funds; and

(C) Not less than thirty percent may be expended for nonhighway road recreation facilities;

(iii) The committee may waive the minimum percentage cited in (d)(ii) of this subsection due to insufficient requests for funds or projects that score low in the committee's project evaluation. Funds remaining after such a waiver must be allocated in accordance with committee policy.

(3) On a yearly basis an agency may not, except as provided in RCW 46.09.110, expend more than ten percent of the funds it receives under this chapter for general administration expenses incurred in carrying out this chapter.

(4) During the 2003-05 fiscal biennium, the legislature may appropriate such amounts as reflect the excess fund balance in the NOVA account to the interagency committee for outdoor recreation, the department of natural resources, the department of fish and wildlife, and the state parks and recreation commission. This appropriation is not required to follow the specific distribution specified in subsection (2) of this section. [2004 c 105 § 6. Prior: 2003 1st sp.s. c 25 § 922; 2003 c 361 § 407; 1995 c 166 § 9; 1994 c 264 § 36; 1990 c 42 § 115; 1988 c 36 § 25; 1986 c 206 § 8; 1979 c 158 § 130; 1977 ex.s. c 220 § 14; 1975 1st ex.s. c 34 § 1; 1974 ex.s. c 144 § 3; 1972 ex.s. c 153 § 15; 1971 ex.s. c 47 § 22.]

Expiration dates—Effective dates—2004 c 105 §§ 3-6: See note following RCW 46.09.130.

Severability—Effective date—2003 1st sp.s. c 25: See note following RCW 19.28.351.

Findings—Part headings not law—Severability—2003 c 361: See notes following RCW 82.36.025.

Effective dates—2003 c 361: See note following RCW 82.08.020.

Purpose—Headings—Severability—Effective dates—Application—Implementation—1990 c 42: See notes following RCW 82.36.025.

Effective date—1986 c 206: See note following RCW 46.09.020.

Effective date—1975 1st ex.s. c 34: "This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1975." [1975 1st ex.s. c 34 § 4.]

Purpose—1972 ex.s. c 153: See RCW 79A.35.070.

46.09.180 Regulation by local political subdivisions or state agencies. Notwithstanding any of the provisions of this chapter, any city, county, or other political subdivision of this state, or any state agency, may regulate the operation of nonhighway vehicles on public lands, waters, and other properties under its jurisdiction, and on streets or highways within

its boundaries by adopting regulations or ordinances of its governing body, provided such regulations are not less stringent than the provisions of this chapter. [1977 ex.s. c 220 § 15; 1971 ex.s. c 47 § 23.]

46.09.190 General penalty—Civil liability. (1) Except as provided in RCW 46.09.120(2) and 46.09.130 as now or hereafter amended, violation of the provisions of this chapter is a traffic infraction for which a penalty of not less than twenty-five dollars may be imposed.

(2) In addition to the penalties provided in subsection (1) of this section, the owner and/or the operator of any nonhighway vehicle shall be liable for any damage to property including damage to trees, shrubs, or growing crops injured as the result of travel by the nonhighway vehicle. The owner of such property may recover from the person responsible three times the amount of damage. [1979 ex.s. c 136 § 42; 1977 ex.s. c 220 § 16; 1972 ex.s. c 153 § 16; 1971 ex.s. c 47 § 24.]

Rules of court: *Monetary penalty schedule—IRLJ 6.2.*

Effective date—Severability—1979 ex.s. c 136: See notes following RCW 46.63.010.

Purpose—1972 ex.s. c 153: See RCW 79A.35.070.

46.09.200 Enforcement. The provisions of this chapter shall be enforced by all persons having the authority to enforce any of the laws of this state, including, without limitation, officers of the state patrol, county sheriffs and their deputies, all municipal law enforcement officers within their respective jurisdictions, fish and wildlife officers, state park rangers, and those employees of the department of natural resources designated by the commissioner of public lands under RCW *43.30.310, 76.04.035, and 76.04.045. [2001 c 253 § 3; 1986 c 100 § 52; 1971 ex.s. c 47 § 25.]

***Reviser's note:** RCW 43.30.310 was recodified as RCW 43.12.065 pursuant to 2003 c 334 § 127.

46.09.240 Administration and distribution of ORV moneys. (1) After deducting administrative expenses and the expense of any programs conducted under this chapter, the interagency committee for outdoor recreation shall, at least once each year, distribute the funds it receives under RCW 46.09.110 and 46.09.170 to state agencies, counties, municipalities, federal agencies, nonprofit ORV organizations, and Indian tribes. Funds distributed under this section to nonprofit ORV organizations may be spent only on projects or activities that benefit ORV recreation on lands once publicly owned that come into private ownership in a federally approved land exchange completed between January 1, 1998, and January 1, 2005.

(2) The committee shall adopt rules governing applications for funds administered by the agency under this chapter and shall determine the amount of money distributed to each applicant. Agencies receiving funds under this chapter for capital purposes shall consider the possibility of contracting with the state parks and recreation commission, the department of natural resources, or other federal, state, and local agencies to employ the youth development and conservation corps or other youth crews in completing the project.

(3) The interagency committee for outdoor recreation shall require each applicant for acquisition or development

*** CHANGE IN 2010 *** (SEE 6379.SL) ***

*** CHANGE IN 2010 *** (SEE 6444-S.SL) ***

(1) From time to time, but at least once each year, the state treasurer shall refund from the motor vehicle fund one percent of the motor vehicle fuel tax revenues collected under chapter 82.36 RCW, based on a tax rate of: (a) Nineteen cents per gallon of motor vehicle fuel from July 1, 2003, through June 30, 2005; (b) twenty cents per gallon of motor vehicle fuel from July 1, 2005, through June 30, 2007; (c) twenty-one cents per gallon of motor vehicle fuel from July 1, 2007, through June 30, 2009; (d) twenty-two cents per gallon of motor vehicle fuel from July 1, 2009, through June 30, 2011; and (e) twenty-three cents per gallon of motor vehicle fuel beginning July 1, 2011, and thereafter, less proper deductions for refunds and costs of collection as provided in RCW 46.68.090.

(2) The treasurer shall place these funds in the general fund as follows:

(a) Thirty-six percent shall be credited to the ORV and nonhighway vehicle account and administered by the department of natural resources solely for acquisition, planning, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities, and information programs and maintenance of nonhighway roads;

(b) Three and one-half percent shall be credited to the ORV and nonhighway vehicle account and administered by the department of fish and wildlife solely for the acquisition, planning, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities and the maintenance of nonhighway roads;

(c) Two percent shall 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; and

(d) Fifty-eight and one-half percent shall be credited to the nonhighway and off-road vehicle activities program account to be administered by the board for planning, acquisition, development, maintenance, and management of ORV, nonmotorized, and nonhighway road recreation facilities and for education, information, and law enforcement programs. The funds under this subsection shall be expended in accordance with the following limitations:

(i) Not more than thirty percent may be expended for education, information, and law enforcement programs under this chapter;

(ii) Not less than seventy percent may be expended for ORV, nonmotorized, and nonhighway road recreation facilities. Except as provided in (d)(iii) of this subsection, of this amount:

(A) Not less than thirty percent, together with the funds the board receives under RCW 46.09.110, may be expended for ORV recreation facilities;

(B) Not less than thirty percent may be expended for nonmotorized recreation facilities. Funds expended under this subsection (2)(d)(ii)(B) shall be known as Ira Spring outdoor recreation facilities funds; and

(C) Not less than thirty percent may be expended for nonhighway road recreation facilities;

(iii) The board may waive the minimum percentage cited in (d)(ii) of this subsection due to insufficient requests for funds or projects that score low in the board's project evaluation. Funds remaining after such a waiver must be allocated in accordance with board policy.

(3) On a yearly basis an agency may not, except as provided in RCW 46.09.110, expend more than ten percent of the funds it receives under this chapter for general administration expenses incurred in carrying out this chapter.

(4) During the 2009-2011 fiscal biennium, the legislature may appropriate such amounts as reflect the excess fund balance in the NOVA account to the department of natural resources to install consistent off-road vehicle signage at department-managed recreation sites, and to implement the recreation opportunities on department-managed lands in the Reiter block and Ahtanum state forest, and to the state parks and recreation commission for maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users. This appropriation is not required to follow the specific distribution specified in subsection (2) of this section.

FILED
COURT OF APPEALS

10/27/26 AM 11:50

STATE OF WASHINGTON

No. 40521-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WASHINGTON OFF-HIGHWAY
VEHICLE ALLIANCE; NORTHWEST
MOTORCYCLE ASSOCIATION
(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; WASHINGTON STATE
PARKS AND RECREATION
COMMISSION, and REX DERR, in his
capacity as Director thereof,

Respondents.

CERTIFICATE OF
SERVICE

I certify that I served a copy of this document on all parties or their
counsel of record on the date below as follows:

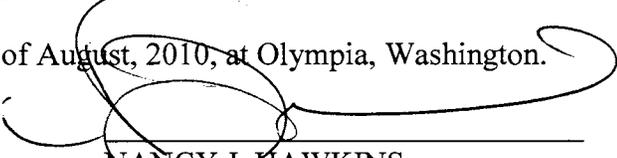
Overnight mail – FedEx with a courtesy copy email to:

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Murphy & Buchal LLP
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Portland, OR 97201

jbuchal@mbllp.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of August, 2010, at Olympia, Washington.



NANCY J. HAWKINS
Legal Assistant