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SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

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.

RESPONDENTS' ANSWER TO MOTION FOR
DISCRETIONARY REVIEW

ROBERT M. MCKENNA
Attorney General

STEVE DIETRICH
Senior Counsel
WSBA No. 21897
PO Box 40108
Olympia, WA 98504-0108
(360) 664-0267
Attorneys for Respondents

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I. INTRODUCTION

The State respectfully requests that the Court deny Petitioners' Motion for Discretionary Review. At its heart, this case is an extension of a quintessentially political dispute over a now-lapsed appropriation from the 2009-11 biennium. As the challenged appropriation was not included in the current biennial budget, the case is moot and a pronouncement by this Court will have no legal or practical effect upon the litigants. Because the legal issues in the case do not raise matters of continuing and substantial public interest, the Court should not invoke the exception to its general rule against reviewing moot cases or issuing advisory opinions. Given the fact-specific nature of budget appropriations and the existence of two well-reasoned published opinions by two divisions of the Court of Appeals, an advisory opinion by this Court is unlikely to provide useful guidance to future budget writers or the broader public.

Reaching beyond the mootness issue, review of the Court of Appeals' decision is not warranted under RAP 13.4(b). Contrary to Petitioners' assertions, that court applied the correct standard of review, and that application raises no constitutional question. It considered each of Petitioners' arguments and carefully explained why each failed to demonstrate beyond a reasonable doubt that the appropriation was unconstitutional. Furthermore, the lower court's holding and the

underlying legal reasoning in this case is entirely consistent with the only other published decision on article II, section 40(d) of the Washington Constitution.¹ It is also consistent with this Court's jurisprudence regarding other parts of article II, section 40.

II. RESTATEMENT OF THE ISSUE

For the reasons detailed below, review of the Court of Appeals' decision is not warranted. However, if review was granted, the issue presented would be:

Whether on the record and arguments presented, Petitioners proved beyond a reasonable doubt that the fund transfer provisions of RCW 46.09.520 and the appropriation to fund a small portion of the operation and maintenance of the state park system breached the limits on the expenditure of motor vehicle funds set out in article II, section 40(d)?

III. RESTATEMENT OF THE CASE

A. Statutory and Constitutional Background

Since its enactment as the 18th Amendment in 1944, article II, section 40 of the Washington Constitution has limited the expenditure of motor vehicle fuel taxes to "highway purposes." Such purposes are defined to include, among other things, "refunds authorized by law for taxes paid on motor vehicle fuels."² Pursuant to subsection (d), since 1971,

¹ *Nw. Motorcycle Ass'n v. State Interagency Comm. for Outdoor Rec.*, 127 Wn. App. 408, 110 P.3d 1196 (2005), *rev. den.*, 156 Wn.2d 1008 (2006).

² Const. art. II, § 40(d). Article II, section 40 is set out in full in Appendix 1. The practice of refunding fuel taxes paid on so-called non-highway uses predates the 18th Amendment. The language in section 40(d) allowed that practice to continue after

approximately one percent of the motor vehicle fuel excise tax collected—representing taxes paid on the recreational use of fuel by so-called non-highway³ vehicles—has been refunded annually from the motor vehicle fund to one of two general fund accounts.⁴

Instead of providing small tax refunds to the people who burned such fuel in non-highway vehicles, the Legislature prohibited individual refunds and instead transferred a designated portion of the motor fuel excise taxes from the motor vehicle fund to these two general fund accounts.⁵ For 40 years, money from these two accounts has been appropriated by the Legislature to build and operate outdoor recreational facilities. These facilities are perceived by the Legislature to benefit the sort of people who originally paid the tax on their recreational non-highway fuel use.⁶

the constitutional amendment. The drafters accomplished this by including “refunds authorized by law” within the list of included “highway purposes.” *Nw. Motorcycle Ass’n*, 127 Wn. App. at 414.

³ The definition of terms such as “nonhighway road,” “nonhighway vehicle,” and “nonhighway road recreational user” is included in RCW 46.09.310. Non-highway vehicles include typical passenger cars when such vehicles are used for recreational purposes on non-highway roads like forest roads. RCW 46.09.310(8).

⁴ RCW 46.09.520 (set out in full in Appendix 2). The accounts that currently receive this transfer were created by Laws of 1986, ch. 206, § 8. One of the accounts is known as the Non-Highway and Off-Road Vehicle Activity or “NOVA” account. RCW 46.09.510. The other is called the “ORV and nonhighway vehicle” account. The allocation of the total annual amount of the refund between these two accounts is specified in RCW 46.09.520(2).

⁵ RCW 46.09.500-.520.

⁶ Respondents’ Brief at 8-12, 15-19 (describing the legislative history of the NOVA program in greater detail); *see also Nw. Motorcycle Ass’n*, 127 Wn. App. at 411.

In the beginning, the facility funding program, which came to be known as the “NOVA program,” exclusively funded recreational facilities designed to benefit users of off-road vehicles such as motorcycles and all-terrain vehicles. Later, in response to input from other users of non-highway fuel, the Legislature expanded the program to fund facilities designed to benefit people who engage in other “non-highway” recreational pursuits such as hiking, biking, and berry picking.

Over time, the share of the NOVA budget pie dedicated to off-road vehicle uses shrank. In 2003, frustrated by the political budget process, representatives of off-road vehicle interests, including several Petitioners involved in this case, sued to block an appropriation from the NOVA account that was intended to fund trails dedicated to non-motorized uses.⁷ In that case, the petitioners first argued that the word “refund” in section 40(d) meant only a return of cash taxes paid directly to the original taxpayer.⁸ But, perhaps recognizing that judicial acceptance of that proffered construction would also doom NOVA funding for their preferred off-road vehicle projects, petitioners also argued that the NOVA fund transfer was acceptable so long as any project funded by the transfer

⁷ Off-road vehicle enthusiasts pay about 20 percent of the total tax paid on the non-highway recreational use of motor vehicle fuel. CP 104-10.

⁸ *Nw. Motorcycle Ass'n*, 127 Wn. App. at 415.

benefited off-road vehicle users.⁹ After pointing out the significant logical flaw in petitioners' alternative arguments, Division III of the Court of Appeals unanimously rejected all of their arguments.¹⁰ This Court declined to review the Court of Appeals' decision in that case.¹¹

B. The Challenged Appropriation and Subsequent Legislative History

In the 2009-11 biennial state operating budget, which was enacted on May 19, 2009, the Legislature appropriated \$9.56 million from the NOVA account to the "state parks and recreation commission" for the "maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users."¹² The Legislature subsequently found that the \$9.56 million appropriation would benefit "off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities."¹³ Petitioners sued to block the appropriation on the grounds

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Nw. Motorcycle Ass'n*, 156 Wn.2d 1008 (2006).

¹² Laws of 2009, ch. 564, § 303. It also appropriated \$982,000 from the same account for the Department of Natural Resources and \$1,062,000 for the NOVA grant program administered by the Recreation and Conservation Office. *Id.*, §§ 304, 308. Also, the Legislature appropriated nearly \$5 million from the off-road vehicle and non-highway vehicle account for distribution to various state agencies. *Id.*, §§ 303, 307-08. All of that money could legally be spent on off-road vehicle facilities. RCW 46.09.520(2).

¹³ Laws of 2010, ch. 37, § 936(4).

that it represented an unconstitutional diversion of motor fuel excise tax revenue.¹⁴

In the supplemental budget enacted February 18, 2011, the Legislature reduced the appropriation amount to \$9.164 million for the 2009-11 biennium.¹⁵ That appropriation authority lapsed at the end of the 2009-11 biennium on June 30, 2011.¹⁶ The state operating and capital budgets¹⁷ for the 2011-13 biennium do not contain an appropriation from the NOVA account to the parks and recreation commission or for the park system. In fact, the current budget calls for the parks system to become “self-supporting” or free from general fund support.¹⁸

C. Statement of Procedure

Petitioners filed a petition for judicial review of agency action in the Thurston County Superior Court pursuant to RCW 34.05.570(4).¹⁹ The parties stipulated to the content of the administrative record and the Honorable Judge Thomas McPhee heard cross-motions for summary

¹⁴ CP 10.

¹⁵ Laws of 2011, ch. 5 (supplemental operating budget), § 302.

¹⁶ RCW 43.88.140.

¹⁷ Laws of 2011, ch. 48 (capital budget); Laws of 2011, ch. 50 (operations budget).

¹⁸ Laws of 2011, ch. 50, § 303(1).

¹⁹ CP 10. The particular agency action challenged has not been entirely clear, although the Court of Appeals treated the Parks and Recreation Commission’s allotment of the appropriation as the agency action at issue. *See Wash. Off-Highway Vehicle Alliance v. State*, No. 40521-1-II, at 9, published at ___ Wn. App. ___, 260 P.3d 956 (2011) (hereafter *Op.*). As that court noted, however, Petitioners’ focus has always been upon the constitutionality of the appropriation.

judgment on March 5, 2010. Judge McPhee granted the State's motion, denied Petitioners' motion, and dismissed their petition with prejudice.

Petitioners then sought review of the summary judgment order in Division II of the Court of Appeals. That court heard oral argument on May 10, and on September 13, 2011, nearly three months after the challenged appropriation authority lapsed, Division II issued a published decision that affirmed the trial court by a vote of two to one. Petitioners timely filed their Motion for Discretionary Review in this Court on October 17, 2011.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should deny the Motion for Discretionary Review because the case is moot and the issue does not warrant review under RAP 13.4 in any event.

A. The Case Is Moot Because the Expenditure Authority Provided by the 2009 Appropriation Expired on June 30, 2011

A case is moot if a court can no longer provide effective relief. *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). Appellate issues related to an appropriation act become moot once the expenditure authority provided by that act has expired. *Cooper v. Dep't of Insts.*, 63 Wn.2d 722, 723, 388 P.2d 925 (1964). As a general rule, "this court will not review a moot case." *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). Indeed, the Court has "said many times that we will

not consider on appeal questions which have become moot.” *Cooper*, 63 Wn.2d at 724 (“Nor will we render advisory opinions. In addition to the many good reasons arrayed against them, we point to the current heavy volume of appellate business which makes advisory opinions inadvisable.”).

To be sure, since the *Cooper* decision, the Court has sometimes reviewed “even a technically moot case . . . where it presents issues of continuing and substantial public interest.” *See, e.g., Local 587 v. State*, 142 Wn.2d 183, 200, 11 P.3d 762 (2000). To determine whether a case features the required public interest to qualify for this exception to mootness, the Court considers: (1) the public or private character of the legal issue presented; (2) the desirability of an authoritative determination to provide future guidance to public officers; and (3) the likelihood that the question will recur. *See, e.g., In re Pers. Restraint of Mines*, 146 Wn.2d 279, 284-85, 45 P.3d 535 (2002).

Addressing those three factors in order, it is evident that this moot case does not present an issue of continuing and substantial public interest. Although the dispute is public in a sense, over the course of several decades with the NOVA program, only these Petitioners have alleged that

the program is unconstitutional.²⁰ As reflected by enactment of the 18th Amendment, the public has long had an interest in ensuring that revenues raised for highway purposes are spent on such purposes, but that non-diversionary interest is not implicated by this case. Recall that in this case, Petitioners wanted the appropriated funds to be spent not on highways, but on recreational trails that could be used by off-road vehicles.²¹ There is no evidence that the constitutional issue presented by this case is significant to any part of the public other than Petitioners.

Similarly, Petitioners provide no evidence or argument suggesting that a ruling by this Court *would* reduce legal uncertainty. Nor is there anything to suggest that legislators or the public would benefit by the Court's advisory opinion on this factual record. Indeed, Petitioners' own litigation history suggests the opposite. In the earlier *Northwest Motorcycle Association* case, some of these same Petitioners challenged an appropriation for trails located within the state parks that would be reserved for non-motorized uses. Although, as discussed previously, they lost that argument in a case that resulted in a published opinion that this

²⁰ For context, the original \$9.56 million appropriation represented about 0.03 percent of the approximately \$33 billion state general fund portion of the biennial operating budget for 2009-11. It comprised about 13 percent of the employee compensation and benefits burden incurred by the park system, which is 70 percent of the total operating cost. CP 631-32.

²¹ Petitioners' Opening Brief (below) at 24-26.

Court declined to review,²² in 2009 they nonetheless challenged this appropriation to fund a small part of the operation and maintenance of that same park system. Budget appropriations are inherently unique and fact-specific. As they did below, Petitioners or any future litigant will argue that the appropriation language at issue in this case, as well as in the predecessor case decided by Division III, is distinguishable from whatever language may be used by a future legislature.²³ In sum, no reason exists for this Court to review this moot issue.

B. Review of the Court of Appeals' Decision Is Not Warranted Under RAP 13.4

Petitioners argue that review is warranted under some of the criteria set forth in RAP 13.4.²⁴ As explained in the remaining sections, Petitioners are incorrect.

1. The Court of Appeals' Deference to the Legislature in Requiring Petitioners to Prove the Challenged Legislation Unconstitutional "Beyond a Reasonable Doubt" Is Required by This Court's Precedent and Does Not Warrant Review

In essence, Petitioners' primary argument is that the Court of Appeals' decision places allegedly untrustworthy legislative foxes in charge of the budgetary hen house. Of course, it is the constitution that places the power to tax and spend firmly in the Legislature's hands, and

²² See pp. 4-5, *supra*.

²³ Op. at 7-8.

²⁴ Motion for Discretionary Review at 11-18.

this Court has directed the lower courts to be especially respectful of the Legislature's constitutional prerogative in those areas. *See, e.g., Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998) (describing the Legislature's "plenary power" over tax issues); *Panell 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.").

This Court recently reaffirmed that the "beyond a reasonable doubt" burden of proof must be applied to constitutional challenges to legislation.²⁵ Nonetheless, Petitioners argue that review is warranted because "[t]he majority opinion ignores this Court's repeated directions as to the proper function of the judiciary in Constitutional disputes."²⁶ However, in this case, the Court of Appeals correctly applied the "beyond a reasonable doubt" standard to the record and Petitioners' arguments.²⁷ The majority carefully considered each of Petitioners' arguments regarding the constitutionality of the appropriation and held that Petitioners had failed to present any argument that demonstrated beyond a

²⁵ *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605-06, 244 P.3d 1 (2010) (explaining that "beyond a reasonable doubt" standard respects the co-equal status of the legislative branch of state government, which speaks for the people, and, like the court, is sworn to uphold the constitution); *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999) (applying "beyond a reasonable doubt" standard to an article II, section 40 case).

²⁶ Motion for Discretionary Review at 13.

²⁷ Op. at 9-10.

reasonable doubt that the appropriation was unconstitutional.²⁸ The deference displayed by the Court of Appeals is the appropriate level of deference due a coequal branch of government that is presumed to act constitutionally.²⁹ In no sense, however, did the court abdicate its duty of judicial review.

In fact, Petitioners cite no specific part of the majority opinion to support their contention that the court inappropriately deferred to the Legislature on any legal issue. To be sure, the majority held, as did Division III in *Northwest Motorcycle Association*, that the Legislature could authorize a “refund” that took the form of non-cash compensation. The court properly reached that conclusion based on its interpretation of the statute and the dictionary definition of “refund.”³⁰ Contrary to Petitioners’ implication, the court did not defer to or refuse to examine a legislative proclamation on that issue.

Similarly, the court did not refuse to review the Legislature’s determination that the challenged appropriation would benefit the

²⁸ *Id.* at 18.

²⁹ *Sch. Dist. Alliance*, 170 Wn.2d at 605-06.

³⁰ *Op.* at 12. The Legislature has used this sort of “collective” refund approach in other areas where individual refunds would be very small and difficult to administer. RCW 46.10.150 (refund of fuel tax paid by snowmobile users to “snowmobile account” state treasury); RCW 46.68.080 (refund of sums deemed paid by residents of island counties to county treasurer); *Nw. Motorcycle Ass’n*, 127 Wn. App. at 416 (“Direct refunds to those who purchased gasoline for these nonhighway road trips is not practical due to the number of recipients and the difficulty in providing proof of the nonhighway use.”). Again, Petitioners do not attack the collective nature of the refund directly, which would threaten NOVA funding for off-road vehicle facilities as well.

underlying taxpayers. Instead, over six pages of the opinion, it carefully considered the arguments presented by Petitioners and rejected each as inconsistent with the record or contradicted by logic.³¹ In other words, the court did not reject Petitioners' arguments because it felt constrained to accept the legislative pronouncement—it rejected the arguments because each failed to demonstrate beyond a reasonable doubt that the appropriation was unconstitutional.

2. The Court of Appeals' Decision Is Consistent With Existing Precedent, Including This Court's Article II, Section 40 Cases and Division III's Decision in *Northwest Motorcycle Association*

Petitioners also assert that the Court of Appeals' decision showed “disregard for the fundamental non-diversionary purpose of Article II, § 40” as announced by this Court in several cases involving article II, section 40.³² But as the Court of Appeals noted, those Supreme Court cases are readily distinguishable from this case for multiple reasons.³³

First, none of this Court's section 40 cases addressed subsection (d) or interpreted the constitutional language “refund

³¹ Op. at 12-17. Similarly, the court did not, as Petitioners contend, engage in “improper fact finding”; it simply analyzed its arguments in light of the stipulated administrative record. That is the court's task in a challenge to agency action under the Administrative Procedures Act. RCW 34.05.558.

³² Motion for Discretionary Review at 11-13 (citing *Auto. Club of Wash., Inc. v. Seattle*, 55 Wn.2d 161, 163, 346 P.2d 695 (1959); *Wash. State Highway Comm'n v. Pacific N.W. Bell Tel. Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961); *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 555, 452 P.2d 943 (1969); *Heavey*, 138 Wn.2d at 813).

³³ Op. at 11.

authorized by law,” which was the lower courts’ only task in this case.³⁴ Again, the question in this case is not whether the object for which the funds were appropriated was a “highway purpose.” The question is whether the fund transfer accomplished by RCW 46.09.520 represents a “refund authorized by law” as that phrase is used in article II, section 40(d).³⁵ If that is such a refund, then it also is *ipso facto* a highway purpose as that phrase is used in the constitution.

Second (other than *Heavey*³⁶), each of this Court’s article 40 cases involved the proposed expenditure of revenue collected from highway users of motor vehicle fuel. That was not the situation here because this dispute involved only motor fuel taxes generated by non-highway uses.³⁷ Since before the enactment of the 18th Amendment, the Legislature has often refunded fuel taxes paid on non-highway uses. The inclusion of the

³⁴ See *Nw. Motorcycle Ass’n*, 127 Wn. App. at 414-15 (noting that the cases cited by the motorcycle association which address the Legislature’s unconstitutional attempts to use motor vehicle funds in conflict with the highway purposes provided in article II, section 40 are inapposite to the construction of subsection 40(d)).

³⁵ Op. at 11.

³⁶ The *Heavey* case did not involve expenditures from the motor vehicle fund. The issue in *Heavey* was whether the Legislature could, by statute, place revenue into the motor vehicle fund that was not required to be placed there by article II, section 40. *Heavey*, 138 Wn.2d at 814.

³⁷ In this case, the majority below also observed that Petitioners were not as a matter of principle opposed to refunds of non-highway motor fuel excise tax in the form of non-cash compensation—they just wanted all of the money directed to their own recreational preferences instead of the preferences expressed by some of their fellow taxpayers. Op. at 17. As the court noted, they wanted to enjoin any expenditure from the NOVA account that did not directly benefit off-road vehicle users. See also *Nw. Motorcycle Ass’n*, 127 Wn. App. at 415 (Petitioners wanted the same relief in the Division III case).

phrase “refund authorized by law” within the prescribed list of constitutionally allowable “highway purposes” was designed to allow that practice to continue.³⁸ “[T]he framers apparently intended to return the share of those taxes paid by drivers who expended fuel driving on roadways other than public highways, roads, and streets. Thus, the refund is paradoxically a ‘highway purpose’ for taxes levied on non-highway driving.”³⁹

Other than the decision at issue here, the only published decision construing the “refunds authorized by law” language of section 40(d) is Division III’s decision in *Northwest Motorcycle Association*. In that case, the court held that the fund transfer established in RCW 46.09.520 and a subsequent appropriation to build a trail for exclusively non-motorized uses within a state park constituted a “refund authorized by law.” It noted that for the purposes of article II, section 40(d), a refund need not be limited to a cash payment but could instead come “in the form of ORV, nonmotorized, and nonhighway recreational uses.” Division III held that an appropriation from the NOVA account for the purpose of building non-motorized trails within the state park system was consistent with article II, section 40(d).⁴⁰

³⁸ *Nw. Motorcycle Ass’n*, 127 Wn. App. at 414-16.

³⁹ *Id.* at 414.

⁴⁰ *Id.* at 410, 416.

The Court of Appeals in this case construed the same statutory fund transfer scheme, RCW 46.09.520, and a slightly different appropriation. Its decision is entirely consistent with *Northwest Motorcycle Association*, which it cited with approval in numerous places.

3. The Decision Below Does Not Raise an Issue of Substantial Public Interest Warranting Review

Finally, Petitioners claim the decision below raises an issue of substantial public interest, citing dissenting Judge Worswick's concern that the decision gives the Legislature "unfettered discretion to appropriate these funds without limitation." That concern is misplaced. First, Petitioners conceded⁴¹ that the RCW 46.09.520 refund is comprised only of the share of the motor vehicle fuel tax paid on non-highway uses. Thus, one obvious limitation on the Legislature's discretion to issue refunds from the motor vehicle fund is that the amount transferred could not exceed the amount paid in. For example, in this case, the Legislature could not refund more than the amount motor fuel excise tax paid by recreational users of non-highway fuel.

Second, the purpose of a challenged appropriation is similar to past appropriations from the NOVA account. The transferred non-highway motor fuel excise tax revenues have been used to fund many types of outdoor recreational facilities for 40 years. It is undisputed that many of

⁴¹ CP 97.

those facilities are located within the park system.⁴² The challenged appropriation was for the purpose of keeping those parks open so that access to all of the amenities provided by the parks, including the non-highway recreational facilities, can be maintained during extraordinarily difficult times. Despite Petitioners' misleading and prejudicial hyperbole, the appropriation for state parks maintenance and operations is not qualitatively different from the other uses to which the Legislature has applied the RCW 46.09.520 refund. As Division III in *Northwest Motorcycle Association* and Division II here recognized, the Legislature could reasonably determine that each appropriation provided some tangible benefit to the underlying taxpayers and thus that each appropriation was consistent with article II, section 40(d).

Petitioners argue that intervention by this Court is essential to prevent a future legislature from traveling down the proverbial slippery slope to wholesale motor fuel tax diversion. That concern is entirely speculative and has not materialized despite the passage of several budget bills in a very difficult fiscal environment.

⁴² The non-motorized trails funded by the appropriation challenged in *Northwest Motorcycle Association* were to be built within the state parks.

V. CONCLUSION

For the preceding reasons, Respondents respectfully request that the Court deny Petitioners' Motion for Discretionary Review.

RESPECTFULLY SUBMITTED this 16th day of November, 2011.

ROBERT M. MCKENNA
Attorney General



STEVE DIETRICH, WSBA No. 21897
Senior Counsel

Attorneys for Respondents

SECTION 40 HIGHWAY FUNDS. 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 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.

[AMENDMENT 18, 1943 House Joint Resolution No. 4, p 938. Approved November, 1944.]

RCW 46.09.520

Refunds from motor vehicle fund — Distribution — Use.

(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 46.68.045, 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 46.68.045, 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. 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 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. The appropriations under this subsection are not required to follow the specific distribution specified in subsection (2) of this section.

[2010 1st sp.s. c 37 § 936; 2010 c 161 § 222. Prior: 2009 c 564 § 944; 2009 c 187 § 2; prior: 2007 c 522 § 953; 2007 c 241 § 16; 2004 c 105 § 6; (2004 c 105 § 5 expired June 30, 2005); prior: (2003 1st sp.s. c 26 § 920 expired June 30, 2005); 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. Formerly RCW 46.09.170.]

Notes:

Reviser's note: This section was amended by 2010 c 161 § 222 and by 2010 1st sp.s. c 37 § 936, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- 2010 1st sp.s. c 37: See note following RCW 13.06.050.

Effective date -- Intent -- Legislation to reconcile chapter 161, Laws of 2010 and other amendments made during the 2010 legislative session -- 2010 c 161: See notes following RCW 46.04.013.

Effective date -- 2009 c 564: See note following RCW 2.68.020.

Severability -- Effective date -- 2007 c 522: See notes following RCW 15.64.050.

Intent -- Effective date -- 2007 c 241: See notes following RCW 79A.25.005.

Expiration dates -- Effective dates -- 2004 c 105 §§ 3-6: See note following RCW 46.09.480.

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 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 46.09.310.

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.

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

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

DATED this 16th day of November, 2011, at Olympia,
Washington.



NANCY J. HAWKINS
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Hawkins, Nancy (ATG)
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Washington Off Highway Vehicle Alliance v. State, Supreme Court No. 86602-3

Attached for filing by Steve Dietrich, (360) 664-0267, Bar No. 21897, SteveD@atg.wa.gov, in the above-referenced matter is Respondents' Answer to Motion for Discretionary Review.

<<respondents' answer to motion.pdf>>

A hard copy of the attached is in the U.S. mail, postage prepaid, to Mr. Buchal.

Nancy Hawkins | Government Operations Division
7141 Cleanwater Dr. SW
Olympia, WA 98504

tel: 360-586-0810



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