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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' BRIEF IN ANSWER TO BRIEF OF AMICUS
CURIAE AUTOMOTIVE UNITED TRADES ORGANIZATION**

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I. INTRODUCTION

Amicus Curiae Automotive United Trades Organization (AUTO) does not deny that article II, section 40, expressly authorizes the Legislature to refund taxes collected on motor vehicle fuel by identifying such refunds as within the list of permissible “highway purposes.” AUTO also accepts that a “refund” may be provided programmatically so long as the program funded by the refund dollars directly benefits the payers of the taxes collected. However, like Petitioner Washington Off-Highway Vehicle Alliance, AUTO asserts the 2009 appropriation to State Parks does not directly benefit the relevant class of taxpayers, and thus does not comply with the article II, section 40 refund clause. AUTO denounces the 2009 appropriation as an “effort to gain access to the [motor vehicle fund] for non-highway projects.” Amicus Brief at 1.

AUTO’s argument has no merit because the 2009 appropriation was not a raid on the motor vehicle fund (MVF). The challenged appropriation came from a one percent annual refund set-aside that reflects a considered and conservative estimate of fuel tax collections attributable to recreational non-highway use of those fuels. Moreover, AUTO’s argument fails for the same reason that WOHVA’s arguments fail: The 2009 appropriation to State Parks provided a direct benefit to the 80 percent of recreational non-highway fuel purchasers who pursue the type

of non-motorized recreational activities that are available at state parks. Like WOHVA, AUTO fails to present any credible evidence or argument that the Legislature misappropriated MVF funds for non-highway purposes and thus fails to meet the heavy burden of proving beyond a reasonable doubt that the Legislature's appropriation violated the constitution. The court of appeals should be affirmed.

II. FACTS

The following facts are relevant in responding to the Amicus Brief. A legislatively funded independent study reported in 2003 that 80 percent of fuel consumed by back-road drivers is consumed by recreationalists in pursuit of destinations where they engage in non-motorized recreational activities such as "hiking, mountain biking, cross-country skiing, and equestrian," as well as "sightseeing, hunting, fishing, [and] wildlife viewing." CP 122. By contrast, only 20 percent of the fuel consumed for non-highway recreational purposes was used in the pursuit of motorized recreational activities such as "four-wheeling," trail-riding on motorcycles, or use of all-terrain-vehicles. CP 122.

WOHVA has stipulated that "virtually all of the state parks feature 'nonmotorized recreational facilities' within the meaning of [former]

RCW 46.09.020.” CP 99.¹ “Nonmotorized recreational facilities” are defined as “recreational trails and facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonmotorized recreational users.” RCW 46.09.310(9). WOHVA also stipulated that the challenged appropriation went “to pay a portion of the salaries and benefits of employees *directly engaged in the maintenance and operation of state parks.*” CP 98 (emphasis added). None of the challenged appropriation was used to improve accessibility for boaters. CP 98.

Each year, approximately one percent of motor fuel excise tax collections are set aside as a refund to use in building and operating recreational facilities that are enjoyed by people who paid those taxes. The one percent refund amount is based upon a conservative estimation of the portion of the motor fuel excise taxes paid on fuel actually used for recreational non-highway purposes. These funds are set aside to the ORV and NOVA accounts. RCW 46.09.520.²

As required by law, the former Interagency Committee on Outdoor Recreation (IAC) maintained a statewide plan to guide distribution and

¹ RCW 46.09.020 has been recodified as RCW 46.09.310.

² Although the statute authorizes this one percent refund into the NOVA and ORV accounts, the refund amounts are less than the actual tax paid in by recreational non-highway fuel purchasers. Since 2008, the gas tax has been set at 37½ cents per gallon, *see* RCW 82.36.025, but for purposes of calculating the one percent refund, the legislature presently credits only 23 cents per gallon. RCW 46.09.520(1). As a result, the amount transferred to the NOVA and ORV accounts is actually less than the full amount of gas tax that the recreational non-highway fuel purchasers are paying into the system.

expenditure of NOVA funds. *See* RCW 46.09.370. In 2005, the IAC released its 2005-2011 NOVA Plan, which contains several goals pertinent to this case. First, the NOVA Plan detailed a 2004 recommendation to the Legislature to share funds more evenly across ORV uses, non-highway recreational uses, and non-motorized recreational uses. CP 325.³ Another goal was to encourage NOVA-funded projects that are located conveniently near population centers. CP 431. Another goal was to focus more on maintenance of existing facilities than on acquisition and capital projects. CP 442.

III. AUTHORITY AND ARGUMENT

AUTO raises two insupportable claims behind its assertion that the Legislature unconstitutionally raided the motor vehicle fund. AUTO first claims that the State Parks appropriation was not part of a legitimate refund because it did not provide targeted benefits to the relevant category of taxpayers. In making this argument, AUTO relies primarily on the erroneous assertion that some of the 2009 appropriation benefitted boaters who can separately claim direct refunds, purportedly giving boaters an undeserved double-refund. Second, AUTO incorrectly claims that the court of appeals and the State would allow the Legislature to spend refunds for “*any* purpose, as long as those funds are designated as ‘refunds.’” Amicus

³ The full report is split into two parts within the court record. The beginning of the report is at CP 313 – 330, the remaining part of the report is at CP 431 – 468.

Brief at 9 (emphasis in original). To the contrary, the court of appeals correctly held that constitutionally permissive refunds “must benefit nonhighway users who paid motor vehicle fuel excise taxes.” *Wash. Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 741, 260 P.3d 956 (2011).

A. The 2009 Appropriation for the Maintenance and Operation of State Parks Benefits Non-Highway Recreational Fuel Users and Satisfies the Article II, Section 40 Refund Clause.

In appropriating NOVA funds to State Parks, the Legislature directed that the funds be used “for maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users.” Laws of 2009, ch. 564, § 944. In 2010, the Legislature amended the statute to add an express finding that the appropriation “will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities.” Laws of 2010, 1st Spec. Sess., ch. 37, § 936 (presently codified at RCW 46.09.520(4)).

Like WOHVA, AUTO invites judicial micromanagement of legislative fact-finding, urging this Court to reject the Legislature’s considered determination that recreational non-highway fuel users would directly benefit from continued access to state parks and the non-highway amenities they provide. In construing the state constitution and applying its limits on legislative actions, courts have acknowledged the plenary

authority of the Legislature, especially in the role of legislative fact finding. “Legislative declarations of fact . . . are deemed conclusive unless they are obviously false and a palpable attempt at dissimulation.” *CLEAN v. State*, 130 Wn.2d 782, 808, 928 P.2d 1054 (1996) (internal quotation marks omitted). Courts have applied this high level of deference even when the particular legislative fact, such as finding the existence of a budgetary emergency, results in citizens being denied the constitutional right of referendum for the legislation at issue. *Id.* This high level of deference has also been afforded in other contexts. *See, e.g., State v. McCuiston*, No. 81644-1 (Wash. May 3, 2012), slip op. at 22-23 (judicial deference to legislative fact findings precludes the need to conduct a judicial inquiry into the degree of scientific rigor underlying such findings); *CLEAN v. State*, 130 Wn.2d at 814 (J. Talmadge, concurring) (listing numerous examples where the “Court has been exceedingly reluctant, and properly so, to intrude upon the decisionmaking process of a coordinate branch of state government.”); *State v. Anderson*, 81 Wn.2d 234, 240, 501 P.2d 184 (1972) (holding a legislative declaration of the need for a law is deemed conclusive as to the circumstances asserted unless “the legislative declaration on its face is obviously false”).

Here, the Legislature expressly found that “boaters and off-road vehicle users and others who use nonhighway and nonmotorized

recreational facilities” would benefit by utilizing NOVA funds to help operate and maintain the State’s park system. The Legislature’s declaration is not obviously false on its face, nor does it resemble an attempt at dissimulation.

To the extent this Court is inclined to scrutinize the express findings set out in the 2010 amendment to former RCW 46.09.170(4), at least five factual bases support the Legislature’s findings.

First, nearly every state park offers one or more non-motorized recreational opportunities including hiking trails, mountain biking trails, camp grounds, and numerous other amenities that are the same amenities utilized by recreational non-highway fuel users. WOHVA acknowledged this fact when it stipulated that virtually all of the state parks constitute “nonmotorized recreational facilities” under the statute, which means that they contain “recreational trails and facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonmotorized recreational users.” RCW 46.09.310(9).

Second, the 2003 fuel use study establishes that 80 percent of fuel consumed by recreational non-highway drivers is consumed to reach destinations where they engage in non-motorized recreational activities,

nearly all of which are available at most state parks.⁴ Where 80 percent of non-highway fuel consumption is associated with taxpayers who are seeking out a variety of non-motorized recreational activities, and where state parks provide opportunities to engage in these types of non-motorized recreational activities, it made sense for the Legislature to conclude that keeping state parks open and operating will preserve those opportunities and directly benefit the relevant taxpayers.

Third, one of the IAC goals for the 2005-2011 period was to focus on funding non-highway recreational opportunities closer to urban areas, and many state parks are within the urban core.⁵ CP 431. Another goal was to provide more NOVA funding to non-highway and non-motorized recreational activities (60 percent) than ORV activities (30 percent). CP 325. The 2009 appropriation to State Parks matched the allocation goal by directing more funds towards non-motorized recreational activities, while other 2009 appropriations were still available for ORV facilities.⁶

Fourth, yet another IAC goal was to focus expenditures on maintenance instead of capital improvements, CP 442, and the 2009

⁴ See also State's Supplemental Brief at 13 & n.8, detailing the number of parks at which various specific recreational amenities are available.

⁵ A review of any state map showing the location of state parks will confirm that dozens of state parks abut the I-5 and I-90 corridors. See, e.g., http://www.dnr.wa.gov/Publications/eng_rms_trustlands_map_nu2.pdf (last visited 4/27/12).

⁶ See State's Supplemental Brief at 14-15 (analyzing the percentages of off-road appropriations made in the 2009 operating budget).

appropriation to State Parks was for operations and maintenance. The majority of State Parks' operating costs are the salaries and benefits of its employees, who are "directly engaged in the maintenance and operation of state parks." CP 98. The employees are necessary to operate and maintain the parks. The record shows that without this funding, some parks would have closed and the non-highway fuel taxpayers would have lost access to the non-motorized recreational facilities available within those parks.

Finally, State Parks has previously received over two dozen competitively awarded grants from the NOVA program to acquire or build numerous off-highway amenities, both motorized and non-motorized. CP 388-89; CP 99. Those grants reflected a reasoned determination by the Interagency Committee on Outdoor Recreation that such projects would directly benefit the relevant taxpayer groups. Funding the continued operation and maintenance of state parks keeps those parks open, thereby maintaining access to those previously-funded projects.

In conclusion, the Legislature's finding that the 2009 appropriation to State Parks would benefit 80 percent of the non-highway fuel user group finds extensive support in the record. The appropriation to State Parks thereby constituted a refund authorized by law that fully conforms with article II, section 40(d).

AUTO claims the State Parks appropriation cannot satisfy the refund clause because it allegedly benefits individuals outside of the relevant taxpayer group, such as boaters. The argument fails for two reasons. First, State Parks did not expend any of the 2009 appropriation for boating facilities. CP 98-99. Thus AUTO's arguments about the NOVA funds being used to benefit boaters lack support in the record. Second, the fact that boaters and others could also continue to enjoy state parks does not negate the fact that the non-motorized recreational facilities within state parks directly benefit non-highway fuel purchasers.

While article II, section 40, does limit use of motor vehicle funds *exclusively* to highway purposes, one such exclusive purpose is "refunds authorized by law." Art. II, sec. 40(d). No constitutional language requires that the *beneficiaries* of any Motor Vehicle Fund expenditures be *exclusively* those individuals who paid taxes into the Motor Vehicle Fund. All members of the public are free to utilize our public highways, even if they did not pay the taxes used to build and maintain those highways. Likewise, ORV facilities funded by NOVA dollars are available to the general public, including persons who travel from out-of-state and may not purchase fuel in Washington, and persons who use ORV facilities for non-motorized activity such as BMX (bicycle motocross) riding. Similarly, State Parks has received over two-dozen specific NOVA

program grants over the years, and no party has ever complained that such grants were invalid because the general public are welcome to use those amenities. CP 388-89. Also, the appropriation out of the NOVA account constituted less than 10 percent of State Parks' total 2009-2011 operating budget, and because the remaining portion of State Parks' budget came from other funding sources, the rest of the public have the right to share in the amenities offered at state parks.

AUTO's claim that a refund program can benefit *only* the relevant taxpayers would require any such program to have exclusive membership requirements with the attendant ability to monitor and keep out all non-taxpayers.⁷ WOHVA itself does not argue such a construction of the refund clause. Under AUTO's theory of *exclusive* benefit, every program grant offered since 1965 for boaters, and every program grant offered since 1971 for ATV, ORV, and snowmobiler users, would be unconstitutional. Contrary to AUTO's theory, so long as a refund program directly benefits the relevant category of taxpayers, the program complies with the constitutional requirements, regardless of the fact that others may have access to the same amenities.

⁷ Furthermore, such a program with exclusive access would be unable to accept grants or funds from any other public source because exclusive access would be inconsistent with the purpose of most other public funding sources.

B. Constitutionally Permissible Refunds Must Benefit the Relevant Taxpayers.

AUTO accuses the court of appeals of performing “logical gymnastics to reach its remarkable conclusion that the Legislature may now expend MVF funds for *any purpose*.” Amicus Brief at 9 (emphasis added). Rather, it is AUTO that engages in logical contortions by misconstruing the holding of the case. In reality, the court of appeals’ holding was narrowly tailored: “We conclude that a refund authorized by law under article II, section 40, *must benefit nonhighway users who paid the motor vehicle fuel excise taxes* and that the 2009 appropriation satisfies that requirement.” *Wash. Off-Highway Vehicle Alliance*, 163 Wn. App. at 741 (emphasis added). Contrary to AUTO’s claim, and contrary to the dissenting opinion in *Wash. Off-Highway Vehicle Alliance*, this holding does *not* provide “unfettered discretion to the legislature to appropriate these refunds without limitation.” *Id.* at 742 (Worswick, A.C.J., dissenting).

A constitutionally permissive refund program should meet two criteria. First, the amount of the refund cannot be greater than the amount of taxes paid in by the relevant taxpayer group. WOHVA stipulates that the one percent of Motor Vehicle Fund dollars transferred into the ORV and NOVA accounts is less than the total amount of taxes paid by non-

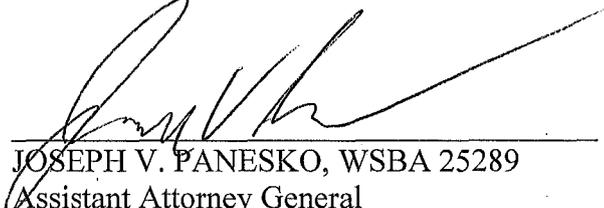
highway vehicle users. Second, the amenities funded by the refund program must directly benefit the relevant class of taxpayers. As pointed out above, the amenities available within state parks are the same amenities pursued by 80 percent of recreational non-highway drivers, establishing the requisite direct connection.

IV. CONCLUSION

AUTO's amicus brief provides no additional weight to WOHVA's challenge, and their collective arguments fail to carry the heavy burden required to show that the Legislature's appropriation from the NOVA account to State Parks violates the constitutional limits beyond a reasonable doubt. The court of appeals should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of May, 2012.

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