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STATE OF WASHINGTON
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No. 86602-3

BY RONALD R. CARPENTER

**SUPREME COURT
OF THE STATE OF WASHINGTON**

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

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.

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

JAMES L. BUCHAL, WSB #31369
Murphy & Buchal LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97214
(503) 227-1011
Attorney for Petitioners

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Introduction

Petitioners are two Washington nonprofit corporations, the Washington Off Highway Vehicle Alliance and NMA Trail Division, and four individual residents of Washington, David S. Bowers, Kathleen J. Harrison, Jon O'Brien, and Kurt J. Kootnekoff.

Assignment of Error and Issues Presented

Petitioners raise a single assignment of error and single issue: whether the appropriation and subsequent expenditure of \$9,560,000 from the non-highway and off-road vehicle activities (NOVA) program account to the state parks and recreation commission ("Parks") violated Article II, § 40 of the Washington Constitution.

Respondents have raised two additional issues: (1) whether all Petitioners are somehow collaterally estopped by the prior decision of the Court of Appeals in *Northwest Motorcycle Ass'n [NMA] v. Interagency Comm'n for Outdoor Recreation*, 127 Wn. App. 408 (2005); and (2) whether this appeal has been mooted by the expiration of the particular appropriation at issue.

Statement of the Case

Even prior to amendment, the People of Washington insisted that their Constitution provide that "[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the

object of the same to which only it shall be applied”. (Wn. Const. Art. VII, § 5.) In 1944, by which time it was long apparent that Legislature was not spending fuel taxes on the intended object of improving highways, the People of the State of Washington added a new and more specific § 40 to Article II:

“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

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

(Wn. Const. Art. II, § 40.) Voters wanted fuel taxes spent on roads, and not used for other purposes. (1944 Voters’ Pamphlet: CP602-03.¹)

Article II, § 40 expressly defines the permissible “highway purposes” for which the fuel taxes may be expended to include “refunds authorized by law for taxes paid on motor vehicle fuel”. Over the years, the Legislature has enacted various provisions for a refund of motor vehicle fuel tax directly to taxpayers, but since 1971, this refund has not

¹ Citations to the clerk’s papers are in the form “CP”, followed by the page number of that record.

been available to Petitioners and others utilizing “nonhighway vehicles”.

See RCW 46.09.150.²

Instead, the Legislature developed a program to “refund” such taxes to a grantmaking program originally intended to provide recreational benefits for off-road vehicle users. The program is set forth in RCW 46.09.170, which provides that “[f]rom 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” (RCW 46.09.170(1)) and “place these funds into the general fund” (RCW 46.09.170(2)). There follows a detailed and complex formula which provides that the largest portion of the funds should be treated as follows:

“ . . . Fifty-eight and one-half percent shall be credited to the nonhighway and off-road vehicle account [NOVA 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”.
RCW 46.09.170(2)(d).

The statute provides that “funds under this subsection shall be expended in accordance with the following limitations” (*id.*), and allocates 30% to “education, information and law enforcement” and 70% “for ORV,

² The pertinent provisions of RCW 46.09 were recodified effective July 1, 2011; for consistency, we use the pre-2011 citations and include cross-references in the Table of Authorities.

nonmotorized, and nonhighway road recreation facilities” (RCW 46.09.170(2)(d)(i)-(ii)). “Not less than thirty percent” of this 70% share “may be expended for ORV recreation facilities”. RCW 46.09.170(2)(d)(ii)(A).

Additional statutory provisions operate to maintain congruence between the burdens of the motor vehicle fuel tax and the recreational benefits provided by the grantmaking program. *See* RCW 46.09.280 (provisions to “ensure that overall expenditures reflect consideration of the results of the most recent fuel use study”); RCW 46.09.250 (statewide plan).

In a prior case, the Court of Appeals upheld the expansion of that program, known as the “non-highway and off-road vehicle activities” program (hereafter, the “NOVA program”), to provide grants for “nonmotorized recreational facilities”. *Northwest Motorcycle Association [NMA] v. State Interagency Comm’n for Outdoor Recreation*, 127 Wn. App. 408 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). Following the *NMA* decision, the Legislature expanded its legislative reach with respect to motor vehicle fuel taxes through the device challenged on this appeal: in the context of general fund shortfall, it reappropriated funds from the NOVA program account to be spent “on general park operations for salary of rangers and park maintenance [personnel]”. (CP416; *see also* CP482

(detailed allotment for “salaries and benefits”; *Washington Off Highway Vehicle Alliance [WOHVA] v. State of Washington Interagency Commission for Outdoor Recreation*, 163 Wn. App. 722, 729 (2011) (majority notes entire amount spent for “employee salaries and benefits”). While seizure of the NOVA funds preserved certain employment in the state parks, it also caused substantial public employment losses and operational curtailments in other public programs providing ORV benefits to Petitioners. (*See generally* CP65-79, CP81-92.)

The sequence of legislative action was as follows. On May 19, 2009, the Governor approved (with partial vetoes not important to this case) Engrossed Substitute House Bill 1244 (ESHB 1244), which made certain operating appropriations for fiscal years 2009-2011. Section 944 of the Bill provided that during the 2009-2011 fiscal biennium, “the legislature may appropriate such amounts as reflect the excess fund balance in 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.” (CP63.) Section 303 of the bill provided an appropriation to the Washington State Parks and Recreation Commission (Parks) from the NOVA program account in the amount of \$9,560,000. (CP59.)

While the legislature characterized the monies as an “excess fund balance” in the NOVA account, the Legislature’s appropriation caused the Board to declare that due to budget cuts, grants would not be offered in the NOVA Program in 2009 and 2010. (*See* CP99.) In order to foster orderly review of the narrow legal questions presented, defendants stipulated that the issue is ripe for review, and that plaintiffs, who suffer by reason of the loss of NOVA program grants, have standing to pursue their claims herein. (CP549-50.)

In the midst of the case, in an apparent attempt to influence the ongoing litigation, the Legislature amended the statute to add a declaration that: “The legislature finds that the appropriation of NOVA funds from the account during the 2009-11 fiscal biennium . . . *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 (emphasis added). This language, however, demonstrates a legislative intention to benefit groups beyond those who paid the taxes. In particular, boat owners get actual refunds for their motor fuel excise taxes. *See* RCW 79A.25.040-050.

A split decision by the Court of Appeals upheld the statute in a published opinion filed September 13, 2011. *WOHVA*, 163 Wn. App. 722. The majority opinion determined that “a refund authorized by law

under article II, section 40 must benefit nonhighway users who paid motor fuel excise taxes and the 2009 appropriation satisfies that requirement”. (*Id.* at 741). The dissenting judge determined that the majority opinion improperly authorized “an end run around the constitution’s explicit prohibition on the use of highway funds for nonhighway purposes”. (*Id.* at 742.)

Argument

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

While it is true that “[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity” (RCW 34.05.570(1)(a)),³ Petitioners meet that burden because the Constitutional provision is unambiguous and the Legislative scheme is contrary to it.

The plain language of Article II, § 40(d) covers “all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel”. The manifest purpose was to dedicate the voters’ “gas tax money” to “highway purposes”. (*See also* CP604 (Voter’s Pamphlet complains that “. . . in excess of \$10,000,000 of your gas tax

³ This Court may wish to reconsider opinions declaring that the burden of proving unconstitutionality is “beyond a reasonable doubt” as inconsistent with this statute, as well as providing a presumption contrary to all human experience: even constitutional governments, in the long run, inevitably tend to assert powers not granted by the People.

money was diverted away from street and highway improvement and maintenance for other uses.) The original purpose of the refund language in Article II, § 40(d) was to limit the expenditures to the improvement and maintenance of highways, or return the taxes collected to those who paid them. This Court has repeatedly set aside the Legislature's disregard of Article II, § 40. *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 555 (1969); *Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216 (1961); *Automobile Club of Washington, Inc. v. Seattle*, 55 Wn.2d 161, 163 (1959).

Respondents take the position that once the Legislature declared fuel excise tax revenues to be "refunded" pursuant to RCW 46.09.170(1), any decision regarding the expenditure of such "refunds" comes within the Legislature's plenary power of taxation. In essence, Respondents urge this Court to hold that an abstract declaration that amounts are "refunded" permits the Legislature to do whatever it wants with the money. This demonstrates a profound disrespect for the very concept of constitutional limitations on legislative action.

Since *Marbury v. Madison*, 5 U.S. 137, 176 (1803), it has been "emphatically the province and duty of the judicial branch to say what the law is". *Id.* at 176. This Court has repeatedly emphasized that the "ultimate power to interpret, construe and enforce the constitution of this

State belongs to the judiciary”. *See generally Seattle School Dist. v. State*, 90 Wn.2d 476, 496-97 (1978) (collecting cases). And this Court has stated: “[w]here, as here, the issues involve the constitutionality of a statute and matters relating to the expenditure of public funds, it is appropriate for us to exercise our original jurisdiction”. *Dep’t of Ecology v. State Fin. Comm.*, 116 Wn.2d 246, 251 (1991).

For this reason, any State objections concerning the “political” nature of the case, or the legislature’s “prerogatives” in taxation or the creation and funding of programs, are beside the point because the Constitution speaks directly to the lawfulness of the funding. “[T]he Legislature possesses a plenary power in matters of taxation *except as limited by the Constitution*,” *Belas v. Kiga*, 135 Wn.2d 913, 919 (1998) (emphasis added), and here the Constitution expressly limits the Legislature’s plenary powers.

Specifically, Article II, § 40 requires that motor vehicle fuel tax revenues “shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes”. Those “highway purposes” are then defined to include “[r]efunds authorized by law for taxes paid on motor vehicle fuels”. This case marks the first time this Court has construed the term “refund” as used in Article II, § 40, but it is not a particularly troublesome term.

As in the *Automobile Club* case, “we are here confronted with a constitutional limitation adopted by the people, which is to be understood as their words are used in their ordinary meaning and not in any technical sense”. *Automobile Club*, 55 Wn.2d at 167; *see also Pacific Northwest Bell*, 59 Wn.2d at 220 (“Rules of construction require that words in the constitution be given their usual, ordinary and nontechnical meaning”); *O’Connell*, 75 Wn.2d at 559; *State ex rel. Heavy v. Murphy*, 138 Wn.2d 800, 809 (1999).

At first glance, both the *NMA* court and the majority below seemed to do just that:

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

NMA, 127 Wn. App. at 415 (emphasis added); *WOHVA*, 163 Wn. App. at 735.

But the language of the appropriation here does not even attempt to return the funds to the affected taxpayers. Rather, its purpose is plain from the statutory language: “to the state parks and recreation

commission for maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users”. (CP63 (§ 944(4).)

There is no dispute that:

- Not one dime of the appropriation will in fact be spent on “improv[ing] accessibility for boaters [who have no logical relationship to any “refund” through the NOVA program at all] and off-road vehicle users”—it will all be spent for salaries of Park employees (CP98);
- ORV users can access but a single facility within the entire State of Washington providing benefits to them, which benefits they already fund through other Legislative direction of the RCW 46.09.170(1) “refund” amount (RCW 46.09.170(2)(c)) (CP98-99); and
- Because of the challenged re-appropriation, amounting to 58.5% of the “refunded” taxes, all ORV benefits from the NOVA program ceased (CP99).

In short, the only way “the sum [may be said to] be returned to those people who used the gasoline for nonhighway purposes,” *NMA*, 127 Wn. App. 415, is the notion that paying the salaries of Parks employees might somehow provide benefits to nonmotorized recreationalist taxpayers who might someday visit the parks. This is not returning motor vehicle fuel excise taxes “to those people who used the gasoline”. *NMA*, 127 Wn. App. at 415 (emphasis added); *WOHVA*, 163 Wn. App. at 735. There is simply no “connection between the expenditure and [any] contemplated highway use”, as this Court has recently required to sustain the

constitutionality of expenditures under Article II, § 40. *Freeman v. Gregoire*, 171 Wn.2d 316, 329 (2011).

The majority below avoided this obvious conclusion by invoking a rule of statutory construction that “when interpreting a statute, we must consider the statute as a whole and avoid rendering any section meaningless . . .”. *Truly v. Heuft*, 138 Wn. App. 913, 922 (2007) (quoted in *WOHVA*, 163 Wn. App. at 737). The Court reasoned that because the Legislature added subsection (4) to RCW 46.09.170, provisions, authorizing itself to “appropriate such fund as reflect the excess fund balance in the NOVA account” in various ways, any such funds were “part of the refund”. *WOHVA*, 163 Wn. App. at 736.

As a matter of statutory construction, the Legislature apparently *intended* that such funds be “part of the refund.” The question presented, however, is not what the Legislature intended, but whether the Legislature had *power* to define the constitutional provision “refund” in this fashion. This Court’s prior declaration, in this very context, that the Legislature “has no constitutional power or authority to define the meaning and scope of a constitutional provision,” *Washington State Highway Comm’n*, 59 Wn.2d at 222, should answer that question.

Proceeding in the teeth of that declaration, the majority in substance upheld the State’s position that “the determination that a

sufficient benefit [to taxpayers to characterize the expenditure as a refund] is the legislature's alone". *WOHVA*, 163 Wn. App. at 738. The legislature did declare, through legislation passed after the suit was underway, that the challenged expenditure would "benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreation facilities". *Id.* at 738 (quoting Laws of 2010, 1st Spec. Sess., ch. 37, § 936). As a matter of "usual, ordinary and nontechnical meaning," *Pacific Northwest Bell*, 59 Wn.2d at 220, transferring funds to a state agency that runs programs for the benefit of all Washingtonians, including those who did not even pay the taxes, is not in any sense a "refund" of taxes.

Perhaps recognizing this, both the majority and the *NMA* court emphasized Petitioners' (and the *NMA* plaintiffs') failure to challenge the NOVA program as a whole. Petitioners proceeded with a more limited challenge to the further legislative innovation of "refunding" the taxes to Parks employees in reliance upon long-established authority that this Court may hold portions of a statute unconstitutional without striking down the entire statute. *In re Hendrickson*, 12 Wn.2d 600, 609 (1942); *see also* RCW 46.09.900 (severability clause).

The Legislature certainly does not acquire power to override constitutional constraints imposed by the People merely because a group

of Petitioners has not expanded a constitutional argument to its limit. *Cf. Pierce v. King County*, 62 Wn.2d 324, 332 (1963) (“mere acquiescence, regardless of the period thereof, cannot legalize a clear usurpation of power which offends against the constitution adopted by the people”); quoting *Forbes v. Hubbard*, 348 Ill. 166, 176 (1932)). The Court may determine it appropriate to strike down the NOVA program as a whole, but it would not do justice to the Constitution, the People or Petitioners to decline to consider the constitutional objections because they are not presented in their most sweeping form.

Finally, the State is expected to argue that notwithstanding the diversion of these funds, the NOVA program continues to provide benefits to Petitioners. This is a disputed question of fact not properly addressed in review of the Superior Court’s summary judgment holding. It is also beside the point: other legislative appropriations cannot turn this challenged appropriation into a “refund”. The appropriation to Parks is simply an appropriation to a non-highway purpose disguised as a “refund”.

If this re-appropriation of NOVA funds is approved, the Legislature will be able to “refund” these funds to backfill any particular budgetary shortfalls in any agencies arguably providing “benefits” to affected taxpayers and others. No taxpayers will have any incentive to

support any future “refund” programs because constitutional restrictions on spending purposes will be rendered meaningless.

II. COLLATERAL ESTOPPEL SHOULD NOT BAR THIS COURT’S CONSIDERATION OF THE MERITS.

Three out of the four requirements for application of the doctrine of collateral estoppel are absent here: the issues are not “identical”; there are parties before the Court not “in privity with a party to the prior litigation”; and application of the doctrine would “work an injustice”. *Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 449 (1998). The important questions of public law presented also militate against application of the doctrine.

Petitioners are aware of no case where a Constitutional challenge to one statute is regarded as “identical” to a Constitutional challenge to another, different statute. The doctrine of collateral estoppel is not satisfied with a mere “similarity” of issues; it requires the “identical” issue to be determined. Whether the Legislature may re-appropriate NOVA program funds for the benefit of boaters and park users (this case) is manifestly not an *identical* issue to whether the funds may be expended *through the NOVA program* to build and maintain ORV trails and nonmotorized recreational facilities (the *NMA* case).

The *NMA* Court manifestly believed that its holding was limited to a finding that “the Legislature’s dispersal of that refund *through NOVA* for the benefit of the affected taxpayers comes within its plenary powers of taxation,” 127 Wn. App. at 416 (emphasis added); *see also id.* at 415 (“our only concern is whether the funds transferred to the NOVA program qualify as refunds authorized by law”). At the time the *NMA* Court made its holding, the Legislature had innovated beyond disbursement of the “refund” through the NOVA program,⁴ but the *NMA* Court did not understand itself to be approving any such innovative appropriation; the question presented was whether the Legislature could direct the refund to “recreational trails that cannot be used by motorized vehicles”, *id.* at 410. The *NMA* court had before it a fuel use study purporting to tailor NOVA program benefits to taxpayer subgroups upon which it relied to sustain the program spending. *Id.* at 415-16. No such congruence appears between the fuel taxpayers and spending challenged here.

⁴ The *NMA* plaintiffs initially challenged Chapter 238, § 123(3)(b), Laws of 2002, which had amended RCW 46.09.170(1)(d)(iii) to authorize funding for trails “intended solely for nonmotorized recreational uses”. During that litigation, the initial amendment expired and was replaced with SSB 5401 (Chapter 26, Laws of 2003 (1st Special Session)). One portion of SSB 5401 (§ 366(2)) declared that “\$325,000 of the appropriation is provided solely to the state parks and recreation committee to construct and upgrade trails and trail-related facilities for both motorized and nonmotorized uses”. However, the Legislature did not directly appropriate money to Parks.

Even if the Northwest Motorcycle Association were collaterally estopped by virtue of its participation in the *NMA* case—and it should not be—the remaining appellants cannot be considered to have been “in privity” with Northwest Motorcycle Association. Individual appellants Harrison, Kootnekoff, and O’Brien all offered testimony as to the injustice of barring their claims on account of the prior *NMA* litigation. (CP638; CP659; CP678.) Nor can the doctrine of “virtual representation” be imposed, for it requires that “the nonparty in some way participated in the former adjudication, for instance as a witness”. *Garcia v. Wilson*, 63 Wn. App. 516, 522 (1991). There are no such facts here.

Finally, this Court has repeatedly rejected attempts to apply the doctrine of collateral estoppel where, as here, “an important question of public law” is involved. *Kennedy v. City of Seattle*, 94 Wn.2d 376, 379 (1980); *see also Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wa.2d 413, 419 (1989).

III. THIS APPEAL SHOULD NOT BE DISMISSED FOR MOOTNESS.

This Court has identified at least five factors are to be considered in considering whether a case should be dismissed for mootness, and each and every one of those factors militates in favor of exercising jurisdiction here:

“Three factors in particular are determinative: ‘(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur’. [4] A fourth factor may also play a role: the ‘level of genuine adverseness and the quality of advocacy of the issues’. [5] Lastly, the court may consider ‘the likelihood that the issue will escape review because the facts of the controversy are short-lived’.”

Satomi Owners Ass’n v. Satomi, LLC, 167 Wn.2d 781 (quoting *In re Marriage of Homer*, 151 Wn.2d 884, 892 (2004)).

1. A case should not be denied review on the ground of mootness where “matters of continuing and substantial public interest are involved,” *Sorenson v. Bellingham*, 80 Wn.2d 547, 548 (1972), and this case manifestly involves such issues. As the dissenting Justice below correctly noted, the majority’s legal interpretation of Article II, § 40 “essentially authorize[s] the legislature to enact a NOVA excess fund balance transfer for nearly any purpose . . .” *WOHVA*, 163 Wn. App. at 742-43.⁵

2. An authoritative determination is desirable to provide guidance to future legislatures, because the People can only believe that the plain language of their initiative flatly prohibits the conduct challenged here: diverting motor vehicle fuel excise tax revenues to non-highway

⁵ As the dissenting justice went on to explain, all that is required is that the Legislature “makes a finding that nonhighway users will benefit, regardless of how weak that link is”. (A20.)

uses. To paraphrase this Court's remarks in *Washington Legislature v. Lowry*, 131 Wn.2d 309, 317 (1997), "courts, legislators, and Governors have had significant difficulties defining ['highway purposes' and 'refunds authorized by law' such that it is appropriate] . . . in the Court's constitutional role as interpreter of the Washington Constitution, to set forth operating guidelines". Unless and until this Court provides an authoritative determination, the issue will continue to be litigated in the courts below.

3. The issue is almost certain to recur, as Washington State government faces chronic revenue shortfalls, and the Legislature has repeatedly raided the NOVA fund. As set forth in *Northwest Motorcycle Ass'n v. Interagency Comm'n for Outdoor Recreation*, 127 Wn. App. 408, 411 & n.4 (2005), *rev. denied*, 156 Wn.2d 1008 (2006), the statute was the subject of budgetary amendments in 2002, 2003, and 2004. Thereafter there were subsequent budgetary amendments in 2007 and 2009, and 2010. While the Legislature appears inclined to abide this Court's decision before further action, its inactivity so far should not be taken as evidence that the funds are no longer at risk.

4. Because the budget bills have an operative duration of two years or less, it is certain that "the issue will escape review because the facts of the controversy are short-lived". Any future challenge to future

appropriations will raise the same fundamental question of what the term “refund” means in Article II, § 40.

5. As to the “level of genuine adverseness and the quality of advocacy of the issues,” this is not a collusive suit and the issues have been adequately briefed. The questions are squarely presented for this Court on a clear record.

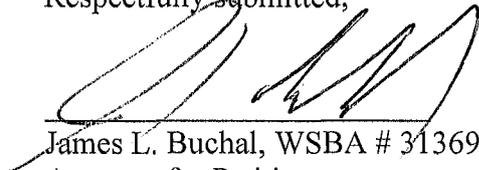
In sum, each and every factor relevant to whether or not this Court should exercise jurisdiction is strongly in favor of its exercise here. The Legislature will continue to violate Article II, § 40 by characterizing its misappropriation of NOVA funds as “refunds” unless and until this Court makes it clear that “refunds as authorized by law” does not mean general public spending with some possibility that motor vehicle fuel excise taxpayers will gain a benefit.

Conclusion

This Court should reverse the decision of the Court of Appeals, and remand the case for further proceedings consistent with its ruling.

Dated: April 5, 2012.

Respectfully submitted,



James L. Buchal, WSBA # 31369
Attorney for Petitioners

Appendix

Washington State Constitution

ARTICLE II LEGISLATIVE DEPARTMENT

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.]

ARTICLE VII REVENUE AND TAXATION

SECTION 5 TAXES, HOW LEVIED. No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.

RCW 34.05.570

Judicial review.

- (1) Generally. Except to the extent that this chapter or another statute provides otherwise:
 - (a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
 - (b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
 - (c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
 - (d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

RCW 46.09.150

Motor vehicle fuel excise taxes on fuel for nonhighway vehicles not refundable.
(Effective until July 1, 2011. Recodified as RCW 46.09.500.)

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.

RCW 46.09.170

Refunds from motor vehicle fund — Distribution — Use. *(Effective until July 1, 2011. Recodified as RCW 46.09.520.)*

- (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. 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.

RCW 46.09.250

Statewide plan. (Effective until July 1, 2011. Recodified as RCW 46.09.370.)

The board shall maintain a statewide plan which shall be updated at least once every third biennium and shall be used by all participating agencies to guide distribution and expenditure of funds under this chapter.

RCW 46.09.280

Nonhighway and off-road vehicle activities advisory committee. (Effective until July 1, 2011. Recodified as RCW 46.09.340.)

- (1) The board shall establish the nonhighway and off-road vehicle activities advisory committee to provide advice regarding the administration of this chapter. The committee consists of governmental representatives, land managers, and a proportional representation of persons with recreational experience in areas identified in the most recent fuel use study, including but not limited to people with ORV, hiking, equestrian, mountain biking, hunting, fishing, and wildlife viewing experience.

- (2) After the advisory committee has made recommendations regarding the expenditure of the fuel tax revenue portion of the nonhighway and off-road vehicle account moneys, the advisory committee's ORV and mountain biking recreationists, governmental representatives, and land managers will make recommendations regarding the expenditure of funds received under RCW 46.09.110.
- (3) At least once a year, the board, the department of natural resources, the department of fish and wildlife, and the state parks and recreation commission shall report to the nonhighway and off-road vehicle activities advisory committee on the expenditures of funds received under RCW 46.09.110 and 46.09.170 and must proactively seek the advisory committee's advice regarding proposed expenditures.
- (4) The advisory committee shall advise these agencies regarding the allocation of funds received under RCW 46.09.170 to ensure that overall expenditures reflect consideration of the results of the most recent fuel use study.

RCW 46.09.900

Severability — 1971 ex.s. c 47.

If any provision of this 1971 amendatory act, or its application to any person or circumstance is held invalid, the remainder of this 1971 amendatory act, or the application of the provision to other persons or circumstances is not affected.

[1971 ex.s. c 47 § 26.]

RCW 79A.25.040

**Marine fuel tax refund account — Moneys derived from tax on marine fuel —
Refunding and placement in account — Exception.**

There is created the marine fuel tax refund account in the state treasury. The director of licensing shall request the state treasurer to refund monthly from the motor vehicle fund an amount equal to one percent of the motor vehicle fuel tax moneys collected during that period. The state treasurer shall refund such amounts and place them in the marine fuel tax refund account to be held for those entitled thereto pursuant to chapter 82.36 RCW and RCW 79A.25.050, except that the treasurer may not refund and place in the marine fuel tax refund account more than the greater of the following amounts: (1) An amount equal to two percent of all moneys paid to the treasurer as motor vehicle fuel tax for such period, (2) an amount necessary to meet all approved claims for refund of tax on marine fuel for such period.

[2010 c 23 § 2; 2000 c 11 § 71; 1995 c 166 § 2; 1991 sp.s. c 13 § 42; 1985 c 57 § 53; 1979 c 158 § 110; 1965 c 5 § 4 (Initiative Measure No. 215, approved November 3, 1964). Formerly RCW 43.99.040.]

Notes:

Effective dates -- Severability -- 1991 sp.s. c 13: See notes following RCW 18.08.240.

Effective date -- 1985 c 57: See note following RCW 18.04.105.

CERTIFICATE OF SERVICE

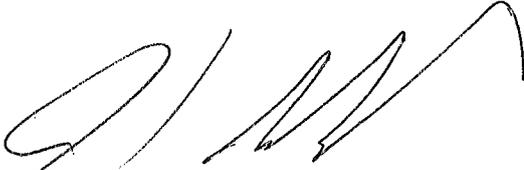
I certify that on April 5, 2012, I caused to be served a copy of the SUPPLEMENTAL BRIEF OF PETITIONERS—WASHINGTON OFF HIGHWAY VEHICLE ALLIANCE, NMA TRAIL DIVISION, DAVID S. BOWERS, KATHLEEN J. HARRISON, JON O'BRIEN and KURT J. KOOTNEKOFF in the above-captioned matter upon the parties herein by first class mail:

ROBERT M. MCKENNA
Attorney General
STEVE E. DIETRICH
Senior Counsel
MICHAEL B. FERGUSON
Assistant Attorney General
Government Operations Division
7141 Cleanwater Drive SW
Olympia, WA 98504-0108
Tel: 360-586-3636

the foregoing being the last known business address.

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

Dated April 5, 2012.



James L. Buchal, WSBA # 31369
Attorney for Petitioners