

FILED  
COURT OF APPEALS

10 JUL -8 AM 10:03

STATE CLERK  
CLERK OF COURT  
CLERK OF COURT  
CLERK OF COURT

No. 40521-1-II

---

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

---

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

Appellants,

v.

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

Respondents.

---

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

---

JAMES L. BUCHAL, WSB #31369  
Murphy & Buchal LLP  
2000 SW 1<sup>st</sup> Ave., Ste. 420  
Portland, OR 97201  
(503) 227-1011

July 7, 2010

PM 9-7-10

**TABLE OF CONTENTS**

INTRODUCTION .....1

ASSIGNMENT OF ERROR AND ISSUES PERTAINING THERETO ...3

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT .....14

ARGUMENT .....15

I. STANDARDS FOR JUDICIAL REVIEW IN ARTICLE II,  
§ 40 CASES .....15

II. THE CHALLENGED PORTIONS OF ESB 1244 CANNOT BE  
SUSTAINED AS “REFUNDS AUTHORIZED BY LAW”  
WITHIN THE MEANING OF ARTICLE II, § 40.....19

III. THE FIG LEAF OF ASSERTED INDIRECT BENEFITS TO  
PURCHASERS OF MOTOR VEHICLE FUEL TAXES  
CANNOT SAVE THE BILL.....25

IV. STARE DECISIS DOES NOT BIND THIS COURT .....29

V. COLLATERAL ESTOPPEL DOES NOT BIND  
APPELLANTS .....30

A. Several Appellants Cannot Be Virtually Represented  
by the NMA Petitioners .....30

B. The Interpretation of Article II, § 40 Is an Important Public  
Question of Law that Ought Not To Be Determined by  
Collateral Estoppel.....32

CONCLUSION.....33

## TABLE OF AUTHORITIES

### Cases

<i>Automobile Club of Washington, Inc. v. Seattle</i> , 55 Wn.2d 161 (1959) .....	16, 18, 19
<i>Garcia v. Wilson</i> , 63 Wn. App. 516 (1991) .....	30, 31, 32
<i>Kennedy v. City of Seattle</i> , 94 Wash.2d 376 (1980).....	32
<i>Northwest Motorcycle Ass'n v. State Interagency Comm'n for Outdoor Recreation</i> , 127 Wash. App. 408 (2005), <i>rev. denied</i> , 156 Wash.2d 1008 (2006) .....	<i>passim</i>
<i>Southcenter Joint Venture v. National Democratic Policy Committee</i> , 113 Wash.2d 413 (1989).....	32
<i>State ex rel. Heavey v. Murphy</i> , 138 Wash.2d 800 (1999).....	15, 18, 19, 20, 21, 29
<i>State ex rel. O'Connell v. Slavin</i> , 75 Wn.2d 554 (1969) .....	17, 19, 20, 24
<i>State v. Ray</i> , 130 Wash.2d 673 (1996).....	29
<i>State v. Riles</i> , 135 Wash.2d 326 (1998).....	29
<i>State v. Stalker</i> , 152 Wash. App. 805 (2009).....	29
<i>State v. Sweet</i> , 138 Wash.2d 466 (1999).....	30

<i>Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.,</i> 59 Wn.2d 216 (1961) .....	16, 17, 19, 21
---	----------------

**Constitution, Statutes, and Rules**

Washington Const. Article I, § 1 .....	3
Washington Const. Article II, § 40 .....	<i>passim</i>
Chapter 81, § 4, Laws of 1923 .....	5
Chapter 47, § 20, Laws of 1971 (1 <sup>st</sup> Ex. Sess.).....	6
Chapter 144, § 3, Laws of 1974 (1 <sup>st</sup> Ex. Sess).....	6
Chapter 220, Laws of 1977 (1 <sup>st</sup> Ex. Sess.).....	6
RCW 46.09 .....	22
RCW 46.09.020 .....	25
RCW 46.09.020(10).....	9
RCW 46.09.020(10)(a) .....	28
RCW 46.09.110 .....	7
RCW 46.09.150 .....	8
RCW 46.09.170 .....	7, 22
RCW 46.09.170(1).....	7
RCW 46.09.170(4).....	24
RCW 46.09.250 .....	23
RCW 46.09.280 .....	22
RCW 46.10.080 .....	9

RCW 46.68.090 .....	7
RCW 79A.25.040-050 .....	9, 28
RCW 82.36.270 .....	5
RCW 82.36.280 .....	5
RCW 82.36.330 .....	6
RCW 88.020.040 .....	9
<b>Other Authority</b>	
Engrossed Substitute House Bill 1244.....	12, 24, 27, 28
<i>Black's Law Dictionary</i> (5 <sup>th</sup> ed. 1979).....	19
<i>Merriam-Webster's Collegiate Dictionary</i> (10 <sup>th</sup> ed. 1988) .....	19

## INTRODUCTION

This case puts before this Court its most important task: protecting the People of the State of Washington, whose will is enshrined in the Washington State Constitution, from the predations of faithless legislators acting in derogation of that Constitution. In 1944, the People of Washington, responding to widespread concern that the Legislature was diverting gasoline excise tax revenues from the highway fund to non-highway purposes, amended the Constitution of the State of Washington to require that such revenues be spend on “highway purposes”.

Appellants, individuals and entities primarily interested in the promotion and operation of off-road vehicles (ORVs) (*see* CP64-65;<sup>1</sup> CP80-81), wish to see gasoline excise tax revenues expended in accordance with Constitutional requirements. The dispute arises primarily through language in Article II, § 40 defining permissible “highway purposes” to include “refunds as authorized by law for taxes paid on motor vehicle fuel”.

In 2005, Division III of this Court upheld the Legislature’s decision to “refund” a portion of gasoline excise tax revenues collected into a grant program formerly run by Interagency Committee for Outdoor

---

<sup>1</sup> Citations to the clerk’s papers for the Court Record are in the form “CP”, followed by the page number of that record.

Recreation, and now run by the Recreation and Conservation Funding Board, called the Non-Highway and Off-Road Vehicle Activities (NOVA) program. *Northwest Motorcycle Association v. State Interagency Comm'n for Outdoor Recreation*, 127 Wash. App. 408 (2005), *rev. denied*, 156 Wash.2d 1008 (2006). In so doing, the Court upheld a program that attempted carefully to target tax revenues collected from nonhighway and off-road users to the NOVA program for expenditure to provide specific benefits to such users. However, the *Northwest Motorcycle Association (NMA)* decision apparently emboldened the Legislature to take the further step, challenged here, of seizing funds from the NOVA program account and diverting them for general payroll expenditures not related to the provision of specific benefits to those paying the taxes. The Superior Court upheld this result based upon the *NMA* case and its conception of the Legislature's broad powers with respect to taxation.

Unless this Court acts to limit the scope of the *NMA* decision, the Legislature may find itself unable to engage in innovative policies such as the NOVA program, for the People of the State of Washington will not suffer motor vehicle excise tax revenues to be diverted for specified and agreeable refund purposes knowing that the careful Constitutional limitations in Article II, § 40 may be discarded at will.

## **ASSIGNMENT OF ERROR AND ISSUES PERTAINING THERETO**

The Superior Court erred when it denied appellants' motion for summary judgment, and granted summary judgment to the State, upholding as constitutional an appropriation of \$9,560,000 in NOVA program funds to the state parks and recreation commission ("Parks").

1. The Superior Court erred to the extent it applied *stare decisis*, asserted to arise from the *NMA* case, to bind it to uphold the Legislature's action.

2. The Superior Court erred to the extent it determined that the Legislature enjoyed plenary authority under its taxation power to divert the money to Parks as a "refund", notwithstanding Article II, § 40.

3. The remote possibility that taxpayers might visit state parks and benefit from the legislative appropriation does not make the appropriation a "refund" within the meaning of Article II, § 40.

4. The Superior Court did not err in declining to consider the State's alternative defense that appellants were collaterally estopped from presenting the issue for review.

## **STATEMENT OF THE CASE**

On November 7, 1944, the People of the State of Washington, in whom all political power is inherent pursuant to Article I, § 1 of the

Washington Constitution, enacted House Joint Resolution No. 4, adding a new § 40 to Article II of the Washington Constitution:

“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 . . .”

(Wash. Const. Art. II, § 40; *see also* 1944 Voters’ Pamphlet: CP602-03.)

The Voter’s Pamphlet argument in favor of amendment noted that

“Between 1933 and 1943 in this state, in excess of \$10,000,000 of your gas tax money was diverted away from street and highway

improvement and maintenance for other uses. Several hundred miles of good, paved safe highway would have been built to save money in motor vehicle operation had this special motor tax money been used as it was intended. These were highways and streets we paid for, but didn't get! Now you can stop further diversion." (CP604.)

There was no opponents' statement in the Voter's Pamphlet.

Article II, § 40 expressly defines the permissible "highway purposes" for which the motor vehicle fund may be expended to include "refunds authorized by law for taxes paid on motor vehicle fuel". The Legislature has enacted provisions for a refund of motor vehicle fuel tax since 1923. *See* Laws of 1923, ch. 81, § 4, now codified at RCW 82.36.280. Generally—albeit not for appellants—the Legislature has declared that

"[a]ny person who uses any motor vehicle fuel for the purpose of operating any internal combustion engine not used on or in conjunction with any motor vehicle licensed to be operated over and along any of the public highways . . . shall be entitled to and shall receive a refund of the amount of the motor vehicle fuel excise tax paid on each gallon of motor vehicle fuel so used . . ." RCW 82.36.280.

Citizens seeking refunds must obtain a permit (RCW 82.36.270), and "[u]pon the approval of the director of the claim for refund, the state treasurer shall draw a warrant upon the state treasury for the amount of the claim in favor of the person making such claim and the warrant shall be

paid from the excise tax collected on motor vehicle fuel . . .” (RCW 82.36.330).

In 1971, however, the legislature declared that

“Motor vehicle fuel used and purchased for providing the motive power for all terrain vehicles on other than public highways shall be considered a nonhighway use of fuel, and for purposes of this 1971 amendatory act shall be known as ATV fuel. *Persons purchasing and using ATV fuel shall not be entitled to refund of the motor vehicle excise tax in accordance with the provisions of RCW 82.36.280 as it now exists or is hereafter amended.*” Chapter 47, § 20, Laws of 1971 (1<sup>st</sup> Ex. Sess.) (emphasis added).

Instead of a refund, the Legislature directed that monies collected from fuel taxes paid by ATV users be distributed by the Interagency Commission for Outdoor Recreation (IAC) for the maintenance of ATV trails. *Id.* §§ 21-22, 27. In 1974, the fuel tax monies were arbitrarily capped at 1%. *See* Chapter 144, § 3, Laws of 1974 (1<sup>st</sup> Ex. Sess).

In 1977, the Legislature deleted references to “ATV” and replaced them with the broader terms “off road vehicle” (or “ORV”) and “nonhighway vehicle”. *See generally* Chapter 220, Laws of 1977 (1<sup>st</sup> Ex. Sess.). The Legislature also provided additional direction concerning the precise purposes for which the 1% of fuel tax revenues might be expended, with the vast majority of funding going to off-road vehicle trails and areas. *Id.* § 14. In substance, the Legislature determined to “refund” the monies paid by appellants and those similarly situated into a program

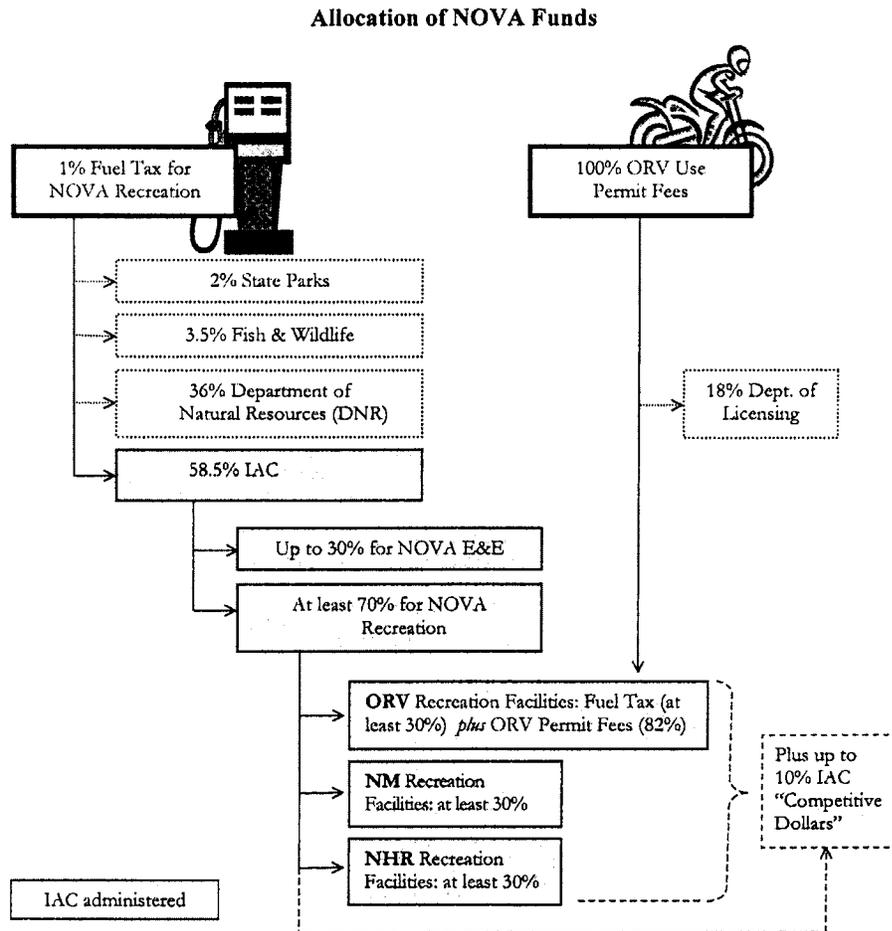
to provide benefits specifically targeted to such taxpayers: a “non-highway and off-road vehicle activities” (NOVA) program. The record contains a fuller history of the NOVA program. (CP346-52.)

As presently constituted, the NOVA program is (or was) operated by the Recreation and Conservation Funding Board. The funds that should have been available for the Board’s use are described in RCW 46.09.170(1), 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 . . . less proper deductions for refunds and costs of collection as provided in RCW 46.68.090” (emphasis added).

The next sentence of RCW 46.09.170(1) directs the State Treasurer to “refund from the motor vehicle fund one percent of the motor vehicle fuel tax revenues collected under chapter 82.36 RCW” based on certain assumptions. These funds, together with certain funds collected for off-road vehicle use permits, *see* RCW 46.09.110, are then supposed to be spent pursuant to detailed criteria set forth in RCW 46.09.170, or were supposed to be spent in this fashion until the Legislative action giving rise to this action. (*See also* CP97-98 (stipulation concerning operation of NOVA program).)

The State has prepared a graphical representation of this somewhat complex scheme:



(CP543.)

RCW 46.09.150 declares that “[m]otor vehicle fuel excise taxes 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 . . .”. The term “nonhighway vehicle” is defined to *exclude*:

“(1) Any vehicle designed primarily for travel on, over, or in the water;

“(2) Snowmobiles or any military vehicles; or

“(3) Any vehicle eligible for a motor vehicle fuel tax exemption or rebate under chapter 82.36 while an exemption or rebate is claimed. This exemption includes but is not limited to farm, construction, and logging vehicles.” RCW 46.09.020(10).

Thus appellants are in the unique position among motorized recreational interests (as opposed to boaters and snowmobilers) of having no statutory eligibility for refunds. *See also* RCW 79A.25.040-050 (specific authority to refunds to boating gasoline.) This is true even though the Legislature has created standalone programs dedicated to improving recreational opportunities for boats (*see, e.g.*, RCW 88.020.040) and snowmobiles (*see* RCW 46.10.080).

Nevertheless, ORV interests strongly supported the creation of the NOVA program. (*See* CP346 (noting passage because of strong support by a “coalition of ORV enthusiasts” and various “state government agencies”).) No party has as yet challenged the somewhat dubious constitutional power to “refund” motor vehicle fuel excise tax revenues to a program created to provide benefits to specific fuel excise taxpayers on a class basis.

In the *NMA* suit, the appellants challenged certain amendments to the NOVA program, urging the court to “rule upon the constitutionality of the challenged amendments without reaching broader questions as to the constitutionality of the larger legislative scheme”. (CP578-79 (citing savings clause in legislation and other authority).) The *NMA* appellants were unhappy with an amendment that authorized the IAC to fund certain trails “intended exclusively for nonmotorized recreation uses”, explaining that the agency’s focus on such trails would, by virtue of finite funding authority and other factors, shrink benefits for ORV users. (*See* CP558-61.) (By contrast, any trails built for motorized uses would also be available for nonmotorized recreationalists.)

Nevertheless, the *NMA* court did opine as to the constitutionality of the NOVA program as a whole, and offered the following explanation:

“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 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.

“At the time of the enactment of Article II, section 40, Washington Statutes already authorized refunds for nonhighway use of fuel. [Citations omitted.] These refunds generally applied to all internal combustion vehicles that were not motor vehicles licensed to be operated on the public highways. RCW 82.36.280. According to statistics compiled in an IAC-sponsored survey

involving 7,252 Washington vehicle owners,<sup>[2]</sup> over 25 million gallons of gasoline were used in 2002 to travel on nonhighway roads (including back roads and off-road trails). Direct refunds to those who purchased gasoline for these nonhighway road trips is [*sic*] not practical due to the number of recipients and the difficulty in providing proof of the nonhighway use.<sup>[3]</sup> Consequently, the legislature directed that one percent of the total gasoline excise taxes representing nonhighway use of gasoline, would be refunded annually to a program that would benefit the nonhighway travelers who purchased the gasoline. RCW 46.09.170. The benefit comes in the form of ORV, nonmotorized, and nonhighway recreational uses.” *NMA*, 127 Wash. App. at 415-16.

In short, the *NMA* court upheld an innovative legislative program through which the taxation power of the Legislature could be exercised to “refund” gasoline excise tax revenues through a carefully-crafted program that targeted benefits to a specific group of taxpayers.

This appeal challenges the Legislature’s abandonment of the NOVA program in favor of seizing funds from the NOVA program

---

<sup>2</sup> The survey (CP104-30) was used to devise the relative funding shares for the types of recreational facilities set forth in the statute, and asked citizens of Washington concerning the purposes for which they used fuel “back roads” “off-road”. (CP110.) Appellants regard this survey methodology as defective, because, among other things, the category “back roads” was manifestly larger than the relatively narrow subset of “nonhighway roads” or off-road use as to which fuel refunds would theoretically be (and formerly were) available. Nevertheless, the survey concluded that roughly 20% of fuel consumption was associated with ORV use. (CP121.)

<sup>3</sup> There was and is no evidence to support such speculation by the *NMA* court. In fact, the Department of Licensing has a simple application form that merely asks applicants to keep appropriate records. (CP46-47; *see also* CP43-44.)

account and transferring them to cover a general fund shortfall and be spent “on general park operations for salary of rangers and park maintenance”. (CP416.) While seizure of the NOVA funds preserved certain park jobs and operations, it also caused substantial public employment losses and operational curtailments in other public programs providing ORV benefits to appellants. (*See generally* CP65-79, CP81-92.)

Specifically, on May 19, 2009, the Governor approved (with partial vetoes not important to this case) Engrossed Substitute House Bill 1244 (ESHB 1244),<sup>4</sup> 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

---

<sup>4</sup> For the convenience of the Court, copies of the pertinent portions of ESHB 1244 may be found as CP58-63.

NOVA program account in the amount of \$9,560,000. (CP59.<sup>5</sup>) The Legislature did not characterize its action as any sort of “refund”.

Whatever the legislature meant by any “excess fund balance” in the NOVA account, it could not have meant that there were more funds than the Recreation and Conservation Funding Board could spend. In fact, the Legislature’s appropriation of this “excess fund balance” has caused the Board to declare that due to budget cuts, grants will 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.)

By order entered March 5, 2010 (CP724-26), the Superior Court dismissed petitioners’ complaint, thereby upholding the constitutionality of the challenged statutory provisions. Insofar as the Superior Court upheld the statutes, it did not address petitioners’ claims for injunctive relief. On April 1, 2010, petitioners timely lodged their appeal with this Court (CP722.)

---

<sup>5</sup> Of this amount, approximately one-third represents ORV permit fees (CP98), not subject to the protections of Article II, § 40.

## SUMMARY OF ARGUMENT

Until the *NMA* case, the courts of Washington had a long history of enforcing the specific constraints on Legislative power reflected in Article II, § 40. It is emphatically the duty of the Court to define the meaning of Article II, § 40, and interpret the phrase “refunds as authorized by law” consistent with common sense. Even assuming *arguendo* that the *NMA* case was correctly decided, its holding that the Legislature could constitutionally “refund” the monies through a grantmaking program targeted to provide benefits directly to affected taxpayers cannot be extended to permit the Legislature to strip those funds from the program and use them to backfill budget shortfalls generally.

Nor can such action be upheld as a “refund” because of the remote possibility that some public expenditures resulting from the appropriation might somehow reach affected taxpayers. To permit the Legislature to “refund” gasoline excise tax revenues to any particular state program needing funds would eviscerate Article II, § 40 and make a mockery of the State Constitution.

No principle of *stare decisis* bars this Court from enforcing the plain language of Article II, § 40, and any contention by the State that these appellants are collaterally estopped by the *NMA* case, which was not accepted by the Superior Court, should be rejected.

It is the province of the judiciary, not the Legislature, to determine the meaning of Article II, § 40, and this Court should resist the Legislature's raid on the motor vehicle fund as it has done so many times before. Under any standard of review, a "refund" does not mean taking a taxpayer's money and spending it for nonhighway public purposes. The Superior Court's decision should be reversed, and the case remanded for further remedial proceedings.

## ARGUMENT

### I. STANDARDS FOR JUDICIAL REVIEW IN ARTICLE II, § 40 CASES.

The Supreme Court's most recent review of legislative action asserted to be inconsistent with Article II, § 40, provides the standard of review:

"A statute is presumed constitutional and the parties challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt. This standard is met if argument and research establish that there is no reasonable doubt that the statute violates the Constitution."

*State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808 (1999) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 920 (1998)).<sup>6</sup> In particular, "a statute

---

<sup>6</sup> In the *Murphy* case, a statute requiring motor vehicle excise taxes to be put *into* the motor vehicle fund was challenged; insofar as the entire purpose of Article II, § 40 was to insure that the funds taken *out* of the fund would be used exclusively for highway purposes, the challenge was easily rejected. *See Murphy*, 138 Wn.2d at 813.

cannot be judicially declared to be beyond the power of the legislature unless in conflict with some specific or definite provision of the constitution. *Id.* at 813 (quoting *Gruen v. Washington State Tax Comm'n*, 35 Wn.2d 1, 7 (1949)).

The courts of Washington have repeatedly set aside as unconstitutional various attempts by the Legislature to expend motor vehicle fund revenues as being in conflict with the specific and definite provisions of Article II, § 40. In 1959, the Automobile Club of Washington challenged a transfer of funds “from the ‘city street fund’ to the emergency fund for the purpose of paying a certain death and bodily injury judgment rendered against the city, by reason of the negligence of its bridge tenders . . .”. *Automobile Club of Washington, Inc. v. Seattle*, 55 Wn.2d 161, 163 (1959). The Supreme Court declared the transfer unconstitutional, noting that the expenditures “could in no way contribute toward the safety, administration, or operation of our highway system”. *Id.* at 168-69.

In 1961, the Supreme Court rejected attempts to utilize motor vehicle fund monies to pay utilities to relocate their facilities incident to highway construction. *Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216 (1961). The Court emphasized the word “exclusive” in Article II, § 40’s demand that such funds be used

“exclusively for highway purposes”. *Id.* at 220-21. Noting that the utilities could simply abandon facilities, the Court declined to find a “highway purpose” in paying the utilities to relocate them. *Id.* at 222.

In 1969, the Supreme Court rejected attempts to appropriate motor vehicle fund monies for the purpose of “planning, engineering, financing and feasibility studies incident to the preparation of a comprehensive public transportation plan”. *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 555 (1969). The Court emphasized that such “funds were intended to be used exclusively for ways open to the public for motor vehicular traffic”. *Id.* at 558 (1969). The Court held that the mere fact that public transportation vehicles “may travel over the highways, or . . . may relieve the highways of vehicular traffic, does not make their construction, ownership, operation, or planning a highway purpose”. *Id.* at 560.

These and other cases uniformly hold that the Legislature is without power to define the scope of the “highway purposes” for which motor vehicle fund monies must be exclusively utilized. In particular, the construction of the meaning of “highway purpose” is exclusively a judicial function”. *Pacific Northwest Bell*, 59 Wn. at 222. As the *Bell* court emphasized, “[t]he constitution does not grant to the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision”. *Id.*

And “where the language of the enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation”. *State of Washington v. Murphy*, 138 Wn.2d 800, 809 (1999) (quoting *Western Petroleum Importers, Inc. v. Friedt*, 127 Wn.2d 420, 423-24 (1995)); see also *Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 167 (1959) (“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”).

The spending in question would not constitute a “highway purpose” within the meaning of any of the subsections of Article II, § 40 other than § 40(d) (“refunds authorized by law”). The question before the Court is whether funds initially “refunded” to the NOVA program account can be diverted for general governmental purposes and still constitute the provision of a “refund authorized by law” within the meaning of Article II, § 40. As set forth below, there can be no reasonable doubt that such an interpretation cannot be allowed, as it would confound the fundamental purpose of Article II, § 40 to “limit . . . expenditure[s]” from the motor vehicle fund, *Murphy*, 138 Wn.2d at 812.

**II. THE CHALLENGED PORTIONS OF ESB 1244 CANNOT BE SUSTAINED AS “REFUNDS AUTHORIZED BY LAW” WITHIN THE MEANING OF ARTICLE II, § 40.**

In § 40(d), as in the other subsections, “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; *Murphy*, 138 Wn.2d at 809.

The usual, natural and ordinary meaning of “refund” is to give money back to the citizens who paid it. The dictionary sources confirm such a common sense understanding of refund. Webster’s Dictionary defines “refund” as “to give or put back” or “to return”. *Merriam-Webster’s Collegiate Dictionary* 983 (10<sup>th</sup> ed. 1988). Black’s Law Dictionary defines “refunds” as

“Money received by the government or its officers which, for any cause, are to be refunded or repaid *to the parties paying them*; such as excessive duties or taxes, duties paid on goods destroyed by accident, duties received on goods which are re-exported, etc.” *Black’s Law Dictionary* 1152 (5<sup>th</sup> ed. 1979) (emphasis added).

No voter could possibly have understood that their word “refund”, as utilized in Article II, § 40(d), would be interpreted to mean anything other than *giving back* the tax revenues to the taxpayers who paid them. A

construction that expands the word “refund” to mean using the funds generally to benefit the People through public expenditures, rather than giving back the funds to affected taxpayers, engenders precisely the result the People sought to avoid: the diversion of highway funds for other public purposes.

The People manifestly intended to constrain their government to either spend the money collected for highway purposes, or give it back to the citizens that paid it. The People’s understanding of “refunds as authorized by law” was surely informed by the presence of statutory refund program dating back more than twenty years before the passage of Article II, § 40, as detailed above. Insofar as the word “refund” is “unambiguous and in [its] commonly received sense leads to a reasonable conclusion, it should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of . . . extending its operation”. *O’Connell*, 75 Wn.2d at 558.

Indeed, where “the language of the enactment is plain, unambiguous and well understood according to its natural and ordinary sense and meaning, [such that] the enactment is *not subject to judicial interpretation*”. *Murphy*, 138 Wn.2d at 809 (emphasis added). To interpret the word “refund” to mean transferring motor vehicle fuel excise

tax revenues to the general fund (after laundering them through the NOVA program) would override entirely the will of the People and destroy the fundamental purpose of Article II, § 40. The Superior Court's decision, in substance, overrules a long line of Washington Supreme Court cases by empowering the Legislature to evade the holdings of those cases by transferring monies out of the NOVA program fund to support those particular expenditures.

While the Legislature may have plenary powers of taxation, it cannot expand the meaning of a tax "refund" beyond reason. As Supreme Court has repeatedly advised in construing Article II, § 40, "the constitution does not grant to the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision". *Murphy*, 138 Wn.2d at 810 (quoting *Pacific Northwest Bell*, 59 Wn.2d at 222). The Legislature has ample power to create any sort of refund of motor vehicle gasoline excise tax revenues it desires, in perfect congruence with Article II, § 40(d), but a real "refund" that returns consideration to the actual taxpayers must be involved. The Legislature cannot alter the meaning of "refund" so as to make the constitutional prohibition on spending toothless.

For all these reasons, the only way to square the *NMA* opinion with the foregoing precedent is to read it as upholding the detailed plan set

forth in RCW 46.09.170 to link particular refund benefits to particular fuel taxes paid by affected taxpayers. The *NMA* court was presented with, relied upon, and referred to the specific survey concerning gasoline usage on “back roads and off-road trails”, and it affirmed Legislative power to direct that funds “be refunded annually to a program that would benefit the nonhighway travelers who purchased the gasoline”. *NMA*, 127 Wash. App.2d at 416. The *NMA* court noted that the “benefits come in the form of ORV, nonmotorized, and nonhighway recreational uses”. *Id.*

It was an essential premise of the *NMA* opinion that the survey data used to craft the proportion of expenditures dedicated to ORV facilities provided a coherent relationship between NOVA program and “refunded” benefits to the affected taxpayers. RCW Chapter 46.09 directly ties the allocation of “refunded” benefits to the categories of uses established in the fuel use survey through the funding percentages specified in the statute. Indeed, the Legislature specifically directed the Recreation and Conservation Funding Board to establish an advisory committee “to ensure that overall expenditures reflect consideration of the most recent fuel use survey” (RCW 46.09.280) to maintain a consistency between the benefits and the taxpayers over time. It also directs the Board to “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 46.09.250.<sup>7</sup>

On the basis of this detailed statutory scheme, the *NMA* court could find that “the Legislature’s *dispersal of that refund through NOVA for the benefit of the affected taxpayers* comes within its plenary powers of taxation”. *Id.* at 416 (emphasis added). The *NMA* court made it abundantly clear that its decision was limited to funds spent under and through the NOVA program. *See, e.g., id.* at 411 (noting that program “is administered by the [IAC]”), 415 (“our only concern is *whether the funds transferred to the NOVA program* qualify as refunds authorized by law”; emphasis added).

This appeal, however, does not concern the “dispersal of that refund *through* NOVA”. Whatever character the funds had as a “refund” in the hands of the IAC, or would have in the hands of the Board, those funds cannot be characterized as a “refund” when transferred away to fund general budget shortfalls elsewhere. This appeal concerns the diversion of the “refunds” *from* the NOVA Program account *to* Parks to replace a reduction in general fund funding.

---

<sup>7</sup> The Board has established such a plan. (CP313-68.)

The Legislature did not even use the word “refund” to describe its action. (See CP58-63(ESHB 1244, §§ 303 & 1244).) *On that basis alone*, fidelity to the Constitution cannot uphold the Legislature’s appropriation as a “refund authorized by law”. The Legislature has taken an account into which it deposited motor vehicle fuel tax revenues, and re-appropriated it, not even purporting to “refund” it.<sup>8</sup>

Certainly the purposes of the appropriation cannot be characterized as “highway purposes”. The Legislature appropriated the NOVA program funds to State Parks for, among other things, general park “maintenance and operation”. (CP63 (ESHB 1244, § 944 (amending RCW 46.09.170(4)).) As a matter of undisputed fact, Parks proposes to use the entire amount for this purpose: “to pay a portion of the salaries and benefits of employees directly engaged in the maintenance and operation of state parks”. (CP98.) And as a matter of undisputed fact, NOVA program grants have stopped. (CP99.) It may be true that the

---

<sup>8</sup> Even if the Legislature had used the word refund, as the Supreme Court has warned in the context of Article II, § 40, “the legislative body cannot change the real nature and purpose of an act by giving it a different title or by declaring its nature and purpose to be otherwise, any more than a man can transform his character by changing his attire or assuming a different name”. *O’Connell*, 75 Wash.2d at 563 (citing cases). Rather, “[t]he constitutionality of an act depends on its real character and on the end designed to be accomplished rather than on its title or the professions as to its purpose which may be contained in it, and therefore such declarations do not conclude the court”. *Id.*

appropriated funds helped keep State parks open, but there is no such thing as a free lunch, and the benefits provided to park users generally are offset by losses in funding that had been targeted to the ORV taxpayer groups. (*See generally* CP65-79, CP81-92.)

**III. THE FIG LEAF OF ASSERTED INDIRECT BENEFITS TO PURCHASERS OF MOTOR VEHICLE FUEL TAXES CANNOT SAVE THE BILL.**

Defendants will point out that the State parks contain “nonmotorized recreational facilities” within the meaning of RCW 46.09.020. (CP99.) And some of these facilities are even of the same type sometimes funded by NOVA grants; indeed Parks has received such grants in the past. (*Id.*) Defendants will say, in substance, what difference does it make if the Legislature “refunds” the gasoline excise tax revenues to the Board to give grants to Parks and other entities, or just appropriates the money to Parks directly?

First, it is undisputed that the Legislature’s action resulted in significant and adverse effects upon appellants and others similarly situated by destroying ORV programs, against which the ephemeral speculation of benefits vanishes. The Board distributes funds pursuant to a plan calculated to return benefits to the affected taxpayers, and the direct appropriation to Parks subverts that plan.

Second, the Legislature did not even attempt to defend the constitutionality of its action by characterizing the \$9,560,000 transfer as any type of “refund” falling within the scope of Article II, § 40. Nor did the Legislature provide any specific guidance to Parks to ensure that the spending was somehow “for the benefit of the affected taxpayers” within the meaning of *NMA*, 127 Wash. App. at 416.

Third, appellants, as ORV interests, get less than nothing from the challenged action. The extensive matrix of recreational activities in State Parks identified by Respondents (CP635-36) does not even refer to *any* ORV activities. It is true that that Riverside Park is identified in the chart notes as containing “600 acres for A.T.V.” (CP635.) The Stipulation establishes that:

“Parks operates one park containing off-road vehicle recreational facilities, Riverside State Park in Spokane. The Allotment Expenditure Status run on November 2, 2009 shows that all of the funding for the off-road vehicle recreational facilities at Riverside State Park comes from the ORV and nonhighway vehicle account. *For 2009-2011, those facilities are not funded by the NOVA program appropriation at issue in this case.*” (CP98-99; emphasis added.)

The ORV facilities at Riverside Park are funded by \$7,200 a month taken from the Off Road Vehicle Account to operate this tiny area (CP485), which extends to covering other park costs as well.

Nevertheless, a declarant for the State asserted that:

“although we have not allotted any of this appropriation to the ORV facilities at Riverside State Park, a portion of the salaries and benefits of employees operating and maintaining the associated park and camping facilities within that park will be paid by this appropriation. Thus to some extent, it will directly benefit ORV users.” (CP632.)

In short, the spending is asserted to constitute the provision of a benefit sufficient to qualify as a “refund” by virtue of the thought that some small portion of it has some small chance of benefitting taxpayers who have some small chance of visiting one of a great many recreational facilities operated in the State. This is a strong a link between the affected taxpayers and the spending as asserting that the money might be given to schools because some of the affected taxpayers’ children attend them, or for prisons because released prisoners might assault some of the affected taxpayers. Such an approach to constitutional interpretation makes a mockery of the People’s serious purpose in enacting Article II, § 40.

It is true that the funds are appropriated to Parks “for the maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users”. (CP63 (ESHB 1244, § 944.)) But the State has stipulated that Parks is not expending the funds to improve accessibility for ORV users (CP99) and Parks is not *required* to do so by the terms of the statute. The Legislature’s general authorization for “maintenance and operation” was manifestly intended to “replace a

general fund reduction [so that] it will help pay the bills” (CP416), without regard to the interests of the affected taxpayer groups. The Legislature simply had no intention of providing targeted benefits sufficient to constitute a “refund”.

The reference to improving accessibility for “boaters” makes it even clearer that the Legislature was not attempting any sort of targeted “refund” benefits to those paying gasoline excise tax. Boaters remain entitled to a refund of the tax (RCW 79A.25.050), and boats are expressly excluded from the statutory definition of “nonhighway vehicles” (RCW 46.09.020(10)(a)) for which no fuel tax refund is available (*id*).

In short, defense of ESHB 1244 is defense of the proposition that the Legislature may “refund” gasoline excise taxes: (1) by paying the salaries and benefits of state employees who provide benefits to the taxpayers in common with all other citizens of Washington; and/or (2) by offering to provide benefits to other taxpayers who are already entitled to a refund of fuel excise taxes under law.

Simply put, ESB 1244 cannot be construed a taxation decision to “refund” in the sense that any sum is “paid back”. *Cf. NMA*, 127 Wash. App. at 415 (quoting *Webster’s 3d New Int’l Dictionary* (definition of “refund”)). The statute *imposes* no link whatsoever between the spending and the Constitutional constraint. The Court may appropriately be guided

by common sense in evaluating this claim. *Cf. Heavey*, 138 Wash.2d at 813. Backfilling budget shortfalls to pay state employees is quite different *from* making affirmative grants to provide specific benefits to specific taxpayer groups pursuant to a scheme rationally, if poorly, targeted to provide such benefits.

#### **IV. STARE DECISIS DOES NOT BIND THIS COURT.**

As set forth above, the *NMA* court was upholding the constitutionality of expenditures made through the NOVA program, not upholding general authority to seize NOVA program funds and transfer them to other agencies to spend them with impunity. But even if the *NMA* decision is construed to cover the latter holding—and it should not be—the doctrine of *stare decisis* should not be invoked in this case.

There is ongoing ambiguity in Washington law as to whether a departure from *stare decisis* requires that the former decision be “incorrect or harmful” or “incorrect and harmful”. *See generally State v. Stalker*, 152 Wash. App. 805, 811-12 & n.1 (2009). The better reasoned cases have utilized “incorrect or harmful”. *E.g., State v. Ray*, 130 Wash.2d 673, 678 (1996) (emphasis added). Given the plain language of Article II, § 40, any holding permitting motor vehicle excise tax revenues to be spent for “operation and maintenance” of state facilities generally is manifestly incorrect, and contrary to the long line of Supreme Court cases cited in the

opening brief. And it is harmful too because it discredits the Constitution and the will of the People in amending it.

Finally, different Divisions of the Court of Appeals frequently disagree concerning even identical legal issues. *See, e.g., State v. Sweet*, 138 Wash.2d 466, 477 (1999); *State v. Riles*, 135 Wash.2d 326, 338 (1998). To the extent the *NMA* case is interpreted to uphold a direct re-appropriation of NOVA program funds to another agency, this court should reject the decision of Division III as manifestly incorrect and/or harmful.

**V. COLLATERAL ESTOPPEL DOES NOT BIND APPELLANTS.**

The State asserted, but the Superior Court did not agree, that collateral estoppel bound appellants from pursuing this litigation. (*See* CR725.)

**A. Several Appellants Cannot Be Virtually Represented by the NMA Petitioners.**

The State oversimplifies the test for collateral estoppel, which has four required elements,

“(1) the issue presented must be identical, (2) there must be a final judgment on the merits, (3) the party against whom collateral estoppel is asserted must have been a party to the former adjudication, and (4) no injustice will result by applying collateral estoppel.” *Garcia v. Wilson*, 63 Wn. App. 516, 518 (1991).

The State bears the burden of proving the elements of this defense. *Id.*

As we have seen, the issues presented are not identical between this case and the *NMA* case, but even if they were, a fatal defect to the State’s attempt to foreclose this Court’s consideration of the issues presented is that most of the appellants in this case have utterly no relationship with the former case or the litigants in it. Indeed, there is only one appellant in common: the Northwest Motorcycle Association.<sup>9</sup> The State cites no case, and Petitioners are aware of none, where plaintiffs who had nothing to do with a prior case—and were not even associated with an entity in the prior case—are somehow to be barred from the courts of Washington. Testimony before the Superior Court established that at least three appellants, Kathleen Harrison, Kurt Kootnekoff, and Jon O’Brien, were not members of the Northwest Motorcycle Association and had nothing to do with the prior litigation. (CP637-38, CR658-59, CP677-78.)

Lacking an identity of parties between the former action and this action, the State attempted resort to a doctrine of “virtual representation”. *Garcia v. Wilson*, 63 Wn. App. 516, 520-21 (1991). As the *Garcia* case explains, “[t]he primary factor to be considered is whether the nonparty participated in the former adjudication, for instance as a witness.” *Id.* at 521. Thus in *Garcia*, a motor vehicle accident case where both passengers in the car testified in a case brought by one of them against an allegedly negligent defendant, the non-suing passenger was held collaterally

---

<sup>9</sup> Plaintiff NMA Trail Division, a Washington nonprofit corporation, operates under the name Northwest Motorcycle Association. (CP6.)

estopped on the question of defendant's negligence. The *Garcia* court also explained that before "virtual representation" is found, "there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene but presents no valid reason for doing so." *Id.* at 521. The State makes no such showing in this case, and can make no such showing.

**B. The Interpretation of Article II, § 40 Is an Important Public Question of Law that Ought Not To Be Determined by Collateral Estoppel.**

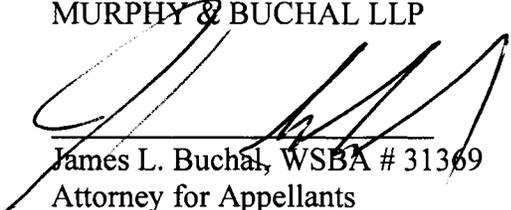
The Washington Supreme Court has repeatedly rejected attempts to apply the doctrine of collateral estoppel where, as here, "an important question of public law" is involved. *Kennedy v. City of Seattle*, 94 Wash.2d 376, 379 (1980) (applying doctrine to assess constitutionality of a Seattle ordinance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

**CONCLUSION**

For the foregoing reasons, the judgment of the Superior Court should be reversed, and the case remanded for further proceedings.

Dated: July 7, 2010.

MURPHY & BUCHAL LLP



James L. Buchal, WSBA # 31369  
Attorney for Appellants

FILED  
COURT OF APPEALS

10 JUL -8 AM 10:03  
STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

No. 40521-1-II

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I certify that on the 7<sup>th</sup> day of July, 2010, I caused to be served a copy of  
Appellants' Opening Brief in the above-captioned matter upon the following party by  
Federal Express:

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

I certify under penalty of perjury under the laws of the State of Washington that

1 the foregoing is true and correct.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

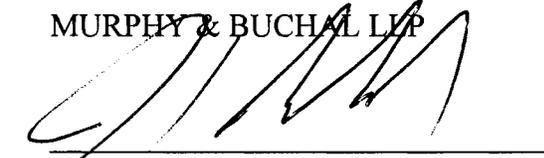
23

24

25

26

MURPHY & BUCHAL LLP



---

JAMES L BUCHAL WSBA #31369

Attorney for Appellants

(503) 227-1011

PAGE 2 – CERTIFICATE OF SERVICE

JAMES L. BUCHAL  
MURPHY & BUCHAL LLP  
2000 SW 1<sup>ST</sup> AVENUE, SUITE 420  
PORTLAND, OR 97201  
TEL (503) 227-1011 FAX (503) 227-1034