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COURT OF APPEALS
DIVISION II

No. 40521-1-II

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
DEPUTY

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.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS

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.

II. DECISION BELOW

Petitioners seek review of the published opinion filed September 13, 2011 in the case of *Washington Off Highway Vehicle Alliance et al. v. State of Washington Interagency Commission for Outdoor Recreation et al.*, Case No. 40521-1-II. A copy of the decision is in the Appendix at pages A1-A20.

III. ISSUE PRESENTED FOR REVIEW

Whether Article II, § 40 of the Constitution of the State of Washington is a dead letter. More specifically, whether the Court of Appeals, in a split decision, properly upheld the Legislature's diversion of motor vehicle fuel excise taxes to cover budgetary shortfalls, in the teeth of the express Constitutional command that the motor vehicle fuel excise taxes be spent for "highway purposes", including "refunds as authorized by law". The dissenting judge below, Acting Chief Judge Worswick, could "find no plausible argument that the transfer of the [funds] to cover a shortfall in the budget for state parks comports with the plain meaning

and a reasonable interpretation of the refund provision” in Article II, § 40.

(A20.)

IV. STATEMENT OF THE CASE.

On November 7, 1944, the People of the State of Washington added 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 . . .”

(Wn. Const. Art. II, § 40; *see also* 1944 Voters' Pamphlet: CP602-03.¹)

In short, the Constitution requires that if the Legislature chooses to collect motor vehicle fuel excise taxes, it must either spend the money for "highway purposes" or refund it to the taxpayers who paid it.

The purpose of the amendment was self-evident: voters wanted gasoline taxes spent on roads, and not used for other purposes. 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. (CP54 (AGO 2001, No. 2 reviews history of the provision).

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. For example, the Legislature has declared that

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

“[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 82.36.280.²

Since 1971, however, this refund has not been available to petitioners and others utilizing “nonhighway vehicles”. See RCW 46.09.150.³

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. 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 v. State Interagency Comm’n for Outdoor*

² Generally, citizens seeking refunds must obtain a permit (RCW 82.26.270), 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). The State provides a simple procedure for obtaining such refunds. See generally <http://www.dol.wa.gov/vehicleregistration/ftrefunds.html> (accessed 10/7/11).

³ “Nonhighway vehicle” is defined as “any motorized vehicle including an ORV [off-road vehicle] when used for recreational purposes on nonhighway roads, trails, or a variety of other natural terrain”. RCW 46.09.310(8). It does not include boats, snowmobiles, or other vehicles eligible for actual fuel tax refunds. *Id.*

Recreation, 127 Wn. App. 408 (2005), *rev. denied*, 156 Wn.2d 1008 (2006). The program is set forth in RCW 46.09.170,⁴ 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 the 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, 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).

⁴ Effective July 1, 2011, this section has been recodified as RCW 46.09.520, as have related sections herein.

Additional statutory provisions operate in an attempt to maintain some degree of congruence between the burdens of the motor vehicle fuel excise tax and the recreational benefits, additional statutory provisions. *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).

The earlier Court of Appeals decision had upheld a statutory amendment to add the “nonmotorized recreation facilities” to the type of recreational facilities that could be funded with NOVA funds. *NMA*, 127 Wn. App. at 411. The Court of Appeals explained its decision as follows:

“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, 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.^{5]} 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 Wn. App. at 415-16.

“This is a legislative policy, so our task is simply to determine if RCW 46.09.170 is constitutional. *Heavey*, 138 Wn.2d at 813. Giving the appropriate deference, we conclude that an annual one percent withdrawal from the motor vehicle fund (an estimate of the taxes paid for nonhighway gasoline use) falls within the refund authorized by article II, section 40. The legislature's disbursal of that refund through NOVA for the benefit of the affected taxpayers comes within its plenary powers of taxation. *Heavey*, 138 Wn.2d at 808-09.”

In short, the *NMA* court upheld a legislative program through which the taxation power of the Legislature could be exercised to “refund” gasoline excise tax revenues through a program ostensibly designed to target recreational benefits to taxpayers who would otherwise have received a refund.

Perhaps encouraged by the *NMA* court's extraordinary “deference”, *NMA*, 127 Wn. App. at 416, the Legislature expanded its raid on the motor vehicle fuel excise taxes through the device challenged on

⁵ Insofar as the State of Washington has long had functioning refund programs for numerous other types of fuel use, this comment was plainly wrong, and the record of that appeal will reflect no evidence to support the Court of Appeals' statement. *See supra* n. 2; *see also* CP43-44 & CP46 (record includes simple form and instructions currently used for refund administration).

this appeal: it simply seized funds from the NOVA program account, in the context of general fund shortfall, 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”; A6 (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 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), 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.)

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.)

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 Sp. Sess., ch. 37, § 936.

Though this language, the legislature again confirmed the lack of any targeting of benefits to taxpayers buying motor vehicle fuel and not able to obtain a direct refund. Boat owners get actual refunds for their motor fuel excise taxes pursuant to the provisions cited above, so

provision of benefits to them cannot constitute a “refund”. And “others”—including those who do not even purchase motor vehicle fuel—cannot be receiving any “refund” through provision of benefits.

A split decision by the Court of Appeals upheld the statute in a published opinion filed September 13, 2011. (A1-A20) The majority opinion determined that the Legislature’s additional language operated “retrospectively” to “clarify” the statute (A15), and ultimately 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” (A18). The dissenting judge easily 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”. (A20.)

V. WHY REVIEW SHOULD BE GRANTED.

Every consideration governing acceptance of discretionary review identified in Rule 13.4(b) of the Rules of Appellate Procedure militates in favor of granting discretionary review.

A. The Majority Opinion Is In Conflict With Numerous Decisions of this Court.

1. The majority opinion ignores this Court's repeated enforcement of the fundamental non-diversionary purpose of Article II, § 40.

This Court has repeatedly struck down the Legislature's attempts to evade the limitations imposed by 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. This Court properly required a direct relationship between the challenged spending and benefit to the highway system. *Id.* at 561.

More recently, this Court declined to issue a writ of mandamus prohibiting the deposit of motor vehicle licensing fees into the highway fund as a matter of “common sense”. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 813 (1999). In so doing, this Court reaffirmed its prior authority construing Article II, § 40. *Id.* at 810-13. The Attorney General has issued a formal opinion reviewing these decisions (AGO 2001, No. 2), which stresses the importance of interpreting Article II, § 40 to give

“meaning to both the nondiversionary purpose of the enacting clause and the [specific] proviso” under review. (*See* CP53.)

The majority opinion gave no weight to all these cases, apparently because none of them construed the specific “highway purpose” of “refunds authorized by law”. (*See* A12) The majority opinion declared that even though “refund” meant “the sum should be returned to those people who used the gasoline for nonhighway purposes” (A12; quoting *NMA*, 127 Wn. App. at 415), the Legislature could “refund” the money to state park employees and vendors through RCW 46.09.170(4). The Court’s disregard for the fundamental non-diversionary purpose of Article II, § 40—placing the taxes into highways or back in the hands of the taxpayers, places its decision in conflict with every decision of this Court that has reviewed Article II, § 40. In authorizing an “end run around the constitution’s explicit prohibition” (A20 (dissenting opinion)), the majority destroyed the fundamental non-diversionary purpose of the provision.

2. The majority opinion ignores this Court’s repeated directions as to the proper function of the judiciary in Constitutional disputes.

There is a second way in which the majority opinion is in conflict with numerous decisions of this Court. To uphold the challenged statute, the majority did not merely expand the term “refund” to include

something quite different than “a sum that is paid back” (*NMA*, 127 Wn. App. at 415 (quoting *Webster’s Dictionary*)), the common sense definition of “refund”. The majority also had to rely on an extreme level of “deference” to the Legislative characterization of RCW 46.09.170 as generally providing a “refund” in these circumstances. While the Court’s reasoning was not entirely clear, the majority appears to have accepted the State’s position that “the determination that a sufficient benefit exists [to find a ‘refund’] is the legislature’s alone”. (A14-15.)

The apparent extreme “deference” to the State’s position seems to shirk the judiciary’s solemn duty to police Legislative compliance with Constitutional limitations on legislative power.⁶ In reviewing Article II, § 40, this Court noted that “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”. *Pacific Northwest Bell*, 59 Wn.2d at 222. Rather, “[t]he construction of the meaning and scope of a constitutional provision is exclusively a judicial function”. *Id.*

⁶ The majority also complained that that Petitioners “made no attempts to challenge previous appropriations from the excess fund balance as unconstitutional per se” (A13), but did not and could not describe why this might have legal significance. A government does not acquire power forbidden to it under the Constitution merely because citizens fail to object for some period of time; such a view is frankly inconsistent with the very concept of a constitution.

The dissenting judge properly recognized that “constitutional analysis requires us to look to the plain language of the text and afford such its reasonable interpretation”. (A20.) She properly opined that the proviso “which defines ‘[r]efunds authorized by law for taxes paid on motor vehicle fuels’ as a ‘highway purpose’ cannot reasonably be interpreted to provide unfettered discretion to the legislature to appropriate these refunds without limitation”. (A19.)

3. The majority opinion ignores this Court’s repeated directions as to appropriate inferences to be drawn in summary judgment cases.

A third and final way in which the majority opinion is in conflict with numerous opinions of this Court was in its extraordinary disregard of the summary judgment context. Over and over again, the Court engaged in detailed weighing of the evidence that is entirely inconsistent with this Court’s longstanding admonition—and the plain language of CR 56—that “all evidence and all reasonable inferences therefrom [must be made] in a light most favorable to the nonmovant”. *Barber v. Bankers Life & Casualty Co.*, 81 Wn.2d 140, 142 (1972).

A significant portion of the majority opinion constituted improper fact-finding concerning the degree of “taxpayer benefit from the 2009 appropriation”. (A15-17.) The majority suggested that the detailed evidentiary showing of losses to Petitioners in ORV facilities was not

sufficiently “specific,” notwithstanding detailed information concerning the budget cuts. (*E.g.*, CP72-74; *see also* CP69-70; CP85; CP87-89.) Ignoring the detailed statutory provisions for allocation of program grants, the majority disparaged benefits to ORV users because “NOVA grants are awarded on a competitive basis”.⁷ The majority did not discuss the parties’ stipulation that the Petitioners had suffered sufficient injury for standing. (*See* CP549-50.)

The majority also cited a board appropriation suggesting that the grant program continued (A17), citing Laws of 2009, ch. 564, § 304. But there is no evidence any of those funds were used for any grants (as opposed to overhead); the majority’s conclusion that § 304 “show[s] that ORV users are receiving a considerable percentage of the one percent refund” (A17) is unsupported and unsupportable. Moreover, the parties had stipulated (consistent with fact) that the challenged statute caused all grants to stop (CP99 (Stip. ¶ 10)).

The Court of Appeals found an additional fact contrary to the stipulation of the parties, rejecting the stipulation that only one state park

⁷ The statute does permit the board to “waive the minimum percentage [to be expended on ORV benefits] due to insufficient requests for funds or projects that score low” (RCW 46.09.170(2)(d)(iii)), but there was no evidence this had happened, and plenty of evidence of significant funding of such projects. Moreover, two wrongs do not make a right; if the statute does not provide sufficient certainty of benefits as a “refund”, that is a reason to hold it unconstitutional, not constitutional.

even has ORV facilities. (A16 n.3.) We are baffled by this. (*See* <http://www.parks.wa.gov/parks/?selectedpark=Steamboat%20Rock&subject=activities> (accessed 10/7/11; no mention of any such facilities).

B. The Court of Appeals Decision Constitutes a Significant Question of Law Under the Constitution of the State of Washington.

Most generally, this case concerns the question, perhaps more important than any other legal question, whether the Constitution of the State of Washington remains a constitution—a document that actually constrains the power of the Legislature. If the Legislature is permitted to establish definitions of Constitutional terms that are flatly at odds with all common understanding of those terms—here redefining “refund” to mean taking the taxpayers money and transferring it to the general fund for public purposes that might somehow ultimately benefit the taxpayer—the Constitution will gradually be rendered meaningless.

The most fundamental and significant question in interpreting a Constitution is the level of deference to be given legislative enactments arguably contrary to Constitutional limitations. This Court’s repeated pronouncements that Legislative enactments must be proven Constitutional “beyond a reasonable doubt”, *e.g.*, *Murphy*, 138 Wn.2d at 808 (quoting *Belas v. Kiga*, 135 Wn.2d 913, 920 (1998), manifestly require further clarification for the lower courts. Under the majority’s

approach to constitutional interpretation, “reasonable doubt” may overpower clear textual limitations on the authority of the legislature. Under the majority’s approach, it is difficult to imagine any Legislative enactment that could ever meet the “reasonable doubt” standard, as the Legislature can always offer “reasons” for disregarding Constitutional limitations.

C. The Motion Involves an Issue of Substantial Public Interest.

The question of highway spending and taxation therefore has never ceased to be a matter of vital and continuing public concern. The People of the State of Washington manifestly sought to prevent gasoline excise taxes from being used for non-highway purposes, both to assure an adequate system of highways, and to avoid higher fuel taxes not applied to the construction and maintenance of such highways. As this Court observed before in analogous circumstances, to permit motor vehicle excise taxes to be used contrary to the express limitations of Article II, § 40, “would establish a precedent that could result in substantially decreasing those funds reserved for [highway] purposes”. *Automobile Club*, 55 Wn.2d at 169.

As the dissenting judge explained, the majority opinion, “by endorsing the State’s expansive interpretation of Article II, § 40, . . . has essentially authorized the legislature to enact a NOVA excess fund

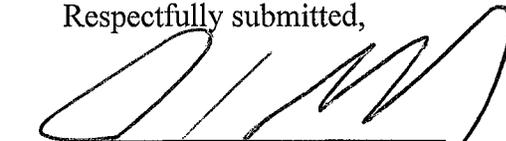
balance transfer for nearly any purpose, so long as the legislature makes a finding that nonhighway users will benefit". (A20.) But the majority's approach is far worse; under it, the Legislature may now divert *any* particular portion of the highway fund (not merely NOVA funds) to the general fund with the simple declaration that the diversion constitutes a "refund" of gasoline taxes to one group or another, and once diverted, declare such diversion to be "excess funds" and use them for any purpose whatsoever. Allowing an "end run" around Article II, § 40 (A20), makes a mockery of it, and of the Constitution itself.

VI. CONCLUSION

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

Dated: October 12, 2011.

Respectfully submitted,



James L. Buchal, WSBA # 31369
Attorney for Petitioners

Appendix

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY _____
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WASHINGTON OFF-HIGHWAY VEHICLE
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DAVID S. BOWERS; KATHLEEN J.
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KOOTNEKOFF,

No. 40521-1-II

Appellants,

PUBLISHED OPINION

v.

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

Respondents.

ARMSTRONG, J. — The Washington Off-Highway Vehicle Alliance (WOHVA), Northwest Motorcycle Association (NMA), and four individuals representing off-road vehicle users appeal the trial court's summary judgment dismissal of their complaint challenging the legislature's 2009 appropriation of motor vehicle fuel excise tax revenues for a park maintenance fund. We affirm.

FACTS

A. Statutory Background

Washington has levied an excise tax on the sale, distribution, or use of motor vehicle fuel since 1921. *See* LAWS OF 1921, ch. 173, § 2; RCW 82.36.020. In doing so, the legislature has distinguished between tax revenue generated by fuel used on state highways, county roads, and city streets ("highway" uses) and tax revenue related to fuel consumed on other "nonhighway roads." *See* former RCW 46.09.020(7) (2004) (defining "nonhighway road"), *recodified as*

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RCW 46.09.310(5) (eff. July 1, 2011). The legislature has at various times enacted legislation that refunds a portion of the tax paid by those who use motor vehicle fuel for nonhighway uses. RCW 82.36.280.

By the 1940s, many Washington citizens were concerned about the use of highway-related fuel tax revenues for purposes other than building or improving roads and highways. See LAWS OF 1933, ch. 8 and 65 (spending fuel excise tax revenues on unemployment relief). In 1944, voters amended the state constitution to require that motor vehicle license fees and excise taxes on the sale, distribution, or use of motor vehicle fuel be used “exclusively for highway purposes.” WASH. CONST. art. II, § 40 (Amendment 18). “Highway purposes” expressly include “[r]efunds authorized by law for taxes paid on motor vehicle fuels.” WASH. CONST. art. II, § 40(d).

In 1971, the legislature enacted legislation regulating all-terrain vehicles (ATV) that required revenue generated by registration fees and fuel excise taxes paid by ATV users to be distributed to the Interagency Committee for Outdoor Recreation for maintaining ATV trails. LAWS OF 1971, 1st Ex. Sess., ch. 47, §§ 22, 27; former RCW 46.09.170 (1971), *recodified as* RCW 46.09.520 (eff. July 1, 2011). This legislation eliminated individual fuel tax refunds for ATV users. LAWS OF 1971, 1st Ex. Sess., ch. 47, §§ 20-22. In 1974, the legislature capped the refund at one percent of fuel tax revenues. LAWS OF 1974, 1st Ex. Sess., ch. 144, § 3.

In 1977, the legislature replaced the term “ATV” with “off-road vehicle” (ORV) and “nonhighway vehicle” and thus expanded the types of fuel uses that were considered nonhighway uses. LAWS OF 1977, 1st Ex. Sess., ch. 220. The legislature also appropriated parts of the now annual refund to additional state agencies, including the Washington State Parks and

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Recreation Commission (Parks), for recreational purposes other than ORV trails. LAWS OF 1977, 1st Ex. Sess., ch. 220, § 14; LAWS OF 1986, ch. 206, § 8.

In 1986, the legislature created two accounts in the state treasury: “the ORV and nonhighway vehicle account” and what it eventually termed the “nonhighway and off-road vehicle activities” or NOVA program account. LAWS OF 1986, ch. 206, § 8.¹ The allocation of the fuel tax refund between the two accounts was accomplished by former RCW 46.09.170(1) (1986), which set forth the percentages of the refund credited to each account. The refund allocated to the ORV and nonhighway vehicle account was apportioned directly to state agencies according to the distribution percentages indicated, while the NOVA account went to the interagency committee for distribution to projects through a competitive grants program. Former RCW 46.09.170(1). This NOVA funding was also governed by specific distribution requirements.

To address concerns that ORV users were receiving too much of the refund, the 2001 legislature funded a study to determine the relative proportion of motor vehicle fuel excise tax revenues attributable to various types of vehicles operating off-road or on nonhighway roads for recreational purposes. LAWS OF 2001, 2nd Spec. Sess., ch. 8, § 346. After that study showed that only 20 percent of fuel use went to ORV activities, the 2003 legislature amended the statute to allow the appropriation of NOVA funds for nonmotorized as well as motorized recreational uses. LAWS OF 2003, 1st Spec. Sess., ch. 26, §§ 366, 920. Nonmotorized uses include hiking, backpacking, mountain biking, cross-country skiing, snowshoeing, and equestrian activities.

¹ The term “nonhighway and off-road vehicle activities program account” was not substituted for “outdoor recreation [account]” until 1995. LAWS OF 1995, ch. 166, § 9.

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NOVA funding program subcategories now include trail and nonhighway road education and enforcement support activities, nonhighway road-related recreational facility funding, nonmotorized trail facility funding, and ORV trail facility funding.

B. NMA Litigation

The NMA and Byron Stuck, current president of WOHVA, challenged the 2003 appropriation for nonmotorized recreational facilities and trails as an unconstitutional expenditure of fuel excise tax revenue. *Nw. Motorcycle Ass'n (NMA) v. State Interagency Comm'n for Outdoor Recreation*, 127 Wn. App. 408, 412, 110 P.3d 1196 (2005). The trial court granted the State's motion for summary judgment and Division Three affirmed:

At the time of the enactment of article II, section 40, Washington statutes already authorized refunds for nonhighway use of fuel. . . . Direct refunds to those who purchased gasoline for these nonhighway road trips is not practical due to the number of recipients and the difficulty in providing proof of the nonhighway use. 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.

This is a legislative policy, so our task is simply to determine if RCW 46.09.170 is constitutional. . . . [A]n annual one percent withdrawal from the motor vehicle fund (an estimate of the taxes paid for nonhighway gasoline use) falls within the refund authorized by article II, section 40. The legislature's dispersal of that refund through NOVA for the benefit of the affected taxpayers comes within its plenary powers of taxation. We find nothing in article II, section 40 that specifically prohibits the legislature from dispersing the "refund" as it sees fit.

NMA, 127 Wn. App. at 415-16 (citations omitted). The court thus upheld the challenged legislation. *NMA*, 127 Wn. App. at 415-16.

C. Excess Fund Balance Appropriations

At issue in *NMA* was the 2003 legislation amending former RCW 46.09.170(1) to allow the appropriation of NOVA funds to Parks to construct and upgrade trails and related facilities for both motorized and nonmotorized purposes. *NMA*, 127 Wn. App. at 411 (citing LAWS OF 2003, 1st Sp. Sess., ch. 26, § 920). In a separate bill, the 2003 legislature added a new section to the statute that appropriated part of the “excess fund balance” in the ORV account directly to Parks. LAWS OF 2003, ch. 25, § 922.

In 2004, the legislature amended this provision to refer to the NOVA account rather than the ORV account, and it distributed the excess fund balance as follows:

During the 2003-05 fiscal biennium, the legislature may appropriate such amounts as reflect the excess fund balance in the NOVA account to the interagency committee for outdoor recreation, the department of natural resources, the department of fish and wildlife, and the state parks and recreation commission. This appropriation is not required to follow the specific distribution specified in subsection (2) of this section.

LAWS OF 2004, ch. 105, § 6 (former RCW 46.09.170(4) (2004)). The State explains that an excess fund balance appropriation reduces the competitive grant program in favor of a direct appropriation that does not have to abide by any distribution requirements.

In 2007, the legislature replaced the Interagency Committee for Outdoor Recreation with the Recreation and Conservation Funding Board (Board) as the administrator of NOVA grants. LAWS OF 2007, ch. 241, §§ 15, 16(2)(d). It again authorized the appropriation of the excess fund balance in the NOVA account, but this time the appropriation went to:

the department of natural resources for planning and designing consistent off-road vehicle signage at department-managed recreation sites, and for planning recreation opportunities on department-managed lands in the Reiter block and Ahtanum state forest.

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LAWS OF 2007, ch. 522, § 953.

In 2009, the legislature faced a revenue shortfall, and Parks anticipated the closure of 15 state parks in addition to other program reductions. By the end of the session, the legislature had reduced Parks' general fund appropriation by \$52 million from the previous biennium. In a separate section of the budget bill, the legislature appropriated the excess fund balance in the NOVA account as follows:

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

LAWS OF 2009, ch. 564, § 944(4) (amending former RCW 46.09.170(4)). This appropriation to Parks, referred to hereafter as the "2009 appropriation," amounted to \$9.56 million. LAWS OF 2009, ch. 564, § 303. Parks understood that these funds were intended to replace part of the reduction in its general fund appropriation, and it allocated the entire amount to employee salaries and benefits. The 2009 appropriation was in addition to an appropriation from the NOVA account to the Board's grant program and to separate funds distributed to the ORV and nonhighway vehicle account. LAWS OF 2009, ch. 564, §§ 303-04, 307-08.

WOHVA, the NMA, and four individuals challenged the 2009 appropriation under the Administrative Procedures Act (APA), chapter 34.05 RCW. After the parties filed cross motions for summary judgment, the trial court granted the State's motion, denied WOHVA's motion, and dismissed the complaint with prejudice.

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Before WOHVA filed its appeal, the legislature again amended former RCW 46.09.170(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 and Ahtanum state forest, and to the state parks and recreation commission. The legislature finds that the appropriation of funds from the NOVA account during the 2009-2011 fiscal biennium for maintenance and operation of state parks ((and)) or to improve accessibility for boaters and off-road vehicle users at state parks will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities. ((This appropriation is)) The appropriations under this subsection are not required to follow the specific distribution specified in subsection (2) of this section.

LAWS OF 2010, 1st Sp. Sess., ch. 37, § 936.

ANALYSIS

I. COLLATERAL ESTOPPEL

The State argues that collateral estoppel bars this court's substantive consideration of WOHVA's arguments because Division Three rejected them in the *NMA* decision. The doctrine of collateral estoppel prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). We review de novo whether collateral estoppel precludes relitigation of an issue. *Lemond v. Dep't of Licensing*, 143 Wn. App. 797, 803, 180 P.3d 829 (2008).

The party asserting collateral estoppel must prove that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice.

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Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, *2, 254 P.3d 818 (2011); *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002).

At issue in *NMA* was whether the legislature could appropriate part of the annual fuel tax refund in former RCW 46.09.170 (2003) for nonmotorized purposes. *NMA*, 127 Wn. App. at 412. The court determined that article II, section 40 authorized the appropriation and that the legislature could disburse it as deemed appropriate. *NMA*, 127 Wn. App. at 416. The State contends that the refund statute and article II, section 40 have not changed since the *NMA* decision and that the specific purpose of the appropriation made from NOVA funds is irrelevant.

Former RCW 46.09.170 has in fact been amended several times since 2003. Although the State claims that both the appropriation in *NMA* and the 2009 appropriation stemmed from the excess fund balance in the NOVA account, this does not appear to be the case. At issue in *NMA* was legislation amending former RCW 46.09.170(1) to allow NOVA funding to be used for nonmotorized purposes, and that subsection required the expenditure of such funds according to a specific distribution scheme. *NMA*, 127 Wn. App. at 411 (citing LAWS OF 2003, 1st Sp. Sess., ch. 26, § 920).² By contrast, the 2009 appropriation came from the NOVA excess fund balance and was not so restricted. WOHVA argues that the purpose and effect of the two sets of legislation differ because the 2009 appropriation provides none of the benefits to nonhighway travelers who use gasoline that the *NMA* court cited in upholding the 2003 legislation. *See NMA*, 127 Wn. App. at 416. The State counters that under *NMA*, the specific purpose of the appropriation is irrelevant. *See NMA*, 127 Wn. App. at 416. Even if the State is correct,

² The appropriations in chapter 26, sections 365 and 366, were intended to implement section 920 and not the separately enacted ORV excess fund balance provision. *See LAWS OF 2003, 1st Sp. Sess., ch. 25, § 922.*

WOHVA's current complaint concerns a different and broader appropriation of tax revenues that prohibits our application of collateral estoppel. Consequently, we turn to the merits of the appeal.

II. CONSTITUTIONALITY OF 2009 APPROPRIATION

A. Standard of Review

WOHVA seeks reversal of the trial court's summary judgment in the State's favor. Once again, our review is de novo. *Pierce County v. State*, 150 Wn.2d 422, 429, 78 P.3d 640 (2003). Summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

WOHVA brought its complaint under the APA as a challenge to the constitutionality of agency action. See RCW 34.05.570(4)(c)(i). The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity. RCW 34.05.570(1)(a).

The agency action here is Parks' allotment of the 2009 appropriation. Allotments are an agency's detailed plans for expenditures and must comply with the terms, limits, or conditions of legislative appropriations. RCW 43.88.110(1). WOHVA does not assert that Parks' plan of expenditure is inconsistent with the appropriation. Its real challenge is to the legislature's amendment of former RCW 46.09.170(4) and its 2009 appropriation of NOVA funds to pay for general agency expenditures.

In Washington, a statute is presumed constitutional and a challenger must prove it unconstitutional beyond a reasonable doubt. *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). In this context, "beyond a reasonable doubt" does not refer to an evidentiary standard. *Sch. Dists.' Alliance*, 170 Wn.2d at

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606. Rather, it means that, based on respect for the legislature, courts will not strike a duly enacted statute unless they are “fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Sch. Dists. ’ Alliance*, 170 Wn.2d at 606 (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)); see also *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 813, 982 P.2d 611 (1999) (court cannot declare statute invalid unless it conflicts with specific or definite provision of state constitution).

Determining the meaning and scope of a constitutional provision is a judicial function. *Heavey*, 138 Wn.2d at 810. When construing constitutional provisions, courts look first to the text’s plain language and give that language a reasonable interpretation. *Wash. Water Jet Workers Assoc. v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). The legislature is entitled to great deference and it is our duty to uphold a statute as constitutional whenever possible. *Sch. Dists. ’ Alliance*, 170 Wn.2d at 608; *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000).

The heavy burden of proving a statute unconstitutional reflects that “[t]he Legislature possesses a plenary power in matters of taxation except as limited by the Constitution.” *Heavey*, 138 Wn.2d at 808-09 (quoting *Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998)). In addition, power over appropriations remains with the legislature. *Ortblad v. State*, 85 Wn.2d 109, 116, 530 P.2d 635 (1975); see also *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 616, 229 P.3d 774 (2010) (appropriation of state funds is up to legislature, subject to gubernatorial veto), Madsen, C.J., dissenting. “The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.” *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979). Courts will not direct the legislature to appropriate

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funds unless creating a program and/or funding it is constitutionally mandated. *Pannell*, 91 Wn.2d at 599.

B. Refund Authorized by Law

WOHVA's central argument is that funds initially allocated to the NOVA program account cannot be diverted to remedy a budgetary shortfall and still constitute a "refund authorized by law" within the meaning of article II, section 40.

Washington courts have set aside as unconstitutional various legislative attempts to expend motor vehicle fund revenues where they conflicted with the "highway purposes" requirement in article II, section 40. *See State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (public transportation study was not "highway purpose" for which motor vehicle excise tax revenues could be used); *Wash. State Highway Comm'n v. Pac. Nw. Bell Tel. Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961) (cost of relocating utility facilities along highway right-of-way was not expenditure "exclusively for highway purposes" that could constitutionally be taken out of state motor vehicle fund); *Auto. Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959) (payment of tort judgment against city for negligent operation of bridge was not highway purpose justifying expenditure of gasoline excise tax funds).

None of these cases, however, discussed the only provision of article II, section 40 under which the 2009 appropriation can be justified; i.e., the provision that "[r]efunds authorized by law for taxes paid on motor vehicle fuels" are highway purposes for which such taxes may be expended. WASH. CONST. art. II, § 40(d). Division Three explained the intent behind this provision in the *NMA* decision:

By including "refunds authorized by law for taxes paid on motor vehicle fuels" as a "highway purpose," the framers apparently intended to return the share of those

taxes paid by drivers who expended fuel driving on roadways other than public highways, roads, and streets. Thus, the refund is paradoxically a “highway purpose” for taxes levied on nonhighway driving.

NMA, 127 Wn. App. at 414 (citation omitted).

WOHVA insists that the 2009 appropriation cannot constitute a refund under section 40(d) because it provides no benefit to those who paid the taxes being refunded, particularly ORV users. WOHVA argues that the word “refund” plainly conveys giving money back to the citizens who paid it. The *NMA* court agreed that the reference to “refund” in article II, section 40 is unambiguous:

A refund is generally “a sum that is paid back.” 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 (citation omitted). According to WOHVA, “[t]he Legislature has ample power to create any sort of refund of motor vehicle gasoline excise tax revenues it desires . . . but a real ‘refund’ that returns consideration to the actual taxpayers must be involved.” Br. of Appellant at 21. Otherwise, highway funds are being used for other public purposes in violation of article II, section 40. *See NMA*, 127 Wn. App. at 416 (legislature’s dispersal of the refund authorized by article II, section 40 through NOVA “for the benefit of the affected taxpayers” comes within its plenary powers of taxation).

WOHVA asserts that central to *NMA* was that former RCW 46.09.170 tied the allocation of refunded benefits to the categories of uses established in the fuel use survey through the funding percentages specified in the statute. As WOHVA points out, agencies that receive funds under the statute are advised “to ensure that overall expenditures reflect consideration of the results of the most recent fuel use study.” Former RCW 46.09.280(4), *recodified as* RCW

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46.09.340(4) (eff. July 1, 2011). It is true that the legislation at issue in *NMA* concerned that part of former RCW 46.09.170 containing the distribution requirements, while the 2009 appropriation concerns the excess fund balance, which is not so restricted. WOHVA asserts that the very notion of an excess fund balance is incompatible with the concept of a refund and that unlike *NMA*, which concerned the dispersal of a refund through the NOVA program, this case concerns an unlawful diversion of funds from the NOVA program to replace a reduction in the general fund. *See NMA*, 127 Wn. App. at 415 (“our only concern is whether the funds transferred to the NOVA program qualify as refunds authorized by law”). As WOHVA adds, the 2009 appropriation did not include the word “refund.”

WOHVA’s protests notwithstanding, we are persuaded that the 2009 appropriation of the excess fund balance falls within the refund that the statute authorizes. Former RCW 46.09.170 is entitled “Refunds from motor vehicle fund--Distribution--Uses.” Subsection (1) outlines the manner in which the state treasurer is to collect the one percent refund from the motor vehicle fund, subsection (2) shows how the treasurer is to place these funds into the general fund by dividing it between the ORV and NOVA accounts and among various state agencies, subsection (3) sets limits on an agency’s administrative expenses in distributing those funds, and subsection (4) explains how the excess fund balance from the NOVA account is to be distributed. That balance is part of the refund the statute addresses without being separately identified as such. *See Truly v. Heuft*, 138 Wn. App. 913, 922, 158 P.3d 1276 (2007) (when interpreting a statute, we must consider it as a whole). Furthermore, we note that WOHVA made no attempt to challenge previous appropriations from the excess fund balance as unconstitutional per se.

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WOHVA also argues that the 2009 appropriation cannot be a lawful refund under article II, section 40 because funding for general park maintenance and operation is not funding for highway purposes. The State responds that if the appropriation is part of a refund authorized by law, it is funding for a highway purpose, and the appropriated funds may be spent on anything necessary to carry out that purpose. *See Slavin*, 75 Wn.2d at 558 (lest the term “highway purposes” in article II, section 40 be too narrowly construed, the people have defined its scope in the succeeding paragraphs); *NMA*, 127 Wn. App. at 414 (article II, section 40(d) refund is paradoxically a “highway purpose” for taxes levied on nonhighway driving). As the *NMA* court observed:

Giving the appropriate deference, we conclude that an annual one percent withdrawal from the motor vehicle fund (an estimate of the taxes paid for nonhighway gasoline use) falls within the refund authorized by article II, section 40. . . . We find nothing in article II, section 40 that specifically prohibits the legislature from dispersing the “refund” as it sees fit.

NMA, 127 Wn. App. at 416.

WOHVA rejects such a generous reading of article II, section 40 and urges us to “police” the legislature’s dispersal of the excise tax refund to ensure that the legislative scheme is consistent with the constitutional requirement that the money be refunded. *See Pannell*, 91 Wn.2d at 599 (courts will not direct legislature unless funding of program is constitutionally mandated). The State responds that any suggestion that courts should evaluate whether each appropriation of the former RCW 46.09.170(1) refund sufficiently benefits the underlying taxpayers is antithetical to the legislature’s plenary power in the areas of taxation and appropriations. While conceding that a refund authorized by law must benefit the taxpayers whose taxes prompted the refund, the State asserts that the determination that a sufficient benefit

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exists is the legislature's alone. We therefore turn to the legislative determination concerning the benefits of the 2009 appropriation.

C. Taxpayer Benefit from 2009 Appropriation

The legislature directly addressed the issue of benefits when it amended former RCW 46.09.170(4) in 2010. It found that "the appropriation of funds from the NOVA account during the 2009-11 fiscal biennium for maintenance and operation of state parks . . . will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities." LAWS OF 2010, 1st Sp. Sess., ch. 37, § 936 (emphasis omitted). Subsequent enactments that clarify an earlier statute may apply retrospectively. *Matteson*, 142 Wn.2d at 307. WOHVA insists, however, that the benefits that ORV users will receive from the 2009 appropriation are insufficient for the appropriation to qualify as a lawfully authorized refund.

As an example of the deficiency of the 2009 appropriation, WOHVA complains about the possible expenditure of funds "to improve accessibility for boaters." Former RCW 46.09.170(4) (2009). Boaters are excluded from the statutory definition of "nonhighway vehicles" and are entitled to individual tax refunds. Former RCW 46.09.020(10)(a), *recodified as* RCW 46.09.310(8)(a) (eff. July 1, 2011); RCW 79A.25.050. Because boaters may receive refund benefits under the 2009 appropriation, WOHVA argues that the legislature was not attempting to target the refund to taxpayers who fund the NOVA account. The 2009 appropriation refers to the possibility of spending the refund to improve "accessibility for boaters and [ORV] users," however, and does not provide a separate appropriation for boaters. Former RCW 46.09.170(4). That boaters may benefit from the continued operation of state parks that the 2009 appropriation

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allows does not undermine the determination that those who fund the underlying refund will benefit as well.

WOHVA rejects the State's claim that paying part of the salaries and benefits to the employees at Riverside Park, the only state park with ORV trails, will provide some benefit to ORV users, and it contends that any benefits to park users generally will be more than offset by losses in funding targeted to the ORV taxpayer groups.³ As support for this contention, WOHVA cites statements from state and national park representatives documenting the impact of lost NOVA grants on ORV users. One statement refers to alternative funding, however, and others do not delineate cuts to ORV facilities specifically. We agree with the State that in a time of reduced revenue, it is not arbitrary or irrational for legislators to give priority to state facilities over federal facilities. Furthermore, the notion that former funds were targeted to ORV users contradicts the premise that NOVA grants are awarded on a competitive basis. As the State asserts, there is no certainty that ORV users would have received the 2009 appropriation if Parks had not. Still, WOHVA claims that because of the 2009 appropriation, it is "undisputed" that the appellants "are receiving nothing at all from the NOVA program." Reply Br. of Appellant at 21.

The State maintains that funding a state park system that provides some of the outdoor recreational activities the NOVA program supports will benefit at least some of the taxpayers who fund the NOVA account. *See NMA*, 127 Wn. App. at 416 (benefit under former RCW 46.09.170 comes in the form of ORV, nonmotorized, and nonhighway recreational uses). As

³ Although the parties stipulated that only one state park, Riverside, has ORV recreational facilities, the record shows that Steamboat Rock Park devotes 130 acres to ATV use. Furthermore, while WOHVA claims that ORV users can access but a single facility in the entire state providing benefits to them, the record shows that ORV users ride on roads, trails, private forest land, designated open riding areas (e.g., sand dunes), urban/suburban lots, and ORV sports parks.

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stated, ORV users are not the only taxpayers who fund and benefit from that account. In addition to supporting the nonmotorized recreational activities described earlier, NOVA funding now benefits recreationists who do not use trails and stay close to nonhighway roads, such as anglers, gatherers, and sightseers. Furthermore, ORV users will receive funding through the ORV account provisions in former RCW 46.09.170(2), and the record shows that expenses for the ORV facilities at Riverside Park will be paid by the refund allowed under former RCW 46.09.170(2)(c). As the State points out, some of that funding may go to employee salaries and benefits as well. In addition, the Board received a \$1,062,000 appropriation from the NOVA account for its grant program for this biennium. LAWS OF 2009, ch. 564, § 304. Although WOHVA correctly argues that such funding does not validate the 2009 appropriation, it does show that ORV users are receiving a considerable percentage of the one percent refund.

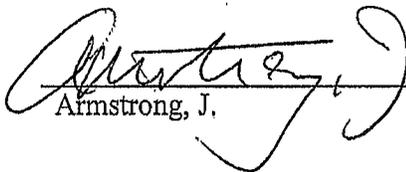
As the State asserts, WOHVA seems to seek a return to the statutory framework in which only ORV users benefited from the motor vehicle fuel excise tax refund. WOHVA's complaint sought, in addition to injunctive relief, a judgment declaring that the legislature may not appropriate NOVA program funds for purposes other than benefitting ORV users. The NOVA fund now accommodates several other types of nonhighway recreation, and it would be unconstitutional to exclude the taxpayers who engage in those types of recreation from the refund program in favor of ORV users exclusively. As the State argued below,

Nearly forty years of legislative history has produced a program that is much broader and more inclusive than the original ATV program. Today, 80% of the recreational nonhighway fuel tax refund is comprised of taxes paid by people using fuel to power passenger vehicles to reach non-motorized recreational activities or facilities. Thus, Petitioners' underlying premise--that the refund "belongs" exclusively to ORV users--is false as a factual matter.

Clerk's Papers at 627-28.

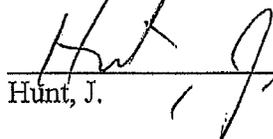
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We conclude that a refund authorized by law under article II, section 40 must benefit nonhighway users who paid motor vehicle fuel excise taxes and that the 2009 appropriation satisfies that requirement. WOHVA does not establish the unconstitutionality of the 2009 appropriation beyond a reasonable doubt, and we affirm the trial court's order granting the State's motion for summary judgment and dismissing WOHVA's complaint.



Armstrong, J.

I concur:



Hunt, J.

WORSWICK, A.C.J. (dissenting) – While I recognize the unprecedented fiscal challenge that the recent recession has posed for our legislature, I respectfully dissent from the majority’s holding that the legislature’s 2009-2011 biennial appropriation of the NOVA⁴ account’s excess fund balance to the state parks budget was constitutional. While nonhighway and nonmotorized recreational facilities may benefit from a well-funded parks maintenance and operation budget, the legislature’s finding 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” in and of itself is insufficient to overcome the constitutional prohibition on motor vehicle gas tax funds being used for nonhighway purposes. Former RCW 46.09.170 (2009), recodified as RCW 46.09.520.

I hold a differing view of the scope of the article II, section 40 refund provision in the Washington Constitution. This provision, which defines “[r]efunds authorized by law for taxes paid on motor vehicle fuels” as a “highway purpose” cannot reasonably be interpreted to provide unfettered discretion to the legislature to appropriate these refunds without limitation. WASH. CONST. art. II, § 40.

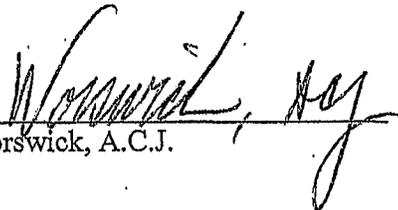
The State and the majority both cite *Nw. Motorcycle Ass’n v. State Interagency Comm. for Outdoor Recreation (NMA)*, 127 Wn. App. 408, 110 P.3d 1196 (2005) to support this appropriation. *NMA* dealt with the broader question of whether a one percent withdrawal from the motor vehicle fund fell within the refund provision of article II, section 40. I do not read

⁴ Nonhighway and off-road vehicle activities funding under RCW 46.09.520 is generally referred to as the NOVA program.

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NMA to stand for the proposition that the legislature, under its plenary powers of taxation, may do whatever it wants with this “refund.” And as the *NMA* court recognized, a refund is generally “a sum that is paid back.” 127 Wn. App. at 415 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1910 (1993)). This is particularly relevant here because our constitutional analysis requires us to look to the plain language of the text and afford such its reasonable interpretation. *Wash. Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). I find no plausible argument that the transfer of the NOVA excess fund balance to cover a shortfall in the budget for state parks comports with the plain meaning and a reasonable interpretation of the refund provision.

The State’s position, that the refund mechanism under article II, section 40 authorizes the appropriation in this instance, is an end run around the constitution’s explicit prohibition on the use of highway funds for nonhighway purposes. And despite the fact that we presume statutes to be constitutional and we are generally deferential to the legislature in light of its plenary taxing and spending powers, I still find the appropriation here to be improper. By endorsing the State’s expansive interpretation of article II, section 40, the majority has essentially authorized the legislature to enact a NOVA excess fund balance transfer for nearly any purpose, so long as the legislature makes a finding that nonhighway users will benefit, regardless of how weak the link is. Based on this, I dissent.


Worswick, A.C.J.

Washington Constitution, Article II, § 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.

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 46.09.310

Definitions. (Effective July 1, 2011.)

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Advisory committee" means the nonhighway and off-road vehicle activities advisory committee established in RCW 46.09.340.
- (2) "Board" means the recreation and conservation funding board established in RCW 79A.25.110.
- (3) "Dealer" means a person, partnership, association, or corporation engaged in the business of selling off-road vehicles at wholesale or retail in this state.
- (4) "Highway," for the purpose of this chapter only, means the entire width between the boundary lines of every roadway publicly maintained by the state department of transportation or any county or city with funding from the motor vehicle fund. A highway is generally capable of travel by a conventional two-wheel drive passenger automobile during most of the year and in use by such vehicles.
- (5) "Nonhighway road" means any road owned or managed by a public agency or any private road for which the owner has granted an easement for public use for which appropriations from the motor vehicle fund were not used for (a) original construction or reconstruction in the last twenty-five years; or (b) maintenance in the last four years.
- (6) "Nonhighway road recreation facilities" means recreational facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonhighway road recreational users.
- (7) "Nonhighway road recreational user" means a person whose purpose for consuming fuel on a nonhighway road or off-road is primarily for nonhighway road recreational purposes, including, but not limited to, hunting, fishing, camping, sightseeing, wildlife viewing, picnicking, driving for pleasure, kayaking/canoeing, and gathering berries, firewood, mushrooms, and other natural products.
- (8) "Nonhighway vehicle" means any motorized vehicle including an ORV when used for recreational purposes on nonhighway roads, trails, or a variety of other natural terrain. Nonhighway vehicle does not include:
 - (a) Any vehicle designed primarily for travel on, over, or in the water;
 - (b) Snowmobiles or any military vehicles; or

- (c) Any vehicle eligible for a motor vehicle fuel tax exemption or rebate under chapter 82.36 RCW while an exemption or rebate is claimed. This exemption includes but is not limited to farm, construction, and logging vehicles.
- (9) "Nonmotorized recreational facilities" means recreational trails and facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonmotorized recreational users.
- (10) "Nonmotorized recreational user" means a person whose purpose for consuming fuel on a nonhighway road or off-road is primarily for nonmotorized recreational purposes including, but not limited to, walking, hiking, backpacking, climbing, cross-country skiing, snowshoeing, mountain biking, horseback riding, and pack animal activities.
- (11) "Organized competitive event" means any competition, advertised in advance through written notice to organized clubs or published in local newspapers, sponsored by recognized clubs, and conducted at a predetermined time and place.
- (12) "ORV recreation facilities" include, but are not limited to, ORV trails, trailheads, campgrounds, ORV sports parks, and ORV use areas, designated for ORV use by the managing authority that are intended primarily for ORV recreational users.
- (13) "ORV recreational user" means a person whose purpose for consuming fuel on nonhighway roads or off-road is primarily for ORV recreational purposes, including but not limited to riding an all-terrain vehicle, motorcycling, or driving a four-wheel drive vehicle or dune buggy.
- (14) "ORV sports park" means a facility designed to accommodate competitive ORV recreational uses including, but not limited to, motocross racing, four-wheel drive competitions, and flat track racing. Use of ORV sports parks can be competitive or noncompetitive in nature.
- (15) "ORV trail" means a multiple-use corridor designated by the managing authority and maintained for recreational use by motorized vehicles.

RCW 82.36.270

Refund permit.

Any person desiring to claim a refund shall obtain a permit from the department by application therefor on such form as the department shall prescribe, which application shall contain, among other things, the name and address of the applicant, the nature of the business and a sufficient description for identification of the machines or equipment in which the motor vehicle fuel is to be used, for which refund may be claimed under the permit. The permit shall bear a permit number and all applications for refund shall bear

the number of the permit under which it is claimed. The department shall keep a record of all permits issued and a cumulative record of the amount of refund claimed and paid thereunder. Such permit shall be obtained before or at the time that the first application for refund is made under the provisions of this chapter.

RCW 82.36.280

Refunds for nonhighway use of fuel. (*Effective July 1, 2011.*)

Any 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 registered to be operated on any of the public highways, and as the motive power thereof, upon which motor vehicle fuel excise tax has been paid, 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, whether such motor vehicle excise tax has been paid either directly to the vendor from whom the motor vehicle fuel was purchased or indirectly by adding the amount of such excise tax to the price of such fuel. No refund shall be made for motor vehicle fuel consumed by any motor vehicle as herein defined that is required to be registered as provided in *chapter 46.16 RCW; and is operated on any public highway except that a refund shall be allowed for motor vehicle fuel consumed:

- (1) In a motor vehicle owned by the United States that is operated off the public highways for official use; and
- (2) By auxiliary equipment not used for motive power, provided such consumption is accurately measured by a metering device that has been specifically approved by the department or is established by either of the following formulae:
 - (a) For fuel used in pumping fuel or heating oils by a power take-off unit on a delivery truck, refund shall be allowed claimant for tax paid on fuel purchased at the rate of three-fourths of one gallon for each one thousand gallons of fuel delivered: PROVIDED, That claimant when presenting his or her claim to the department in accordance with the provisions of this chapter, shall provide to said claim, invoices of fuel oil delivered, or such other appropriate information as may be required by the department to substantiate his or her claim; or
 - (b) For fuel used in operating a power take-off unit on a cement mixer truck or load compactor on a garbage truck, claimant shall be allowed a refund of twenty-five percent of the tax paid on all fuel used in such a truck; and
 - (c) The department is authorized to establish by rule additional formulae for determining fuel usage when operating other types of equipment by means of power take-off units when direct measurement of the fuel used is not feasible. The department is also authorized to adopt rules regarding the

usage of on board computers for the production of records required by this chapter.

RCW 82.36.330

Payment of refunds — Interest — Penalty.

- (1) Upon 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: PROVIDED, That the state treasurer shall deduct from each marine use refund claim an amount equivalent to one cent per gallon and shall deposit the same in the coastal protection fund created by RCW 90.48.390.
- (2) Applications for refunds of excise tax shall be filed in the office of the director not later than the close of the last business day of a period thirteen months from the date of purchase of such motor fuel, and if not filed within this period the right to refund shall be forever barred, except that such limitation shall not apply to claims for loss or destruction of motor vehicle fuel as provided by the provisions of RCW 82.36.370.
- (3) The department shall pay interest of one percent on any refund payable under this chapter that is issued more than thirty state business days after the receipt of a claim properly filed and completed in accordance with this section. After the end of the thirty business-day period, additional interest shall accrue at the rate of one percent on the amount payable for each thirty calendar-day period, until the refund is issued.
- (4) Any person or the member of any firm or the officer or agent of any corporation who makes any false statement in any claim required for the refund of excise tax, as provided in this chapter, or who collects or causes to be repaid to him or her or to any other person any such refund without being entitled to the same under the provisions of this chapter is guilty of a gross misdemeanor.

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CERTIFICATE OF SERVICE

I certify that on October 12, 2011, I caused to be served a copy of
MOTION FOR DISCRETIONARY REVIEW in the above-captioned
matter upon the parties herein by first class mail:

ROBERT M. MCKENNA
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STEVE E. DIETRICH
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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 October 12, 2011.



James L. Buchal, WSBA # 31369
Attorney for Petitioners