

NO. 86602-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Petitioners,

v.

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

Respondents.

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**SUPPLEMENTAL BRIEF OF RESPONDENTS**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUE.....1

III. SUPPLEMENTAL STATEMENT OF THE CASE.....2

    A. Background Facts Regarding the Fuel Tax.....2

    B. Petitioners’ Unsuccessful Challenges to State Parks’ Use  
        of Recreational Non-Highway Fuel Tax Refunds .....5

IV. ARGUMENT .....7

    A. This Case is Moot Because the Challenged Appropriation  
        Expired Nearly One Year Ago.....7

    B. Standard of Review.....8

    C. The 2009 Appropriation to State Parks Constitutes a  
        Refund that Complies with the Refund Clause of  
        Article II, Section 40.....9

        1. Appropriating fuel tax refunds to programs that  
            benefit recreational non-highway fuel users complies  
            with the Refund Clause. ....10

        2. The 2009 appropriation to State Parks complies with  
            the Refund Clause.....12

            a. The amenities offered by State Parks are utilized  
                by recreational non-highway fuel purchasers. ....12

            b. The amount of the 2009 appropriation is  
                proportionate to the number of recreational non-  
                highway fuel purchasers who engage in non-  
                motorized activities. ....14

c.	State Parks' employees are a necessary prerequisite to the benefits that State Parks offers to non-motorized recreationalists. ....	15
3.	WOHVA has failed to prove beyond a reasonable doubt that the Legislature's spending decision was unconstitutional. ....	17
V.	CONCLUSION .....	20

## TABLE OF AUTHORITIES

### Cases

<i>Beggs v. Dep't of Social &amp; Health Servs.</i> , 171 Wn.2d 69, 247 P.3d 421 (2011).....	8
<i>Freeman v. Gregoire</i> , 171 Wn.2d 316, 256 P.3d 264 (2011).....	7
<i>Harvey v. Blewett</i> , 151 Mont. 427, 443 P.2d 902 (1968).....	18, 19
<i>Mason-Walsh-Atkinson-Kier Co. v. Case</i> , 2 Wn.2d 33, 97 P.2d 165 (1939).....	2
<i>Nw. Motorcycle Ass'n v. State Interagency Comm. for Outdoor Recreation</i> , 127 Wn. App. 408, 110 P.3d 1196 (2005).....	passim
<i>Pappas v. Hershberger</i> , 85 Wn.2d 152, 530 P.2d 642 (1975).....	8
<i>Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State</i> , 170 Wn.2d 599, 244 P.3d 1 (2010).....	8, 9
<i>State ex rel. Heavey v. Murphy</i> , 138 Wn.2d 800, 982 P.2d 611 (1999).....	9, 18
<i>State ex rel. O'Connell v. Slavin</i> , 75 Wn.2d 554, 452 P.2d 943 (1969).....	17
<i>V-1 Oil Co. v. Idaho State Tax Comm'n</i> , 134 Idaho 716, 9 P.3d 519 (2000) .....	18
<i>Washington Off-Highway Vehicle Alliance v. State</i> , 163 Wn. App. 722, 260 P.3d 956 (2011).....	7, 8, 9, 20
<i>West v. Reed</i> , 170 Wn.2d 680, 246 P.3d 548 (2010).....	8

## Statutes

Laws of 1921, ch. 96, § 18.....	2
Laws of 1921, ch. 173, § 2.....	2
Laws of 1923, ch. 81, § 4.....	2
Laws of 1933, ch. 41, § 18.....	2
Laws of 1965, ch. 5, § 7.....	3
Laws of 1965, ch. 5, § 8.....	3
Laws of 1971, 1st Ex. Sess., ch. 29, § 15.....	3
Laws of 1971, Ex. Sess., ch. 47, § 22.....	3
Laws of 2001, 2d Spec. Sess., ch. 8, § 346(3).....	4
Laws of 2003, 1st Spec. Sess., ch. 26, § 920.....	5
Laws of 2009, ch. 564, § 303.....	6
Laws of 2010, 1st Spec. Sess., ch. 37, § 936.....	12
Laws of 2010, 1st Spec. Sess., ch. 37, § 936(4).....	6, 9
Laws of 2011, ch. 50, § 303.....	8
Laws of 2011, ch. 50, §§ 304, 308.....	8
Laws of 2011, ch. 320, § 22.....	7
RCW 46.09.....	4
RCW 46.09.020.....	12
RCW 46.09.170.....	5
RCW 46.09.520.....	4, 5

RCW 46.09.520(2)(a)-(c)..... 15

RCW 79A.05.305(4)..... 13

**Other Authorities**

AGLO 1975 No. 35..... 16

AGO 1957-58 No. 221..... 16

Benjamin Wham, *The Gasoline Tax*, 21 Ill. L. Rev. 771, 774 (1927)..... 11

**Constitutional Provisions**

Const. art. II, § 40 ..... passim

Const. art. II, § 40(d)..... passim

## I. INTRODUCTION

This case presents a quintessentially political dispute over a now-lapsed appropriation from the 2009-11 state budget. Washington Off-Highway Vehicle Alliance (WOHVA) challenged the Legislature's appropriation of recreational non-highway fuel tax refunds to the Washington State Parks and Recreation Commission (State Parks) for park operations and maintenance. Because the money has already been spent, a pronouncement by this Court will have no legal or practical effect, so the case is moot.

If the Court were to reach beyond the mootness of this matter, it should affirm the Court of Appeals and hold that using such fuel tax refunds to help operate and maintain state parks benefits recreational purchasers of non-highway fuel, and complies with the refund clause in article II, section 40, of the state constitution. The Legislature's conclusion that recreational non-highway fuel purchasers benefit from the state park system is supported by the record and should not be second-guessed by this Court.

## II. ISSUE

In 2009, the Legislature appropriated a portion of the recreational non-highway fuel tax refund to support the operation and maintenance of the state park system. Have Petitioners failed to prove beyond a

reasonable doubt that making the appropriation exceeded the limitation of “[r]efunds authorized by law for taxes paid on motor vehicle fuels” set out by article II, section 40(d)?

### III. SUPPLEMENTAL STATEMENT OF THE CASE

#### A. Background Facts Regarding the Fuel Tax

From its advent in 1921, the fuel tax was designed to generate income for the improvement of highways, which taxes were to be paid by those purchasing fuel for use in motor vehicles being driven upon those highways. Laws of 1921, ch. 173, § 2. Anyone who purchased taxed fuel for purposes other than operating motor vehicles on public highways was allowed to submit an affidavit to the State and receive a refund. Laws of 1923, ch. 81, § 4. Through numerous amendments over the years, the Legislature consistently adhered to the principle that the fuel tax be incurred by those actually using the fuel on the highways. *Mason-Walsh-Atkinson-Kier Co. v. Case*, 2 Wn.2d 33, 44-45, 97 P.2d 165 (1939).

Although the motor vehicle fund receiving fuel tax dollars was designated for highway purposes,<sup>1</sup> the public became concerned that the Legislature had diverted over \$10 million from this fund for other uses between 1933 and 1943. CP at 604 (1944 Voter’s Pamphlet, Argument for House Joint Resolution No. 4). In response, the citizens approved the

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<sup>1</sup> See, e.g., Laws of 1921, ch. 96, § 18; Laws of 1933, ch. 41, § 18.

18th constitutional amendment (article II, section 40) requiring various taxes collected by the State to be used for specified “highway purposes.” The constitutional definition of “highway purpose” includes “refunds authorized by law for taxes paid on motor vehicle fuels.” Art. II, § 40(d).

Over time, the Legislature and citizens have modified various provisions of the recreational non-highway fuel tax refund laws. In 1964, voters approved Initiative 215 which authorized the Legislature to utilize unclaimed refunds of fuel taxes attributed to motor boat fuel purchases.<sup>2</sup> Those refunds were appropriated to the Interagency Committee for Outdoor Recreation (IAC), and then passed through to state agencies and local governments to acquire or improve marine recreation lands. Laws of 1965, ch. 5, § 8. Then, in 1971, the Legislature determined that taxes paid on non-highway fuels used by snowmobiles and all-terrain vehicles (ATVs) should be refunded by directing those monies to State Parks, the Department of Natural Resources (DNR), and the Department of Game for the development or operation of snowmobile facilities and off-road ATV trails. Laws of 1971, 1st Ex. Sess., ch. 29, § 15 (snowmobiles); Laws of 1971, Ex. Sess., ch. 47, § 22 (ATVs). From 1972 to 1973, the Department of Motor Vehicles conducted a study that determined approximately 4.61 percent of motor vehicle fuel purchases were attributable to ATV use. CP

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<sup>2</sup> The legislation described the State as succeeding to the refund rights of the boaters who failed to submit refund claims. Laws of 1965, ch. 5, § 7.

at 447. The Legislature, however, chose to refund less than one percent of the total motor fuel excise taxes for off-highway recreational facilities.

Over the years this original 1971 ATV program has evolved into a broader outdoor recreational program benefitting both off-road vehicle (ORV) enthusiasts and also people who use fuel on non-highway roads en route to non-motorized recreational activities, driven by a better understanding of how non-highway recreational fuel is used. Since 1986, the non-highway fuel taxes attributable to recreational users have been split between two accounts, the “ORV and nonhighway vehicle account,” and the “Nonhighway and off-road vehicle activities” (NOVA) program account. *See* RCW 46.09.520.<sup>3</sup>

In 2001, the Legislature appropriated funds for an independent study to categorize and measure the various recreational activities pursued by those consuming fuel on non-highway roads. Laws of 2001, 2d Spec. Sess., ch. 8, § 346(3). The IAC was to use the study results to recommend adjustments to the statutory dispersal of the recreational non-highway fuel taxes “consistent with the relative proportion of the uses generating such revenues.” *Id.* The year-long study concluded that only 20 percent of fuel use attributable to non-highway recreational activities was associated with ORV and snowmobile activities. CP at 122. The study found that 80

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<sup>3</sup> The codification of the statutes in RCW chapter 46.09 changed during the course of this litigation. This brief uses the current codifications.

percent of non-highway fuel used recreationally was burned in normal cars operating on non-highway roads en route to non-motorized recreational activities such as hunting, fishing, bird watching, and hiking. *Id.*

**B. Petitioners' Unsuccessful Challenges to State Parks' Use of Recreational Non-Highway Fuel Tax Refunds**

In response to the 2003 study results, the Legislature amended former RCW 46.09.170 (now RCW 46.09.520) to provide that a portion of the non-highway fuel tax refunds could be used by the State Parks to construct and upgrade trails and related facilities within the state park system for both motorized and non-motorized uses. Laws of 2003, 1st Spec. Sess., ch. 26, § 920. This 2003 appropriation was challenged by the Northwest Motorcycle Association (NMA), which argued that it was unconstitutional for the Legislature to use non-highway fuel tax collections for the construction and maintenance of non-motorized trails. *See Nw. Motorcycle Ass'n v. State Interagency Comm. for Outdoor Recreation*, 127 Wn. App. 408, 415, 110 P.3d 1196 (2005) (“NMA”) (“[T]he motorcycle association seems to contend that the refund can also mean a transfer of these funds to NOVA, as long as the funds are used to construct and maintain nonhighway trails open to motorized vehicles.”).

*NMA* concluded that the 2003 appropriation was fairly characterized as a refund of non-highway fuel taxes, and was thereby

consistent with article II, section 40. *Id.* at 416. The Court refused to second-guess the Legislature's rational decision to refund part of the recreational non-highway fuel taxes by appropriating those refunds to help operate state parks, which provide numerous activities enjoyed by recreational non-highway fuel users. *Id.*

In 2009, the Legislature utilized part of the recreational non-highway fuel tax refunds by appropriating \$9.56 million from the NOVA account to State Parks. Laws of 2009, ch. 564, § 303. Approximately two-thirds of the \$9.56 million was attributable to fuel tax refunds, with the remaining one-third deriving from other sources. CP at 98. This appropriation was designated for the maintenance and operation of the park system, based upon the Legislature's determination that the appropriation would allow outdoor recreational opportunities that benefit non-highway fuel purchasers. *Id.* at § 944(4); *see also* Laws of 2010, 1st Spec. Sess., ch. 37, § 936(4). The parties stipulated that State Parks allotted the funds to pay for a portion of the salaries and benefits of employees directly engaged in the operation and maintenance of state parks. CP at 98.

The Petitioners here raise similar claims as in *NMA*. Primarily, they argue the appropriation to State Parks does not benefit all non-highway recreational fuel purchasers and, thus, is not a proper expenditure

of the tax refund. As Division III did several years ago, Division II upheld the Legislature's determination that using part of the NOVA funds for the maintenance and operation of the state park facilities benefited the non-highway recreational fuel taxpayers and complied with the article II, section 40 refund clause. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 260 P.3d 956 (2011).

#### IV. ARGUMENT

##### A. This Case is Moot Because the Challenged Appropriation Expired Nearly One Year Ago

The challenged appropriation authority expired at the end of the last fiscal biennium, on June 30, 2011. State Parks' legal authority to commit unexpended or unobligated funds lapsed on that day. The relief requested by WOHVA—enjoining State Parks from spending the appropriation—simply cannot be granted. *See Freeman v. Gregoire*, 171 Wn.2d 316, 335, 256 P.3d 264 (2011) (J. Alexander, concurring op.) (“Asking us to bar the named officials from expending the funds now is a bit like asking us to put the genie back in the bottle.”).

Additionally, the Legislature has now altered the funding mechanism for State Parks in a manner that does not utilize fuel excise taxes. *See* Laws of 2011, ch. 320, § 22 (directing that revenues from a newly implemented public lands vehicle pass “must be used for the purpose of operating and maintaining state parks”). The 2011 operating

budget did not appropriate any NOVA funds to State Parks. *See* Laws of 2011, ch. 50, § 303.<sup>4</sup> Given this structural funding change, the expired appropriation is not likely to recur in the future, rendering the matter moot. *See West v. Reed*, 170 Wn.2d 680, 246 P.3d 548 (2010). Accordingly, WOHVA's Petition for Review should be dismissed as improvidently granted. *Cf. Pappas v. Hershberger*, 85 Wn.2d 152, 530 P.2d 642 (1975) (dismissing a petition as improvidently granted on other grounds).

#### **B. Standard of Review**

Because the trial court dismissed WOHVA's claims on summary judgment, this Court conducts a de novo review. *Beggs v. Dep't of Social & Health Servs.*, 171 Wn.2d 69, 75, 247 P.3d 421 (2011). A party challenging the constitutionality of state laws must prove their claim 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). Under the reasonable doubt standard, courts will not invalidate legislation unless they are "fully convinced, after a searching legal analysis, that the statute violates the constitution." *WOHVA*, 163 Wn. App. at 733 (internal quotations omitted). Courts give great deference to the Legislature, and it is their duty to uphold the constitutionality of statutes whenever possible.

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<sup>4</sup> The 2011 operating budget made only two appropriations out of the NOVA account, one to the Recreation and Conservation Funding Board and the other to DNR. *See* Laws of 2011, ch. 50, §§ 304, 308.

*Id.* (citing *Sch. Dists. ' Alliance*, 170 Wn.2d at 608). A challenger's burden of proof is heavy when challenging taxation matters because "the Legislature possesses a plenary power in matters of taxation except as limited by the Constitution." *Id.* (quoting *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808-09, 982 P.2d 611 (1999)).

**C. The 2009 Appropriation to State Parks Constitutes a Refund that Complies with the Refund Clause of Article II, Section 40**

The Court of Appeals upheld the Legislature's \$9.56 million appropriation from the NOVA account to State Parks for the maintenance and operation of state parks or to improve accessibility for boaters and off-road vehicle users.<sup>5</sup> The court correctly found that the appropriation was consistent with subsection (d); the "refund clause," contained in article II, section 40:

SECTION 40 HIGHWAY FUNDS. All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:

.....

(d) Refunds authorized by law for taxes paid on motor vehicle fuels; .....

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<sup>5</sup> The 2009 law used the conjunctive "and" in between "state parks" and "improve accessibility," but a 2010 amendment replaced "and" with "or." Laws of 2010, 1st Spec. Sess., ch. 37, § 936(4).

Although the 2009 appropriation at issue in this case (to operate and maintain the state park system) is slightly different than the 2003 appropriation upheld by *NMA* (to build and operate non-motorized trails within state parks) the analysis in that case applies equally well here.<sup>6</sup> An appropriation to fund the operation and maintenance of the state park system complies with the refund provision of article II, section 40, because 80 percent of recreational non-highway fuel purchasers engage in the outdoor recreational activities offered at state parks. Using the refund to support state parks therefore benefits those citizens paying taxes for non-highway fuel used in their recreational pursuits.

**1. Appropriating fuel tax refunds to programs that benefit recreational non-highway fuel users complies with the Refund Clause.**

WOHVA does not contest the constitutionality of the recreational non-highway fuel tax refund program. WOHVA's Complaint does not challenge the legislative determination that a refund of recreational non-highway fuel taxes can be accomplished by using such refunds for purposes that benefit those citizens paying taxes on fuel consumed in their recreational off-road pursuits. *See* CP at 10-11. In fact, a coalition of off-road vehicle enthusiasts is partially credited with efforts to enact the

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<sup>6</sup> No other published cases directly bear on this analysis. Other decisions involving article II, section 40, did not involve the refund clause and are thus inapposite. *See NMA*, 127 Wn. App. at 414.

original 1971 refund program. CP at 446. Accordingly, WOHVA has not claimed that the only constitutionally permissible way to refund fuel excise taxes is to issue refund checks directly to non-highway fuel users. Rather, WOHVA simply wants the Legislature to allocate more of the refund to ORV programs that benefit its members. *See* CP at 34 (Plaintiffs' trial pleading arguing that non-highway fuel tax refunds must be spent on programs that provide "at least some benefits to the ORV community").

The reasonableness of refunding fuel taxes by spending the refunds on programs directed towards non-highway fuel purchasers was confirmed in *NMA*, where the court explained that the administrative cost of providing direct refunds to every possible off-road user would be prohibitive: "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." *Id.* at 416; *see also* Benjamin Wham, *The Gasoline Tax*, 21 Ill. L. Rev. 771, 774 (1927) ("[F]rom a practicable standpoint . . . refunds are usually so small that the cost of making them is almost as great as the refunds themselves."). The Legislature overcame the impracticality by using recreational non-highway fuel tax refunds to support programs that benefit those recreational non-highway fuel consumers.

**2. The 2009 appropriation to State Parks complies with the Refund Clause.**

**a. The amenities offered by State Parks are utilized by recreational non-highway fuel purchasers.**

The Legislature's 2009 appropriation to State Parks required that the funds be used "for maintenance and operation of state parks or to improve accessibility for boaters and off-road vehicle users . . . ." Laws of 2010, 1st Spec. Sess., ch. 37, § 936. The Legislature determined that the use of such funds "will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities." *Id.* Two of WOHVA's stipulations entered at the trial level confirm the reasonableness of the Legislature's findings. First, WOHVA stipulated that State Parks has previously received NOVA grants for Riverside State Park which contains ORV trails, and has also received numerous other NOVA grants for the planning, development, maintenance, and management of non-motorized and non-highway road recreation facilities in other parks. CP at 99. *See also* CP at 388-89 (listing over two dozen different grants previously awarded to State Parks). Second, WOHVA stipulated that "[v]irtually all of the state parks feature 'nonmotorized recreational facilities' within the meaning of RCW 46.09.020." CP at 99.

The state park system easily qualifies as non-motorized recreational facilities that are utilized by recreational non-highway fuel

purchasers. One of State Parks' statutory mandates is to "[p]rovide a variety of recreational opportunities to the public, including but not limited to use of developed recreation areas, trails, and natural areas; . . . ." RCW 79A.05.305(4). The 2003 fuel use study documented that 80 percent of recreational non-highway fuel purchasers burn their fuel to reach end-destination activities that include hiking, mountain biking, cross-country skiing, equestrian, sightseeing, hunting, fishing, and wildlife viewing. CP at 122. The state park system offers nearly all of those activities.<sup>7</sup> The Legislature's using part of the non-highway fuel tax refund to support State Parks benefits 80 percent of recreational non-highway fuel users.

WOHVA contends the appropriation to State Parks fails to sufficiently target recreational non-highway fuel taxpayers. But the fact that other citizens utilize parks does not detract from the Legislature's reasoned determination that the amenities offered by the state park system benefit 80 percent of the recreational non-highway fuel taxpayers.

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<sup>7</sup> A search of State Parks' website reveals the following results for amenities: hiking trails—89 parks; mountain biking—31 parks; cross-country skiing—13 parks; horse stables—2 parks; freshwater fishing—58 parks; saltwater fishing—49 parks; wildlife viewing—89 parks. See <http://www.parks.wa.gov/parks/search>.

- b. The amount of the 2009 appropriation is proportionate to the number of recreational non-highway fuel purchasers who engage in non-motorized activities.**

The real source of WOHVA's complaint seems to flow from a belief that its constituents, ORV drivers and motorcycle riders, are entitled to *more* of the 2009 tax refund expenditures than what the Legislature provided for ORV programs. WOHVA disagrees with the Legislature's allocation of the non-highway tax refunds between motorized and non-motorized outdoor recreational opportunities. But even if the Legislature was required to mathematically apportion non-highway recreational fuel tax refunds between the various user groups, the 2003 non-highway fuel use study documented that ORV and snowmobile users comprise only about 20 percent of all non-highway recreational fuel purchasers. CP at 122. Based on these study results, ORV projects would be entitled to not more than 20 percent of the annual refunds.

A mathematical comparison of the 2009 fuel refund appropriations does not support WOHVA's assertion that more funds are constitutionally required to be directed to ORV projects. In 2009, the Legislature appropriated a total combined amount of \$16.494 million out of the NOVA account and the Off Road Vehicle Account. Of that total amount, the Legislature appropriated \$9.56 million from the NOVA account to

State Parks, which comprises less than 60 percent of the total.<sup>8</sup> Thus, the State Parks appropriation was less than the 80 percent share of fuel use attributed to non-motorized outdoor recreational enthusiasts by the 2003 study. At the same time, the Legislature appropriated \$4.89 million out of the Off Road Vehicle Account, an amount which constitutes over 25 percent of the total amount appropriated—more than the 20 percent share of fuel use attributed to motorized outdoor recreational enthusiasts by the 2003 study, and more than satisfying any equitable balancing of refunds across user groups.<sup>9</sup> WOHVA posits no theory justifying how the Constitution requires the Legislature to spend more than 20 percent of the non-highway recreational fuel tax refunds exclusively on ORV activities.

**c. State Parks' employees are a necessary prerequisite to the benefits that State Parks offers to non-motorized recreationalists.**

WOHVA complains greatly about the fact that State Parks used the NOVA appropriation to cover a portion of employee salaries and benefits.

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<sup>8</sup> Only two-thirds of the \$9.56 million is attributable to non-highway fuel taxes, with the remainder coming from other fees and permits that are also deposited into the NOVA account. CP at 98. Removing the other revenue sources from the mathematical comparisons shows that State Parks received only about 50 percent of the appropriations attributable to the non-highway fuel tax refunds.

<sup>9</sup> RCW 46.09.520(2)(a)-(c) allows the agencies to use the ORV funds for ORV, non-motorized, and non-highway road recreation facilities and the maintenance of non-highway roads. WOHVA did not submit any evidence suggesting that the \$4.89 million appropriated from the ORV account did not directly benefit their user groups. WOHVA also overlooks a separate \$1,062,000 appropriation from the NOVA account to the Recreation and Conservation Funding Board, or "RCO". Although the RCO did not award any new ORV grants in the 2009-2011 biennium, *see* CP at 99, WOHVA never explains what the RCO did with its 2009 NOVA appropriation.

WOHVA asserts that paying state employees has no relation to refunding taxes so as to benefit the taxpayers. However, WOHVA stipulated to the fact that those park employees are directly engaged in operating and maintaining park facilities. CP at 98. State Parks' 2009-2011 operations costs utilized 74 percent of its total budget, and salaries comprised 70 percent of the operations costs. CP at 98. The cost of the park rangers and other employees is the biggest expense in running the state parks, and those employees are necessary to operate and maintain the parks. The services provided by those employees constitute an intrinsic part of the benefits utilized by the 80 percent of the recreational non-highway fuel purchasers who engage in non-motorized recreational activities.

Nor does using motor vehicle funds to pay salaries inherently violate article II, section 40. The Department of Transportation can use motor vehicle funds to pay salaries and other administrative costs incurred in overseeing the highway system. *See* AGLO 1975 No. 35. Similarly, motor vehicle funds can be used to pay salaries and capital costs for state patrol officers because "policing" of public highways is an enumerated constitutional use. *See* AGO 1957-58 No. 221. The Legislature's using fuel tax refunds to benefit recreational non-highway fuel taxpayers constitutes a highway purpose, so funding salaries of employees whose services benefit the same taxpayers fits within the constitutional limits.

**3. WOHVA has failed to prove beyond a reasonable doubt that the Legislature's spending decision was unconstitutional.**

As demonstrated in the previous section, the challenged 2009 appropriation to State Parks utilized less than 60 percent of all funds appropriated out of the NOVA and ORV accounts that biennium, despite the fact that the 2003 study established that 80 percent of non-highway fuel users engaged in end-destination activities as are found in state parks. The Legislature's appropriation decision is a quintessential aspect of its power to tax and spend, and the appropriations that flow from that power should not be overturned absent proof that they are unconstitutional beyond a reasonable doubt. WOHVA has provided no evidence demonstrating any error in the Legislature's decision to apportion some of the non-highway fuel tax refunds to benefit non-motorized recreationalists.

Article II, section 40, does not authorize the courts to micromanage legislative spending decisions regarding fuel tax refunds authorized by law. Absent explicit constitutional restrictions, this Court should acknowledge and defer to the Legislature's *unrestrained* lawmaking power, which includes the power to allocate the tax refunds amongst the user group beneficiaries as the Legislature sees fit. *See State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969) (“[T]he

power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions.”); *see also State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 809, 982 P.2d 611 (1999).

Courts in other states with constitutional limits on the use of gas taxes have similarly deferred to legislative determinations regarding the disposition of non-highway tax refunds. In *V-1 Oil Co. v. Idaho State Tax Comm’n*, the Idaho Supreme Court upheld the legislature’s determination that 20 percent of fuel purchases were attributable to off-road uses. 134 Idaho 716, 9 P.3d 519 (2000). The oil company attacked the 20 percent determination as lacking evidence, to which the court responded: “[S]uch empirical evidence is unnecessary. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* at 720 (internal quotations omitted). Similarly, in Montana, a party challenged the legislature’s diverting one-percent of fuel taxes to state parks on the theory that one-percent represented fuel purchases by motor-boaters. *Harvey v. Blewett*, 151 Mont. 427, 443 P.2d 902 (1968). The Montana court pointed out the state did not need to prove the legislature’s correctness, but that the challenger had to prove beyond a reasonable doubt that the legislature’s findings were erroneous. *Id.* at 437. The court also held “the general rule

is that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted.” *Id.* at 439.

In the present case, WOHVA has failed to submit any evidence discrediting the Legislature’s finding that allocating under 60 percent of the annual off-highway fund appropriations to State Parks benefits a majority of recreational non-highway fuel purchasers. WOHVA’s invitation to more-closely scrutinize the Legislature’s benefit allocation would place this Court in the position of making the spending decisions that our Constitution reserves to the legislative branch of government.

An isolated statement from *NMA* could be construed to suggest that once the Legislature establishes an amount of non-highway tax refunds it may spend the money on anything “as it sees fit.” *See NMA*, 127 Wn. App. at 416 (quoted in *WOHVA*, 163 Wn. App. at 737). However, *NMA* recognized that the contested appropriation for non-motorized trails benefited the relevant tax payers. *NMA*, 127 Wn. App. at 415 (“The clear inference is that the sum should be returned to those people who used the gasoline for nonhighway purposes.”). That court also recognized that the legislative determination was not unreviewable. *Id.* at 416 (“Giving the appropriate deference, we conclude that an annual one percent withdrawal from the motor vehicle fund . . . falls within the refund authorized by article II, section 40.”) In any event, to be clear, the State

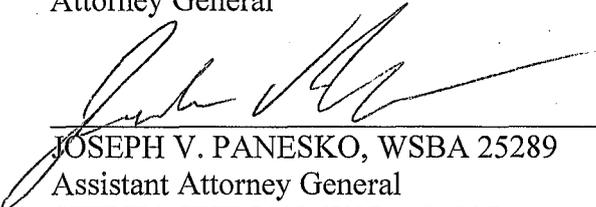
does not advocate here for a rule that would allow the Legislature to spend refunded fuel taxes for a purpose that bears no plausible relationship to the underlying tax payers. Rather, as properly held by *WOHVA*, “a refund authorized by law must benefit the taxpayers whose taxes prompted the refund.” *WOHVA*, 163 Wn. App. at 738. No part of the *WOHVA* opinion allows the Legislature to spend the non-highway taxes for *any* purpose. Whatever the limits may be on the Legislature’s use of the non-highway refunds, the appropriation in this case is well within the margins, with the challenged expenditure benefiting a collective group representing 80 percent of recreational non-highway fuel purchasers.

## V. CONCLUSION

Presuming this Petition is not dismissed as moot, the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of April, 2012.

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