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NO. 89714-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; EL CENTRO DE LA RAZA, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; WAYNE AU, PH.D., on his own behalf; PAT BRAMAN, on her own behalf; DONNA BOYER, on her own behalf and on behalf of her minor children; and SARAH LUCAS, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent,

and

WASHINGTON STATE CHARTER SCHOOLS ASSOCIATION, LEAGUE OF EDUCATION VOTERS, DUCERE GROUP, CESAR CHAVEZ CHARTER SCHOOL, INITIATIVE 1240 SPONSOR TANIA DE SA CAMPOS, and MATT ELISARA,

Respondents/Intervenors.

**INTERVENORS' STATEMENT OF ADDITIONAL AUTHORITIES
(RAP 10.8)**



ORIGINAL

Harry J. F. Korrell, WSBA #23173
Michele Radosevich, WSBA #24282
Joseph P. Hoag, WSBA #41971
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

Attorneys for Intervenors

Pursuant to RAP 10.8, Intervenors identify the following additional authority:

Washington State Senate, Ways and Means Committee, *A Citizen's Guide to the Washington Budget* (2014) at 2-3 (describing nature and composition of Washington State budget), 11-14 (describing composition of the Washington State General Fund and how monies from that fund are spent), available at <http://www.leg.wa.gov/Senate/Committees/WM/Documents/CGTB%202014.pdf>. A copy of excerpts of this publication is attached hereto as **Exhibit A**.

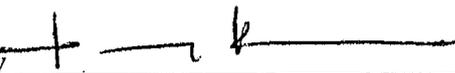
Teachers' Retirement System of Idaho v. Williams, 84 Idaho 467, 472, 374 P.2d 406 (1962) (holding that “regarding the income from the public school fund [an irreducible fund, the income from which is constitutionally restricted to supporting public schools] as dedicated to, and held in trust for, support and maintenance of schools, the trust pursuit rule would operate to prevent its inseparable commingling with moneys appropriable to other uses, and any withdrawals from the mass for other uses would be presumed to be from moneys in the mass not so dedicated. 54 Am.Jur., Trusts, §§ 256, 260; 90 C.J.S. Trusts § 438 b. c.”). A copy of the published opinion is attached hereto as **Exhibit B**.

Freeman v. State, 178 Wn.2d 387, 397 n.1 (2013) (“More importantly, the appellants have not shown that these MVF funds will be

used for the light rail construction. Thus, the appellants have not met their burden of showing a violation of article II, section 40.”). A copy of the published opinion is attached hereto as **Exhibit C**.

U.S. Department of Education, *U.S. Department of Education Awards \$39.7 Million in Grants to Expand High Quality Charter Schools* (October 8, 2014) (awarding a combined \$1,122,606 to five Washington state public charter schools to “ support charter schools’ efforts to increase high-need students’ success, especially in underserved areas”), available at <http://www.ed.gov/news/press-releases/us-department-education-awards-397-million-grants-expand-high-quality-charter-sc>. A copy of this publication is attached hereto as **Exhibit D**.

RESPECTFULLY SUBMITTED this 13th day of November,
2014.

By 
Harry Korrell, WSBA #23173
Michele Radosevich, WSBA #24282
Joseph P. Hoag, WSBA #41971
Davis Wright Trémaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
(206) 757-7299

Counsel for Intervenors

CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on this 14th day of November, 2014, I caused to be served a true and correct copy of the following **Intervenors' Statement of**

Additional Authorities (RAP 10.8) upon:

David A. Stolier, WSBA # 24071, Sr. AAG
Chief, Education Division
Rebecca R. Glasgow, WSBA #32886, Deputy
Solicitor General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
Phone: 360-753-6200
Email: daves@atg.wa.gov
Email: rebeccag@atg.gov
Attorneys for Respondent State of Washington

via facsimile
 via overnight courier
 via first-class U.S. Mail (Appendix only)
 via email
 via electronic court filing
 via hand delivery

Paul J. Lawrence, WSBA #13557
Jessica A. Skelton, WSBA #36748
Jamie L. Lisagor, WSBA #39946
Pacifica Law Group
1191 Second Avenue, Ste. 2100
Seattle, WA 98101
Phone: 206-245-1700
Email: paul.lawrence@pacificalawgroup.com
Email: jessica.skelton@pacificalawgroup.com
Email: Jamie.lisagor@pacificalawgroup.com
Attorneys for Appellants

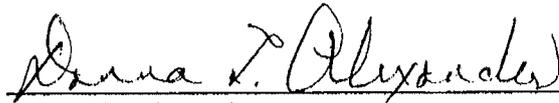
via facsimile
 via overnight courier
 via first-class U.S. Mail (Appendix only)
 via email
 via electronic court filing
 via hand delivery

Robert M. McKenna, WSBA #18327
Brian T. Moran, WSBA #17794
Andrew Ardinger, WSBA #46035
Orrick, Herrington & Sutcliffe LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Email: rmckenna@orrick.com
Email: brian.moran@orrick.com
Email: aardinger@orrick.com

- via facsimile
- via overnight courier
- via first-class U.S. Mail (Appendix only)
- via email
- via electronic court filing
- via hand delivery

*Attorneys for Amicus Stand for Children-
Washington, Washington Roundtable,
Technology Alliance and Teachers United*

Dated this 14th day of November, 2014.



Donna L. Alexander
Assistant to Harry J. F. Korrell
Davis Wright Tremaine LLP
1201 3rd Avenue, Suite 2200
Seattle, WA 98101
Tele: (206) 622-3150
Email: patriciaholman@dwt.com

EXHIBIT A



**A CITIZEN'S GUIDE TO THE
WASHINGTON STATE
BUDGET
2014**

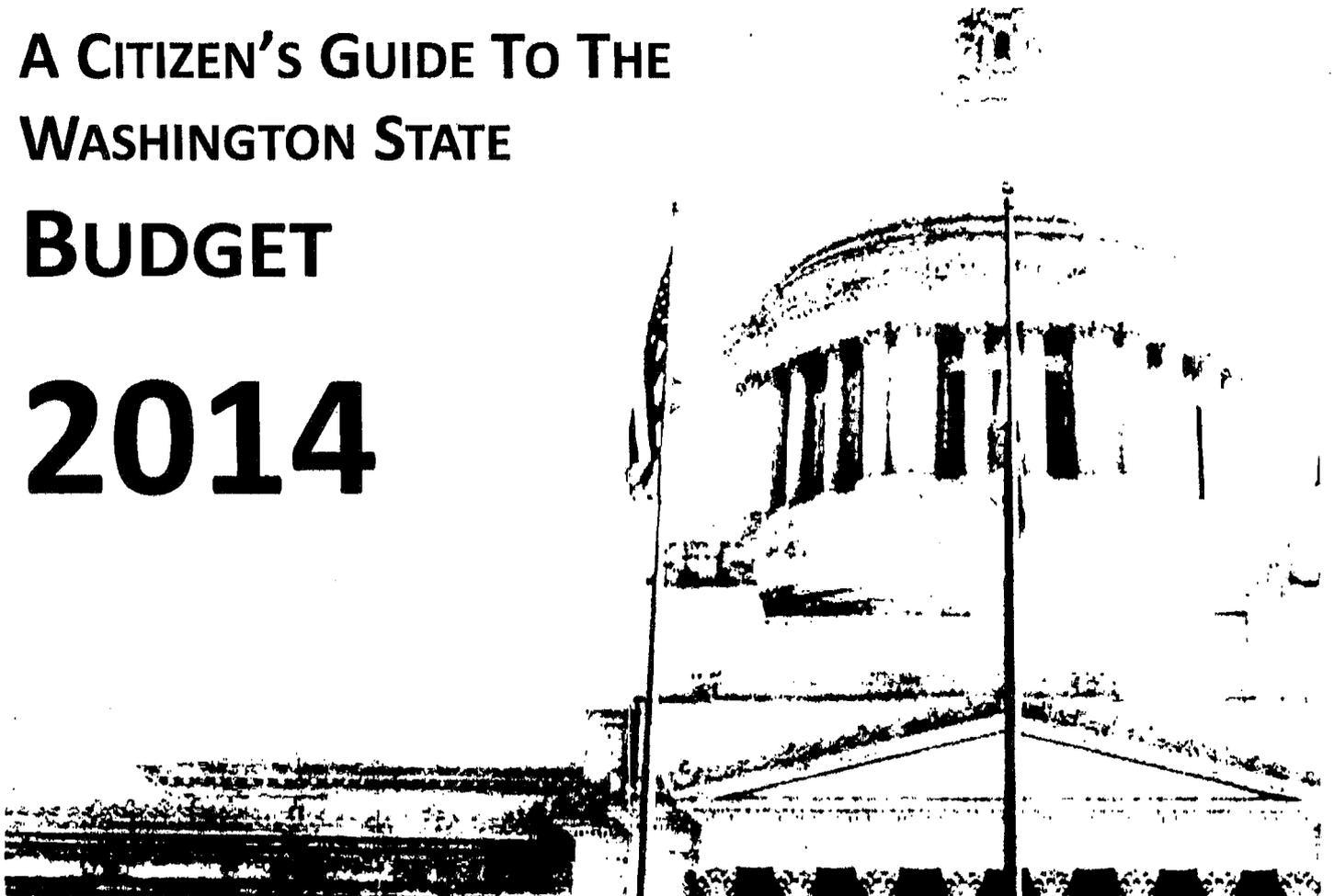
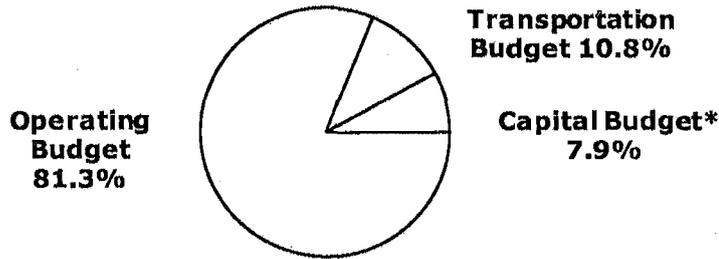


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HOW BIG IS THE STATE BUDGET?

As of the 2014 Legislative Session, the State of Washington will spend a total of \$81.8 billion for the 2013-15 biennium (or about \$112 million per day on average during the two-year spending period). This \$81.8 billion includes amounts from three different budgets, which are plans of how the state will spend the money. The relative size of each of the three state budgets is shown in the following chart:



2013-15 State Budgets
(Dollars in Billions)

Operating Budget	\$66.5
Transportation Budget	\$8.9
Capital Budget*	\$6.4
Total	\$81.8

*Includes Capital Re-appropriations.

Sources: Winsum and Buildsum budget development systems for the 2013 Session.

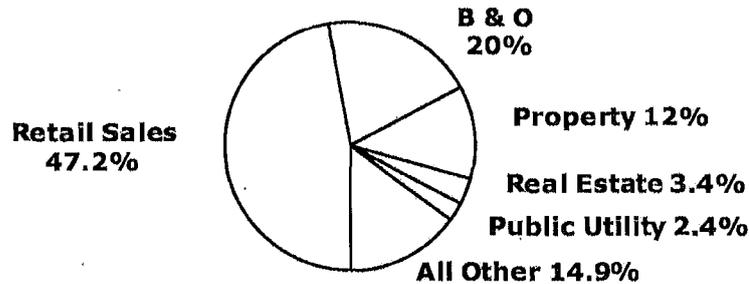
- The budget that pays for the day-to-day operations of state government (including federal funds and dedicated funds) is called the **Operating Budget (\$66.5 billion)**.
- The budget that pays for transportation activities, such as designing and maintaining roads and public transit, is called the **Transportation Budget (\$8.9 billion)**. This budget includes amounts for both transportation operating activities (\$3.6 billion) and transportation capital activities (\$5.2 billion).
- The budget to acquire and maintain state buildings, public schools, higher education facilities, public lands, parks, and other assets is called the **Capital Budget (\$6.4 billion)**.

Budget-related materials frequently refer to the “state general fund” or General Fund-State (“GF-S”), which is the largest state fund; it

represents more than half of the \$66.5 billion operating budget. A discussion of the GF-S budget begins on page 11.

WHAT IS THE STATE GENERAL FUND?

The state general fund is the largest single fund within the state budget. It is the principal state fund supporting the operation of state government. All major state tax revenues are deposited into this fund. The sources of tax revenue for the state general fund are shown in the following chart:



**2013-15 Sources of
State General Fund Revenue**
(Dollars in Billions)

Retail Sales	\$15.6
Business & Occupations (B & O)	\$6.6
Property	\$4.0
Real Estate	\$1.1
Public Utility	\$0.8
All Other	\$4.9
Total	\$33.0

Source: Economic and Revenue Forecast, November 2013 (Cash Basis).

For the 2013-15 budget period, the state general fund will receive \$33 billion in revenues. Nearly half of that amount is from the state retail sales tax. The second largest tax is the Business and Occupation (B&O) tax, which accounts for 20%. The third largest tax is the state property tax, which accounts for 12% of the total.

The state sales tax, the B&O tax, and the state property tax account for 79.3% of all state general fund revenues. In addition, the general fund relies on real estate excise taxes, use taxes, a public utility tax, insurance premium taxes, and a number of other smaller taxes. (For a description of these and other state taxes, refer to the Washington State Department of Revenue web site at <http://dor.wa.gov>.)

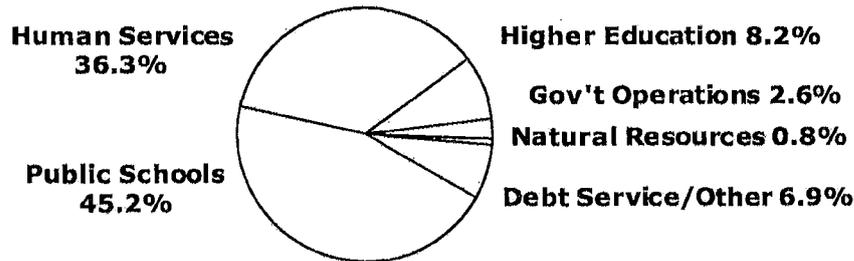
The major difference between the state general fund revenues (\$33 billion) and the total of all budgeted funds revenues (\$81.9 billion) is the dedication of revenue sources to specific uses. Most of the difference can be attributed to four types of funds:

- Federal funds for specific federal programs (\$20.1 billion)
- Higher Education-specific funds such as the Grants and Contracts Account, Higher Education Dedicated Local Accounts, the Tuition and Fees Account, and the University of Washington Hospital Account (\$10 billion)
- Bonds for capital purposes (\$5.7 billion)
- Gas taxes for transportation purposes (\$2.9 billion)

These four sources account for nearly 79% of the difference between revenues available for all state government budgets and the state general fund budget.

HOW IS STATE GENERAL FUND MONEY SPENT?

Because of the nature of its tax sources, the state general fund receives the most attention during the budget-building process. During the 2013-15 biennium, the state will spend approximately \$32.8 billion (or about \$45 million per day on average) from the state general fund. The following chart shows how the state general fund budget is allocated:



2013-15 General Fund-State Expenditures
(Dollars in Billions)

Public Schools	\$14.8
Human Services	\$11.9
Higher Education	\$2.7
Governmental Operations	\$0.8
Natural Resources	\$0.3
Debt Service/Other	\$2.3
Total	\$32.8

Source: Winsum budget development system for the 2013 Session.

The largest single state general fund program is **Public Schools**, which includes state support for K-12 education. Public schools account for 22.2% of total budgeted expenditures, but that share increases to 45.2% when examining only the state general fund. In the 2013-15 biennium, the state will provide public education funding for more than 1,000,000 children.

Human Services state general fund spending consists primarily of the operating budget for the Department of Social and Health Services, the State's umbrella organization that provides medical, social, and income assistance to citizens in need. It also includes spending for the

Department of Corrections, the Department of Health, and Health Care Authority.

Higher Education spending includes funding for six public universities, and thirty-four community colleges and technical schools serving more than 233,000 FTE students. It also includes state financial aid to approximately 106,000 students attending both state supported and private colleges and universities. Expenditures for higher education represent 16% of all budgeted funds and 8.2% of the state general fund. In addition to money from the state general fund, higher education receives \$10 billion of dedicated revenues, principally grants and contracts, and tuition and fees.

Other general fund spending categories include **Natural Resources, Governmental Operations, Other Education, Transportation** and other expenditures such as the payment of **Debt Service**.

GLOSSARY OF COMMONLY USED BUDGET TERMS

Appropriation - A legislative authorization for an agency or other governmental unit to make expenditures and incur obligations: (1) for specific purposes, (2) from designated funding sources, and (3) during a specified time period.

Biennium - The 24-month period from July 1st of odd-numbered years to June 30th of odd-numbered years, such as the 2013-15 biennium which runs from July 1, 2013 to June 30, 2015.

Capital Budget - The budget that pays for the construction and renovation of state facilities, including public schools, prisons, state hospitals, higher education institutions, parks, etc. Revenues to support capital spending come primarily from bonds and dedicated cash accounts.

Debt Service - The interest and principle costs of facilities and services funded through general obligation bonds.

Dedicated Funds - The product of reserving certain tax revenues for a specific purpose or purposes. Generally, any fund other than the general fund or a federal fund is referred to as a dedicated fund. There are literally hundreds of dedicated funds in the state treasury. Two of the largest are the Motor Vehicle Account, which receives gas tax revenues and is restricted to roads and highways, and the State Lottery Account, which accounts for revenues from ticket sales and is reserved for the cost of lottery operations and prizes.

Federal Funds - Monies provided by the federal government to support state programs. Major operating budget federal programs include Medicaid and the Social Services Block Grant.

Fiscal Year (FY) - The 12-month period from July 1st to June 30th, expressed in terms of the first six months of the second calendar year. For example, FY 2014 runs from July 1, 2013 until June 30, 2014.

FTE Staff - Full time equivalent (FTE) staff is a way to measure the size of the state's workforce. One FTE is equivalent to 2,088 hours worked per year, which represents one full-time employee. Total FTE staff does not necessarily represent the total number of state employees because some staff work part-time and are thus classified as a percentage of one FTE.

Governmental Operations - A functional area of state spending which comprises a large number of central service agencies, such as the departments of General Administration, Personnel, Financial Management, Revenue, etc., as well as the legislative and judicial branches of government.

Higher Education - A functional area of state spending that includes the cost of secondary education and workforce training provided through the state's 34 community and technical colleges, four regional universities, and two research universities.

Human Services - A functional area of state spending which comprises human services agencies such as the Department of Social and Health Services, the Department of Corrections, the Health Care Authority, and the Department of Health.

Natural Resources - A functional area of state spending that includes the state's natural resource agencies such as the departments of Ecology, Fish and Wildlife, Natural Resources, and the State Parks and Recreation Commission.

Object - A state accounting classification used to categorize expenditures. Objects of expenditure in the state operating and capital budgets include: Salaries and Wages; Employ Benefits; Personal Service Contracts; Goods and Services; Travel; Capital Outlays; Grants, Benefits, and Client Services; Debt Service; and various transfer objects.

Operating Budget - The budget which pays for most of the day-to-day operations of state government and constitutes the majority of all state spending is referred to as the operating budget. Revenue to support this budget comes from a variety of taxes and fees that are deposited into more than 200 separate funds and accounts, the largest of which is the state general fund.

Other Education - A functional area of state spending that includes the cost of providing specialized education services at the Schools for the Deaf and the Blind, arts and cultural services provided through the Arts Commission and the two state Historical Societies, and cost of the state Work Force Training, and Education Coordinating Board.

Public Schools - A functional area of state spending that includes the cost of educating the state's children from grades kindergarten through high school. It also includes the funding for other activities of the public school system. The Superintendent of Public Instruction allocates these funds to 295 school districts, nine educational service districts and other contractors who provide education services.

State General Fund - Often referred to as General Fund-State (GF-S), this fund serves as the principal state fund supporting the operation of state government. All major state tax revenues (sales, business and occupation, property tax, and others) are deposited into this fund.

Transportation Budget - The budget which pays for both the day-to-day operation of state transportation agencies and the construction and preservation of state highways and roads, is called the transportation budget. Most of the revenue that supports the transportation budget comes from the state gas tax.

EXHIBIT B

84 Idaho 467
Supreme Court of Idaho.

TEACHERS' RETIREMENT SYSTEM OF IDAHO, Plaintiff,

v.

Joe R. WILLIAMS, State Auditor, Defendant.

No. 9170. | July 25, 1962. | Rehearing Denied Sept. 25, 1962.

Original petition for writ of mandate to require the state auditor to transfer funds from the general fund to the public school income fund and from the public school income fund to the teachers' retirement system. The Supreme Court, Taylor, J., held, inter alia, that the statute I.C. § 33-1509(c), appropriating from the public school income fund to the teachers' retirement system the money appropriated by Laws 1961, c. 293, from the general fund to the public school income fund expressly for the purpose of making funds available for transfer to the retirement system does not authorize expenditure of income from the public school fund for purposes other than support and maintenance of public schools in violation of the Constitution or Idaho Admission Bill, since money appropriated out of general fund to public school income fund for purpose of making funds available for transfer to teachers' retirement system was thereby earmarked for such purpose and thus prevented from becoming commingled with other funds in public school income fund, including income from public school fund, and trust pursuit rule would prevent income from public school fund from becoming inseparably commingled with moneys appropriated to other uses.

Peremptory writ granted.

West Headnotes (5)

[1] **Education** *v.* Creation of funds

Money appropriated out of general fund to public school income fund expressly for purpose of making funds available for transfer to teachers' retirement system were earmarked for such purpose and thus prevented from becoming commingled with other moneys in public school income fund, including income from public school fund. Laws 1961, c. 293; I.C. §§ 33-1009, 33-1509(c); Const. art. 9, § 3; Idaho Admission Bill, § 5.

Cases that cite this headnote

[2] **Education** *v.* Investment and administration

Income from public school fund, being dedicated to, and held in trust for, support and maintenance of public schools, would be prevented by trust pursuit rule from becoming inseparably commingled with moneys appropriable for other uses, and any withdrawals from the mass for other uses would be presumed to be from moneys in the mass not so dedicated. Idaho Admission Bill, § 5; Const. art. 9, §§ 3, 4.

Cases that cite this headnote

[3] **Education** *v.* Illegal apportionment or disbursement

Statute appropriating out of public school income fund to teachers' retirement system money appropriated out of general fund to public school income fund expressly for purpose of making funds available for transfer to teachers' retirement system does not provide for expenditure of income from public school fund for purposes other than support

and maintenance of public schools in violation of Constitution or Admission Bill. Laws 1961, c. 293; I.C. §§ 33-1009, 33-1011, 33-1509(c); Idaho Admission Bill § 5; Const. art. 9, §§ 3, 4.

1 Cases that cite this headnote

[4] Education → Creation of funds

Money appropriated out of public school income fund to teachers' retirement system was expressly identified as money appropriated out of general fund to public school income fund for purpose of making funds available for transfer to retirement system for specified fiscal biennium and was not involved in or affected by provision in same act appropriating funds to retirement system in each fiscal period thereafter. I.C. § 33-1509(c).

Cases that cite this headnote

[5] Statutes → Government property, facilities, and funds

Statutory provision for appropriation expressly allocated to specified fiscal biennium could be upheld without involving approval, implied or otherwise, of provision in same section of statute for continuing appropriation specifically limited to commence in each fiscal period thereafter, since such provisions of statute were clearly severable. Laws 1961, c. 293; I.C. § 33-1509(c).

1 Cases that cite this headnote

Attorneys and Law Firms

*468 **407 Langroise, Clark & Sullivan, Thomas A. Miller, Boise, for plaintiff.

*469 Frank L. Benson, Atty. Gen., Warren Felton, Asst. Atty. Gen., Boise, for defendant.

Opinion

TAYLOR, Justice.

Plaintiff invoked the original jurisdiction of this court by petition for a writ of mandate to require the state auditor to transfer \$100,000 from the general fund of the state to the public school income fund in compliance with its request made pursuant to Chapter 293, 1961 Session Laws, and to require the auditor to transfer the same sum from the public school income fund to the teachers' retirement system, pursuant to Idaho Code § 33-1509(c), as amended by 1961 Session Laws, c. 308. Alternative writ was issued and defendant in his return thereto alleged that the statutes above referred to are violative of Constitution, Art. 9, §§ 3 and 4, and of Idaho Admission Bill, § 5. So far as applicable here, the provisions referred to are as follows:

Statutes:

'Section 1. There is hereby appropriated out of the General Fund of the State of Idaho to the Public School Income Fund the sum of \$200,000, or so much thereof as may be necessary, for the purpose of making funds available for transfer to the Teachers' Retirement System as provided for by enactment of legislation by the Thirty-Sixth Session of the Idaho Legislature.

*470 'Section 2. Transfer of the moneys here appropriated shall be made upon request of the Board of Trustees of the Teachers' Retirement System and upon order of the State Auditor, during the period commencing July 1, 1961 and ending June 30, 1963.' 1961 Session Laws, c. 293.

Teachers' Retirement System of Idaho v. Williams, 84 Idaho 467 (1962)

374 P.2d 406

'(c) There is hereby appropriated out of the public school endowment income fund the sum of \$200,000 or so much thereof as may be necessary to the Teachers' Retirement System for the purpose of paying the state's share of annuities, refunds, allowances and benefits which will become due in the fiscal biennium beginning July 1, 1961; and in each fiscal period thereafter, there is hereby appropriated to the Teachers' Retirement System from the public school endowment income fund a sum equal to the state's share of the annuities, benefits, allowances and refunds, estimated to become due in such fiscal period, but not to exceed \$200,000, or so much thereof as may be necessary.' 1961 Session Laws, c. 308, I.C. § 33-1509, subsection (c).

The fund actually referred to in the foregoing subsection (c) is the 'public school income fund.'

Constitution:

'The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur.' Art. 9, § 3.

'The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known **408 as school lands, and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general education purposes, or where no other special purpose is indicated in such grant; all estates or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated *471 under the laws of the state; and all other grants, gifts, devises, or bequests made to the state for general educational purposes.' Art. 9, § 4. Idaho Admission Bill, § 5, as amended:

'All lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than ten years, and in the case of an oil, gas, or other hydrocarbon lease, for as long thereafter as such product is produced, and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.'

The 'public school income fund' was created by 1933 S.L., c. 205, § 3, now codified as I.C. § 33-1009, as follows:

'There is hereby created a fund in the state treasury to be known as the 'public school income fund.' All income from the public school fund; the proceeds of all state taxes levied for public school purposes; and all other money received by the state for public school purposes, other than permanent or trust funds, national forest reserve moneys received for public school purposes, and grants of federal moneys received for special school purposes, together with state appropriations to match such funds, shall be placed in this fund and shall be transferred and paid therefrom and apportioned as provided in section 33-1011.'

Idaho Code § 33-1011, as amended, provides for the apportionment and distribution of the moneys received in the public school income fund to the counties and school districts of the state.

Defendant concedes that the legislature may constitutionally appropriate money from the general fund to the teachers' retirement system, but contends that such moneys cannot be placed in the public school income fund and then transferred therefrom to the teachers' retirement system. Apparently his theory is that moneys placed in the 'public school income fund' become commingled with income from the 'public school fund' and that any withdrawal therefrom would include income from the 'public school

fund,' which under Constitution, Art. 9, § 3, and Idaho Admission Bill, § 5, can only be withdrawn and expended in the 'support' and 'maintenance' of the schools of the state; that the withdrawal now demanded for the teachers' retirement *472 system would result in the expenditure of a portion of the income from the 'public school fund' for purposes other than the support and maintenance of the schools, and is, therefore, repugnant to the constitution and the admission bill.

[1] [2] We do not so regard the transfers presently demanded. By the provision of chapter 293, that the appropriation from the general fund was made 'for the purpose of making funds available for transfer to the Teachers' Retirement System,' the \$200,000 or such portion of it as actually reaches the public school income fund was by that provision earmarked for the Teachers' retirement system, and thus prevented from becoming commingled with other moneys in that fund. On the other hand, regarding the income from the public school fund as dedicated to, and held in trust for, support and maintenance of schools, the **409 trust pursuit rule would operate to prevent its inseparable commingling with moneys appropriable to other uses, and any withdrawals from the mass for other uses would be presumed to be from moneys in the mass not so dedicated. 54 Am.Jur., Trusts, §§ 256, 260; 90 C.J.S. Trusts § 438 b. c.

[3] Why the legislature took this circuitous route to transfer money from the general fund to the teachers' retirement system does not appear. However, we see no constitutional objection to the method adopted. It involves no more than mere bookkeeping entries: first, the recording of a transfer of the requested \$100,000 from the general fund to the public school income fund; and second, the recording of a transfer of that same \$100,000 from the public school income fund to the teachers' retirement system.

[4] Defendant calls attention to the continuing appropriation contained in section 33-1509(c) of chapter 308, hereinabove set out, and urges that this constitutes a direct attempt to appropriate moneys from the public school income fund, including the income from the public school fund, in violation of the restrictions imposed by the provisions of the constitution and admission bill. We do not reach that question in the present proceeding. The first appropriation provided in subsection (c), supra, identifies the \$200,000 appropriated by chapter 293, and the \$200,000 appropriated in subsection (c) is in turn identified by the provision in chapter 293, to the effect that the appropriation from the general fund for the purpose of making funds available for transfer to the teachers' retirement system, is the transfer 'provided for by enactment of legislation by the Thirty-sixth Session of the Idaho Legislature.' We find no other legislation of the thirty-sixth session to which this reference could *473 apply. Thus the money involved in the present requested transfer is identified as a portion of the \$200,000 presently appropriated by the first part of subsection (c), and is not involved in, nor affected by, the continuing appropriation.

[5] Furthermore, the appropriation of \$200,000 provided for by the first part of subsection (c) is specifically allocated to the 'fiscal biennium beginning July 1, 1961.' The continuing appropriation set up in the second half of subsection (c) is specifically limited to commence 'in each fiscal period thereafter.' The two provisions are clearly severable and the one providing for the transfer of the \$200,000, appropriated from the general fund by chapter 293, can therefore be upheld without involving approval, implied or otherwise, of the continuing appropriation. State v. Finch, 79 Idaho 275, 315 P.2d 529; Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068; In re Edwards, 45 Idaho 676, 266 P. 665; Stark v. McLaughlin, 45 Idaho 112, 261 P. 244; Gillesby v. Board of County Com'rs of Canyon County, 17 Idaho 586, 107 P. 71; In re Abel, 10 Idaho 288, 77 P. 621:

It is ordered that the petition be granted and peremptory writ issue as prayed.

No costs allowed.

SMITH, C. J., and KNUDSON, McQUADE and McFADDEN, JJ., concur.

Parallel Citations

374 P.2d 406

EXHIBIT C

178 Wash.2d 387
Supreme Court of Washington,
En Banc.

Kemper FREEMAN; Jim Horn; Steve Stivala; Ken Collins; Michael Dunmire; Sarah Rindlaub; Al
Deatley; Jim Coles; Bryan Boehm; Emory Bundy; Roger Bell; Eastside Transportation Association,
a Washington nonprofit corporation; and Mark Anderson, Appellants/Cross-Respondents,

v.

STATE of Washington; Christine O. Gregoire, Governor; and PAULA
Hammond, Secretary, Department of Transportation, Respondents,
Central Puget Sound Transportation District, Respondent-Intervenor/ Cross-Appellant.

No. 87267-8. | Argued Feb. 19, 2013. | Decided Sept. 12, 2013.

Synopsis

Background: Citizens and nonprofit corporation brought action challenging lease agreement between Department of Transportation (DOT) and lessee of air space over center highway lanes for light rail. Lessee intervened. The Superior Court, Kittitas County, Michael E. Cooper, J., granted summary judgment in favor of DOT. Citizens appealed.

Holdings: The Supreme Court, Madsen, C.J., held that:

[1] lease agreement did not violate constitutional provision that required that motor vehicle fund (MVF) be used for highway purposes;

[2] DOT was the appropriate entity to decide whether highway land was presently needed under statute; and

[3] determination by DOT that center highway lanes were not presently needed was not arbitrary or capricious.

Affirmed.

J.M. Johnson, J., dissented and filed opinion.

West Headnotes (11)

[1] **Appeal and Error** Cases Triable in Appellate Court
Supreme Court reviews the trial court's summary judgment order de novo.

Cases that cite this headnote

[2] **Highways** Highway funds
Constitution requires that motor vehicle fund (MVF) be used for highway purposes. West's RCWA Const. Art. 2, § 40.

Cases that cite this headnote

[3] **Highways** Highway funds

Constitutional provision requiring that motor vehicle fund (MVF) be used for highway purposes does not protect highways; rather, it protects certain taxes and revenues from uses other than highway purposes by creating a fund and then limiting the uses to which the fund may be put. West's RCWA Const. Art. 2, § 40.

Cases that cite this headnote

[4] **Highways** Highway funds

Constitutional provision requiring that motor vehicle fund (MVF) be used for highway purposes does not prohibit Department of Transportation (DOT) from transferring highways built with the MVF where the MVF is reimbursed. West's RCWA Const. Art. 2, § 40.

Cases that cite this headnote

[5] **Courts** Previous Decisions as Controlling or as Precedents

While attorney general's office (AGO) opinions are not controlling, they are given great weight.

Cases that cite this headnote

[6] **Highways** Highway funds

States Disposition of property

Lease agreement between Department of Transportation (DOT) and lessee of airspace above highway lanes for light rail did not violate constitutional provision that required that motor vehicle fund (MVF) be used for highway purposes, where lessee reimbursed MVF for the money spent by the State in constructing the portion of the highway over which the light rail would travel along with the fair market value of the lease, and DOT did not expend money from the MVF on light rail. West's RCWA Const. Art. 2, § 40.

Cases that cite this headnote

[7] **Highways** Highway funds

States Disposition of property

There was no de facto sale of highway lanes to lessee of airspace above the lanes for light rail in violation of statute that allowed Secretary of Department of Transportation (DOT) to transfer and convey to the United States, state agency, county, city, or port district unused state-owned real property, even if the useful life of the structure was 40 years, where lessee had the option to renew the lease for an additional 35 years, and there was an absence of specific evidence supporting the claim. West's RCWA 47.12.080.

Cases that cite this headnote

[8] **States** Disposition of property

Determination by Department of Transportation (DOT) that highway lanes were not presently needed was not reviewable under Administrative Procedure Act (APA); the "not presently needed" language fell under statute that allowed Department of Transportation (DOT) to lease lands, improvements, or air space above or below any lands that were held for highway purposes, but were not presently needed, and determination was a decision regarding a lease. West's RCWA 34.05.010(3), 47.12.120.

Cases that cite this headnote

[9] States ~ Disposition of property

Department of Transportation (DOT) was the appropriate entity to decide whether highway land was presently needed under statute that allowed DOT to lease lands, improvements, or air space above or below any lands that were held for highway purposes, but were not presently needed; DOT had broad authority to administer highways, and there was no statutory guidance suggesting otherwise. West's RCWA 47.12.120.

Cases that cite this headnote

[10] Administrative Law and Procedure ~ Arbitrary, unreasonable or capricious action; illegality

In determining how much deference is given to an agency decision, it is helpful to consider that actions reviewable under the Administrative Procedure Act (APA) are subject to an arbitrary and capricious standard. West's RCWA 34.05.010 et seq.

2 Cases that cite this headnote

[11] States ~ Disposition of property

Determination by Department of Transportation (DOT) that center highway lanes were not presently needed was not arbitrary or capricious, and, thus, they could be leased to lessee for light rail under statute that allowed DOT to lease lands, improvements, or air space above or below any lands which were held for highway purposes, but were not presently needed, where possession and control of the center lanes would not be transferred to lessee until after they were replaced by outside high occupancy vehicle (HOV) lanes, lease was contingent on the replacement, and DOT engaged in a careful evaluation of the need of the center lanes at the time of the transfer, relying upon studies and historical materials. West's RCWA 47.12.120.

Cases that cite this headnote

Attorneys and Law Firms

****438** Bryce E. Brown Jr., Attorney at Law, Olympia, WA, for Respondent.

Philip Albert Talmadge, Sidney Charlotte Tribe, Talmadge/Fitzpatrick, Tukwila, WA, George E. Kargianis, Law Offices of George Kargianis, Seattle, WA, for Appellant/Cross-Respondent.

****439** Matthew J. Segal, Paul J. Lawrence, Jessica Anne Skelton, Pacifica Law Group LLP, Desmond Leoron Brown, Sound Transit Union Station, Seattle, WA, for Respondent Intervenors.

Stephen Joel Crane, Crane Dunham PLLC, Seattle, WA, amicus counsel for Haney Truck Line, LLC.

Lisabeth R. Belden, Law Office of Lisabeth R Belden, Seattle, WA, amicus counsel for Save Mi Sov.

Opinion

MADSEN, C.J.

*390 ¶ 1 The Washington State Department of Transportation (WSDOT) and the Central Puget Sound Regional Transit Authority (Sound Transit) entered into an agreement that would lease a portion of Interstate 90 (I-90) to Sound Transit for light rail. As consideration, Sound Transit agreed to pay an amount equal to the State's contribution to construct the center lanes and the value of a 40 year lease. Sound Transit also agreed to advance the cost of replacing the center two lanes, credited toward its lease. The appellants contend this lease violates article II, section 40 of the Washington Constitution and RCW 47.12.120. We hold that the lease does not violate article II, section 40 and RCW 47.12.120, affirm the trial court's summary judgment order in favor of the respondents, and deny the appellants' request for attorney fees.

FACTS AND PROCEDURAL HISTORY

¶ 2 Interstate 90 (I-90) is a state highway. The portion in dispute extends over Lake Washington, connecting Seattle, Mercer Island, and Bellevue. It consists of eight motor vehicle lanes, including three general purpose lanes in each *391 direction and two reversible high occupancy vehicle (HOV) lanes in the center.

¶ 3 In 1976, several parties executed a "Memorandum of Agreement" (MOA) resulting in the present configuration of I-90. These parties included King County, Seattle, Mercer Island, Bellevue, the municipality of Metropolitan Seattle, and the Washington State Highway Commission. The parties to the MOA declared that I-90 would have no more than eight lanes and that two of the lanes would be designed for and permanently committed to transit use. I-90 was to be designed so that "conversion of all or part of the transit roadway to fixed guideway is possible." Clerk's Papers (CP) at 1017. The construction relied in part on federal funding, with the United States secretary of transportation issuing approval in 1978 upon the express condition that "public transportation shall permanently have priority in the use of the center lanes." *Id.* at 1031.

¶ 4 From 1998 to 2004, Sound Transit and WSDOT engaged in planning and review regarding transit and HOV operation over Lake Washington. Several plans were considered, with plan "R-8A" being the preferred alternative. R-8A included restriping and adding two HOV lanes to the outer lanes, new HOV on and off ramps on Mercer Island, and improvements to HOV access at Bellevue Way, while retaining the existing reversible center lanes.

¶ 5 In 2004, the signatories of the 1976 MOA amended the MOA to state that the "ultimate configuration" of I-90 was high capacity transit in the center lanes and HOV lanes in the outer roadways. *Id.* at 1033. High capacity transit was defined to include light rail. The United States Department of Transportation Federal Highway Administration also selected R-8A as the preferred alternative because it would "accommodate the ultimate configuration of I-90 (High Capacity Transit in the center lanes)," among other reasons. *Id.* at 1432.

¶ 6 In 2008, voters approved a plan to facilitate light rail travel from Seattle, over Mercer Island, and into Bellevue *392 (the east link). In 2009, the legislature budgeted \$300,000 from the motor vehicle fund (MVF) for an appraisal of the center HOV lanes, which would be used for light rail. This appraisal was at issue in *Freeman v. Gregoire*, 171 Wash.2d 316, 323, 256 P.3d 264 (2011) (*Freeman I*). There, *Freeman* sought a writ of mandamus to bar WSDOT from converting the center lanes to light rail and to prevent MVF money from being expended for the lane valuation. *Id.* We denied the writ because we found there was no mandatory duty for WSDOT to transfer the **440 center lanes and because the valuation was a lawful expenditure for a highway purpose. *Id.* at 331, 256 P.3d 264.

¶ 7 Following the appraisal, WSDOT and Sound Transit negotiated a term sheet stating that Sound Transit would receive a 40 year lease of the air space over the center lanes. In exchange, Sound Transit would pay an amount equal to the State's share of the cost of the center roadway investment and the fair market rental value of the lanes as determined by the appraisal. The federal highway administration confirmed that the federal funds previously expended on I-90 need not be repaid if the lanes were used for light rail.

¶ 8 In 2011, WSDOT and Sound Transit signed a final “Umbrella Agreement” for the lease of the center lanes. CP at 1380. Under the agreement, Sound Transit would pay the State’s 14.2 percent share of the cost of center roadway improvements (the two center lanes, the access and exit ramps, and other improvements) and the value of a 40 year lease, with an option to renew for an additional 35 years. Sound Transit also agreed to advance the amount needed to construct the replacement outer HOV lanes, which would be credited against the amount owed under the lease. The agreement states that the center lanes will not be “presently needed” when the new HOV lanes are open and that possession or control will not be transferred to Sound Transit until after the replacement HOV lanes are constructed and open to traffic, and other obligations are satisfied. *Id.* at 1383.

*393 ¶ 9 In November 2011, Washington voters rejected an initiative that would have prohibited WSDOT from transferring or using the center lanes for the east link light rail. Also that month, the federal transit administration issued a statement that the National Environmental Policy Act of 1969 (42 U.S.C. § 4321) requirements had been satisfied. The federal highway administration also issued a decision stating that because the center lanes will not be converted until after HOV lanes are added, “[t]here will be no net loss of HOV lanes.” *Id.* at 1573.

¶ 10 The appellants filed the present challenge to the lease agreement seeking declaratory relief and a writ of mandamus in Kittitas County Superior Court. Sound Transit intervened. All parties filed cross motions for summary judgment. The trial court granted summary judgment in favor of WSDOT and Sound Transit.

ANALYSIS

[1] ¶ 11 At issue is whether the lease between WSDOT and Sound Transit violates article II, section 40 and RCW 47.12.120. This court reviews the trial court’s summary judgment order de novo. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash.2d 471, 484, 258 P.3d 676 (2011). “A summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

I. Article II, Section 40

[2] ¶ 12 Article II, section 40 requires that the MVF be used for highway purposes. *See State ex rel. O’Connell v. Slavin*, 75 Wash.2d 554, 559, 452 P.2d 943 (1969). The relevant portion of article II, section 40 states:

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 *394 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 **441 ferries which are a part of any public highway, county road, or city street.

¶ 13 Here, the parties do not dispute that light rail is a nonhighway purpose. However, they disagree as to whether the MVF is implicated, in violation of the antidiversionary policy of article II, section 40 in the lease of lands pursuant to RCW 47.12.120. The relevant portion of RCW 47.12.120 provides:

The department may rent or lease any lands, improvements, or air space above or below any lands that are held for highway purposes but are not presently needed. The rental or lease:

(1) Must be upon such terms and conditions as the department may determine.

¶ 14 The appellants argue that article II, section 40 requires that highway facilities built and maintained using the MVF must continue to be used for highway purposes until “not presently needed” under RCW 47.12.120. In effect, the appellants suggest there is a constitutional mandate that highways constructed with the MVF continue to be used as highways. The appellants rely in part on *O’Connell*, 75 Wash.2d at 559, 452 P.2d 943, for this claim.

¶ 15 In *O’Connell*, we considered the constitutionality of using a MVF appropriation to fund studies incident to the preparation of a public transportation plan. *395 *Id.* at 555, 452 P.2d 943. There, we stated that article II, section 40 is unambiguous and leads to the conclusion “that the people in framing this provision intended to insure that certain fees and taxes paid by them for the privilege of operating motor vehicles should be used to provide roads, streets and highways on which they could drive those vehicles.” *Id.* at 559, 452 P.2d 943. We took judicial notice of the fact that “automobile drivers generally want more and better highways, leading to more places, rather than fewer.” *Id.* at 561, 452 P.2d 943. The appellants rely on this language for the conclusion that because the lease would transfer two highway lanes, the constitution is violated. First, this argument ignores that two lanes on the outside will be added *before* Sound Transit takes possession of the two center lanes. There will be no net loss of lanes. Additionally, R-8A does not require an appropriation from the MVF, as in *O’Connell*. Rather, Sound Transit will provide the funds for light rail and reimburse the MVF for any previous MVF highway expenditures. Accordingly, *O’Connell* is unhelpful to appellants.

[3] ¶ 16 More importantly, article II, section 40 by its language does not protect highways. Rather, it protects certain taxes and revenues from uses other than highway purposes. Specifically, the amendment creates a fund and then limits the uses to which the fund may be put. Nothing in the language suggests the intent of the amendment was to protect the highways themselves.

¶ 17 The appellants rely on a 1944 voters pamphlet for their claim that the people intended highways in use to remain in use. The pamphlet characterizes article II, section 40 as “limiting exclusively to highway purposes the use of motor vehicle license fees, excise taxes on motor fuels and other revenue intended for highway purposes only” and expresses concern that tax money was diverted from highway improvements for other uses. *State of Washington Voters Pamphlet, General Election 45* (Nov. 7, 1944), available at http://wsldocs.sos.wa.gov/library/docs/OSOS/voterspamphlet/voterspamphlet_1944_2006_002278.pdf. Rather *396 than supporting the appellants’ attempt to constitutionalize highways, the pamphlet only reflects the people’s desire to protect certain money for highway purposes by creating a dedicated fund; it does not address whether highway facilities must continue to be used for highway purposes.

¶ 18 The appellants note, though, that RCW 47.12.120 was enacted shortly after article II, section 40, suggesting the statute’s requirements are a part of article II, section 40. However, the drafters of article II, section 40 could have easily included these requirements, but did not do so. RCW 47.12.120 also makes no reference to article II, section 40.

¶ 19 The appellants also assert that article II, section 40 could be turned into a funding source for nonhighway purposes. The appellants opine that “MVF moneys could build a highway facility, but within days or months of its construction, WSDOT could turn the **442 facility over to an entity for a non-highway purpose for ‘consideration’ and not violate the 18th Amendment.” Br. of Appellants at 27. However, appellants’ own statement acknowledges that consideration must be paid to the MVF, which satisfies article II, section 40. The management of the highways themselves is left to the legislature to determine, so long as the MVF is not expended on a nonhighway purpose.

[4] ¶ 20 While RCW 47.12.120 may have been adopted contemporaneously with the amendment, the appellants do not show the amendment was intended to incorporate the statute. Thus, while article II, section 40 requires that the MVF be used for highway purposes, it does not prohibit WSDOT from transferring highways built with the MVF where the MVF is reimbursed.

[5] ¶ 21 Our conclusion is supported by the opinion of the attorney general’s office (AGO). While AGO opinions are not controlling, they are given great weight. *Thurston County ex rel. Bd. of County Comm’rs v. City of Olympia*, 151 Wash.2d

171, 177, 86 P.3d 151 (2004). Addressing the consideration necessary to allow the lease or sale of land previously acquired for highway purposes with *397 MVF money, the AGO opined that the purchaser would need only to provide necessary consideration to prevent an unlawful diversion of motor vehicle funds, and that such consideration need not be monetary or precisely equivalent to the fair market value. *See* 1975 Letter Op. Att'y Gen. No. 62, at 3, 1975 WL 165801, at *3.

[6] ¶ 22 Here, WSDOT plans to lease the highway facility to Sound Transit, pursuant to RCW 47.12.120. As consideration, Sound Transit will reimburse the MVF for the money spent by the State in constructing that portion of I-90, along with the fair market value of the lease. WSDOT will not expend money from the MVF on light rail, a nonhighway purpose. Because no money from the MVF is being expended on a nonhighway purpose, and any money that was previously expended from the MVF will be reimbursed, the language of article II, section 40 is not violated.

¶ 23 The appellants contend, however, that even if WSDOT could lease the center lanes, the MVF is not properly reimbursed through the lease. Specifically, the appellants argue the appraisal failed to include maintenance and replacement costs. The appellants do not cite authority demonstrating the valuation method applied was improper, nor provide evidence to support their claim that millions of MVF dollars were spent on maintenance. As for replacement costs, the federal government has agreed that the funds it provided need not be repaid. Because article II, section 40 only concerns “[a]ll fees collected by the State of Washington,” WSDOT need only provide consideration for the cost to the MVF for constructing the center lanes in order to comply with the Constitution. Thus, article II, section 40 is not violated.¹

¹ The dissent contends that MVF funds are at risk because WSDOT has promised to spend \$44 million on the R-8A project. Dissent at 449. The dissent asserts that WSDOT would not otherwise spend this money but for the light rail construction. *Id.* However, the record reveals that the light rail construction simply afforded WSDOT an opportunity to implement R-8A, which was the preferred plan that focused on the nonrail transit lanes. More importantly, the appellants have not shown that these MVF funds will be used for the light rail construction. Thus, the appellants have not met their burden of showing a violation of article II, section 40.

***398 2. RCW 47.12.120**

[7] ¶ 24 The appellants next contend the lease is not authorized under RCW 47.12.120 because the center lanes are “presently needed.” As an initial matter, the appellants raise in a footnote the question of whether the lease at issue is actually a de facto sale, in which case RCW 47.12.080 would apply. This claim appears to rely on a statement made by the respondents during oral arguments in *Freeman I* that 40 years was the useful life of a structure under the Federal Transit Authority and Federal Highway Administration guidelines. The respondents noted that “no public entity is going to put millions or billions of dollars into a project if the Department can turn around the next day and terminate that.”² The appellants in **443 their brief do not cite to the guidelines referenced in the oral arguments of *Freeman I*. Additionally, even if the useful life of a structure is 40 years, the appellants do not explain why Sound Transit would have the option of renewing the lease for another 35 years. In light of the amount of funds invested in the project, and the absence of specific evidence supporting the appellants' claim, we conclude no de facto sale took place.

² Wash. Supreme Court oral argument, *Freeman v. Gregoire*, No. 83349-4 (Sept. 16, 2010), at 32 min., 43 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* <http://www.tvw.org>.

¶ 25 Turning to RCW 47.12.120, the appellants contend that the statute does not give WSDOT the discretion to determine whether the lanes are “not presently needed” and that even if WSDOT has discretion under RCW 47.12.120, its determination is incorrect. Before addressing these arguments, it is important to consider the basis for this court's review.

[8] ¶ 26 First, this action is not reviewable under the Administrative Procedure Act (APA), chapter 34.05 RCW. *399 Under the APA, an agency action “does not include an agency decision regarding ... (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests.” RCW 34.05.010(3). Because the “not presently needed” language falls under the leasing statute and is a “decision regarding” a lease under RCW 34.05.010(3), we must turn elsewhere for any authority to review WSDOT's determination.

¶ 27 Although review under the APA is unavailable, relief can be obtained through a declaratory judgment action. Under the Uniform Declaratory Judgment Act, “[a] person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020. Accordingly, this court can review RCW 47.12.120 to determine whether WSDOT is authorized to make a determination of “presently needed.”

¶ 28 Addressing their first argument, the appellants contend that while RCW 47.12.120 states WSDOT may lease lands presently not needed, it does not give WSDOT the discretion to determine *whether* such lands are presently needed. In support of this argument, they cite several rules of construction, including that the legislature “ ‘says what it means and means what it says’ ” and that the legislature is capable of expressly granting discretion to the department as it has done in other statutes and because such an expression is absent here, the legislature did not intend to give WSDOT discretion here. Reply Br. of Appellants at 33 (quoting *State v. Radan*, 143 Wash.2d 323, 330, 21 P.3d 255 (2001)). The appellants point to RCW 47.12.063 as a contrast to RCW 47.12.120, noting that RCW 47.12.063(2) states property may be sold “ ‘[w]henver the department determines that any real property ... is no longer required,’ ” whereas RCW 47.12.120 is silent on who determines whether property is “ ‘presently needed.’ ” *Id.* at 34 (quoting RCW 47.12.063(2)).

*400 ¶ 29 The appellants also cite to *Sperline v. Rosellini*, 64 Wash.2d 605, 392 P.2d 1009 (1964), which concerned a similar statute addressing the transfer of land. In *Sperline*, a declaratory judgment was sought seeking construction of a statute that stated:

“The Washington State highway commission is authorized and directed to set aside or convey to the state parks and recreation commission so much of certain lands presently owned or to be acquired by the highway commission situated in Douglas county and lying along the eastern shore of the Columbia river, north of the community of East Wenatchee, as will not be required for highway purposes.”

Id. at 605–06, 392 P.2d 1009 (emphasis omitted) (quoting LAWS OF 1959, ch. 72, § 1). There, the commission did not declare lands surplus before seeking to transfer them. *Id.* at 606, 392 P.2d 1009. The State argued that no declaration was necessary because the statute itself was a declaration the lands listed within were not required for highway purposes. *Id.* The court disagreed, construing the statute to require a determination that lands were not required for highway purposes. *Id.* *Sperline* does not suggest that the highway commission was without the authority **444 to make a determination of present need; rather, *Sperline* simply concluded that a determination was required under the statute. Such a determination was made here, as stated in the Umbrella Agreement: “upon the completion of the R8A Project and the completion of all the necessary obligations and actions identified in this Agreement and the exhibits attached hereto, the Center Roadway will no longer be presently needed for highway purposes.” CP at 1382.

¶ 30 Conversely, the respondents argue that RCW 47.12.120 gives discretion to WSDOT. Specifically, the respondents assert that the department “may” lease lands and that lease is upon terms the department “may” determine. RCW 47.12.120. The respondents contend the statute is clear and discretion to determine whether highway land is “not presently needed” is necessary to carry out department *401 discretion. This reading is consistent with RCW 47.01.260(1), which states that “[t]he department of transportation shall exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways.”

¶ 31 Additionally, no statutes provide procedures for making these decisions, unlike in other statutes. *See, e.g.*, RCW 47.52.133–.195 (public hearing required to determine establishment of limited access facility); *State ex rel. Agee v. Superior Court*, 58 Wash.2d 838, 839, 365 P.2d 16 (1961). In *Agee*, a statute required a specific highway width “ ‘unless the director of highways, for good cause, may adopt and designate a different width.’ ” 58 Wash.2d at 839, 365 P.2d 16 (emphasis omitted) (quoting REM.REV.STAT. § 6400–30). The court determined that “good cause” was a discretionary decision left to the director because the legislature did not provide procedures for a public hearing, fact finding commission, or other procedure. *Id.* The appellants contend *Agee* differs because discretion was explicitly granted to the director by statute; however, whether this

language afforded discretion was the entire point in *Agee*. Here, as in *Agee*, there are no statutes providing a procedure to determine “presently needed,” suggesting discretion was meant to lie with WSDOT. Moreover, there are no statutes placing the discretion to make that decision with a different body or agency. If WSDOT does not have discretion and there is no other person or agency with discretion then lands could never be leased or transferred because there would be no determination that the land was “not presently needed.”

[9] ¶ 32 In light of the broad authority granted to WSDOT to administer highways, and the lack of any statutory guidance suggesting otherwise, WSDOT is the appropriate entity to decide whether highway land is “presently needed.”

¶ 33 The appellants next contend that even if WSDOT has discretion under RCW 47.12.120, its assessment was *402 incorrect and should have been based on objective data. As discussed above, a sale or lease is not reviewable under the APA. However, the appellants believe that review of the constitution and statutes is authorized under the court's de novo review powers and that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Reply Br. of Appellants at 31 (internal quotation marks omitted) (quoting *In re Salary of Juvenile Dir.*, 87 Wash.2d 232, 241, 552 P.2d 163 (1976)). Appellants rely on *Heavens v. King County Rural Library District*, 66 Wash.2d 558, 560, 404 P.2d 453 (1965), where a declaratory action challenged the constitutionality of a statute authorizing local improvement districts for public libraries. Here, the appellants appear to be suggesting this is the proper vehicle because they are questioning “WSDOT's interpretation of its statutory authority without regard to the 18th Amendment.” Br. of Appellants at 43. As noted above, RCW 47.12.120 is distinct from article II, section 40. While this court may be able to say “‘what the law is,’” it is a different matter entirely to consider WSDOT's exercise of discretion under the law. *Juvenile Dir.*, 87 Wash.2d at 241, 552 P.2d 163 (internal quotation marks omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

¶ 34 The respondents argue for a narrow scope of review, contending this court can **445 only consider whether its determination was “arbitrary and capricious or contrary to law.” Br. of Resp'ts' State of Wash., Governor Gregoire & Sec'y Hammond at 21–22 (citing *Williams v. Seattle Sch. Dist. No. 1*, 97 Wash.2d 215, 221, 643 P.2d 426 (1982)). “‘Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.’” *Pierce County Sheriff v. Civil Service Comm'n*, 98 Wash.2d 690, 695, 658 P.2d 648 (1983) (quoting *State v. Rowe*, 93 Wash.2d 277, 284, 609 P.2d 1348 (1980)). The respondents argue this *403 review exists under the court's inherent authority provided in article IV, section 6. See *Saldin Sec., Inc. v. Snohomish County*, 134 Wash.2d 288, 292, 949 P.2d 370 (1998) (“The superior court has inherent power provided in article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts.”).

¶ 35 In arguing for this standard, the respondents analogize this case with other similar actions that do apply an arbitrary and capricious standard. For example, other acts under chapter 47.12 RCW, such as those relating to condemnation, do follow the arbitrary and capricious standard. See *State ex rel. Lange v. Superior Court*, 61 Wash.2d 153, 157, 377 P.2d 425 (1963) (administrative selection of lands is conclusive in the absence of bad faith, arbitrary, capricious, or fraudulent action); *State ex rel. Sternoff v. Superior Court*, 52 Wash.2d 282, 295, 325 P.2d 300 (1958) (considering whether the director of highways acted arbitrarily, capriciously, or fraudulently). Notably, RCW 47.12.010, a condemnation statute addressing acquisition of property, specifically states that actions can be brought where there is bad faith, arbitrary, capricious, or fraudulent action. The respondents argue that because condemnation deals with a determination of necessity, the same standard should also apply here.

¶ 36 In arguing for limited review, the respondents also cite to *Deaconess Hospital v. Washington State Highway Commission*, 66 Wash.2d 378, 406, 403 P.2d 54 (1965). In *Deaconess*, this court considered the Highway Commission's determination of where to place a freeway and said, “If the administrative agency has acted honestly, with due deliberation, within the scope of and to carry out its statutory and constitutional functions, and been neither arbitrary, nor capricious, nor unreasonable, there is nothing left for the courts to review.” *Id.* This court also observed, “That the courts may have reached a decision, made a choice or a conclusion different from that of the administrative agency, *404 or taken wiser or more sensible action, does not empower them to do so.” *Id.*

[10] ¶ 37 In determining how much deference is given to an agency decision, it is also helpful to consider that actions reviewable under the APA are subject to an arbitrary and capricious standard.

¶ 38 In light of the arguments of the parties, this court's history of reviewing administrative decisions, and the review afforded in other statutes dealing with necessity determinations, we will review WSDOT's determination under the arbitrary and capricious or contrary to law standard.³

³ None of the parties challenge the court's authority to hear challenges to administrative decisions where review is unavailable under the APA.

[11] ¶ 39 Turning to the appellant's arguments that WSDOT's determination was incorrect, we first consider the appellants' claim that WSDOT failed to objectively determine whether the center lanes were needed prior to the transfer. The appellants assert that whether a highway is presently needed must relate to the need at that moment, not a point in the future. Accordingly, the appellants argue that WSDOT cannot lease the center lanes in the future because the lanes are currently in use and presently needed.

¶ 40 This argument ignores that possession and control of the center lanes will not be transferred to Sound Transit until *after* the center HOV lanes are replaced by outer HOV lanes. The lease is contingent upon **446 this, at which point the lanes will not be "presently needed" under RCW 47.12.120 because they will be replaced. As the federal highway administration noted, "[t]here will be no net loss of HOV lanes." CP at 1573. Furthermore, following the appellants' interpretation would severely limit WSDOT's authority to enter into contracts that may rely on future contingencies, such as in the present case.

¶ 41 The appellants also contend that the center lanes will still be needed after the replacement lanes are added. *405 Initially, the appellants argue that 10 lanes are superior to 8, and that 10 lanes was the number under the original R-8A plan. However, without funding from Sound Transit there would be no additional lanes. Indeed, 10 lanes were never an option because the State lacked funds to implement such a plan. Additionally, the MOA limits I-90 to eight lanes.

¶ 42 Next the appellants and amici argue the facts do not support WSDOT's assessment that the lanes are not presently needed. The arbitrary and capricious or contrary to law standard requires more than a showing that WSDOT has erred; it requires that WSDOT acted willfully and unreasonably, without consideration and in disregard of facts and circumstances. In this case, WSDOT considered numerous studies and engaged in extensive planning, as identified in the Umbrella Agreement. Considerations included the "I-90 Two-Way Transit and HOV Operations FEIS [(Final Environmental Impact Statement)] and ROD [(Record of Decision)]; I-90 Two-Way Transit and HOV Access Point Decision Report; WSDOT I-90 Center Roadway Study; East Link FEIS and ROD; East Link/I-90 Interchange Justification Report; I-90 Bellevue to North Bend Corridor Study; the WSDOT Highway System Plan 2007-2026, and the legislative history reflected in the 2009 Engrossed Senate Substitute Bill 5352, § 204(3) and § 306(17)." *Id.* at 1383. Taking all of the studies and historical materials into consideration, WSDOT executed its agreement with Sound Transit. A review of studies supports the respondents' contentions that WSDOT engaged in a careful evaluation of the need of the center lanes at the time of transfer.

¶ 43 To counter this evidence of extensive review, the appellants make several arguments that rely in part on documents and references Sound Transit sought to strike at the trial court and before this court. We passed Sound Transit's motion to the merits.

¶ 44 Among the documents Sound Transit seeks to exclude is an auditor's report addressing light rail ridership, *406 which was published after the trial court decisions. Appellants included this document as an appendix to their reply brief. Under RAP 9.11(a), the court may direct that additional evidence on the merits be taken if six criteria are met:

- (1) additional proof of facts is needed to fairly resolve the issues on review,
- (2) the additional evidence would probably change the decision being reviewed,
- (3) it is equitable to excuse a party's failure to present the evidence to the trial court,
- (4) the remedy available to a party through postjudgment motions

in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Here, the auditor's report raises doubts about Sound Transit's ridership numbers for light rail. However, even assuming the ridership numbers are flawed as the auditor's report claims, the appellants provide no evidence to support their conclusion that the lane transfer would negatively impact transit compared with the present lane configuration due to reduced ridership. In the absence of this evidence, the auditor's report is not needed to fairly resolve the issue, nor would it be inequitable to decide the case solely on the evidence already taken at trial. Additionally, the appellants inappropriately included this report in their reply appendix without indicating the report was not part of the record. See *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wash.App. 590, 594, 849 P.2d 669 (1993).

¶ 45 Along with the auditor's report, Sound Transit seeks to exclude citations to articles not in the record, unsupported factual assertions **447 in amici briefs, and related references. Sound Transit also moved to strike certain documents at the trial court level, including declarations it argued lacked foundation or were untimely and unauthenticated documents. The trial court denied the motion to strike, stating it reviewed the record "more with the intent *407 on determining the legal issues as opposed to the collateral issues on some of the marginal information supplied." CP at 3194 n. 5. After reviewing the evidence, we grant Sound Transit's motion to strike and reverse the trial court's denial of Sound Transit's motion and address the appellants' remaining arguments without considering these struck materials.

¶ 46 Appellants and amici argue that WSDOT's "not presently needed" determination was incorrect because peak traffic will lose a lane as a result of the lease. Currently, five lanes are available for peak traffic, and following the lease that number will indeed be reduced to four. However, traffic in the reverse direction will gain a lane, increasing from three lanes to four. A 2004 study reveals a shift in inbound and outbound travel patterns, resulting in nearly equal volumes of traffic across Lake Washington in each direction during peak periods. Thus, while the peak direction may be losing a lane, the reverse direction will be seeing almost the same level of ridership and be gaining a lane.

¶ 47 The appellants and amici also make several other claims that primarily concern policy decisions. For example, amicus Save MI SOV raises a concern that Mercer Island residents could lose their present access to the center HOV lanes. While Mercer Island residents may be impacted by this lease, this does not violate the MOA, which provides that Mercer Island traffic needs are a lower priority than transit and carpools. Amicus Haney Truck Line LLC also argues that the trucking industry will be negatively impacted by the changed lane configuration. Whether or not this assertion is accurate, it is but one of many considerations and does not overwhelm the vast evidence that WSDOT's determination relied upon.

¶ 48 In this case, there is room for two opinions. While the appellants and amici may disagree with certain decisions and policy determinations, nothing suggests WSDOT did not consider the facts and circumstances in making its *408 decision. We conclude that WSDOT's decision to lease the center lanes was not arbitrary and capricious or contrary to law.

¶ 49 The appellants seek common fund attorney fees at trial and on appeal, relying on *Weiss v. Bruno*, 83 Wash.2d 911, 914, 523 P.2d 915 (1974). In *Weiss*, we endorsed the recovery of reasonable attorney fees under the common fund principle where there was "(1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge." *Id.* Here, the appellants do not meet the first requirement because they did not bring a successful suit. Accordingly, we deny the appellants' request for attorney fees.

CONCLUSION

¶ 50 We affirm the trial court's grant of summary judgment in favor of the respondents and deny the appellants' request for attorney fees. The lease of the two center lanes of I-90 to Sound Transit does not violate article II, section 40 or RCW 47.12.120.

WE CONCUR: OWENS, FAIRHURST, STEPHENS, WIGGINS, GONZÁLEZ, and McCLOUD, Justices.

J.M. JOHNSON, J. (dissenting)

¶ 51 This court once again erodes the guaranties of the Washington State Constitution's 18th Amendment, which prevents the diversion of gas tax, vehicle registration, and related funds for nonhighway purposes. Constitutional amendments allow a concerned citizenry to bind future policymakers, preventing fleeting political designs from undermining our most deeply rooted principles. As the State's highest court, it is our sworn responsibility to safeguard all provisions of the constitution, *409 including those that may appear inconvenient or politically unfavored. Here, the majority once again puts the motor **448 vehicle fund (MVF) at risk of legislative and administrative pilfering for projects outside its constitutionally prescribed purposes. Moreover, the majority blatantly ignores the plain meaning of the words "presently needed" as they appear in RCW 47.12.120. I, therefore, dissent.

ANALYSIS

The 18th Amendment

¶ 52 The 18th Amendment to the Washington State Constitution, article II, section 40, was passed in 1944 with the intention of ensuring that motor vehicle funds (mostly gas tax, vehicle registration, and related funds) be used "exclusively" for highway purposes. The constitutionally required voters' pamphlet states "Between 1933 and 1943 in this state, in excess of \$10,000,000 of ... gas tax money was diverted away from street and highway improvement and maintenance for other uses." *State of Washington Voters' Pamphlet, General Election 47* (Nov. 7, 1944). The purpose of the amendment is undeniable: the legislature had been using gas tax money and registration fees as a funding source for nonhighway, politically decided projects, and the voters sought to amend the constitution to "limit definitely the use of gasoline taxes and automobile registration fees to street and highway construction, maintenance and safety." *Id.*

¶ 53 The Washington State Constitution accordingly provides:

All fees collected ... as license fees for motor vehicles and all excise taxes collected ... 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.

CONST. art. II, § 40 (emphasis added).

*410 ¶ 54 The provision further enumerates specific authorized expenditures, none of which includes bus, train, light rail, or any other type of public transportation. *Id.* This court has since interpreted the amendment's use of the term "highway purposes" in *State ex rel. O'Connell v. Slavin*, 75 Wash.2d 554, 560, 452 P.2d 943 (1969). In that case, we held that public transportation is not a "highway purpose" under article II, section 40. It is accordingly well settled law that money cannot be diverted from the MVF for public transportation. *Id.* ("We are convinced that it was no more the intent of the framers to provide subsidies for the planning, construction, owning or operating of public transportation systems, however beneficial such a use of the funds might be to the state and its citizens.").

¶ 55 The respondents attempt to circumvent these clear restrictions on the use of the MVF by doing indirectly what they cannot do directly. The majority accepts their argument that the 18th Amendment is not implicated if the MVF is reimbursed by the

entity buying or leasing the highway lands. However, this reasoning impermissibly transforms the MVF into a funding source for nonhighway purposes.

¶ 56 The “East Link” project, as currently contemplated, most certainly puts MVF funds at risk in violation of the 18th Amendment. Although the “R-8A” project would not be implemented but-for Sound Transit’s East Link project, the record reflects that the Washington State Department of Transportation (WSDOT) has still promised to fund portions of the construction. For example, under the “umbrella agreement,” WSDOT proposes to spend \$44.4 million in funding for the R-8A project, which includes an estimated \$10.5 million for construction of “dowel bar retrofits.” Clerk’s Papers (CP) at 1969. In other words, at least 44.4 million taxpayer dollars have been promised by the State to prepare the Interstate 90 (I-90) bridge for construction of *411 the East Link project. Under *O’Connell*, any appropriation of money from the MVF to satisfy this obligation will run afoul of the 18th Amendment.

¶ 57 I also question whether Sound Transit’s obligations under the umbrella agreement fully reimburse the taxpayers for the value of the center lanes when occupied by trains. Sound Transit’s estimated payment of \$165.7 million to fund the construction of the new HOV (high occupancy vehicle) lanes on the I-90 outer roadway will be credited against the amounts owed WSDOT for the light rail use of the center lanes. CP at **449 1969. In a true arm’s length lease, it is inconceivable that the modifications needed to make the property usable to the lessee, but which provide no benefit whatsoever to the lessor, would be credited against the rent due under the lease. It appears improper that the money paid by Sound Transit to replace the HOV lanes will be credited against its own rental obligations under the lease.

¶ 58 I further question the validity of relying on an attorney general opinion as the sole authority for the proposition that WSDOT can simply transfer highways to third parties for some nominal consideration. Although attorney general opinions are entitled to weight, they are not controlling. *Thurston County ex rel. Bd. of County Comm’rs v. City of Olympia*, 151 Wash.2d 171, 177, 86 P.3d 151 (2004). The majority’s deference to WSDOT represents an unprecedented grant of power without even a modicum of oversight or process. It is this court’s responsibility to thoroughly consider the constitutional issues at hand, including whether WSDOT may transfer highways built with MVF funds where the MVF is reimbursed. The majority improperly defers to the reasoning in the cited attorney general opinion, as well as WSDOT’s expertise, without meaningfully engaging the legal question at issue. *See* majority at 441–42; 1975 Letter Op. Att’y Gen. No. 62, 1975 WL 165801.

¶ 59 Under the respondents’ analysis, although MVF funds could not be expended directly for a nonhighway *412 purpose, WSDOT could use MVF funds to build a highway facility and then turn it over to an entity for a nonhighway purpose as long as some “consideration” was paid. There is no controlling precedent suggesting that our constitution may be stretched to make this permissible. Furthermore, in a feat of contractual sleight of hand, WSDOT and Sound Transit attempt to credit construction for the new HOV lanes against future rent payments for the center lanes. Finally, the State has agreed to contribute \$44.4 million to further construction of the R-8A project, a payment which will most certainly violate the 18th Amendment if appropriated from the MVF. Here, the contractually contemplated transfer of the I-90 bridge center lanes violates the antidiversionary purpose underlying the 18th Amendment to our state constitution.

RCW 47.12.120

¶ 60 RCW 47.12.120 provides WSDOT with the statutory authority to lease highway lands. In other words, if the statutory criteria are not met, any contract to lease highway lands would be impermissible. RCW 47.12.120 provides, in part, “[WSDOT] may rent or lease any lands, improvements, or air space above or below any lands that are held for highway purposes but are not *presently needed*.” (emphasis added). It has been well established that the center lanes to the I-90 bridge are highway lands that are “presently needed” under the statute. In fact, this point was conceded by WSDOT in discovery. CP at 2659 (WSDOT admitting: “Interstate 90 has been designated as a highway of statewide significance pursuant to RCW 47.06.140.”); CP at 2664 (WSDOT admitting: “the existing two center lanes on Interstate 90 between Seattle and Bellevue Way are presently needed for highway purposes.”). Thus, according to the plain meaning of the words “presently needed” as they appear in RCW 47.12.120,

WSDOT may not contract to lease the center lanes of I-90 at a future date. Rather, a determination of whether highway lands are “presently needed” *413 must be made contemporaneously with any contract to lease highway property.

¶ 61 The umbrella agreement between WSDOT and Sound Transit specifically notes that “upon the completion of the R8A Project and the completion of all the necessary obligations and actions identified in this Agreement ..., the Center Roadway will no longer be presently needed for highway purposes.” CP at 1970 (emphasis added).¹ Because the statutory elements are a prerequisite to leasing highway lands, this statement is indispensable to the underlying agreement. If WSDOT cannot show that the lands are **450 not presently needed, then the umbrella agreement cannot stand.

¹ Nor is there explanation of the loss of vehicle capacity during the years' long construction period.

¶ 62 WSDOT's determination that the lanes will no longer be presently needed pursuant to RCW 47.12.120 is reviewed for whether the decision was “arbitrary, capricious or contrary to law.” *Williams v. Seattle Sch. Dist. No. 1*, 97 Wash.2d 215, 221, 643 P.2d 426 (1982). The majority clings to this standard in order to defer to WSDOT. However, it is improper for us to abandon our responsibility to interpret the statute in question. “When interpreting a statute, our fundamental objective is to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wash.2d 909, 914, 281 P.3d 305 (2012) (citing *State v. Budik*, 173 Wash.2d 727, 733, 272 P.3d 816 (2012)). We first look to the statute's plain language. *State v. Velasquez*, 176 Wash.2d 333, 336, 292 P.3d 92 (2013). “If the plain language is unambiguous, subject only to one reasonable interpretation, our inquiry ends. A statute is not ambiguous merely because multiple interpretations are conceivable.” *Id.* (citation omitted). Here, the majority improperly defers to WSDOT's RCW 47.12.120 determination without first interpreting the meaning of the words at issue in this case: “presently needed.” We should, instead, interpret those words, then apply the meaning to the facts, determining whether WSDOT's actions were “arbitrary, *414 capricious or contrary to law.” *Williams*, 97 Wash.2d at 221, 643 P.2d 426.

¶ 63 “When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning.” *State v. Gonzalez*, 168 Wash.2d 256, 263, 226 P.3d 131 (2010). “[P]resently” is defined as “at the present time; at present; at this time; NOW ...: immediately.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1793 (2002). “[N]eeded” is defined as “be necessary ...: REQUIRE ...: be under necessity or obligation to.” *Id.* at 1512. Thus, WSDOT is only authorized to lease highway lands that are unnecessary for highway purposes now—not at some point after the construction of the outer HOV lanes. At this moment in time, the center HOV lanes are both necessary and regularly used by the public. In fact, it is difficult to imagine any property in the entire state of Washington that is needed for highway purposes more than the two center lanes of the I-90 bridge during any daily rush hours. Furthermore, WSDOT already conceded that the lanes are presently needed for highway purposes. CP at 2664. Any determination that the lanes are not presently needed for highway purposes is clearly arbitrary and capricious.

¶ 64 The majority accepts WSDOT's position that it can enter into a contract to lease the center lanes even though the contract is predicated on the assertion that the center lanes will no longer be needed after construction of the outer HOV lanes. However, those outer lanes would never exist but-for the underlying contract, which includes a promise to lease and transfer the center lanes upon completion of the outer lanes. Through the circularity of the contract, WSDOT and Sound Transit attempt to excise the words “presently needed” from RCW 47.12.120. The majority effectively endorses these legal gymnastics.

¶ 65 It is irrelevant that possession and control will not be transferred to Sound Transit until the replacement HOV lanes are complete and operational. The umbrella agreement *415 is itself unlawful, indeed unconstitutional, and should be held void. It is well settled law in Washington that contracts that are illegal or violative of public policy are unenforceable. “If a contract is illegal, our courts will leave the parties to that contract where it finds them.” *Golberg v. Sanglier*, 96 Wash.2d 874, 879, 639 P.2d 1347, 647 P.2d 489 (1982) (citing *State v. Nw. Magnesite Co.*, 28 Wash.2d 1, 26, 182 P.2d 643 (1947)). Contracts which “grow[] immediately out of and [are] connected with an illegal act” are similarly unenforceable. *Id.* (citing *Waring v. Lobdell*, 63 Wash.2d 532, 533, 387 P.2d 979 (1964)). Here, WSDOT's decision to enter into the umbrella agreement was arbitrary and capricious given a proper interpretation of the words “presently needed.” Because, it is predicated on an unlawful action—WSDOT's untimely determination of present need under RCW 47.12.120—the umbrella agreement is void. Accordingly, the

arrangement between **451 WSDOT and Sound Transit to build the outer HOV lanes and ultimately transfer the center lanes to Sound Transit for the East Link project is unlawful.

CONCLUSION

¶ 66 The majority again turns a blind eye to the subversion of the 18th Amendment's antidiversionary purpose, which assures the payers of gas taxes and vehicle registration fees that they receive full highway value for their money. Furthermore, the majority refuses to engage in meaningful statutory interpretation of the term "presently needed," preferring instead to defer to WSDOT's own illogical use of the term: that the department can say with certainty in this moment whether or not a specific parcel of highway land will be "presently needed" at a date years in the future. The absurdity of this assertion will further destroy the trust in government promises to our citizens whose gas taxes and registration fees will now be accessible *416 for nonhighway projects through elaborate contracts and back room agency agreements.

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Donna L. Alexander
Legal Assistant to Harry Korrell, Taylor Ball, John Hodges-Howell & Laura Turczanski
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200 | Seattle, WA 98101
Tel: (206) 757-8402 | Fax: (206) 757-7700
Email: donnaalexander@dwt.com | Website: www.dwt.com

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