IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.	)	No. 86602-3 En Banc Filed December 13, 2012

OWENS, J. -- This case concerns Washington Constitution article II, section 40's refund provision, which states that a refund of motor vehicle fuel tax revenues is a "highway purpose[]." Wash. Const. art. II, § 40(d). Specifically at issue is the legislature's statutory refund program, which places one percent of fuel tax revenues

into a special fund to benefit off-road vehicle (ORV), nonmotorized, and nonhighway

road recreational users for fuel consumed on nonhighway roads. In 2009, the legislature appropriated a portion of this special fund for the Parks and Recreation Commission's (Parks) general budget. The Washington Off Highway Vehicle Alliance (WOHVA), Northwest Motorcycle Association (NMA), and four individuals[1] representing ORV users, contend that the Court of Appeals erred in holding that the appropriation was a refund within the meaning of article II, section 40. WOHVA argues that the appropriation was not sufficiently targeted to affected taxpayers to constitute a refund despite legislative findings to the contrary. Given the presumption of constitutionality and the evidence before us, we affirm the Court of Appeals.

FACTS

A. Nonhighway Fuel Tax Refund History

The Washington Constitution requires that all motor vehicle fuel tax revenues and licensing fees be spent on "highway purposes." Wash. Const. art. II, § 40. Article II, section 40(d), specifically includes as a highway purpose, "Refunds authorized by law for taxes paid on motor vehicle fuels."

For many years, the legislature has refunded one percent of the motor vehicle fuel tax revenues to nonhighway recreational users, such as ORV users, hikers, campers, and hunters. *See, e.g.*, Laws of 1986, ch. 206, § 8; former RCW 46.09.170

[1] For simplicity, we refer to petitioners simply as WOHVA.

(2010), *recodified as* RCW 46.09.520.[2] Unlike a direct refund, this refund is spent for the benefit of the affected taxpayers, not directly returned to them. *See* former RCW 46.09.170. The treasurer divides the money between two accounts: (1) 41.5 percent in the ORV and nonhighway vehicle account (ORV account) and (2) 58.5 percent in the nonhighway and off-road vehicle activities program (NOVA) account. Former RCW 46.09.170(2)(a)-(d). The majority of the funds in the ORV account are administered by the Department of Natural Resources (DNR) to build and maintain "ORV, nonmotorized, and nonhighway road recreation facilities." Former RCW 46.09.170(2)(a). The remaining portion of funds is shared by the Department of Fish and Wildlife (DFW) and Parks for identical purposes. Former RCW 46.09.170(2)(b), (c).

The NOVA account funds are administered by the Recreation and Conservation Funding Board (Board) and subject to specific distributive restrictions. The distributive restrictions include: "[n]ot less than seventy percent may be expended for ORV, nonmotorized, and nonhighway road recreation facilities;" and not less than 30 percent of this 70 percent must be spent on each group respectively. Former RCW 46.09.170(2)(d)(ii). The Board may use up to 30 percent of the NOVA account to fund education, information, and law enforcement programs. Former RCW 46.09.170(2)(d)(i). Since 2003, the NOVA account funds have typically been awarded

[2] We use former RCW 46.09.170 as it was in effect at the time this action arose.

as grants to organizations, such as Parks, DNR, and even the federal government, for projects related to ORV, nonmotorized, and nonhighway recreational uses. *See* Clerk's Papers (CP) at 470; Laws of 2003, 1st Spec. Sess., ch. 26, § 920.

By way of background, the refund did not begin benefiting non-ORV users until a 2003 study, funded by the legislature, showed that non-ORV users contributed 80 percent of the 1 percent of refund revenues. The non-ORV users consist of two separate groups• nonmotorized recreational users and nonhighway road recreational users who use fuel to access their activities. *See* RCW 46.09.310(7), (10). Nonmotorized users include hikers, mountain bikers, and horseback riders, RCW 46.09.310(10); and nonhighway road recreational users include campers, fishers, kayakers, and firewood gatherers. RCW 46.09.310(7).

When the refund was first used "to construct and maintain nonmotorized recreation trails and facilities," the NMA challenged its constitutionality. *Nw. Motorcycle Ass'n v. Interagency Comm. for Outdoor Recreation*, 127 Wn. App. 408, 412, 110 P.3d 1196 (2005) (*NMA*). The NMA challenged the constitutionality of using funds for non-ORV users, claiming such use was not a refund under article II, section 40. *Id*. at 412-14. Ultimately, the Court of Appeals upheld the legislature's decision, reasoning that disbursing the "refund through NOVA for the benefit of the affected taxpayers [came] within [the legislature's] plenary powers of taxation." *Id*. at

416.

B. The 2009 Appropriation

In the years between *NMA* and this lawsuit, the refund continued to benefit all affected taxpayers: ORV, nonmotorized, and nonhighway road recreational users. The challenged action in this case arose in 2009 when, in response to budgetary shortfalls, the legislature appropriated the excess fund balance from the NOVA account for the benefit of Parks. The legislature appropriated

> *such amounts as reflect the excess fund balance in the NOVA account to* the department of natural resources to install consistent off-road vehicle signage at department-managed recreation sites, and to implement the recreation opportunities on department-managed lands . . . , and *to the state parks and recreation commission for maintenance and operation of parks and to improve accessibility for boaters and off-road vehicle users*.

Former RCW 46.09.170(4) (2009) (emphasis added). The 2009 appropriation to Parks amounted to $9.56 million (2009 appropriation) and was not subject to the distributive restrictions of former RCW 46.09.170.

Parks used the 2009 appropriation "to pay a portion of the salaries and benefits of employees directly engaged in the maintenance and operation of state parks." CP at 98. "Virtually all of the state parks feature 'nonmotorized recreational facilities' within the meaning of [former] RCW 46.09.020 [(2007)]." *Id*. at 99. This means the parks featured trails and facilities that were accessed by, or adjacent to, a nonhighway

road. *See* former RCW 46.09.020(11) (2007), *recodified as* RCW 46.09.310(9). But only one park, Riverside State Park, features ORV recreational facilities. As a frame of reference, salaries and benefits represent 70 percent of the Parks operations budget and the 2009 appropriation accounted for 13 percent of that amount. As a direct consequence of the 2009 appropriation, Parks avoided several state park facilities closures. The 2009 appropriation also ostensibly caused the Board to cease all grants during the 2009-2011 fiscal biennium.

C. Procedural History

Upset over the 2009 appropriation, WOHVA filed suit alleging the appropriation was not a refund within the meaning of article II, section 40(d). WOHVA challenged the appropriation under the Administrative Procedure Act, chapter 34.05 RCW, and sought two separate forms of relief: (1) a declaratory judgment that "the Legislature may not lawfully appropriate NOVA program funds for purposes other than providing benefits to [ORV] users" and (2) an injunction to prevent the expenditures. CP at 11.

The State and WOHVA filed cross motions for summary judgment, and the trial court granted the State's motion and denied WOHVA's. WOHVA then appealed, and, while the appeal was pending, the legislature amended the statute, adding: "The legislature finds that the appropriation of funds from the NOVA account during the

2009-2011 fiscal biennium . . . *will benefit* boaters and *off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities*." Laws of 2010, 1st Spec. Sess., ch. 37, § 936(4) (emphasis added). The Court of Appeals ultimately affirmed in a split decision. *Wash. Off Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 741, 260 P.3d 956 (2011). In doing so, the majority determined WOHVA had failed to prove that the 2009 appropriation did not sufficiently benefit affected taxpayers so as to violate article II, section 40. *Id*. The dissent reasoned the legislature had overstepped its authority and that the benefit to affected taxpayers was too weak to constitute a refund. *Id*. at 742-43 (Worswick, A.C.J., dissenting).

WOHVA filed a petition for discretionary review with this court challenging only whether the 2009 appropriation was constitutional. The State, in its response, raised a preliminary issue of whether the 2009 appropriation's expiration on June 30, 2011, rendered the constitutional issue moot. We granted review. *Wash. Off Highway Vehicle Alliance v. State*, 173 Wn.2d 1013, 272 P.3d 247 (2012).

Issue Presented[3]

Is the 2009 appropriation a refund under article II, section 40?

Analysis

A. Is WOHVA's Case Moot?

[3] We do not consider the State's collateral estoppel argument, which it made at the Court of Appeals, as the State has apparently abandoned it. *See* RAP 13.7(b).

Before we can address the constitutionality of the refund, we must first decide whether this case is rendered moot by the 2009 appropriation's lapse in 2011. Generally, we will dismiss a case as moot if we "'can no longer provide effective relief.'" *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). "However, this court may review a moot case if it presents issues of continuing and substantial public interest." *Id*.

The State is correct that this case is technically moot. Because the 2009 appropriation expired over a year ago, WOHVA cannot receive the injunctive relief it requested. *See Cooper v. Dep't of Insts.*, 63 Wn.2d 722, 723-24, 388 P.2d 925 (1964) (per curiam) (dismissing as moot a challenge to issues related to an expired appropriation act). Additionally, WOHVA most likely cannot receive its requested declaratory relief that the legislature may use NOVA funds to benefit only ORV users. *See NMA*, 127 Wn. App. at 416 (upholding use of NOVA funds for benefit of nonmotorized recreational users (i.e., non-ORV users)).

Nevertheless, WOHVA presents an issue of continuing and substantial public interest, an exception to the mootness doctrine. Whether the case presents such an issue depends on "'(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public

officers; and (3) whether the issue is likely to recur.'" *Horner*, 151 Wn.2d at 892 (internal quotation marks omitted) (quoting *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994)). Another possible factor is the "'level of genuine adverseness and the quality of advocacy of the issues.'" *Id*. (internal quotation marks omitted) (quoting *Westerman*, 125 Wn.2d at 286).

Applying those factors here, we conclude review is appropriate. First, the legislature's decision on how to spend NOVA funds is certainly a public issue as it involves public funds. Second, an authoritative determination will guide future legislatures in the appropriate use of NOVA funds by solidifying the constitutional limits of article II, section 40(d). Third, the issue is likely to recur as the legislature could still use NOVA funds to cover other budgetary shortfalls in the future. The mere fact that sales of discover passes and day-use permits now supplement the Parks budget, Laws of 2011, ch. 320, § 22, does not foreclose the possibility of future budgetary shortfalls. And fourth, the issue is properly briefed by the parties. One final consideration that favors review is that such appropriations last only two years, which may not be sufficient time for an appeal, thus evading review. As a result, WOHVA presents an issue of continuing and substantial public interest.

B. Is the 2009 Appropriation a Refund under Article II, Section 40?

1. Standard of Review

A party challenging a statute's constitutionality "must prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). While not an evidentiary standard, "we will not strike a duly enacted statute unless we are 'fully convinced, after a searching legal analysis, that the statute violates the constitution.'" *Id*. at 606 (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)). The challenger must prove "by argument and research" that the statute does in fact violate the constitution. *Island County*, 135 Wn.2d at 147. "This burden of proof is in keeping with the fact that '[t]he Legislature possesses a plenary power in matters of taxation except as limited by the Constitution.'" *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808-09, 982 P.2d 611 (1999) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998)). "'The construction of the meaning and scope of a constitutional provision is exclusively a judicial function.'" *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 271, 534 P.2d 114 (1975) (quoting *State Highway Comm'n v. Pac. Nw. Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605 (1961)).

2. Constitutionality

We are determining only whether the 2009 appropriation is a "[r]efund[] authorized by law," Wash. Const. art. II, § 40(d). "When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its

reasonable interpretation. . . . The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted." *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) (citations omitted). We need not look to legislative history if the provision is unambiguous. *Heavey*, 138 Wn.2d at 811.

Subsection (d), at issue here, states that "[r]efunds authorized by law for taxes paid on motor vehicle fuels" are "highway purposes." Wash. Const. art. II, § 40(d). The plain meaning of "refund" is "'a sum that is paid back.'" *NMA*, 127 Wn. App. at 415 (quoting Webster's Third New International Dictionary 1910 (2002) (incorrectly cited as 1993 edition)). This definition is not in dispute.[4] Therefore, the plain meaning of the term is unambiguous. Applying this definition, the *NMA* court upheld using the one percent fuel tax refund to benefit affected taxpayers• ORV recreational users, nonmotorized recreational users, and nonhighway road recreational users. *Id*. at 416. An underlying principle that supported the *NMA* court's reasoning was that the contested expenditure constituted a refund because it benefited the affected taxpayers.

[4] To the extent WOHVA asks us to define "refund" as requiring a direct payment to taxpayers, we decline. WOHVA contends that while this definition would invalidate the 2009 appropriation, it would not apply to NOVA as a whole, as WOHVA was not seeking to strike down NOVA. We reject this incongruous position, however, as it would effectively create a poison pill allowing WOHVA to scuttle any refund expenditures it disagreed with. We also decline to strike down NOVA as a whole as this issue was neither raised in the petition for discretionary review nor properly briefed. *See* RAP 13.7(b).

See id. We now adopt the *NMA* court's reasoning for purposes of this case.

WOHVA contends *NMA* is inapplicable here because the funds in *NMA*, unlike the 2009 appropriation, were refunded to the Board, which used the funds according to the distributive restrictions of former RCW 46.09.170 (2003). *See id*.; former RCW 46.09.170(1)(iv) (2003). However, considering that the distributive restrictions are not constitutionally required, *see* Wash. Const. art. II, § 40(d), the general principle that a refund will be upheld so long as it benefits affected taxpayers is still instructive. Consequently, we must decide whether the 2009 appropriation sufficiently benefits affected taxpayers so as to constitute a refund.

As a preliminary point, prior case law involving article II, section 40 is relatively unhelpful in resolving this issue. WOHVA, arguing to the contrary, believes these cases illustrate a history of this court striking down overreaching legislatures. While true, not one of these cases involved subsection (d) and what properly constitutes a "[r]efund[] authorized by law," Wash. Const. art. II, § 40(d). *See State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969); *Pac. Nw. Bell*, 59 Wn.2d 216; *Auto. Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959). Accordingly, these cases shed no light on interpreting the 2009 appropriation at issue.

Turning to the 2009 appropriation, we are presented with a legislative finding of

fact that the 2009 appropriation "will benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities." Former RCW 46.09.170(4) (2010).[5] Traditionally, we give great deference to the legislature's factual findings. "Legislatures must necessarily make inquiries and factual determinations as an incident to the process of making law, and courts ordinarily will not controvert or even question legislative findings of facts." *O'Brien*, 85 Wn.2d at 270, *quoted in State v. McCuistion*, 174 Wn.2d 369, 391, 275 P.3d 1092 (2012).

WOHVA argues that we owe no deference to the legislature in this case because it does not involve any findings of fact, only a constitutional interpretation, which is strictly a judicial determination. WOHVA, however, applies too broad a brush in painting the picture of its argument. This case certainly involves interpreting what constitutes a refund under article II, section 40. But the legislative finding that the appropriation will benefit affected taxpayers is not a legislative finding that the appropriation is a refund. Instead, the finding is simply a statement about how the appropriation will impact certain groups, not a constitutional interpretation. We therefore defer to the legislature on this finding.

Regardless, even assuming arguendo that such deference is misplaced, there is ample evidence in the record to conclude that the 2009 appropriation sufficiently

[5] We give retroactive effect to the legislature's clarifying amendment that those who use nonhighway and nonmotorized recreational facilities will benefit from the appropriation. *See In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000).

benefited nonmotorized and nonhighway road recreational taxpayers• 80 percent of affected taxpayers• to constitute a refund. "Virtually all of the state parks feature 'nonmotorized recreational facilities,'" CP at 99, and many state parks feature nonhighway road recreational facilities. Moreover, Parks land receives some of the most concentrated use of any "natural resource agenc[y]." *Id*. at 190. The employees paid by the 2009 appropriation operate and maintain these facilities. Because nonhighway and nonmotorized road recreational taxpayers can utilize these facilities, they benefit from the 2009 appropriation. Consequently, the 2009 appropriation is a refund.

WOHVA disagrees for four main reasons. The first two reasons are similar to WOHVA's argument that the 2009 appropriation is too untargeted and too uncertain. Third, WOHVA appears to argue that ORV users did not receive their fair share of the appropriation. And fourth, WOHVA argues that the appropriation cannot be a refund because the appropriation benefited boaters and, more generally, all Washingtonians. We address each argument in turn.

First, WOHVA contends that this alleged benefit is too untargeted to be considered a refund. Granted, paying salaries is certainly an attenuated benefit that is at the limit of what may be considered a refund. However, paying salaries and benefits is a necessary step in maintaining the nonmotorized recreational facilities in state

parks. *Cf. Freeman v. Gregoire*, 171 Wn.2d 316, 330, 256 P.3d 264 (2011) (upholding appropriation of motor vehicle funds for a valuation of highway lanes because it "was a necessary preliminary step in managing the use of highway lands"). Without the 2009 appropriation, Parks would have been forced to close numerous facilities, which would have deprived affected taxpayers of access to many nonmotorized recreational facilities. WOHVA even seems to acknowledge that funding positions is necessary to benefit affected taxpayers. Suppl. Br. of Pet'rs at 5 (stating that the lack of funding harmed ORV users by causing "substantial public employment losses and operational curtailments in . . . public programs providing ORV benefits"). Ultimately, if salaries are unpaid, then some facilities will close and affected taxpayers who contributed 80 percent of the refund revenues are deprived of numerous recreational facilities.

Second, WOHVA claims the benefit from the 2009 appropriation is too uncertain to constitute a refund. Contrary to WOHVA's claims that the benefit is too uncertain, affected taxpayers are highly likely to visit state parks. As mentioned above, these state parks receive concentrated use and almost all feature nonmotorized recreational facilities. Under these circumstances, the legislature reasonably concluded that a nonmotorized or nonhighway road recreational user will utilize Parks facilities. Moreover, WOHVA's critique can be leveled against any indirect refund,

even those that benefit ORV users. No matter how the one percent refund of fuel tax revenue is spent, the benefit to the recreationalist taxpayer is not guaranteed. Even when funds are used to construct an ORV trail, there is no guarantee that ORV users will utilize the new trail. Accordingly, this challenge to the 2009 appropriation fails.

Third, to the extent WOHVA is arguing that the 2009 appropriation is unconstitutional simply because ORV users did not receive their fair share of the refund, WOHVA's argument fails. While ORV users did not benefit from the 2009 appropriation, ORV users ostensibly benefited from the ORV account that received almost $5 million from fuel tax revenues. Laws of 2009, ch. 564, §§ 303, 307, 308 (Parks received $239,000; DFW received $415,000; DNR received $4,236,000). Moreover, WOHVA bears the burden of proving they received an insufficient amount of these funds, a burden WOHVA does not even attempt to meet.

Fourth, WOHVA's remaining argument fails as well. WOHVA complains because the legislature intended to benefit boaters, who WOHVA argues are unaffected taxpayers. However, the plain meaning of the term "boater" likely includes at least one group of nonhighway road recreational users• kayakers and canoe users, former RCW 46.09.020(9).

Even assuming boaters are unaffected taxpayers, the 2009 appropriation remains constitutional because paying salaries and benefits of employees is a

necessary prerequisite to Parks maintaining its facilities. These employees will necessarily work to maintain and improve the state parks they work in. Because many state parks contain boating facilities, the Parks employees will likely improve the boating facilities while improving the state parks generally. In other words, the benefit to boaters is a consequence of paying employees' salaries and benefits. Because paying salaries and benefits is a necessary expense to providing any Parks facilities, the incidental benefit to boaters is of little analytical consequence. Moreover, despite the incidental benefit to boaters, affected taxpayers still benefit from the appropriation.

Similarly, while the 2009 appropriation generally benefited all Washingtonians who accessed state parks, affected taxpayers were still the directed recipients of the appropriation. And, as mentioned before, paying these salaries and benefits is a foundational prerequisite for affected taxpayers to utilize the facilities at state parks. Thus, while the legislature acted at the edge of its constitutional authority in granting a refund, the appropriation stands because it sufficiently targets and benefits affected taxpayers.

Ultimately, there is ample evidence to conclude that the majority of affected taxpayers benefit from the 2009 appropriation. WOHVA fails to present evidence proving otherwise. Paying the salaries and benefits of Parks employees ensures that the nonmotorized recreational opportunities that "[v]irtually all of the state parks

feature," CP at 99, continue to remain available. Given the presumption of constitutionality, the 2009 appropriation is a refund.

CONCLUSION

We hold that WOHVA presents an issue of substantial public interest that warrants review even though the issue is technically moot. In turning to the merits, we hold that WOHVA fails to meet its burden of proving the 2009 appropriation is unconstitutional. While the 2009 appropriation stretches the statutory refund to its constitutional limits, the legislative finding of a benefit to affected taxpayers in addition to the ample evidence in the record supports upholding the appropriation. Consequently, we affirm the Court of Appeals.

AUTHOR:
Justice Susan Owens

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Charles K. Wiggins