

**REPORT CONCERNING
CERTAIN EXPENDITURES
FROM THE TRUNK
HIGHWAY FUND IN THE
FY2016-2017
BIENNIAL BUDGET**

PREPARED BY
OFFICE OF THE ATTORNEY GENERAL

April 2015

I. BACKGROUND

The Minnesota Constitution provides that “[t]here is hereby created a trunk highway system which shall be constructed, improved and maintained as public highways by the state.” *See* Minn. Const., art. 14, sec. 2. Additionally, the constitution states that “[t]here is hereby created a trunk highway fund which shall be used solely for the purposes specified in section 2 of this article and the payment of principal and interest of any bonds issued prior to July 1, 1957.” *See* Minn. Const., art. 10, sec. 6. Accordingly, prior to 2000, Minn. Stat. § 161.20, subd. 3 stated that “[t]he commissioner may expend trunk highway funds only for trunk highway purposes.” Minn. Stat. § 161.20, subd. 3 (1998).

In 2000, however, the Minnesota Legislature amended section 161.20, subd. 3, adding that “[p]ayment of expenses related to *sales tax, bureau of criminal apprehension laboratory, office of tourism kiosks, Minnesota safety council, tort claims, driver education programs, emergency medical services board, and Mississippi River parkway commission* do not further a highway purpose and do not aid in the construction, improvement, or maintenance of the highway system.” Minn. Laws 2000, ch. 479, art. 2, sec. 4. (Emphasis added.) For these eight areas of expenditure, the Minnesota Legislature converted the source of appropriation for each from the Trunk Highway Fund (“THF”) to the General Fund.

Minn. Laws 2000, ch. 479, art. 2, sec. 1, also directed preparation of a report as follows for subsequent biennial budget proposals:

Section 1. [PROHIBITION AGAINST APPROPRIATIONS FROM TRUNK HIGHWAY FUND.] To ensure compliance with the Minnesota Constitution, article XIV, sections 2, 5, and 6, the commissioner of finance, agency directors, and legislative commission personnel may not include in the biennial budget for *fiscal years 2002 and 2003, or in any budget thereafter*, expenditures from the trunk highway fund for *a nonhighway purpose as jointly determined by the commissioner of finance and the attorney general. For purposes of this section, an expenditure for a nonhighway purpose is any expenditure not for construction, improvement, or maintenance of highways, but does not include expenditures for payment of taxes imposed under Minnesota Statutes, chapter 297A.* At the time of submission of the biennial

budget proposal to the legislature, *the commissioner of finance and the attorney general* shall report to the senate and house of representatives transportation committees concerning any expenditure that is proposed to be appropriated from the trunk highway fund, *if that expenditure is similar to those reduced or eliminated in sections 5 to 20. The report must explain the highway purpose of, and recommend a fund to be charged for, the proposed expenditure.* [EFFECTIVE DATE.] This section is effective the day following final enactment.

(Emphasis added). The eight expenditure areas enumerated in section 161.20, subd. 3 (sales tax, bureau of criminal apprehension (“BCA”) laboratory, office of tourism kiosks, Minnesota safety council, tort claims, driver education programs, emergency medical services board, and Mississippi River parkway commission) are the appropriations referenced above that were “reduced or eliminated in sections 5 to 20” of Minn. Laws 2000, ch. 479, art. 2, sec. 1.

To date, the Minnesota Legislature has changed the original eight expenditure areas reduced or eliminated for reimbursement by the THF as follows: sales tax deleted from list (Minn. Laws 2003, 1st Special Session, ch. 19, art. 2, sec. 9); personnel costs incurred on behalf of the Governor’s Office was added to the list of reduced or eliminated expenditures (Minn. Laws 2009, ch. 36, art. 3, sec. 3); tort claims were deleted from the list and payment to MN.IT Services in excess of actual costs incurred for trunk highway purposes was added to the list (Minn. Laws 2013, ch. 117, art. 3, sec. 2).

Minnesota Management and Budget (“MMB”) and the Attorney General’s Office (“AGO”) have been unable to agree to all the language of the report. Accordingly, the Attorney General’s Office is filing this document as a stand-alone report. MMB will file its own report.

II. CASE LAW REGARDING APPROPRIATIONS FROM THE THF

The Minnesota Supreme Court has reviewed several challenges to appropriations made from the THF. *See, e.g., Cory v. King*, 209 Minn. 431, 296 N.W. 506 (1941) (holding that the THF may not be used to defray the general costs of government); *State ex rel. Holm*

v. King, 184 Minn. 250, 238 N.W. 334 (1931) (holding that appropriation from the THF to cover the costs of the secretary of state in issuing motor vehicle license and collecting the license tax is constitutional); *Cory v. King*, 214 Minn. 535, 8 N.W. 614 (1943) (holding that appropriating money from the THF to the offices of the auditor, treasurer, department of civil service, and commissioner of administration to defray their expenses reasonably attributable to highway matters does not violate the constitution); *Cory v. King*, 227 Minn. 551, 35 N.W. 807 (1949) (holding that the THF may be charged for services provided by the state tax department to collect the gasoline tax provided the amount charged accurately reflects expenses incurred for such service).

The court has also set forth certain general principles that govern determination of whether an expenditure is for “highway purposes.” The court has stated that the constitutional provisions at issue “are of broad import and do not of themselves define the functional use of a public highway or what constitutes proper construction, reconstruction, improvements, and highway maintenance costs.” *Minneapolis Gas. Co., v. Zimmerman*, 253 Minn. 164, 91 N.W.2d 642 (1958). Nevertheless, the court observed that highway funds may be expended “for whatever is reasonably necessary to the complete accomplishment of all the basic purposes for which a highway exists.” *Id.* at 173, 91 N.W.2d at 650.

III. SUBSEQUENT BIENNIAL BUDGET PROPOSALS

Since 2001, numerous biennial budget proposals have included recommendations that THF monies be appropriated for expenditures in at least two of the eight categories previously reduced or eliminated by the Minnesota Legislature – tort claims and the BCA laboratory. In 2003, 2005, 2007, 2009, 2011 and 2013, the Minnesota Legislature appropriated monies from the THF for highway-related tort claims and BCA expenses, notwithstanding the legislation enacted in 2000 restricting the payment of such costs from the THF. As noted above, in 2013, the Minnesota Legislature amended the 2000 legislation to

delete tort claims from the list of restricted THF expenditures, but did not make a similar change as to BCA laboratory costs. The Minnesota Legislature apparently allowed the payment of tort claims and BCA laboratory costs based on an analysis of case law interpreting the state constitutional provision.

IV. THE 2015 BUDGET REQUEST

The biennial budget for FY2016 and FY2017 provides, in part, for payment from the THF for tort claims and a portion of BCA laboratory costs. Tort claims related to the State's highways are no longer a restricted THF expense due to the 2013 amendment to the 2000 legislation. Minn. Stat. § 161.20, subd. 3 (2014). However, BCA laboratory costs are still a restricted category of THF expense. *Id.* Although case law can be interpreted to allow payment of a proportionate share of BCA laboratory costs from the THF, it is unclear that a court would agree with that interpretation. Moreover, existing legislation provides that such costs are not reimbursable from the THF. Minn. Stat. § 161.20, subd. 3. If the Minnesota Legislature decides again to fund such costs from the THF, it should amend the 2000 legislation to delete BCA laboratory costs from the list of restricted THF expenditures, as it did for tort claims in 2013.

The current budget proposal also includes an appropriation of \$975,000 in FY2016 from the THF to replace one of three fixed-wing aircraft in the State Patrol aviation fleet. The proposal includes the purchase and installation of a high definition thermal imager and camera with mapping ability "to find locations efficiently." The stated highway purpose of this funding is "to provide efficient and effective traffic safety flight missions." The funding proposal also provides that the purchase "is necessary in order for us to provide . . . search and rescue missions." The Governor's budget proposal for FY2016 recommends that the State Patrol's equipment costs be supported by trunk highway funds but did not limit spending to highway purposes.

The Minnesota Department of Public Safety (“DPS”) states that DPS would use the aircraft for traffic enforcement, to support local law enforcement in monitoring high-speed traffic pursuits as well as providing search and rescue assistance, and to transport its executives to meet with its out-state district State Patrol personnel. DPS was unable to provide any allocation of time the new plane would spend engaged in each of these tasks. It is unclear whether the plane would be used to transport State executives of agencies other than DPS. MMB simply states that “the plane will be available to transport state officials.”

MMB also stated that, because state highway patrol activities are an allowable use of the trunk highway fund and because MMB understood the primary use of the aircraft would be for traffic enforcement on the trunk highway system, MMB included the expense as an allowable use of trunk highway fund resources. Also MMB notes the State Patrol is authorized to use helicopters and fixed-wing aircraft in executing its statutory responsibilities to the trunk highway system. *See* Minn. Stat. § 299D.07 (2014).

MMB acknowledged that there may be concern about some of the other uses of the aircraft, including search and rescue and the transportation of State executives. DPS staff did communicate to MMB that on rare occasions the State Patrol is brought in to partner with local law enforcement on search and rescue, and that the vast majority of time the aircraft would be used for traffic enforcement. Additionally, MMB believes the agency personnel transported are primarily State Patrol personnel on official business.

On April 9, 2015, MMB reported to the AGO information it obtained from DPS regarding prior use of the plane it plans to retire. However, no such information was reported and documented regarding the future use of the new plane.

MMB also states that DPS intends to use money from the sale of existing aircraft toward the purchase of the new aircraft. MMB further states that those dollars could be used to pay for the percentage of the plane’s expense that cannot be paid with THF monies. The

AGO notes, however, that use of funds from the sale of existing aircraft does not serve as an offset to cover non-trunk highway use to the extent the plane was maintained over the years with THF monies.

Funding for state highway patrol activities from the THF has been previously acknowledged by the Minnesota Supreme Court to be appropriate. In *Cory v. King*, the court said: “[c]ertain executive agencies such as the state highway patrol are properly incorporated with the highway department and the expense of their maintenance properly charged to the highway fund.” 209 Minn. at 434, 296 N.W. at 508.

In a later decision, the court addressed the question of whether state departments rendering divided services (services related to highway matters as well as non-highway related services) may be proportionately reimbursed from the THF for expenditures reasonably attributable to highway matters. *Cory v. King*, 214 Minn. at 543, 8 N.W. at 618. The court reasoned that “[t]he true test is whether the charge upon the highway fund accurately reflects highway expenses.” *Id.* The court concluded that “[i]t is essential to validity of an appropriation from the highway fund that no more money be taken than is necessary to defray the expenses properly attributable to highway matters.” *Id.*

As indicated above, state highway patrol expenses “attributable to highway matters” can be reimbursed from the THF. *See id.* However, it is “essential” that “no more money be taken than is necessary to defray the expense properly attributable to highway matters.” *Id.* The Minnesota Legislature must have a reasonable basis for allocating the new airplane’s uses if it intends for a portion of the plane’s expense to be paid for from the THF. *See, e.g., id.* (concluding that “the legislature had before it necessary data to inform itself of the amount of expenditures reasonably attributable to highway matters.”). The Legislature therefore can only use THF monies to pay for some of the plane’s cost if it develops the necessary information to reasonably determine the percentage of the new plane’s expense that is

“properly attributable to highway matters.” *Id.* Accordingly, if any portion of the new plane’s cost and maintenance is paid for with THF monies, DPS must certify and ensure that the plane will be used in a manner consistent with the above law.