

**REPORT CONCERNING
CERTAIN EXPENDITURES
FROM THE TRUNK
HIGHWAY FUND IN THE
FY2020-2021
BIENNIAL BUDGET**

PREPARED BY

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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. The constitution also 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. 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 original eight expenditure areas in 2000 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.

Since 2000, the Minnesota Legislature has changed the original eight expenditure areas that were reduced or eliminated for reimbursement by the THF as follows: sales tax was deleted from the 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 (Minn. Laws 2009, ch. 36, art. 3, sec. 3); tort claims was 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).

Currently, the Legislature directs that payment of expenses related to the following eight areas, “do not further a highway purpose and do not aid in the construction, improvement, or maintenance of the highway system” for reimbursement by the THF:

1. Bureau of Criminal Apprehension laboratory;
2. Explore Minnesota Tourism kiosks;
3. Minnesota Safety Council;
4. driver education programs;
5. Emergency Medical Services Board;
6. Mississippi River Parkway Commission;
7. payments to MN.IT Services in excess of actual costs incurred for trunk highway purposes; and
8. personnel costs on behalf of the Governor’s Office.

Pursuant to the legislative mandate, if an expenditure in the biennial budget proposal for FY2020-2021 is similar to the eight areas identified above, this report “must explain the highway purpose of” the proposed expenditure.

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, 171, 91 N.W.2d 642, 648 (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, 2013, 2015, and 2017, 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. But 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. In 2015 and 2017, however, the Minnesota Legislature again appropriated monies from the THF for BCA expenses, notwithstanding the legislation enacted in 2000 restricting the payment of such costs from the THF.

IV. THE 2019 BUDGET REQUEST FOR FY2020-2021: THE DEPARTMENT OF TRANSPORTATION (MNDOT) AND THE DEPARTMENT OF PUBLIC SAFETY (DPS)

There are two categories of appropriations in the current biennial budget proposal that are similar to the eliminated expenditures from the THF enumerated in Minn. Stat. § 161.20, subd. 3: 1) BCA laboratory costs; and 2) MNIT Services costs in both MnDOT and DPS budget proposals. A third category is not similar to eliminated expenditures, but is a divided-cost appropriation (part from the general fund and part from the THF) in a DPS Change Item, *Public Safety Operational Support*, which under current case law is analyzed to determine if the portion of the cost requested from the THF is for a trunk highway purpose.

A. BCA Laboratory Costs

The biennial budget for FY2020 and FY2021 provides, in part, for payment from the THF for a portion of BCA laboratory costs. 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 still 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.

B. MNIT Services Costs in Both MnDOT and DPS Change Items

The current MnDOT budget proposal includes numerous requested appropriations in FY2020 and FY2021 from the THF for MNIT services. The first MnDOT Change Item, *Cyber Security and Agency Priority Initiatives*, includes a \$500,000 ongoing base increase beginning in FY20 and onetime funds of \$2,000,000 in FY20 and \$1,300,000 in FY21. The Change Item states that MnDOT and MNIT have identified a backlog of IT risk management efforts in need of base and one-time investment to bring all of MnDOT’s IT systems to a “consistent and reasonable level of security.”

The second MnDOT Change Item, *Strategic IT Initiatives*, includes an approximate \$1,600,000 ongoing base increase beginning in FY20. The Change Item states that “MnDOT’s priority technology initiatives are designed to enable MnDOT to implement new, modern, and supported technology systems critical to supporting Minnesota’s multimodal transportation system. These investments create opportunities for more modern and innovative technology solutions for a more efficient transportation system.”

The third MnDOT Change Item, *Trunk Highway Operating Pressures*, includes \$2,400,000 per year starting in FY2020 “to cover the additional costs needed for IT services based on projected rates charged by MNIT and volumes of services utilized by MnDOT. . . . MnDOT’s portion of MNIT administrative overhead expenses is projected to increase. . . .

These expenses are allocated to agencies based on their total IT spend [sic] and total numbers of dedicated MNIT staff as of fiscal year 2017.”

The current DPS biennial budget proposal for FY2020 and FY2021 also provides, in part, for payment from the THF for a portion of MNIT Service costs in two DPS Change Items. The first DPS Change Item, *Technology Cost Increases*, includes a “trunk highway fund base increase of \$2,485,000 to support existing hardware, software, and MNIT staffing costs for the Department of Public Safety (DPS) Driver and Vehicle Services (DVS) division and public safety support division.” The Change Item also states that the “ongoing trunk highway fund appropriation of \$2.485 million [is] to fully fund DPS core technology services for software, hardware, and professional services for the transportation budgeted divisions.” MMB obtained information from DPS regarding this Change Item and based on that information, MMB reports that this funding will: “support trunk highway purposes of safety on the state roadways, whether it be State Patrol, Office of Traffic Safety, or DVS, whose collection of fees/taxes support roads and bridges” and that this funding has “historically been funded by TH[F].”

The second DPS Change Item, *Application Server Migration*, includes a request for “additional funding of \$1.032 million in FY20 to migrate the Department of Public Safety (DPS) application servers from the Town Square Center to a new location. The general fund appropriation is \$258,000 in FY20 and \$174,000 ongoing, and the proposal includes ongoing appropriations from the trunk highway and highway user tax distribution funds (HUTD).” The total funding request for FY2021 to FY2023 is \$696,000, of which \$174,000 is a general fund appropriation. There is no information provided regarding the proportional split of funds that will come from the THF and the HUTD to make up the remaining \$522,000 of the total \$696,000 appropriation for FY2021 to FY2023. However, MMB obtained information from DPS regarding this Change Item and MMB reports that “funding is split between the

funding sources related to the activities the servers support, which includes state highways.” The Change Item states that “[w]ithout this funding, DPS and MNIT cannot continue to host these DPS applications, including the DPS public website.”

C. DPS Public Safety Operational Support

The DPS biennial budget proposal in FY2020 and FY2021 also provides, in part, for payment from the THF for a portion of DPS payroll and space rental costs. The DPS Change Item, *Public Safety Operational Support*, provides “additional funding for payroll and lease costs of DPS administrative services.” The Change Item includes base increases in the general fund and THF appropriations totaling \$536,000 per year starting in FY21, with \$405,000 appropriated from the THF and \$131,000 from the general fund. The Change Item states that “[t]his funding is needed for Public Safety Support division because of a decrease in federal funds, which have been used to cover costs normally associated with the general fund and trunk highway fund.” MMB obtained information from DPS regarding this Change Item and based on that information, MMB reports that the portion of funds to be appropriated from the THF reflects the costs attributable to those “services that support state highway purposes.”

V. HIGHWAY PURPOSES

Funding for certain state agency 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, 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 cost of expenses 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 part of the DPS funding requests (for payroll, space rentals, and MNIT Service) if it decides that DPS has provided the necessary information to reasonably determine the percentage of those costs that are “properly attributable to highway matters.” *Id.*

Beyond examining the accuracy of the divided services apportionment for specific Change Items, the Legislature will need to determine what, if any, MNIT Services costs “further a highway purpose.” Minn. Stat. § 161.20, subd. 3. In regard to the MNIT products and services encompassed by the above-referenced Change Items, MMB states that “payments to MNIT for these budget proposals is not in excess of actual costs incurred for trunk highway fund purposes” because “MNIT either bills agencies by passing through the costs of the product or service directly, or charges the agency a break-even rate.” Given that Minn. Stat. § 161.20, subd. 3, identifies “payments to MN.IT Services in excess of actual costs incurred for trunk highway purposes” as an expenditure area that is reduced or eliminated for reimbursement from the THF, the Legislature can only use THF monies to pay

for MNIT Services if it has a reasonable basis to conclude that the amounts will be actually “incurred for trunk highway purposes.” *Id.*