

**REPORT CONCERNING
CERTAIN EXPENDITURES
FROM THE TRUNK
HIGHWAY FUND IN THE
FY2022-2023
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 FY2022-2023 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.2d 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.2d 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). More specifically, the court observed that: “It would be unreasonable to hold that the proceeds of the highway fund may not be expended for whatever is reasonably necessary to the complete accomplishment of all the basic purposes for which a highway exists.” 253 Minn. at 173, 91 N.W.2d at 649-50.

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, 2017, and 2019 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, 2017, and 2019, 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 2021 BUDGET REQUEST FOR FY2022-2023: 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 the MnDOT budget proposal. 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 two DPS Change Items, *State Trooper 8.4% Salary Increase* and *State Patrol Body Worn Cameras*, which under current case law should be 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 FY2022 and FY2023 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. MN.IT Services Costs in MnDOT Change Item.

The current MnDOT budget proposal includes requested appropriations in FY2022 and FY2023 from the THF for MN.IT services. One MnDOT Change Item, *Cyber Security, Risk Management, And Agency Priority Initiatives*, includes a \$9.8 million annual increase to the THF appropriation beginning in FY2022 through FY2025. The Change Item states that: “In partnership, MnDOT and MN.IT at DOT have developed a framework for programming strategic technology investments. This request will support needed modernization efforts designed to update MnDOT’s systems, applications, and platforms. Project resource capacity is needed to support these investment initiatives, which will include a combination of MNIT, MnDOT, and consultant resources.” MMB reports that: “This proposal provides an ongoing appropriation increase from the Trunk Highway Fund starting in FY22 for data modernization, cyber security, risk management, and other technology initiatives to help plan, build, operate, and maintain the state’s transportation system. This includes securing, managing and operating IT systems used for most of the agency business functions.” MMB also reports that the IT tools are used to determine the amount of salt to disperse, to calculate funds distributed to local government, to analyze crash and safety statistics, to replace a system used for processing

applications and issue operating credentials to commercial motor carriers of property and passengers using the trunk highway system. MMB adds that other initiatives involve securing a permitting and routing software used to analyze and approve oversized and overweight loads on Minnesota state highways, and engineering and construction specific technical software used for design state highways and bridges.

A second MnDOT Change Item, *Operating Adjustment*, includes “a base increase in the Trunk Highway Fund appropriations of \$9.36 million in FY 2021 and \$9.56 million in FY 2023 and each year thereafter, largely to cover estimated compensation cost increases including eligible contract steps and insurance.” In addition, the Change Item notes that: “Other operating costs, like rent and lease, fuel and utilities, IT and legal services also grow. This cost growth puts pressure on agency operating budgets that remain flat from year to year without enacted increases.” MMB reports that MnDOT’s operating budget is primarily supported by the THF, and that the requested increase from the THF to IT reflects an increase in IT funding that has previously been attributed to trunk highway purposes.

C. DPS State Patrol Change Items.

The DPS biennial budget proposal in FY2022 and FY2023 provides, in part, for payment from the THF for a portion of State Trooper salary costs and State Patrol body worn cameras. The DPS Change Item, *State Trooper 8.4% Salary Increase*, provides “for the ongoing salary costs of the 8.4% salary increase for State Troopers . . . included in chapter 3 of the 2020 fifth special session.” The Change Item recommends “\$5.937 million annually starting in FY 2022 from the general, trunk highway, and highway user tax distribution (HUTD) funds for the ongoing salary costs” to continue through FY 2025. Specifically, the Change Item lists \$5.591 million as the expenditure total from the THF; \$277,000 from the general fund; and \$69,000 in HUTD funds. The Change Item states that “[t]he funds will be used to continue the current level of service the State Patrol provided to the public and allied

agencies as it relates to traffic safety, public safety, and Capitol security missions.” MMB reports that funding for Capitol security comes from the General Fund, and that the portion of funds to be appropriated from the THF reflects the costs attributable to those State Troopers who are currently compensated from the THF.

The DPS Change Item, *State Patrol Body Worn Cameras*, provides for \$4.018 million as the expenditure total from the THF in FY 2022 and \$3.182 million in FY 2023 through FY 2025; \$449,000 from the general fund in FY 2022 and \$395,000 in FY 2023 through FY 2025; and \$22,000 in HUTD funds in FY 2022 and \$18,000 in FY 2023 through FY 2025. The Change Item states that “[t]his funding will allow State Patrol to purchase, deploy, and manage body-worn cameras (BWCs) for State Troopers, Capitol Security Officers, and Commercial Vehicle Inspectors. The State Patrol is one of the largest law enforcement agencies in the state and the last major law enforcement agency in Minnesota without BWCs.” MMB reports that the portion of funds for equipment costs to be appropriated from the THF reflects the costs attributable to those State Troopers who are currently compensated from the THF.

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.2 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 State Patrol salary costs and BWCs) 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, MN.IT services costs “further a highway purpose.” Minn. Stat. § 161.20, subd. 3. In regard to the MN.IT products and services encompassed by the above-referenced Change Items, MMB indicates that payments to MN.IT for these budget proposals is not in excess of actual costs incurred for trunk highway fund purposes because MN.IT 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 MN.IT Services if it has a reasonable basis to conclude that the amounts will be actually “incurred for trunk highway purposes.” *Id.*