

**REPORT CONCERNING
CERTAIN EXPENDITURES
FROM THE TRUNK
HIGHWAY FUND IN THE
FY2018-2019
BIENNIAL BUDGET**

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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. 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).

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, 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. In 2015, 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 2017 BUDGET REQUEST

The biennial budget for FY2018 and FY2019 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 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 \$4,830,000 in FY2018 from the THF to replace one of three helicopters in the State Patrol aviation fleet. 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 (2016). In the FY18-19 Biennial Budget Change Item, the Minnesota Department of Public Safety (“DPS”) states that the State Patrol currently has three helicopters in its fleet, one of which was damaged in 2016 after “an emergency landing . . . as a result of a catastrophic failure” and it is “not in the best interest of the state [to repair] due to cost and liability.” The second helicopter is 11 years old, and the third is 34 years old and “unable to provide life/safety missions . . . due to limited power and design factors.” The Change Item also states that “this proposal allows the State Patrol to sell the damaged helicopter and the 34-year old aircraft with limited capability. With the addition of a new helicopter, the result would be a fleet of

two Bell 407 helicopters.”

The stated highway purpose of this helicopter funding request is “to provide traffic safety and public safety support for Minnesota.” The funding proposal provides that the purchase “is necessary because the current airworthy fleet of two helicopters is not able to provide consistent critical aviation services to the state” such that “the State Patrol is unable to respond to calls for service that involve life-safety requests, such as fire suppression and rescue.”

The Governor’s budget proposal for FY2018 recommends that the State Patrol’s helicopter purchase be supported by \$4,830,000 in trunk highway funds and \$920,000 from the General Fund, stating that “the split in funding is consistent with the most recent analysis of expenses that are eligible for support from the Trunk Highway Fund.” MMB obtained information from the State Patrol regarding its historical helicopter use. The State Patrol reports it reviewed its helicopter flight data for calendar years 2014, 2015, and January 1, 2016 through September 23, 2016. During that time period, the State Patrol states that it logged a total of 2446.6 helicopter flight hours. Of those flight hours, the State Patrol determined that 84% of those hours involved trunk highway missions and 16% involved general fund missions. The Governor’s budget proposal for FY2018 applies these percentages to the total \$5,750,000 cost of the helicopter to arrive at the cost split (between the THF and General Fund) reflected in the FY18-19 Biennial Budget Change Item.¹

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

¹ According to the State Patrol, proceeds from the future sales of the 34-year old helicopter and the damaged helicopter are estimated at \$300,000 to \$500,000 and \$30,000 to \$50,000, respectively. Any such proceeds will be deposited into the THF’s State Patrol equipment sales proceed account, which is earmarked for THF-eligible expenditures.

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 helicopter’s uses if it intends for a portion of the helicopter’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 helicopter’s cost if it decides that DPS has provided the necessary information to reasonably determine the percentage of the new helicopter’s expense that is “properly attributable to highway matters.” *Id.* Accordingly, if any portion of the helicopter’s cost and maintenance is paid for with THF monies, DPS must certify and ensure that the helicopter will be used in a manner consistent with the above law.