

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KITTITAS COUNTY

NORTHWEST MOTORCYCLE ASSOCIATION,  
WASHINGTON STATE MOTORSPORT  
DEALERS ASSOCIATION, PAUL OSTBO,  
RICHARD LAW, and BYRON STUCK,

Petitioners,

vs.

STATE OF WASHINGTON INTERAGENCY  
COMMISSION FOR OUTDOOR RECREATION  
and LAURA ECKERT JOHNSON, in her capacity  
as Director,

Respondents.

No.

PETITION FOR JUDICIAL  
REVIEW OF AGENCY ACTION

Petitioners Northwest Motorcycle Association, Washington State Motorsport  
Dealers Association, Paul Ostbo, Richard Law, and Byron Stuck allege:

**PARTIES**

1.

Respondent Interagency Commission for Outdoor Recreation is a statutory entity  
created by RCW Chapter 79A.25.

2.

Respondent Laura Eckert Johnson is the Director of IAC, whose powers and  
duties are set forth in RCW 79A.25.020, and is sued in her official capacity.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

3.

Petitioner Northwest Motorcycle Association (NMA) is a Washington nonprofit corporation. NMA strives to inform, educate and organize off-highway motorcyclists within Washington State to preserve and expand off-highway motorcycling opportunities.

4.

Washington State Motorsport Dealers Association (WSMDA) is a Washington nonprofit corporation. WSMDA promotes the interests of motorsport dealers in Washington.

5.

Petitioner Paul Ostbo (Ostbo) is a member of NMA and resident of Kittitas County, Washington. Petitioner Byron Stuck (Stuck) is a member of NMA and a resident of King County, Washington. Richard Law (Law) is a member of NMA and resident of Snohomish County, Washington. Petitioners Ostbo, Law and Stuck and other members of NMA have suffered specific injury from respondents' acts as alleged herein.

**JURISDICTION AND VENUE**

6.

Jurisdiction in Kittitas County Superior Court is proper under RCW 34.05.570 and venue is property pursuant to RCW 34.04.514 in that petitioner Paul Ostbo resides in Kittitas County, and because property affected by challenged actions of the respondents is situated in Kittitas County.

1 **GENERAL ALLEGATIONS**

2 7.

3 Article II, Section 40 of the Constitution of the State of Washington provides that  
4 “all fees collected by the State of Washington as license fees for motor vehicles and all  
5 excise taxes collected by the State of Washington on the sale, distribution or use of motor  
6 vehicle fuel and all other state revenue intended to be used for highway purposes, shall be  
7 paid into the state treasury and placed in a special fund to be used exclusively for  
8 highway purposes.”  
9

10 8.

11 In or about 1972, the Legislature set aside 1% of the gasoline fuel excise tax to  
12 provide funding for a Nonhighway and Off-Road Vehicle Activities (NOVA) program.  
13 In 1986, the Legislature amended the statute to provide a specific distribution of funds  
14 available to IAC.  
15

16 9.

17 Pursuant to RCW 46.09.170(d),  
18

19 “54.5% [of that 1%], together with the funds received by the interagency  
20 committee for outdoor recreation under RCW 46.09.110, shall be credited  
21 to the nonhighway and off-road vehicle activities program account to be  
22 administered by the committee for planning, acquisition, development,  
23 maintenance, and management of ORV recreation facilities and  
24 nonhighway road recreation facilities; ORV user education and  
information; and ORV law enforcement programs. The funds under this  
subsection shall be expended in accordance with the following limitations:

“(i) Not more than twenty percent may be expended for ORV  
education, information, and law enforcement programs under this  
chapter;

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

“(ii) Not less than an amount equal to the funds received by the interagency committee for outdoor recreation under RCW 46.09.110 and not more than sixty percent may be expended for ORV recreation facilities;

“(iii) Not more than twenty percent may be expended for nonhighway road recreation facilities.

As alleged below, respondents and their allies have induced the Legislature to alter these percentages in Second Substitute House Bill 1698, passed by the Senate on April 11, 2003, and, upon information and belief, shortly to be signed by the Governor.

10.

RCW 46.09.020 provides that “‘nonhighway road’ means any road owned or managed by a public agency, or any private road for which the owner has granted a permanent easement for public use of the road, other than a highway generally capable of travel by a conventional two-wheel drive passenger automobile during most of the year and in use by such vehicles and that is not built or maintained with appropriations from the motor vehicle fund.”

11.

RCW 46.09.020 provides that “‘ORV recreation facility’ includes ORV trails and ORV use areas.”

12.

RCW 46.09.020 does not define “nonhighway road recreation facilities”. Section 1(14) of Second Substitute House Bill 1698 adds the following definition:

“Nonhighway road recreation facilities’ means recreational trails and facilities

1 that are accessed by nonhighway roads *and are intended solely for nonmotorized*  
2 *recreational uses.*” (Emphasis added.)

3  
4 13.

5 For many years, petitioner NMA has monitored IAC’s expenditure of funds  
6 pursuant to RCW 46.09.170. NMA has resisted expenditures on trails that cannot be  
7 used by motorized off-road vehicles, particularly since nearly all motorized use trails are  
8 multiple-use trails that may also be used by hikers, mountain bikers, and equestrian users.

9  
10 14.

11 In or about March 2002, the IAC staff, acting in an alliance with  
12 environmentalists, lobbied the Legislature to authorize the spending of gasoline excise  
13 tax monies upon trails that could not be used by motorized vehicles at all. NMA was  
14 unaware of this activity until after the Legislature acted.

15  
16 15.

17 On March 28, 2002, Governor Locke signed (with partial vetoes not pertinent to  
18 this petition) Engrossed Senate Bill 6396, set forth in Chapter 238, Laws of 2002, and  
19 which contained, at Section 123(3)(b), an amendment to RCW 46.09.170(d), which reads  
20 as follows:

21 “Funds may be expended for nonhighway road recreation facilities which may  
22 include recreational trails that are accessed by nonhighway roads and are intended  
23 solely for nonmotorized recreation uses”.

24 As a budgetary act, this language expires on June 30, 2003.

16.

1 In or about July 2002, respondents adopted a plan to guide expenditures under the  
2 Nonhighway and Off-Road Vehicles Activity (NOVA) Program, for the years 2002-  
3 2008, entitled “NOVA Plan 2002-2008”. The Plan sets forth policies with regard to the  
4 expenditure of the 20% of nonhighway road (NHR) funds specified in RCW  
5 46.09.170(d), the first of which was to “encourage a nonmotorized primary management  
6 objective designation (hiking, equestrian, mountain bicycling, etc.) on trails receiving  
7 NHR funding”.

8  
9 17.

10 Petitioner NMA participated in the administrative proceedings leading up to the  
11 2002 NOVA Plan and objected vigorously to this policy, pointing out that it was blatantly  
12 unconstitutional to spend fuel tax monies on facilities that could not be utilized by  
13 motorized vehicles, but respondents adopted it anyway.

14  
15 18.

16 Respondents further particularized IAC policy regarding funding of Non-  
17 Highway Road funding in a policy manual issued January 28, 2003. This policy declares  
18 that maintenance and operation projects pertaining to “facilities open to both motorized  
19 and nonmotorized use is also eligible for funding, provided that the primary management  
20 objective of the facility is clearly non-motorized recreation”.

21  
22 19.

23 Upon information and belief, there are no facilities within the State of  
24 Washington that are open to both motorized and non-motorized use with non-motorized

1 recreation being the primary management designation. As a practical matter, respondents  
2 will not fund the development, maintenance or operation of motorized trails with NHR  
3 funding.

4  
5 20.

6 Pursuant to ESB 6346 and its policies, respondent IAC funds projects for  
7 recreational trails that are intended solely for nonmotorized recreation uses. In the most  
8 recent grant cycle, *none* of the projects funded with NHR funding provided motorized  
9 recreation benefits.

10  
11 21.

12 Pursuant to ESB 6346 and its policies, respondent IAC has denied funding of  
13 several projects that would have provided motorized recreation facilities, including DNR  
14 Burnt Hill, U.S.F.S Domerie Peak, DNR ORV Planning, USFS Sasse/Corral  
15 Reconstruction, and State Parks, Riverside ORV.

16  
17 22.

18 Because IAC's funding authority is finite, and more project applications are  
19 typically received than can be funded, IAC's decisions to fund recreational trails which  
20 are intended solely for nonmotorized recreation uses directly reduce recreational  
21 opportunities available to NMA and its members.

22  
23 23.

24 NMA and its members have suffered substantial prejudice from the policy and

1 funding decisions of respondent IAC, including but not limited to reduced recreational  
2 opportunities by the failure to fund the projects listed above.

3  
4 24.

5 Upon information and belief, IAC staff and their agency and environmentalist  
6 allies have lobbied the Legislature to pass additional legislation expanding upon the  
7 provisions of ESB 6346 about which petitioners complain.

8  
9 25.

10 Second Substitute House Bill 1698 amends RCW 46.09.170 to provide that the  
11 NOVA funds received by IAC are reduced from 54.5% to 52.5%, to be expended as  
12 follows:

13 “(i) Fifty percent must be expended on facilities . . . for nonhighway road  
14 recreation projects or nonhighway and ORV education, information, and law  
15 enforcement programs under this chapter. For purposes of this section,  
16 nonhighway road recreation projects include, but are not limited to, campgrounds,  
trails, restrooms, interpretive facilities, signage, and building maintenance;

17 “(ii) Of the amount not expended in (d)(i) of this subsection not less than an  
18 amount equal to the funds received by the [IAC] under RCW 46.09.110 and not  
19 more than sixty percent may be expended for ORV recreation facilities;

20 “(iii) Of the amount not expended in (d)(i) of this subsection not more than sixty  
21 percent may be expended for nonhighway road recreation facilities.

22 When and if enacted into law, the likely effect of the measure will be to expand the  
23 unconstitutional NOVA expenditures from 20% of the program to 80% of the program.

24 26.

25 If it is enacted, respondents will make funding decisions pursuant to Second  
26 Substitute House Bill 1698 that will continue to divert excise tax revenues on facilities



1 solely intended for nonmotorized users, injuring plaintiffs.

2 **FIRST CAUSE OF ACTION**

3  
4 27.

5 Petitioners reallege paragraphs 1-26 as if set forth herein

6  
7 28.

8 Pursuant to RCW 34.05.570(2), petitioners are entitled to a declaration that  
9 respondent IAC's plans and policies are unconstitutional as alleged above, that  
10 § 123(3)(b) of Chapter 238, Laws of 2002, is unconstitutional as alleged above, and that  
11 § 1(14) and/or § 2(1)(d) of Second Substitute House Bill 1698, if enacted, will also be  
12 unconstitutional as alleged above.

13  
14 **SECOND CAUSE OF ACTION**

15 29.

16 Petitioners reallege paragraphs 1-28 as if set forth herein.

17  
18 30.

19 Petitioners' clear legal rights to agency action in compliance with the laws of  
20 Washington, and its Constitution are being violated by respondents.

21  
22 31.

23 As set forth above, petitioners have a well-grounded fear of invasion of such  
24 rights.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

32.

Petitioners are suffering an actual, substantial and continuing injury insofar as respondents continue unlawfully to spend excise tax monies, thereby reducing recreational opportunities for NMA and its members.

33.

Petitioners have no adequate remedy at law.

34.

Petitioners are entitled to an order enjoining respondents from relying upon IAC's plans and policies, § 123(3)(b) of Chapter 238, Laws of 2002, or §§ 1(14) and/or § 2 of Second Substitute House Bill 1698 , if enacted, to expend any funds from excise tax revenues for trails which are intended solely for nonmotorized recreation uses.

**PRAYER FOR RELIEF**

WHEREFORE, petitioners pray for judgment as follows upon petitioners' causes of action against respondents:

1. For a judgment declaring IAC's plans and policies unconstitutional; § 123(3)(b) of Chapter 238, Laws of 2002, unconstitutional; and §§ 1(14) and/or 2(1)(d) of Second Substitute House Bill 1698, if signed into law, unconstitutional, all to the extent these authorities are construed as authorizing respondents to expend excise tax revenues on facilities intended solely for nonmotorized users.

2. For an injunction barring respondents, their employees and agents from

1 relying upon IAC's plans and policies, § 123(3)(b) of Chapter 238, Laws of 2002, and  
2 §§1(14) and/or 2(1)(d) of Second Substitute House Bill 1698, if enacted, for expending  
3 any funds from excise tax revenues for trails which are intended solely for nonmotorized  
4 recreation uses.

5  
6 3. For an award of petitioners' attorney fees, costs and other expenses  
7 pursuant to RCW 4.84.350(1), insofar as petitioners constitute "qualified parties" within  
8 the meaning of RCW 4.84.340(5).

9 4. For such other and further relief as the Court may deem just and proper.

10 DATED April 16, 2003.

11  
12 MURPHY & BUCHAL LLP

13  
14 /s/ James L. Buchal

15 \_\_\_\_\_  
16 James L. Buchal, WSBA # 31369  
17 Attorney for Petitioners