



DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

January 31, 2001

Grace Crunican  
Director, Oregon Department of Transportation  
355 Capitol St. NE  
Salem OR 97301-3871

Re: Highway Funds  
DOJ File No. 731-001-GG0201-00

Dear Ms. Crunican:

Last year, we concluded that Highway Funds constitutionally could not be used to fund a portion of the program enacted by the 1999 legislature in HB 3292, \_\_\_ Op Atty Gen \_\_\_ (OP 8271, February 24, 2000).<sup>1</sup> That opinion was the most recent issued by this office in which we determined that a portion of a new program established by the legislature could not constitutionally be funded with Highway Funds.<sup>2</sup> All of these opinions address Article IX, Section 3a, of the Oregon Constitution adopted by the voters on May 20, 1980. These opinions, along with others published when the legislature was deliberating on proposed amendments to the predecessor of Article IX, Section 3a, frame the analysis controlling constitutional expenditures of Highway Funds.<sup>3</sup>

Subsequent to publication of OP 8271, we discussed with you the need to perform a comprehensive review of Oregon Department of Transportation (ODOT) programs to determine whether our analysis in OP 8271 and previous opinions might apply to any other programs that use Highway Funds. Until now, we have never performed a comprehensive review of ODOT programs, many of which predate the 1980 constitutional amendment, to determine whether they conform to Article IX, Section 3a. Moreover, as the State's budget tightens and its population increases, the desire to use Highway Funds for additional purposes can be anticipated. As our analysis of Article IX, Section 3a, makes plain, the line between where Highway Funds may and

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<sup>1</sup> As used in this letter, "Highway Funds" are those funds subject to Article IX, Section 3a, of the Oregon Constitution, and do not include federal or other funds that may be included in the Department of Transportation budget.

<sup>2</sup> Others include 48 Op Atty Gen 345 (1997) (legislative proposal to use Highway Funds for start-up and administrative costs of special license plate programs would violate constitution); Letter of Advice dated October 19, 1993, to Gary Weeks (OP-6474) (Highway Funds cannot be used to provide MVD computer information to criminal justice agencies). See also 39 Op Atty Gen 400 (1978) (administrative expenses of the Advisory Committee on Bicycles allowable in proportion to services directly connected to its advice on bicycle paths, lanes and trails).

<sup>3</sup> Opinions issued during the legislative deliberations of the measures that resulted in the adoption of Article IX, Section 3a, are discussed in footnote 5, below.

may not be used can be difficult to discern in certain circumstances. Consequently, programs that relate to and affect highways, and therefore which may seem to qualify for Highway Funds, may fail the stringent analysis required under Article IX, Section 3a. Because of the importance of this issue to the state fisc, we suggested that this review could not be avoided or delayed. Based on our discussions, you agreed to proceed with the analysis.

At the outset, we agreed on a methodology for the project. Your staff would work with us to review all ODOT programs and to identify those programs that may be at risk for impermissibly using Highway Funds. After identifying at-risk programs, we would prepare a summary of those programs consisting of the name and a brief description of the program, the statutory authority for the program and an explanation of whether the program constitutionally uses Highway Funds. In the event we determined that any programs cannot constitutionally use Highway Funds, we agreed to work with ODOT to ascertain whether the programs could be modified to conform to constitutional requirements.

As you know, OP 8271 did not delineate in detail the legal principles that govern the use of Highway Funds. The next section of this letter provides that analysis, followed by an overview of our program-by-program review. The final section of this letter provides the methodology to be applied to any expenditure of funds, present or proposed, to determine whether it is a permissible use of Highway Funds. We believe the multi-step process we propose captures all of the issues arising from the Constitutional provision.

### **Constitutional Use of Highway Funds**

Article IX, Section 3a of the Oregon Constitution provides that revenues from motor vehicle taxes and motor vehicle fuel "shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state." Use of these revenues is also permitted for costs of administration and any refunds or credits authorized by law.<sup>4</sup> Taxes levied on commercial vehicles "may also be used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation."<sup>5</sup> In addition, Highway Funds may be used for the

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<sup>4</sup> Article IX, § 3a (2)(a).

<sup>5</sup> Or Const Art IX, § 3a (2)(d). Article IX, Section 3a, replaced *former* Section 3, which similarly dedicated revenues from fuel taxes and vehicle operation fees as Highway Funds, except that it also authorized use of these revenues for policing highways and development and maintenance of parks and historic places. *Former* Or Const Art IX, § 3 (Repealed by vote on May 20, 1980). This office has advised that use of Highway Funds for "policing activities" is no longer constitutional as a result of the adoption of Article IX, Section 3a. *See* 38 Op Atty Gen 800 (1977) (discussing earlier proposed constitutional amendment (SJR 30); concluding in part that Highway Funds could not be used for state police law enforcement activities or weighmaster activities); Letter of Advice dated January 31, 1979, to Fred Klaboe (OP-4574) (reiterating that, under then proposed SJR 7, "policing" activities, including operations of weighmasters, could not be funded from highway taxes). SJR 7 subsequently was amended to include what is now Article IX, Section 3a(2)(d), which allows Highway Funds to be used for weighmaster-type enforcement activities. Our conclusion in Letter of Advice dated October 19, 1993, to Gary Weeks (OP-6474) that Highway Funds cannot be used for police law enforcement activities directly follows from the analysis in OP-4574.

administrative costs to support a program or project on which Highway Funds permissibly may be spent.<sup>6</sup>

We reviewed ODOT programs to determine if they fit into any of the categories created by Article IX, Section 3a, or whether they administratively support expenditures made for those purposes. Programs directly dealing with construction, reconstruction, repair or maintenance, and programs for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation constitutionally may use Highway Funds. The legal analysis of these programs is relatively straightforward, in part because it is a simple exercise to determine whether a program performs these functions. If a program is included within any of these areas, the program and costs of administration of the program may use Highway Funds.

The issue is not so straightforward when the question is whether the funds are used for the “operation and use” of highways, because that portion of Article IX, Section 3a, has been narrowly construed by the Oregon Supreme Court. In *Rogers v. Lane County*, the court found that construction of an airport parking lot and covered walkway from the parking lot to the airport itself was not a highway-related project and therefore not a constitutionally permissible use of Highway Funds.<sup>7</sup> The Court limited the use of Highway Funds to expenditures on the highways themselves or to projects or purposes “that primarily and directly facilitate motorized vehicle travel.”<sup>8</sup>

The Supreme Court reiterated its narrow construction of this constitutional provision in *Automobile Club of Oregon v. State of Oregon*, holding that the purposes for which the legislature proposed to use underground storage tank fees and emission fees were not constitutionally permissible and, therefore, the fees themselves were invalid.<sup>9</sup> In this case the court specifically refused to adopt a broader test that would have authorized use of Highway Funds for projects or purposes that “improve the operation and use of a highway, road, street or roadside rest area.”<sup>10</sup>

In light of the holding in *Rogers v. Lane County*, Highway Funds that do not involve construction, reconstruction, improvement, repair, or maintenance of highways, or specified

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<sup>6</sup> See 39 Op Atty Gen 400 (1978) (payment of administrative expenses of the Advisory Committee on Bicycles allowable in proportion to services directly connected to its advice on bicycle paths, lanes and trails); 48 Or Atty Gen 345 (1997) (legislative proposal to use Highway Funds for start-up and administrative costs of special license plate programs would violate constitution).

<sup>7</sup> 307 Or 534, 771 P2d 254 (1989). The Court in *Rogers* referred to “improvement, repair, maintenance, operation and use,” but the analysis in *Rogers* focused on “operation and use” and not on “improvement, repair and maintenance.” We believe the analysis on these three elements is more akin to the analysis applicable to construction and reconstruction, because these activities directly relate to the roads themselves, while “operation and use” addresses whether activities performed on and related to the roads are sufficiently connected to the roads themselves to authorize expenditure of Highway Funds for those activities. In *Rogers*, for example, the issue was not construction of roads, but construction of a parking lot and covered walkway. Accordingly, in general the “operation and use” analysis must be applied whenever the activity at issue is, in essence, an adjunct to the road rather than the road itself. As we will see, such “adjuncts” span a wide variety of activities, including relocation of municipal facilities (see page 18 of attached ODOT General program package) to issuance of driver licenses (see Test, Step 2 below at page 6).

<sup>8</sup> *Id.* at 545.

<sup>9</sup> 314 Or 479, 490-491, 840 P2d 674 (1992).

<sup>10</sup> *Id.* at 494.

weighmaster activities, may only be used for the expenses of a project or program that “primarily and directly [facilitates] motorized vehicle travel” or that are costs of administration of such a program.<sup>11</sup> Accordingly, we reviewed ODOT programs to determine if they primarily and directly facilitate motorized vehicle travel and if Highway Funds can be used for the costs of administration of such a program or programs.

### **Program-by-Program Review**

As outlined above, our review began by looking at all ODOT programs. The vast majority of ODOT’s expenditures constitutionally use Highway Funds. This is not surprising, given that the focus of ODOT’s activities are related to construction, reconstruction, improvement, repair and maintenance of roads themselves. In this regard, every ODOT activity directly contributing to building or maintaining highways, including planning, design and administrative support of all of those activities, are properly funded with Highway Funds.

Eventually our review focused on the more than 80 programs covered in the attachments to this letter. These programs constitute only a fraction of ODOT’s overall business, but they are the programs that we determined raised a question regarding constitutional use of Highway Funds. For the most part, these programs do not directly affect roads but, rather, are programs that require application of the *Rogers* test; i.e., do these programs primarily and directly facilitate motorized vehicle traffic? Most of the reviewed programs pass this test, while others pass it in part. In all cases, any constitutional infirmity can be corrected.

In no case did we find that ODOT is operating any program outside its statutory authority. Indeed, in each of our opinions that finds a constitutional infirmity, our conclusion is based on the *Rogers* test.<sup>12</sup> This underscores that application of that test is not intuitively obvious.

The constitutional infirmities we found may be addressed in three ways: (1) internal administrative changes, to ensure that program funds are used only for permissible purposes, (2) amendment to administrative rules, and (3) statutory changes. In the first two cases, the statutory authority for a program may be broad enough to permit unconstitutional use of Highway Funds, but ODOT can avoid that problem by administering the program more narrowly unless doing so would violate a statutory mandate. If narrowly administering a program would violate a statutory mandate, the statute must be changed, either to eliminate the program, obtain funding from another source, or in a manner that would bring expenditures for the program within the confines of Article IX, Section 3a, and the test enunciated by the Supreme Court.

As with all legal analysis, we recognize that reasonable courts or others could disagree with our conclusions. Our advice regarding which ODOT programs should be changed is based on our assessment of what courts applying *Rogers* and *Automobile Club* likely would determine, and it is designed to minimize the risk of adverse judicial decisions.

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<sup>11</sup> See Letter of Advice dated October 19, 1993, to Gary Weeks, Director of the Department of Administrative Services (OP-6474) (providing motor vehicle records to law enforcement at no cost via the Law Enforcement Data System (LEDS) is not constitutionally permissible, but the cost of using LEDS for vehicle registration purposes is an allowable administrative expense).

## The Test

We have determined a method for applying Article IX, Section 3a, to any ODOT program. The method consists of up to seven steps. The test is designed to lead the person performing the test through the analysis necessary to determine if any part of Article IX, Section 3a, authorizes expenditure of Highway Funds for that activity. Each step corresponds to a portion of the constitutional provision, and the number of steps necessary to determine whether an activity may use Highway Funds depends on the nature of the activity. At each step, a determination must be made whether the activity being considered is authorized by that portion of the test. For most parts of the test, the determination is largely factual, and neither the courts nor this office has prescribed a legal test to apply to the activity. However, when the inquiry is at step two of the test, in other words if the question whether use of Highway Funds is permissible turns on whether the activity involves “operation and use,” then the *Rogers* test must be applied.

Accordingly, we present each step by stating the portion of the constitutional language to which it applies, followed by the question that must be asked with respect to that language. We present each step of the test in the order in which the constitutional language that the step addresses appears in Article IX, Section 3a, but the tests can be applied in any order. If the question within any step can be answered in the affirmative, the expenditure is allowable under Article IX, Section 3a. If the answer is no, go to the next step. If you get to the last step and the answer is no, the activity cannot use Highway Funds. Within each step, we offer examples of activities that both fit and do not fit that step of the test.

**Step 1.** Art. IX, § 3a(1) – construction, reconstruction, improvement, repair, maintenance of highways, roads, streets. Are the expenditures for (1) the physical facilities themselves, (2) costs necessary for actual construction of physical facilities or for tasks necessary for construction of the facilities, including design, environmental compliance, permits, and purchase of right of way, (3) bicycle trails,<sup>13</sup> (4) other activities or facilities within the right of way that are related to operation of the highway, including parking, landscaping or maintenance, or (5) agency decisions regarding potential projects for construction, reconstruction, improvement, repair, or maintenance within the right of way?

Examples of permissible activities: (1) paving a highway; (2) purchase of machinery for paving a highway, architectural or engineering studies and drawings for building a highway, highway planning and project development; (3) including a bicycle lane within a highway right of way; (4) paving portion of right of way for on-street parking; (5) Transportation Commission deliberation of whether to build a highway, including preparation of meeting materials and costs of meeting.

Examples of impermissible activities under this section:<sup>14</sup> Purchase of additional right of way for purpose of facilitating placement of utility facilities within the right of way; repayment of bonds issued to fund highway construction; construction of bicycle trails in a county park;

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<sup>12</sup> See Op 8271 and opinions cited in footnote 2, above.

<sup>13</sup> See *Rogers*, 307 Or at 543, fn 7; 38 Op Atty Gen 800 (1977).

<sup>14</sup> The phrase “under this section” is used to underscore that, when applying the test, a “no” answer requires considering the next step. Some of the items listed herein will not satisfy any part of the test. Those that do are considered below.

landscaping adjacent to, but not within, right of way; purchase of new computer system for motor vehicle registration.

**Step 2.** Art. IX, § 3a(1) – operation and use of highways, roads, streets or roadside rest areas. Do the expenditures “primarily and directly” facilitate motorized vehicle travel, in which case use of Highway Funds is permissible? For purposes of answering this question, the following precepts apply. The expenditures “. . . must be limited exclusively to expenditures on highways, roads, streets and roadside rest areas themselves and for other projects or purposes within or adjacent to a highway road, street or roadside rest area right-of-way that primarily and directly facilitate motorized vehicle travel”<sup>15</sup> It is not enough for the projects to be “highway related,”<sup>16</sup> nor is removing vehicles from the highways, other than by way of licensing action or reduction of highway congestion, sufficient.<sup>17</sup> Expenditures for activities that directly relate to operation and use of vehicles, including registration, licensing and titling or suspension, revocation and cancellation of the same, may use Highway Funds. However, expenditures for projects or purposes that merely “improve[] the operation and use of a highway, road, street or roadside rest area,” cannot use Highway Funds.<sup>18</sup>

Examples of permitted activities: Issuance, suspension and revocation of driver licenses; registration of motor vehicles; services to remove disabled vehicles from impeding traffic on highway (COMET).

Examples of impermissible activities under this section: Imposition of civil penalties for violation of statutes or rules;<sup>19</sup> construction of parking lot outside of right of way; mass transit programs.

**Step 3.** Art. IX, § 3a(2)(a) – Costs of administration. Is the money (1) spent for (a) general agency purposes (such as for employees,<sup>20</sup> facilities or equipment) or (b) to support activities of ODOT, where the general agency purposes or activities are permissibly funded or authorized by Article IX, Section 3a,<sup>21</sup> (2) spent for implementation and collection of any tax or excise authorized by Article IX, Section 3a(1), or (3) used to establish and adjust, as necessary, proportions of revenues derived from different classes of vehicles as required by Article IX, Section 3a(3)?

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<sup>15</sup> *Rogers*, 307 Or at 545.

<sup>16</sup> *Rogers*, 307 Or at 539.

<sup>17</sup> *Rogers*, 307 Or at 539, citing 35 Op Atty Gen 198 (1970).

<sup>18</sup> *Automobile Club of Oregon*, 314 Or at 494 (rejecting test proposed in dissent in *Rogers*).

<sup>19</sup> This refers, for example, to civil penalties for violation of motor carrier safety rules. See page 10 of the attached Motor Carrier program package. Penalties and fines related to collection of taxes and excises, however, are permissible under Step 3 of the test. See page 5 of the attached Motor Carrier program package.

<sup>20</sup> Employee costs include salaries, other personnel expenses, hiring and training.

<sup>21</sup> Most ODOT programs include administrative costs as well as other costs. For example, costs incurred in construction of a highway includes everything from the cost of materials that comprise the road to the cost of support staff that assists the planning team. Similarly, issuance of driver licenses includes the cost of materials to produce a license as well as the cost of receptionists at DMV offices to assist clients. Some ODOT programs, however, may entail only administrative costs. The DMV program to establish continuing eligibility for a driver license appears to be such a program, and that program may use Highway Funds for the reasons explained at pages 26-27 of the attached DMV program package.

Examples of permitted activities: Costs for administration, including salary and benefits for support staff, computers, costs of office space, for any program that is permissible under any other portion of the test, including a computer system for motor vehicle registration; costs of administration and collection of weight-mile and fuel taxes.

Examples of impermissible activities under this section: Refund of overcollection of weight-mile taxes; retirement of bond obligations.

**Step 4.** Art. IX, § 3a(2)(a) – Refunds and credits authorized by law. Are the expenditures for refunds or credits authorized by law?

Example of permitted activity: Refund of overcollection of weight-mile tax.

Example of impermissible activities under this section: Retirement of bond obligation.

**Step 5.** Art. IX, § 3a(2)(b) – Retirement of bonds or other debt instruments for which such revenue has been pledged. Are the expenditures to retire bonds or other debt instruments, the proceeds of which were used for any Highway Fund permitted activity?

Example of permitted activity: Retirement of bond issued to fund highway construction preservation or maintenance. Retirement of certificates of participation issued to fund facilities or equipment for Highway Fund eligible purposes. Note that this activity was used as an example of an activity not permitted under Steps 1, 3 and 4. For this activity, a person following this methodology would have gotten to this step before achieving the affirmative answer required to conclude that the expenditure is authorized under Article IX, Section 3a.

**Step 6.** Art. IX, § 3a(2)(c) – Levies under subsection (1)(b) on “recreational” vehicles. If funds are used to acquire, develop, maintain or care for park or recreation areas, did the funds result from levies under Article IX, Section 3a(1)(b) (any tax or excise on ownership, operation or use of motor vehicles) on campers, mobile homes, motor homes, travel trailers, snowmobiles, or like vehicles?

Examples of permitted activity: Registration fees for fifth wheel trailers; maintenance of recreation areas, if funds from a levy permitted under this section.

Example of impermissible activities under this section: Use of funds derived from automobile registration for maintenance of recreation areas.

**Step 7** Art. IX, § 3a(2)(d) – Levies under subsection (1)(b) on “vehicles used or held out for use for commercial purposes.” If funds are used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation, did the funds arise from levies under Article IX, Section 3a(1)(b) on vehicles used or held out for use for commercial purposes?

Example of permitted activity: weighmaster activities.

Example of impermissible activities under this section: Enforcement of commercial motor vehicle safety regulations (this is permitted under Step 2 of the test, if the regulation is

directed at the certification of the carrier to use the highways and not at civil penalties for violations).

**A Final Note**

Finally, as you know, this was a monumental task, and a complicated one. The analysis and discussion in this letter must be read in their entirety. This is particularly important with respect to the examples given under the test for application of Article IX, Section 3a. The most obvious example concerns repayment of bond obligations, which is identified as an impermissible activity under several steps of the test. It is, however, a permitted use of Highway Funds under Step 5 of the test. A person focusing on a single step of the test could miss this crucial point, and that is true of other examples as well. Accordingly, please advise anyone who is given a copy of this letter of this potential for misunderstanding if any portions of the letter are taken out of context.

Sincerely,

Keith L. Kutler  
Attorney-in-Charge  
Government Services Section

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Enclosure

c: Hardy Myers, DOJ  
Pete Shepherd, DOJ  
Don Arnold, DOJ  
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