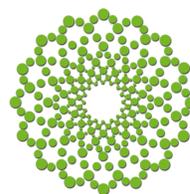


# BUILDING BRIDGES TO OREGON'S TRANSPORTATION FUTURE

A COMPREHENSIVE GUIDE TO RAISING AND SPENDING  
HIGHWAY REVENUES UNDER THE OREGON CONSTITUTION

AMY SCHLUSSER, CARRA SAHLER,  
& RACHEL PEMBERTON

JULY 2022



GREEN ENERGY  
INSTITUTE

AT LEWIS & CLARK LAW SCHOOL

## **Building Bridges to Oregon's Transportation Future: A Comprehensive Guide to Raising and Spending Highway Revenues Under the Oregon Constitution**

**Amy Schlusser, Carra Sahler, and Rachel Pemberton**  
*The Green Energy Institute at Lewis & Clark Law School*  
**July 2022**

### **Oregon Constitution Article IX, Section 3a**

- (1) Except as provided in subsection (2) of this section, revenue from the following 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:
- (a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and
  - (b) Any tax or excise levied on the ownership, operation or use of motor vehicles.
- (2) Revenues described in subsection (1) of this section:
- (a) May also be used for the cost of administration and any refunds or credits authorized by law.
  - (b) May also be used for the retirement of bonds for which such revenues have been pledged.
  - (c) If from levies under paragraph (b) of subsection (1) of this section on campers, motor homes, travel trailers, snowmobiles, or like vehicles, may also be used for the acquisition, development, maintenance or care of parks or recreation areas.
  - (d) If from levies under paragraph (b) of subsection (1) of this section on vehicles used or held out for use for commercial purposes, may also be used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation.
- (3) Revenues described in subsection (1) of this section that are generated by taxes or excises imposed by the state shall be generated in a manner that ensures that the share of revenues paid for the use of light vehicles, including cars, and the share of revenues paid for the use of heavy vehicles, including trucks, is fair and proportionate to the costs incurred for the highway system because of each class of vehicle. The Legislative Assembly shall provide for a biennial review and, if necessary, adjustment, of revenue sources to ensure fairness and proportionality.

## Table of Contents

<b>I. Introduction and Overview of Article IX, Section 3a .....</b>	<b>3</b>
A. Applicable HTF Revenues .....	4
B. Permissible Uses of HTF Revenues .....	5
C. Evaluating the Constitutionality of Public Revenue and Expenditure Policies under Article IX, Section 3a .....	5
D. Terminology Used in this Guide .....	8
<b>II. History and Purpose of Article IX, Section 3a .....</b>	<b>9</b>
A. 1942 Amendments .....	9
B. 1980 Amendments .....	9
C. Unsuccessful Amendment Attempts to Fund Mass Transit .....	10
D. Current Status of State Highway Fund .....	10
<b>III. Revenues Subject to Article IX, Section 3a .....</b>	<b>11</b>
A. Taxes and Excises .....	11
B. Subsection 1(a) Revenues .....	13
C. Subsection 1(b) Revenues .....	13
1. Vehicle Ownership .....	14
2. Vehicle Operation and Use .....	14
D. Revenues Not Subject to Article IX, Section 3a .....	15
E. Proportionality Requirement .....	16
F. Summary of Revenues Reserved and Not Reserved for Highway Use .....	16
<b>IV. Permissible Uses of HTF Revenues .....</b>	<b>17</b>
A. Primary Permissible Uses .....	17
1. Projects Within Public Highway Rights-of-Way .....	18
2. Projects that Facilitate the Operation and Use of Public Highways .....	18
3. Uncertainties Relating to Public Transit and Transportation Demand Management .....	20
B. Secondary Permissible Uses .....	21
1. Administrative Expenses .....	21
2. Refunds or Credits Authorized by Law .....	21
3. Retirement of Bonds .....	22
4. Recreational Vehicles and Uses .....	22
5. Commercial Vehicles and Uses .....	22
C. Summary of Permissible and Impermissible Uses of HTF Revenues .....	23
<b>V. Legal Analysis .....</b>	<b>23</b>
A. Judicial Review Methodology .....	23
1. Step One: Review the Text .....	24
2. Step Two: Examine the Context .....	24
3. Step Three: Consider an Amendment's History .....	24
B. Article IX, Section 3a Case Law .....	25
1. <i>Rogers vs. Lane County</i> .....	25
2. <i>Automobile Club of Oregon v. State</i> .....	26
3. <i>Oregon Telecommunications Association v. Oregon Department of Transportation</i> .....	28
4. <i>AAA Oregon/Idaho Auto Source v. State of Oregon</i> .....	30
5. <i>Western States Petroleum Association v. Oregon Environmental Quality Commission</i> .....	31
<b>VI. Conclusion .....</b>	<b>33</b>

## I. INTRODUCTION TO OREGON'S CONSTITUTIONAL RESTRICTIONS ON TRANSPORTATION FUNDING

The Oregon Constitution imposes limits on how the state and local governments may spend motor vehicle-related revenues. Revenues collected through taxes or fees on vehicle fuels or on the ownership, operation, or use of motor vehicles must be used for specific activities and purposes relating to the construction, upkeep, and use of public highways, roads, and roadside rest areas. These constitutional restrictions have led Oregon to overly rely on gas tax revenues to fund highway maintenance, and have constrained the state's ability to modernize its transportation system and achieve its transportation electrification goals. It has become increasingly clear that Oregon's system for generating and spending transportation revenue is unsustainable and lacks the flexibility necessary to meet future needs. The state must act quickly to revise its highway funding framework, and absent a constitutional amendment, it must do so in a manner that is consistent with the Oregon Constitution. This Guide aims to support this effort by providing a comprehensive overview of Oregon's constitutional restrictions on raising and spending highway-related revenues, and identifying potential opportunities to modernize the state's transportation funding framework within the confines of existing state law.

Oregon is not alone in imposing constitutional restrictions on the use of highway funds. As highway and road networks were expanded across the country in the 1930s, states established new taxes on motor vehicle fuels and vehicle registration and licensing fees to fund highway construction and maintenance. These new taxes and fees were guided by the underlying principle that public highway and road systems should be funded by those who use them. To ensure that highway-related taxes and fees were not diverted for other state uses, many states voted to amend their state constitutions to establish restrictions on the use of highway-related revenues. Oregon voters adopted a constitutional amendment to protect highway-related revenues in 1942, and later voted to revise the amendment in 1980. Oregon's restrictions on highway-related expenditures are currently established through article IX, section 3a of the Oregon Constitution (art. IX, sec. 3a).

At the state level, revenues subject to art. IX, sec. 3a are deposited into the State Highway Fund (commonly referred to as the highway trust fund (HTF)).<sup>1</sup> (For the sake of simplicity, this Guide refers to all revenues subject to art. IX, sec. 3a as "HTF revenues.") HTF revenues are apportioned between the state government and Oregon cities and counties, with approximately 40% of revenues distributed to local governments, and the state retaining the remaining 60%.<sup>2</sup> City and county governments may only use their HTF allocations for the purposes listed in art. IX, sec. 3a.<sup>3</sup> The Oregon Department of Transportation receives the state's allocation of HTF revenues, which the agency spends on highway construction and maintenance projects and associated administrative costs. Local governments may also impose their own taxes and fees on

---

<sup>1</sup> OR. REV. STAT. § 366.505. See Or. Dept. of Transportation, *Transportation Funding in Oregon*,

<sup>2</sup> The specific revenue streams eligible for apportionment and the ratio in which these revenues are split between the state and local governments are dictated by statute. OR. REV. STAT. § 366.739.

<sup>3</sup> OR. REV. STAT. §§ 366.774, 366.790.

motor vehicle fuels and local roadway usage, but these revenues must also be used for the purposes listed in art. IX, sec. 3a.

To be subject to the use restrictions outlined in the Oregon Constitution, a public levy (such as a tax, excise, or fee) must fall within one of two revenue categories listed in art. IX, sec. 3a: taxes on motor vehicle fuels, or taxes or excises on motor vehicle ownership, operation, or use. If a levy falls into one of these categories, revenues collected through the levy may only be used for one or more of the purposes listed in the constitution.

Art. IX, sec. 3a does not define the key terminology it uses to classify the types of revenues that must be reserved for highway uses, or the permissible highway-related uses of such revenues. It can therefore be difficult to determine whether certain levies are HTF revenues, or if HTF revenues are being used for one of the purposes authorized under the constitution. Public levies or expenditures may be subject to legal challenge if they conflict with the restrictions in art. IX, sec. 3a. Oregon courts are tasked with determining whether levies or expenditures are consistent with the constitutional requirements. To do so, courts must interpret the scope and meaning of art. IX, sec. 3a's terms in accordance with the intent of the voters who approved the constitutional amendment. The Oregon Supreme Court has issued several rulings on the application of art. IX, sec. 3a and the constitutionality of various government levies and funding programs. These cases provide some additional clarity on the types of revenues that must be directed into the HTF, and the types of programs and expenditures that may be funded by HTF revenues.

The following sections provide a brief overview of the scope and applicability of art. IX, sec. 3a. Section A describes the types of revenues reserved for highway use under the constitution, and section B describes the permissible uses for these revenues. Section C outlines the steps for evaluating whether revenues are designated HTF revenues under art. IX, sec. 3a and if so, whether they are being devoted to a permissible use or purpose under the constitution. Section D provides some notes on the terminology used in this Guide.

### **A. Applicable HTF Revenues**

Art. IX, sec. 3a applies to two categories of public revenue that must be deposited into the HTF or otherwise used for permissible highway-related purposes. The first category includes any taxes imposed on motor vehicle fuels (or other activities involving motor vehicle fuels, such as the storage, sale, distribution, or use of gasoline or diesel fuels).<sup>4</sup> The second category includes any taxes or excises related to vehicle ownership, operation, or use.<sup>5</sup> This category includes revenues collected from vehicle titling and registration fees, drivers' license fees, road user fees, and other fees drivers are required to pay to operate vehicles in Oregon. Part III of this Guide describes the specific levies that are and are not designated HTF revenues in Oregon.

---

<sup>4</sup> OR. CONST. art. IX, § 3a(1)(a). Art. IX. Sec. 3a(1)(a) applies to "Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles."

<sup>5</sup> Art. IX. Sec. 3a(1)(b) applies to "Any tax or excise levied on the ownership, operation, or use of motor vehicles."

## B. Permissible Uses of HTF Revenues

Art. IX, sec. 3a(1) lists the primary permissible uses of HTF revenues. Under subsection (1), HTF revenues “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.”<sup>6</sup> These permissible uses fall into two general categories: (1) construction, maintenance, and improvement projects; and (2) projects relating to the operation and use of public roads and rest areas. To qualify as a permissible HTF expenditure, the funded project or activity must have a direct connection to a public road or highway, rest area, and/or an adjacent right-of-way.<sup>7</sup> However, projects do not have to physically impact a roadway itself; for example, HTF revenues may be used to build and maintain bike and footpaths within a highway right-of-way.<sup>8</sup> Part IV.A of this Guide describes these primary permissible uses in greater detail.

In addition to the primary permissible uses listed in subsection (1), art. IX, sec. 3a(2) lists some secondary permissible uses of HTF revenues. Under subsection (2), the HTF can be used for administrative costs associated with validly funded projects, legally authorized refunds or credits, and the retirement of highway-associated bonds.<sup>9</sup> Revenues collected from campers, snowmobiles, and other recreational vehicles can be used to support the purchase, development, and upkeep of parks or recreational areas.<sup>10</sup> And revenues collected from commercial vehicles can be used to enforce commercial vehicle regulations, such as size and weight restrictions.<sup>11</sup> Part IV.B of this Guide describes these secondary permissible uses in greater detail.

## C. Evaluating the Constitutionality of Public Revenue and Expenditure Policies under Article IX, Section 3a

The following analytical framework can help determine whether a policy for collecting or spending revenue may be subject to the highway use restrictions established through art. IX, sec. 3a.

---

<sup>6</sup> “Except as provided in subsection (2) of this section, revenue from the following 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.” OR. CONST. art. IX, § 3a(1).

<sup>7</sup> See Or. Telecom. Ass’n v. Oregon Dept. of Transp., 341 Or. 418 (2006).

<sup>8</sup> In fact, City and County governments are legally obligated to devote a portion of their state highway fund allocations to building and maintaining bike and foot paths. OR. REV. STAT. § 366.514.

<sup>9</sup> Art. IX, sec. 3a(2) states that HTF revenues “(a) May also be used for the cost of administration and any refunds or credits authorized by law,” and “(b) May also be used for the retirement of bonds for which such revenues have been pledged.” OR. CONST. art. IX, § 3a(2). Expenditures relating to the “cost of administration” apply to costs related to the administration of permissible highway-related projects. See Or. Op. Att’y Gen. OP-5647, 2 (1984). Similarly, the “refunds and credits” exception also appears to be limited to refunds and credits of HTF revenues.

<sup>10</sup> “If from levies under paragraph (b) of subsection (1) of this section on campers, motor homes, travel trailers, snowmobiles, or like vehicles, may also be used for the acquisition, development, maintenance or care of parks or recreation areas.” OR. CONST. art. IX, § 3a(2)(c).

<sup>11</sup> “If from levies under paragraph (b) of subsection (1) of this section on vehicles used or held out for use for commercial purposes, may also be used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation.” OR. CONST. art. IX, § 3a(2)(d).

***Step One: Is the revenue subject to art. IX, sec. 3a?***

The constitution requires that certain types of revenues must be reserved for highway purposes. Under step one of the HTF analysis, determine how the revenue is collected. As a general rule, taxes and fees that are imposed on vehicle owners or operators, rather than the general public, as a precondition to operating a vehicle in the state, will likely be HTF revenues under art. IX, sec. 3a. The following analytical framework can help determine if revenue collected through a specific tax or fee may be subject to art. IX, sec. 3a:

- Does the revenue meet the criteria listed in art. IX, sec. 3a(1)(a)?
  - Is it a tax on the sale or use of motor vehicle fuel, such as a per-gallon tax on gasoline?
  - Is it a tax on the storage, withdrawal, distribution, importation, or receipt of motor vehicle fuel, such as a tax levied on gasoline storage tanks based on the quantity of fuel stored in the tanks?
- Does the revenue meet the criteria listed in art. IX, sec. 3a(1)(b)?
  - Is it a tax or excise (including fees) on motor vehicle ownership, such as a vehicle titling or registration fee?
  - Is it a tax or excise on motor vehicle operation or use, such as a driver's license fee?

If the answer to any of these questions is “yes,” the revenue is likely subject to the restrictions listed in the constitution. Additionally, Oregon courts have held that certain taxes and fees are subject to art. IX, sec. 3a, while other taxes and fees do not generate highway revenues subject to the constitutional restrictions.

For example, the following revenues are reserved for highway use under art. IX, sec. 3a:

- Motor vehicle fuel taxes (*i.e.*, taxes on fuel used in on-road vehicles)
- Taxes on the storage, transfer, importation, or distribution of vehicle fuels
- Vehicle title and registration fees
- Driver's license fees
- Road user fees
- Other fees imposed as a condition of on-road vehicle registration or licensing

The following revenues are *not* reserved for highway use:

- *Examples of Non-HTF Revenues:*
  - Privilege taxes on motor vehicle dealers
  - Taxes on motor vehicle sales
  - Taxes and fees on products or services that support or are incidental to motor vehicle operations (such as tires or oil changes)
  - Business license fees imposed on motor vehicle-related entities (such as auto mechanics)
  - Taxes on fuels used in non-road vehicles

***Step Two: If the revenue is HTF revenue, will it be used for one of the purposes listed in art. IX, sec. 3a?***

HTF revenues may only be used for the primary or secondary purposes listed in the Oregon Constitution. The following analytical framework can help determine if HTF revenues are being used for a permissible highway purpose:

- Are HTF revenues used for one or more of the primary highway-related purposes listed in the constitution?
  - Are the revenues used for the construction, reconstruction, improvement, repair, or maintenance of a public highway, road, street, bridge, rest area, or roadway-adjacent right-of-way?
  - Are the revenues used to facilitate the operation or use of a public highway, road, street, bridge, rest area, or roadway-adjacent right-of-way, and is there a direct connection between the expenditure and the highway itself?
- Are the HTF revenues used for one or more of the secondary purposes listed in the constitution?
  - Are the revenues used for government expenses incurred through the administration of a highway project?
  - Are the revenues used to pay any legally authorized refunds or credits?
  - Are the revenues used for the retirement of bonds?
  - Are the revenues used to purchase, develop, maintain, or care for parks or recreational areas, and if so, were the revenues collected exclusively from levies on recreational vehicles?
  - Are the revenues used to enforce commercial vehicle regulations and if so, were the revenues collected exclusively from commercial vehicles or vehicles that were designed or intended for commercial use?

If any of these questions are answered in the affirmative, the expenditure likely represents a *permissible* use of HTF revenues.

Some uses of HTF revenues are clearly permissible under art. IX, sec. 3a. For example, HTF revenues may be used for highway construction and maintenance projects. However, there is still uncertainty surrounding the use of HTF revenues for certain types of projects, such as those that facilitate the “operation or use” of public roads and highways.

According to Oregon law and the case law interpreting the permissible uses of HTF revenue, the following uses of HTF revenues are permitted under the constitution:

- Any projects involving the construction, reconstruction, improvement, repair, or maintenance of a public highway or rest area, including projects within the right-of-way of a public highway or rest area.
- Installation and maintenance of biking and walking paths within the public right-of-way of a highway, road, street, bridge, or rest area.
- Transportation demand management projects within a highway, such as the installation of designated high-occupancy vehicle (HOV), bus-only, or bike lanes.

In contrast, the following uses of HTF revenues are likely prohibited under the constitution:

- Projects outside of a highway or rest area right-of-way that do not directly facilitate motor vehicle travel and primarily benefit highway users rather than the general public or some other group or entity;
- Projects that primarily benefit gas stations rather than highway users.
- Construction of airport parking lots and walkways.
- Public transit projects that are not located within a highway right-of-way.

#### D. Terminology Used in this Guide

While this Guide strives to use the ordinary meaning of terms as much as possible, it employs certain words as umbrella terms that refer to broader categories of infrastructure. It also applies definitions or interpretations for certain terms that reflect their usage in Oregon case law and statutory law.

- **“Highway”** is used in this report as an umbrella term for public highways, roads, streets, bridges, and roadside rest areas, including adjacent rights-of-way. Under the Oregon Motor Vehicle Code, “highway” is defined as “every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right.”<sup>12</sup>
- **“HTF revenues”** or **“highway funds”** refer to any public revenues that must be used exclusively for the purposes outlined in art. IX, sec. 3a.
- **“Levy”** is used as an umbrella term for revenue collection mechanisms, such as taxes, excises, fees, and assessments.
- **“Motor vehicle”** refers to an on-road vehicle designed for highway use, such as a passenger car, truck, or bus.
- **“Non-road vehicle”** refers to a vehicle or engine that is designed for non-road or off-road use, such as off-road construction equipment.
- **“Right-of-way”** refers to the public land upon which a road, highway, or rest area is built, and may extend slightly beyond the surface of a road or highway itself.
- **“Roadside rest area”** refers to “an area established and maintained within or adjacent to a state highway right of way by or under public supervision or control for the convenience of the traveling public, and includes safety rest areas, scenic overlooks or similar roadside areas.”<sup>13</sup>

Part II of this Guide describes the relevant history and underlying purpose of art. IX, sec. 3a. Part III describes the types of revenues reserved for highway use under the Oregon Constitution. Part IV explains how these highway-related revenues may permissibly be used under art. IX, sec. 3a. Part V presents the established legal methodology for interpreting the scope and meaning of constitutional amendments in Oregon, and summarizes the key case law interpreting art. IX, sec. 3a.

<sup>12</sup> OR. REV. STAT. §§ 366.005(6), 801.305(1).

<sup>13</sup> OR. REV. STAT. § 377.710(27).

## II. HISTORY AND PURPOSE OF ARTICLE IX, SECTION 3A

Oregon's constitutional restrictions on the use of highway-related revenues were added to the constitution through successful ballot measures that were referred to voters by the Oregon legislature in 1942 and 1980. The underlying purpose of these constitutional amendments was to ensure that public revenues collected solely from vehicle users—such as fuel taxes and vehicle registration fees—would be used for the construction and upkeep of Oregon's roads and highway infrastructure. Efforts to amend the constitution to allow highway revenues to be used for mass transit were defeated by voters in 1974, 1976, and 1990. The following sections summarize the relevant history and current status of art. IX, sec. 3a.

### A. 1942 Amendments

The relevant provisions in art. IX, sec. 3a were first added to the Oregon Constitution in 1942. The amendment resulted from a ballot measure referred to voters by the state legislature, which asked voters: "Shall the Constitution be amended to guarantee that the gasoline, diesel fuel, ton mile and other taxes paid only by motor vehicle users be used for highways, roads and streets, and for the other closely related purposes now provided by law?"<sup>14</sup> Voters approved the amendment, ensuring that taxes and excises paid exclusively by motor vehicle users would be "devoted solely to highway purposes."<sup>15</sup>

The 1942 amendment was originally added to the Oregon Constitution as article IX, section 3. In addition to containing the operative provisions now contained in art. IX, sec. 3a, the original art. IX, sec. 3 allowed highway funds to be used for policing public roads and highways, and for acquiring, developing, and maintaining parks, recreational areas, and scenic and historic places.<sup>16</sup>

### B. 1980 Amendments

In 1980, the state legislature referred an initiative to voters to repeal art. IX, sec. 3 and replace it with the current art. IX, sec. 3a.<sup>17</sup> Voters approved the amendment, imposing additional restrictions on the use of HTF revenues. The newly adopted art. IX, sec. 3a was nearly identical to the original art. IX, sec. 3, with one key difference: the provisions authorizing the use of highway funds for policing and parks were deleted. The changes reflected voters' intent to prevent HTF revenues from being diverted for non-highway purposes.<sup>18</sup> According to the Oregon Supreme Court, the adoption of art. IX, sec. 3a "made it clear and unambiguous that the

---

<sup>14</sup> State of Oregon, 1942, *Official Voter's Pamphlet for the Regular General Election*, Nov. 3, 1942, at 11. Photocopied excerpts from the original voter pamphlets for Oregon's 1942 general election and 1980 primary election were included in a supplemental appendix to the state's answering brief in *AAA v. State*. Respondent's Answering Brief, *AAA Oregon/Idaho Auto Source v. State of Or.*, 363 Or. 411 (2018) (No. SC S065394), Supp. App.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 3.

<sup>17</sup> See *AAA Oregon/Idaho Auto Source v. State of Oregon*, 363 Or. 411, 417 (2018).

<sup>18</sup> *Id.* at 422.

people of Oregon wanted monies derived from taxes and fees on motor vehicles and motor vehicle fuels to be used only for highway purposes.”<sup>19</sup>

### C. Unsuccessful Amendment Attempts to Fund Mass Transit

In addition to the successful initiatives in 1942 and 1980, the Oregon legislature referred three ballot measures to voters aiming to amend the constitution to allow HTF revenues to be used for mass transit. In 1974, 65% of voters voted against amending the constitution to allow state highway funds to be used for mass transit.<sup>20</sup> In 1976, 75% voted against amending the constitution to allow an Oregon vehicle tax to be used for mass transit.<sup>21</sup> And in 1990, 52% voted against amending the constitution to allow a local vehicle tax to be used for mass transit.<sup>22</sup>

### D. Current Status of State Highway Fund

Oregon's current structure for securing highway funding is unsustainable. According to reporting by *The Oregonian*, the HTF is expected to become insolvent by 2024, and unless substantial changes are made, the HTF is projected to have a \$700 million shortfall by 2027.<sup>23</sup> The state's existing highway funding framework and dependency on revenues from gasoline and diesel taxes also conflict with the state's decarbonization objectives.

Under the state's existing funding structure, 40% of HTF revenue is generated from gas taxes.<sup>24</sup> When art. IX, sec. 3 was established in 1942, it made sense to rely on gas tax revenues to pay for highway upkeep, because there was a fairly direct correlation between the taxes a driver paid and their contributions to the wear and tear of public roadways. However, increases in vehicle fuel economies and the transition to electric vehicles has resulted in a reduction in gas tax revenue per vehicle mile traveled.

To address these revenue shortfalls, in 2015 Oregon established a voluntary road user fee that is levied on annual vehicle miles traveled rather than on individual gallons of gasoline or diesel consumed.<sup>25</sup> A bill was introduced in the 2021 legislative session that would make the program mandatory for vehicles with fuel economy ratings of 30 miles per gallon or more, but it did not make it out of the Joint Committee on Ways and Means.<sup>26</sup> However, while a technology-neutral road user fee would provide a more sustainable source of revenue for the HTF, Oregon's current user fee structure is not technology-neutral. Instead, it effectively taxes electric vehicles (EVs) at a higher rate than inefficient gasoline-fueled vehicles. From a highway-funding standpoint, there is no rational basis for imposing a higher tax rate on EVs than inefficient gas or diesel vehicles, because vehicle weight (rather than fuel source) is the primary factor influencing road surface

---

<sup>19</sup> *Rogers v. Lane County*, 307 Or. 534, 541 (1988).

<sup>20</sup> Or. Measure 2, May 28, 1974.

<sup>21</sup> Or. Measure 4, May 25, 1976.

<sup>22</sup> Or. Measure 1, May 15, 1990.

<sup>23</sup> Andrew Theen, *Oregon's Highway Trust Fund Faced "Unsustainable" Financial Crisis Even Before COVID-19 Hit*, OREGONLIVE.COM (Apr. 30, 2020), <https://www.oregonlive.com/commuting/2020/04/oregons-highway-trust-fund-faced-unsustainable-financial-crisis-even-before-covid-19-hit.html>.

<sup>24</sup> *Id.*

<sup>25</sup> OR. REV. STAT. §§ 319.883–946.

<sup>26</sup> H.B. 2342, 81st Leg. Assem., Reg. Sess. (Or. 2021).

impacts. Moreover, this imbalanced tax structure impacts the affordability of EVs, particularly for lower-income residents, and therefore may deter EV ownership, which directly conflicts with Oregon's EV deployment and environmental justice goals.

As the transportation system becomes increasingly electrified over the coming years and decades, Oregon will need to revise its highway funding and revenue structures to make the HTF more sustainable. At the same time, the state will need to establish other sources of funding to reduce vehicle miles traveled (particularly of gas and diesel vehicles), increase access to public transit, and support the decarbonization of the entire transportation system. Art. IX sec. 3a may present a significant barrier to securing revenue for these initiatives.

### III. REVENUES SUBJECT TO ARTICLE IX, SECTION 3A

Art. IX, sec. 3a applies to two relatively broad categories of public revenues. The first category includes revenues related to motor vehicle fuels, which are covered under subsection (1)(a) of art. IX, sec. 3a (“(1)(a) revenues”). The second category includes revenues related to motor vehicle ownership, operation, or use, which are covered under subsection (1)(b) of art. IX, sec. 3a (“(1)(b) revenues”). Art. IX, sec. 3a expressly applies to revenues collected through taxes and excises, but the Oregon Supreme Court has interpreted the terms “tax” and “excise” broadly in the HTF context. Section A describes the distinctions between various revenue collection mechanisms, including taxes, excises, fees, and assessments. Section B describes the HTF revenues designated under art. IX, sec. 3a(1)(a), and section C describes the HTF revenues designated under art. IX, sec. 3a(1)(b). Section D describes some of the specific revenues that courts have held are not reserved for highway use under art. IX, sec. 3a. Section E briefly describes art. IX, sec. 3a's proportionality requirement, which aims to ensure that road users pay their fair share for the impacts they cause to public roads and highways, and prevents the state from imposing disproportionate taxes or fees on any vehicle class.

#### A. Taxes & Excises

Art. IX, sec. 3a expressly applies to revenues collected through two kinds of levies: taxes and excises. Subsection (1)(a) specifically applies to “any *tax*” levied on activities involving motor vehicle fuels, while subsection (1)(b) applies to “any *tax or excise*” levied on vehicle ownership, operation, or use. While the terminology used in subsections (1)(a) and (1)(b) implies that the HTF should only include revenues collected through specific types of revenue mechanisms (*i.e.*, taxes and excises), courts have interpreted the terms “tax” and “excise” very broadly in the context of art. IX, sec. 3a. Rather than focus on the distinctions between various revenue mechanisms, such as taxes, excises, fees, and assessments, courts have held that a levy's function or purpose determines whether the associated revenues must be directed to the HTF.<sup>27</sup> According to the Oregon Supreme Court, in the context of art. IX, sec. 3a, “the character of a levy is determined by its function, not by the label the legislature attaches to it.”<sup>28</sup> In other words, a “fee” or “assessment” may be reserved for the HTF if the fee or assessment functionally operates

---

<sup>27</sup> *Automobile Club of Oregon v. State*, 314 Or. 479, 493 (1992).

<sup>28</sup> *Id.*

as a tax or excise described in art. IX, sec. 3a. Put another way, the government may not avoid the constitutional restrictions simply by giving a levy some other label. Despite the broad judicial interpretation of the terms “tax” and “excise” in the context of HTF revenues, there are distinctions between different types of levies that could potentially be relevant to future HTF-related disputes and policy discussions. The distinctions and overlap between taxes, excises, fees, and assessments are briefly described below.

**Taxes:** For the purposes of art. IX, sec. 3a, a “tax” is a levy or contribution imposed on individuals or businesses by the government “for the use and purpose of the state.”<sup>29</sup> Governments may use tax revenues for a variety of purposes; for example, governments levy taxes on residents’ income and property to fund services that are available to the general public, such as police and public schools. Because the term “tax” is defined broadly to include essentially any money collected from the public for government use, revenues collected through a variety of mechanisms (*e.g.*, fees, tolls) could potentially be classified as taxes under art. IX, sec. 3a.

**Excises:** An excise is a specific kind of tax imposed on individuals or businesses in exchange for the enjoyment of a privilege, such as the privilege of engaging in a specific occupation or performing a specific act.<sup>30</sup> A tax or fee on the ownership, operation, or use of a motor vehicle, such as a driver’s license fee or vehicle registration fee, is an excise because it is a tax on the enjoyment of the privilege of owning, operating, or using a vehicle in the state.<sup>31</sup>

**Fees:** A fee is a charge imposed on a person who directly benefits from a government service that they have received or for which they have applied.<sup>32</sup> For example, vehicle registration fees benefit vehicle owners because the revenues are used to build and maintain public highways. In the context of art. IX, sec. 3a, a fee may also be both an excise and a tax if it is imposed in exchange for enjoying a privilege.

**Assessments:** An assessment is a type of fee that is specifically “imposed on owners of property to finance improvements or services” that directly benefit that property.<sup>33</sup> In some contexts, an assessment may not meet the criteria of a “tax” because the associated revenues are used for the benefit of the entity burdened by the assessment, rather than the government or general public.<sup>34</sup> However, the Oregon Supreme Court has declined to make that distinction in the context of art. IX, sec. 3a, and instead held that an assessment is an HTF revenue if it meets the criteria listed in that section of the constitution, regardless of who benefits from the associated revenues.<sup>35</sup>

---

<sup>29</sup> *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or. 437, 446 (2015). The term “tax” is not defined in art. IX, sec. 3a, so courts apply the ordinary meaning of the term. The Oregon Supreme Court has used the Black’s Law Dictionary definition, which defines tax as is “any contribution imposed by government on individuals, for the use and service of the state.” *Auto. Club*, 314 Or. at 485.

<sup>30</sup> *See Auto. Club* at 492.

<sup>31</sup> *See id.*

<sup>32</sup> *Rogue Valley* at 447.

<sup>33</sup> *Auto. Club* at 485–86.

<sup>34</sup> For example, Oregon courts have held that certain assessments are not taxes for purposes of the uniformity clause of the Oregon Constitution. *See id.* at 486.

<sup>35</sup> *Id.* at 488–89.

## B. Subsection 1(a) Revenues

Art. IX, sec. 3a(1)(a) mandates that all revenues collected from vehicle fuel taxes must be used for highway-related purposes. Under this provision, “Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles” is an HTF revenue.<sup>36</sup> In other words, subsection (1)(a) applies to all taxes that relate to the storage, transfer, sale, or consumption of motor vehicle fuels.<sup>37</sup>

Taxes on gasoline and diesel fuels are the most common source of subsection (1)(a) HTF revenues. The Oregon Supreme Court also held that an assessment levied on gas stations’ underground storage tanks that was measured by the quantity of motor vehicle fuel injected into the tanks constituted a subsection (1)(a) HTF revenue.<sup>38</sup> The fact that the levy was called an “assessment” did not dissuade the court from holding that it was a tax on motor vehicle fuels under subsection (1)(a) because the assessment was measured by the receipt of motor vehicle fuels into storage tanks.<sup>39</sup>

Given the capacious language used in subsection (1)(a), any tax levied on motor vehicle fuels, regardless of where the tax is applied (*e.g.*, on fuel sales, purchases, storage, transfers, etc.), and regardless of what the tax is called (*e.g.*, a fee, assessment, duty, etc.) will likely constitute HTF revenue under subsection (1)(a). However, the provision expressly applies to fuels used in “motor” vehicles, which are vehicles designed for highway use, and therefore does not apply to taxes on fuels used exclusively by non-road or off-road vehicles. This dynamic is discussed in greater detail in section D below.

## C. Subsection 1(b) Revenues

Under art. IX, sec. 3a(1)(b), “Any tax or excise levied on the ownership, operation or use of motor vehicles” is HTF revenue. Art. IX, sec. 3a(1)(b) applies to both taxes and excises, and therefore covers an additional category of revenues (excises) than subsection (1)(a). (For the sake of simplicity, this subsection refers to both (1)(b) taxes and excises as *fees*.) Subsection (1)(b) applies to two general revenue sources: fees on motor vehicle ownership, and fees on vehicle operation or use.

Despite its applicability to both taxes and excises, subsection (1)(b) has a slightly narrower scope in regards to the types of fees it reserves for highway uses. While subsection (1)(a) applies to all taxes “levied on, with respect to, or measured by” motor vehicle fuels or actions involving motor vehicle fuels, subsection (1)(b) only applies to fees “levied *on*” vehicle ownership, operation, or use. This means that fees that are merely related to vehicle ownership or operation, but do not directly apply to ownership or operation, may not be subject to HTF use restrictions.

---

<sup>36</sup> OR. CONST. art. IX, § 3a(1)(a).

<sup>37</sup> *Id.*

<sup>38</sup> *Auto. Club* at 489.

<sup>39</sup> *Id.* at 488–89.

## 1. Vehicle Ownership

Art. IX, sec. 3a(1)(b) applies to fees levied on motor vehicle owners as a direct condition of their vehicle ownership. According to the Oregon Supreme Court, fees on motor vehicle ownership are only subject to subsection (1)(b) when the fees are based on the *status* of vehicle ownership itself, rather than based on an action a vehicle owner may take.<sup>40</sup> For example, vehicle title and registration fees are a mandatory condition of vehicle ownership in Oregon; individuals and corporations that own vehicles in Oregon are legally obligated to title and register their vehicles with the state.<sup>41</sup> Vehicle title and registration fees are therefore HTF revenues under subsection (1)(b).

In contrast, any fees levied on actions a vehicle owner might take, such as selling a vehicle to a new owner, are not subject to art. IX, sec. 3a(1)(b). The Oregon Supreme Court has held that subsection (1)(b) taxes levied on motor vehicle ownership are restricted to taxes “based on the fact of ownership itself.”<sup>42</sup> According to the court, taxes levied on motor vehicle sales or motor vehicle dealers are not HTF revenues.<sup>43</sup>

## 2. Vehicle Operation and Use

Art. IX, sec. 3a(1)(b) also applies to fees that are imposed by the state for the operation or use of motor vehicles on public highways.<sup>44</sup> For example, Oregon residents must pay driver's license fees before they can legally operate motor vehicles in the state, so these fees are HTF revenues under subsection (1)(b). Road user fees, such as Oregon's per-mile road usage charge and weight-mile taxes, are also directly connected to (and conditioned on) motor vehicle use, so these are HTF revenues as well.<sup>45</sup> In other words, fees that are only imposed on individuals that operate or use vehicles on public roads in Oregon and that are directly connected to vehicle operation or use are subject to art. IX, sec. 3a(1)(b).

While license fees and road user fees are fairly straightforward examples of HTF revenues given their direct correlation with vehicle operation and use, the Oregon Supreme Court has held that subsection (1)(b) applies to certain air pollution fees as well. In a 1992 decision, the court concluded that an emissions fee on passenger vehicles was an HTF revenue under art. IX, sec. 3a for two reasons.<sup>46</sup> First, the emissions fee was levied at the time of vehicle registration or renewal, and while the fee technically was not a *condition* of vehicle registration, the state could impose a civil penalty on vehicle owners who failed to pay the fee.<sup>47</sup> Second, according to the court, operating motor vehicles inevitably produces air pollution emissions, so imposing a fee on

---

<sup>40</sup> AAA Oregon/Idaho Auto Source v. State of Or., 363 Or. 411, 424 (2018).

<sup>41</sup> See OR. REV. STAT. § 803.300 (“A person commits the offense of failure to register a vehicle if the person owns a vehicle in this state and the person does not register the vehicle in this state.”).

<sup>42</sup> AAA at 421.

<sup>43</sup> Id. at 420.

<sup>44</sup> OR. CONST. art. IX, § 3a(1)(b).

<sup>45</sup> See AAA at 423–24.

<sup>46</sup> Auto. Club at 493.

<sup>47</sup> Id.

those emissions is the functional equivalent of taxing vehicle operation or use for the purposes of art. IX, sec. 3a.<sup>48</sup>

#### **D. Revenues Not Subject to Article IX, Section 3a**

While some uncertainty remains regarding the full reach of art. IX, sec. 3a's applicability for vehicle-related revenues, Oregon courts have clarified that certain types of revenues, such as sales taxes on motor vehicles, payments for low-carbon fuel credits, and fees on products and services that are incidental to motor vehicle use, are not subject to the constitution's HTF restrictions. Additionally, taxes on fuels used in non-road vehicles are not HTF revenues.

First, taxes on vehicle sales, including privilege taxes imposed on vehicle dealers, are not HTF revenues. In the 2018 *AAA v. Oregon* decision, the Oregon Supreme Court held that a privilege tax on licensed motor vehicle dealers (which taxed dealers "for the privilege of engaging in the business of selling taxable motor vehicles at retail," but effectively functioned like a sales tax on vehicle sellers) was not subject to art. IX, sec. 3a because the tax was not based on the status of motor vehicle ownership.<sup>49</sup> According to the court, subsection (1)(b)'s applicability to taxes on motor vehicle ownership does not extend to taxes levied on *sales* of motor vehicles, because sales or privilege taxes are imposed on actions taken by vehicle owners, rather than vehicle ownership itself.<sup>50</sup> The court also noted that while subsection (1)(a) expressly applies to sales of motor vehicle fuels, subsection (1)(b) does not reference vehicle sales, which implied that subsection (1)(b) was never intended to apply to sales taxes.<sup>51</sup>

Second, in 2019, the Oregon Court of Appeals held that payments for low carbon fuel credits under Oregon's Clean Fuels Program were not taxes on motor vehicle fuels under subsection (1)(a) because the payments were not made to or used by the state or any state entities, and therefore did not generate any tax revenues subject to art. IX, sec. 3a.<sup>52</sup> Instead, the payments were made in transactions between private parties, and the proceeds from credit sales remained in the private sector.<sup>53</sup>

Third, taxes and fees on products and industries that are incidental to motor vehicle ownership, operation, and use should not be subject to art. IX, sec. 3a's use restrictions. Despite its applicability to both taxes and excises, subsection (1)(b) has a slightly narrower scope in regards to the types of fees it reserves for highway uses. While subsection (1)(a) applies to all taxes "levied on, with respect to, or measured by" motor vehicle fuels or actions involving motor vehicle fuels, subsection (1)(b) only applies to fees "levied *on*" vehicle ownership, operation, or use. This means that fees that are merely related to vehicle ownership or operation, but do not directly apply to ownership or operation, should avoid the constitution's HTF use restrictions. For example, fees on products or services that support motor vehicle operations (such as tires or

---

<sup>48</sup> *Id.* at 493 (finding that air pollution emissions are "an inescapable incident of the operation or use of motor vehicles.")

<sup>49</sup> *AAA*, 363 Or. at 424–25.

<sup>50</sup> *Id.* at 419.

<sup>51</sup> *Id.* at 420–21.

<sup>52</sup> *Western States Petroleum Ass'n v. Or. Env'tl. Quality Com'n*, 296 Or. App. 298, 318–20 (2019).

<sup>53</sup> *Id.* at 319.

oil changes) or business license fees imposed on motor vehicle-related entities (such as auto mechanics) are not HTF revenues.<sup>54</sup>

Finally, taxes on fuels used exclusively in non-road vehicles arguably should not be subject to art. IX, sec. 3a's use restrictions, though no court has issued a definitive ruling on this issue. Any tax levied on motor vehicle fuels, regardless of where the tax is applied (*e.g.*, on fuel sales, purchases, storage, transfers, etc.), and regardless of what the tax is called (*e.g.*, a fee, assessment, duty, etc.) will likely constitute an HTF revenue under subsection (1)(a). However, the text and purpose of art. IX, sec. 3a indicate that taxes on non-road vehicle fuels should not be reserved for highway purposes. Art. IX, sec. 3a specifically applies to taxes on *motor* vehicle fuels, which are fuels used to power on-road vehicles designed to operate on public highways. This specification aligns with the voters' intent that the costs of building and maintaining public highways should be borne by those who use the public highways. In contrast, taxes on fuels used exclusively in non-road or off-road vehicles should not be subject to art. IX, sec. 3a's use restrictions because those vehicles do not operate on public highways. For example, a red dye tax on off-road diesel fuel would not be a source of HTF revenue.<sup>55</sup> Art. IX, sec. 3a(2)(c) further supports this conclusion, because it allows taxes and excises on non-road recreational vehicles, such as snowmobiles, to be used for certain non-highway purposes.<sup>56</sup> Under existing Oregon law, revenues from taxes on fuels used in on-road motor vehicles are reserved for highway purposes (*i.e.*, HTF revenues), but revenues from taxes on fuels used in certain non-road contexts are not reserved for highway uses. For example, tax revenues from fuel used in boats is used to fund state boater safety and marine navigation improvement programs.<sup>57</sup> Tax revenue from aviation fuel is similarly reserved for use by the Oregon Department of Aviation.<sup>58</sup>

### E. Proportionality Requirement

Art. IX, sec. 3a(3) states: "Revenues described in subsection (1) of this section that are generated by taxes or excises imposed by the state shall be generated in a manner that ensures that the share of revenues paid for the use of light vehicles, including cars, and the share of revenues paid for the use of heavy vehicles, including trucks, is fair and proportionate to the costs incurred for the highway system because of each class of vehicle." This provision generally means that taxes and excises imposed on light or heavy-duty vehicles should reflect the level of damage those vehicle classes cause to public roads and highways. For example, if heavy-duty trucks cause twice as much wear and tear to a public toll bridge than passenger vehicles cause, the bridge toll should be higher for heavy-duty vehicles. Unfortunately, the proportionality requirement constrains the state's authority to incentivize EV adoption through reduced titling and registration fees because

<sup>54</sup> See *AAA*, 363 Or. at 424; *Auto. Club*, 314 Or. at 490.

<sup>55</sup> In the United States, red dye is added to non-road diesel fuel to indicate that the fuel is exclusively intended for use in non-road vehicles and is not subject to highway taxes. In Oregon, diesel fuel used in non-road vehicles is not subject to the state's fuel taxes, including the motor vehicle dealer tax, use fuel tax, or weight-mile tax, all of which are HTF revenues. See Oregon Dept. of Transportation, *Compliance Guides: Introduction to Fuel Tax in Oregon*, <https://www.oregon.gov/odot/FTG/Pages/Compliance-Guides.aspx>.

<sup>56</sup> Art. IX, sec. 3a(2)(c) only applies to taxes and excises levied under subsection (1)(b), and does not extend to fuel taxes levied under subsection (1)(a), so taxes on non-road vehicle fuels are not subject to the recreational use restrictions listed in subsection (2)(c). OR. CONST. art. IX, § 3a(2)(c). Art. IX, sec. 3a(2)(c) is described in greater detail in section IV.B of this Guide.

<sup>57</sup> OR. REV. STAT. § 319.415(3).

<sup>58</sup> *Id.* § 319.417(2).

EVs and internal combustion engine vehicles generally cause similar levels of wear and tear to road surfaces and EVs do not pay motor vehicle fuel taxes.

## **F. Summary of Revenues that are Highway Funds and Revenues that are Not Reserved for Highway Use**

### ***Examples of HTF Revenues:***

- Motor vehicle fuel taxes (*i.e.*, taxes on fuel used in on-road vehicles)
- Taxes on the storage, transfer, importation, or distribution of vehicle fuels
- Vehicle title and registration fees
- Driver's license fees
- Road user fees
- Other fees imposed as a condition of on-road vehicle registration or licensing

### ***Examples of Non-HTF Revenues:***

- Privilege taxes on motor vehicle dealers
- Taxes on motor vehicle sales
- Taxes and fees on products or services that support or are incidental to motor vehicle operations (such as tires or oil changes)
- Business license fees imposed on motor vehicle-related entities (such as auto mechanics)
- Taxes on fuels used in non-road vehicles

## **IV. PERMISSIBLE USES OF HTF REVENUES**

If revenue meets the criteria listed in art. IX, sec. 3a, it may only be used for the purposes listed in the constitution. Art. IX, sec. 3a dictates that HTF revenues “shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas” in Oregon.<sup>59</sup> These types of highway-related expenditures represent the primary uses of HTF revenues permitted under the constitution. Art. IX, sec. 3a also allows HTF revenues to be used for specific secondary purposes as well, such as government expenses incurred during the administration of a permissible highway-related project. Section A describes the primary permissible uses of HTF revenues, and section B summarizes the secondary permissible uses.

### **A. Primary Highway-Related Uses of HTF Revenues**

Under art. IX, sec. 3a, HTF revenues may only be used for the “construction, reconstruction, improvement, repair, maintenance, operation or use of public highways, roads, streets, and roadside rest areas.” Permissible highway-related projects fall within two general categories: (1) physical projects that occur within the public right-of-way of a highway, road, or rest area and involve the construction, reconstruction, improvement, or repair of the highway, rest area, or

---

<sup>59</sup> OR. CONST. art. IX, § 3a.

right-of-way; and (2) projects that facilitate the operation or use of a public highway, rest area, or adjacent right-of-way.

### **1. Projects Within Public Highway Rights-of-Way**

HTF revenues may permissibly be used for a broad variety of projects that physically affect a public highway or occur within the right-of-way of a public highway. (In this Guide, “highway” is used as an umbrella term for all public streets, roads, freeways, interstates, bridges, and roadside rest areas that are designed for motor vehicle use.) Art. IX, sec. 3a allows the state and local governments to use HTF revenues for highway construction, reconstruction, repair, and maintenance projects that, by their nature, have a direct and physical connection to highway infrastructure. Art. IX, sec. 3a also allows HTF revenues to be used for the “improvement” of public highways, and Oregon courts have considered the scope of these permissible uses in several cases. According to the Oregon Supreme Court in *Oregon Telecom. Association v. ODOT*, the key requirement is that HTF-funded projects must have a direct connection with a highway or a highway right-of-way.<sup>60</sup> Because art. IX, sec. 3a reserves HTF revenues for construction, etc., “of public highways,” an HTF-funded improvement project does not have to directly facilitate motor vehicle traffic, so long as the project occurs within a highway right-of-way.<sup>61</sup>

This means that under most circumstances, HTF revenues may be used for any public project that physically involves a public highway or occurs within a highway right-of-way, regardless of whether the project supports motor vehicle travel on the highway, so long as the project results in the “improvement” of a highway, rest area, or right-of-way.<sup>62</sup> For example, the *Oregon Telecom* court held that HTF revenues could permissibly be used to pay the Oregon Department of Transportation’s administrative expenses associated with the relocation of utility infrastructure from beneath a highway right-of-way during a highway reconstruction project.<sup>63</sup> Oregon law also requires Oregon counties and cities to spend a portion of their HTF allocations to provide footpaths and bicycle trails within highway rights-of-way.<sup>64</sup>

### **2. Projects that Facilitate the Operation and Use of Public Highways**

Under the *Oregon Telecom* holding described in the previous section, HTF-funded projects involving highway construction, reconstruction, improvement, repair, or maintenance must occur within the right-of-way of a public road, highway, or rest area. In addition to these permissible uses, art. IX, sec. 3a also allows HTF revenues to be used for the “operation and use” of highways and roadside rest areas.<sup>65</sup> In a pair of cases decided prior to *Oregon Telecom*, the

---

<sup>60</sup> Oregon Telecommunications Ass’n v. Oregon Dept. of Transp., 341 Or. 418, 430 (2006).

<sup>61</sup> *Id.*

<sup>62</sup> To determine whether a project involves an “improvement,” courts will look at the ordinary meaning of the term. The court in *Oregon Telecom* applied the following definition of “improvement”: “the act or process of improving ... the enhancement or augmentation of value or quality ... a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.” *Id.* at 431.

<sup>63</sup> *Id.* at 432.

<sup>64</sup> OR. REV. STAT. § 366.514.

<sup>65</sup> OR. CONST. art. IX, § 3a.

Oregon Supreme Court indicated that under certain circumstances, HTF revenues may potentially be used for projects that are adjacent to public highways (but outside the highway right-of-way) that support the operation and use of the adjacent highway.<sup>66</sup> However, neither of these cases approved the use of HTF revenues for highway-adjacent projects, and *Oregon Telecom*'s holding that projects must occur within the right-of-way may preclude the use of HTF revenues for highway-adjacent projects moving forward.

The court addressed art. IX, sec. 3a's "operation and use" distinction in two cases that preceded *Oregon Telecom* by more than a decade. In 1989, *Rogers v. Lane County* established that HTF-funded projects involving the operation and use of public highways must be limited to projects involving the highways themselves or projects adjacent to a highway or rest area right-of-way "that primarily and directly facilitate motor vehicle travel."<sup>67</sup> In 1992, *Automobile Club v. State* expanded upon the *Rogers* test, clarifying that to qualify for HTF funding, highway users must be the primary beneficiaries of a right-of-way adjacent project.<sup>68</sup>

While both *Rogers* and *Automobile Club* indicated that HTF revenues may be directed to highway-adjacent projects under limited circumstances, the operation and use test established through those cases has proved difficult to meet. In *Rogers*, the court held that art. IX, sec. 3a did not permit HTF revenues to be used to construct an airport parking lot and an associated covered walkway, because the parking lot and walkway were constructed for the convenience of the airport, rather than facilitating motor vehicle travel on the adjacent roadway.<sup>69</sup> In *Automobile Club*, the court held that HTF revenues could not permissibly be used to help rural gas stations comply with federal storage tank regulations, because the program only tangentially helped facilitate motor vehicle travel (by preventing some rural gas stations from shutting down), and its primary beneficiaries were gas station owners rather than highway users.<sup>70</sup>

Following the decisions issued in *Rogers*, *Automobile Club*, and *Oregon Telecom*, there is some uncertainty around art. IX, sec. 3a's authorization to use HTF revenues for the "operation and use" of public highways. According to *Rogers* and *Automobile Club*, projects must "primarily and directly facilitate motor vehicle travel" to justify the use of HTF revenues for the operation and use of public highways. *Oregon Telecom* rejected this requirement, and held that HTF-funded projects do not have to facilitate motor vehicle travel so long as there is a connection between the expenditure of HTF funds and a public highway or adjacent right-of-way. However, the project at issue in *Oregon Telecom* involved the "improvement" of a public highway, rather than the operation and use of a public highway. It is unclear whether the *Oregon Telecom* holding would extend to projects facilitating the "operation and use" of a highway, or if the *Rogers*' test for motor vehicle travel still applies to projects that do not directly involve highway construction, reconstruction, improvement, repair, or maintenance.

---

<sup>66</sup> *Rogers v. Lane County*, 307 Or. 534 (1988); *Automobile Club of Oregon v. State*, 314 Or. 479 (1992).

<sup>67</sup> *Rogers* at 545.

<sup>68</sup> *Auto. Club*, 314 Or. at 490–91.

<sup>69</sup> *Rogers* at 545.

<sup>70</sup> *Auto. Club* at 490–91.

### 3. *Uncertainties Relating to Public Transit and Transportation Demand Management*

There is a significant degree of uncertainty around the permissibility of using HTF revenues for transportation projects that reduce traffic congestion by removing vehicles from public roadways. Reductions in traffic density and congestion provide clear benefits to the remaining road users, thereby facilitating motor vehicle travel on public highways. Similarly, installing public transportation infrastructure, such as light rail lines, within a highway right-of-way would presumably qualify as an “improvement” of the right-of-way. However, the Oregon courts have yet to issue a definitive ruling on whether these types of projects may be funded by HTF revenues.

*Automobile Club* was the primary case to consider the permissibility of these types of projects, and it ultimately held that art. IX, sec. 3a prohibited the state from directing HTF revenues into a Public Transportation Development Fund.<sup>71</sup> However, the court indicated that transportation demand management projects designed to reduce highway congestion and promote high-occupancy vehicle use could potentially satisfy the constitutional requirements if the projects facilitated motor vehicle travel and benefited highway users.<sup>72</sup>

The *Automobile Club* court justified its holding on the grounds that Oregon voters had rejected three separate initiatives to include public transportation as a permissible use under art. IX, sec. 3a. Because the state's Public Transportation Development Fund included funding for public transportation—an impermissible use of HTF revenues, based on the court's review of the measure's history—the court declined to review the permissibility of specific programs within the fund, including transportation demand management.<sup>73</sup>

While *Automobile Club* ruled that HTF revenues may not permissibly fund public transportation projects, the court reached this holding through the application of an outdated method of judicial review. Under the current methodology, a court must look to a measure's text to determine voter intent, and review any relevant case law interpreting the text at issue.<sup>74</sup> Courts may only review the measure's history as a secondary step if voter intent cannot be determined from the text or relevant case law.<sup>75</sup> The *Oregon Telecom* court noted that *Automobile Club* had applied an incorrect methodology; however, the court declined to suggest that the *Automobile Club* holding—or outcome—was incorrect.<sup>76</sup>

Despite the *Oregon Telecom* court's implicit support for *Automobile Club*'s holding that HTF revenues may not permissibly fund public transportation projects, it is very likely that a court applying the current methodology for judicial review would reach a different conclusion for public transportation projects located within a highway right-of-way.

---

<sup>71</sup> *Id.* at 494.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Oregon's current methodology for interpreting constitutional amendments is described in Part V.A of this Guide.

<sup>75</sup> *Or. Telecom*, 341 Or. at 426.

<sup>76</sup> *Id.* at 429.

## B. Secondary Permissible Uses

In addition to the primary highway purposes discussed above, art. IX, sec. 3a(2) lists several other secondary permissible uses for HTF revenues. Specifically, the government may use HTF revenues to cover administrative expenses, issue refunds or credits, and retire bonds. Art. IX, sec. 3a also allows revenues collected from recreational vehicles to fund parks and recreational areas, and revenues from commercial vehicles may be used to enforce and administer certain commercial vehicle regulations.

### 1. Administrative Expenses

State and local governments are authorized to use HTF revenues to cover administrative costs associated with the administration of HTF-funded projects or the collection or expenditure of HTF revenues. Art. IX, sec. 3a(2)(a) states that HTF revenues may permissibly be used “for the cost of administration.”<sup>77</sup> In this context, “cost of administration” refers to the overhead costs and expenses associated with the operations of a government entity. According to the Oregon Supreme Court, so long as a project itself is a valid use of HTF revenues, HTF revenues may also permissibly be used for the administering agency’s planning and administrative costs associated with the project.<sup>78</sup> For example, the Oregon Department of Transportation was authorized to use HTF revenues to cover its administrative expenses associated with overseeing the relocation of utility infrastructure within the right-of-way of a public highway.<sup>79</sup> However, HTF revenues may not permissibly be used for administrative costs associated with law enforcement and policing of public highways.<sup>80</sup>

### 2. Refunds or Credits Authorized by Law

Art. IX, sec. 3a(2)(a) states that HTF revenues may permissibly be used for “any refunds or credits authorized by law.”<sup>81</sup> While the reference to “any” legally authorized refunds or credits seems to imply that the government has authority to redistribute HTF revenues through a broad variety of tax refunds and credits, the state has primarily applied this provision to refund overpayments of HTF taxes. For example, the HTF is used to refund overpayments of motor vehicle fuel taxes and erroneous tax overpayments made by motor vehicle dealers.<sup>82</sup> The voter pamphlet for the original 1942 measure described refunds and credits as “other closely related purposes” to the permissible uses of HTF revenues listed in the constitution.<sup>83</sup> However, the permissible scope of the refunds and credits provision has not been subject to judicial review, so it is unclear if the HTF may be used for credits or refunds issued to the general public.

---

<sup>77</sup> OR. CONST. art. IX, § 3a(2)(a).

<sup>78</sup> *Or. Telecom* at 431.

<sup>79</sup> *Id.* at 432.

<sup>80</sup> When art. IX, sec. 3 was repealed by voters and replaced with art. IX, sec. 3a in 1980, the revised provision excluded a provision in former section 3 that allowed HTF revenues to fund the policing of public highways.

<sup>81</sup> OR. CONST. art. IX, § 3a(2)(a).

<sup>82</sup> OR. REV. STAT. §§ 319.192, 319.375(1).

<sup>83</sup> State of Oregon, 1942, *Official Voter's Pamphlet for the Regular General Election*, Nov. 3, 1942, at 11.

### 3. Retirement of Bonds

Art. IX, sec. 3a(2)(b) states that HTF revenues may permissibly be used “for the retirement of bonds for which such revenues have been pledged.”<sup>84</sup> This provision allows the state to use HTF revenues to retire bonds that were issued for valid HTF-funded purposes, such as bonds issued to fund highway construction and related facilities or equipment.<sup>85</sup>

### 4. Recreational Vehicles and Uses

Revenues collected from recreational vehicles, such as registration fees for motor homes, may be used to fund public parks and recreation areas. Art. IX, sec. 3a(2)(c) states that any HTF revenues collected from levies on recreational vehicles, including “campers, motor homes, travel trailers, snowmobiles, or like vehicles,” may permissibly be used “for the acquisition, development, maintenance or care of parks or recreation areas.”<sup>86</sup> Revenues collected from non-recreational vehicles, such as passenger car registration fees, may not be spent on parks or recreational areas. It is unclear whether revenues collected from off-road recreational vehicles, such as snowmobiles, may be used for general highway-related projects.<sup>87</sup>

### 5. Commercial Vehicles and Uses

HTF revenues collected from commercial vehicles or vehicles designed or intended for commercial use, such as registration fees for delivery trucks, may be used to enforce and administer certain commercial vehicle regulations. Art. IX, sec. 3a(2)(c) states that any HTF revenues collected from levies on commercial vehicles, or vehicles “held out for use for commercial purposes,” may permissibly be used for “enforcement of commercial vehicle weight, size, load, conformation and equipment regulation.”<sup>88</sup> Under this provision, commercial vehicle revenues may permissibly fund weighmaster-type enforcement activities, but may not fund general policing or law enforcement activities related to commercial vehicle operations or highway use.<sup>89</sup>

---

<sup>84</sup> OR. CONST. art. IX, § 3a(2)(b).

<sup>85</sup> See Letter from Keith L. Kutler, Attorney-in-charge, Government Services Section, Or. Dept. of Justice, to Grace Crunican, Director, Or. Dept. of Transportation, re: Highway Funds, 7 (Jan. 31, 2001), available at [https://www.oregon.gov/ODOT/ROW/Documents/ag\\_letterofcounsel\\_use\\_of\\_hwy\\_funds.pdf](https://www.oregon.gov/ODOT/ROW/Documents/ag_letterofcounsel_use_of_hwy_funds.pdf).

<sup>86</sup> OR. CONST. art. IX, § 3a(2)(c).

<sup>87</sup> The text of art. IX, sec. 3a(2)(c) states that subsection (1)(b) revenues collected from vehicles such as snowmobiles “may also be used” to fund parks and recreational areas, which implies that these off-road related revenues may be used to fund highway projects as well. OR. CONST. art. IX, § 3a(2)(c). However, given the voters’ intent that highway users fund highway projects, it stands to reason that revenues from off-road vehicles should not be used for highways devoted to on-road vehicle use. Oregon courts have not yet reviewed this issue.

<sup>88</sup> OR. CONST. art. IX, § 3a(2)(d).

<sup>89</sup> When art. IX, sec. 3 was repealed by voters and replaced with art. IX, sec. 3a in 1980, the revised amendment excluded a provision in former section 3 that allowed HTF revenues to fund the policing of public highways.

### **C. Summary of Permissible and Impermissible Uses of HTF Revenues**

#### ***Examples of Permissible Uses of HTF Revenues:***

- Any projects involving the construction, reconstruction, improvement, repair, or maintenance of a public highway or rest area, including projects within the right-of-way of a public highway or rest area.
- Installation and maintenance of biking and walking paths within the public right-of-way of a highway, road, street, bridge, or rest area.
- Transportation demand management projects within a highway, such as the installation of designated high-occupancy vehicle (HOV), bus-only, or bike lanes.

#### ***Examples of Impermissible Uses of HTF Revenues:***

- Projects outside of a highway or rest area right-of-way that do not directly facilitate motor vehicle travel and primarily benefit highway users rather than the general public or some other group or entity;
- Projects that primarily benefit gas stations rather than highway users.
- Construction of airport parking lots and walkways.
- Public transit projects that are not located within a highway right-of-way.

## **V. LEGAL ANALYSIS**

Oregon courts are tasked with determining whether levies or expenditures are consistent with the constitutional requirements. Part V.A. of this Guide describes the methodology Oregon courts apply when interpreting constitutional amendments. Part V.B. summarizes the relevant case law interpreting art. IX, sec. 3a.

### **A. Judicial Review Methodology**

When legal disagreements arise over the application or scope of a constitutional or statutory provision, courts step in to interpret the meaning of the provision. Oregon courts follow a specific methodology when interpreting legislatively referred constitutional amendments like art. IX, sec. 3a. The ultimate objective is to determine the intent of the voters who originally adopted the amendment, and to interpret the amendment's provisions in accordance with voters' intent. To determine voter intent, a court will primarily look at the text of the amendment at issue and the relevant case law interpreting the specific provision under dispute. If voter intent cannot be determined from the text and context of the provision, courts may then review the history of the amendment. A court's ultimate objective is to determine the intent of the voters who originally adopted the amendment, and to interpret the amendment's provisions in accordance with the original voters' intent. The following subsections describe the steps of this interpretive framework.

### **1. Step One: Review the Text**

When interpreting the meaning of a constitutional amendment, a court will first look at the text of the provision itself, which provides the “best evidence of the voters’ intent.”<sup>90</sup> According to the Oregon Supreme Court, “there is no reliable record of what the voters intended beyond the language of the amendment itself.”<sup>91</sup> Courts strive to interpret the text as it has been drafted, without adding new terms, omitting existing terms, or otherwise redrafting the text of a constitutional amendment in any way.<sup>92</sup> If key terms are not defined within the constitutional amendment, a court will apply the plain or ordinary meaning of those terms.<sup>93</sup> Dictionary definitions are generally used to determine a term’s ordinary meaning. Art. IX, sec. 3a does not provide definitions for any of its key terms, so courts will generally apply the ordinary meaning (*i.e.*, dictionary definition) of any terms subject to dispute.

### **2. Step Two: Examine the Context**

After reviewing the text, a court will examine the context of a constitutional amendment. Context includes any relevant case law interpreting the provision, as well as any associated statutes or constitutional amendments.<sup>94</sup> When examining the context of art. IX, sec. 3a, courts will review the previous case law interpreting the provisions at issue. Courts generally are not bound to apply the holdings from previous decisions issued by the same or lower courts, but legal principles call for courts to let earlier decisions stand and apply legal precedents established in prior cases. This means that it can be very difficult to persuade a court to overturn a prior decision.

### **3. Step Three: Consider an Amendment’s History**

If voter intent is not clear from the text or existing case law, courts have discretion to consider the history of an amendment to help determine the intent of the voters who originally adopted the amendment. Because the current text of art. IX, sec. 3a is largely identical to the text of the previous art. IX, sec. 3, the Oregon Supreme Court has concluded that art. IX, sec. 3a should be interpreted based on the intent of voters in 1942.<sup>95</sup> Relevant history therefore includes information that was available to voters in 1942 and provides an indication of voters’ understanding of the proposed amendment, “such as the ballot title, arguments included in the voters’ pamphlet, and contemporaneous news reports and editorials.”<sup>96</sup> However, the court has also cautioned against relying too heavily on the statements made in voter pamphlets, because those materials are highly partisan.<sup>97</sup>

---

<sup>90</sup> AAA Oregon/Idaho Auto Source v. State of Or., 363 Or. 411, 418 (2018).

<sup>91</sup> Northwest Natural Gas Co. v. Frank, 293 Or. 374, 381 (1982).

<sup>92</sup> *See id.*

<sup>93</sup> *Or. Telecom*, 341 Or. at 429.

<sup>94</sup> *Id.* at 425–26; AAA, 363 Or. at 418.

<sup>95</sup> AAA at 417.

<sup>96</sup> *Id.*

<sup>97</sup> *Northwest Natural*, 293 Or. at 383.

## B. Article IX, Section 3a Case Law

Oregon courts have issued several decisions interpreting the scope and meaning of art. IX, sec. 3a's provisions. The following subsections summarize the key cases evaluating the types of revenues subject to art. IX, sec. 3a and the permissible uses of such revenues.

### 1. *Rogers vs. Lane County*

Nine years after voters adopted the 1980 amendment establishing current art. IX, sec. 3a, the Oregon Supreme Court found a planned use of highway funds to be impermissible under the provision. In *Rogers v. Lane County*, Lane County and the City of Eugene sought validation of an agreement allocating just over \$1.5 million in HTF funds to build entry and exit roads, an adjacent parking lot, and a covered walkway at the airport owned and operated by Eugene.<sup>98</sup> The agreement was challenged as an impermissible use of highway funds under art. IX, sec. 3a.<sup>99</sup>

The Oregon Supreme Court concluded that the parking lot and covered walkway were not eligible for highway funds.<sup>100</sup> The court gave two reasons for its decision. First, the court held that the parking lot and covered walkway were not among the constitution's listed permissible uses of HTF revenues because they were not public highways, roads, streets, or roadside rest areas.<sup>101</sup> Second, rejecting the municipalities' argument that the parking lot and covered walkway were proper because they were for the "improvement" of the "operation or use" of public highways, the court concluded funds needed to be limited "exclusively" to highways, roads, streets and rest areas themselves.<sup>102</sup> The court indicated that HTF funds could potentially be used for infrastructure adjacent to highways, roads, streets or rest areas, but infrastructure must "primarily and directly facilitate motorized vehicle travel" to receive highway funds.<sup>103</sup> The court concluded the expenditures for a parking lot and walkway did not primarily and directly facilitate vehicle travel.<sup>104</sup> Rather, they were for the "operational convenience of an airport."<sup>105</sup>

The court's analysis relied heavily on statements in the voters' pamphlet. A Joint Legislative Committee's statement, arguing in favor of the 1980 amendment, had contended that the scope of the initial art. IX, sec. 3 was too broad, and that the result of allowing highway funds to be spent on police, parks, and other "highway-related programs" had been to "rob" Oregon highways of needed maintenance.<sup>106</sup> According to the court, this language demonstrated a clear intention that the amended art. IX, sec. 3a should be narrowly construed and applied only to the specific purposes listed in the provision.<sup>107</sup>

---

<sup>98</sup> *Rogers v. Lane County*, 307 Or. 534 (1988).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 545–46. The court did not expressly opine on the constitutionality of using highway funds for constructing exit and entry roads to and from the airport; although the opinion is not clear on this point, it appears Rogers did not challenge that expenditure or did not appeal the trial court's decision on the constitutionality of that expenditure.

<sup>101</sup> *Id.* at 545.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 542.

<sup>107</sup> *Id.* at 545.

While the *Rogers* decision technically still stands, the court's analysis has shifted since 1989. In 2006, the *Oregon Telecom* court revisited the *Rogers* holding and held that HTF-funded projects did not have to "primarily and directly facilitate motorized vehicle travel"; instead, there must merely be a connection between the HTF-funded project and a public highway itself, rather than a connection between the project and motor vehicle traffic that may occasionally use the public highway.<sup>108</sup>

## 2. *Automobile Club of Oregon v. State*

In 1992, the Oregon Supreme Court invalidated two statutory fees under Article IX, section 3a: (1) an underground storage tank assessment on gasoline stations intended to support rural gasoline stations, and (2) an emissions fee on passenger cars.<sup>109</sup> The court held that the underground storage tank assessment constituted a tax on motor vehicle fuel and that the revenue from that tax had not been dedicated to a permitted use under Article IX, section 3a.<sup>110</sup> Similarly, the court held the emissions fee was a tax or excise on motor vehicle use or operation.<sup>111</sup> The court concluded that while some of the emissions fee revenue was directed to a proper use under Article IX, section 3a, the majority was not, and the court declined to redraft the statute to save the permissible uses.<sup>112</sup>

First, the court examined the underground storage tank assessment to determine whether the statute imposing an "assessment" on gasoline stations receiving and storing gasoline in an underground storage tank was in fact a "tax."<sup>113</sup> While acknowledging that the label used by the legislature is an important factor in determining whether something is a "tax," the court held that the function of the levy carries more weight.<sup>114</sup> The court determined that the function of the underground storage tax assessment, which was measured by the receipt of motor vehicle fuel, was a tax on that fuel despite being labeled an "assessment."<sup>115</sup> The court therefore held that the underground storage tank assessment was a tax subject to art. IX, sec. 3a.<sup>116</sup>

The court next evaluated the permissibility of the planned use for the storage tank assessment revenues. Construing art. IX, sec. 3a narrowly, the court concluded that the intended use of the revenue was impermissible.<sup>117</sup> The revenue was intended to provide financial assistance to rural gasoline stations that needed to comply with federal environmental regulations, thereby maintaining access to gasoline in rural Oregon.<sup>118</sup> According to the court, this intended use would not provide for the construction, improvement, repair, maintenance, or use of highways,

---

<sup>108</sup> *Or. Telecom*, 341 Or. at 430.

<sup>109</sup> *Automobile Club of Oregon v. State*, 314 Or. 479 (1992).

<sup>110</sup> *Id.* at 490–91.

<sup>111</sup> *Id.* at 493.

<sup>112</sup> *Id.* at 683.

<sup>113</sup> *Id.* at 485.

<sup>114</sup> *Id.* at 493 ("As we concluded in our discussion of the distinction between assessments and taxes, *ante*, the character of a levy is determined by its function, not by the label the legislature attaches to it.").

<sup>115</sup> *Id.* at 488.

<sup>116</sup> *Id.* at 489.

<sup>117</sup> *Id.* at 490–91.

<sup>118</sup> *Id.* at 489–90.

nor would it “primarily and directly facilitate motorized vehicle traffic” as required by *Rogers*.<sup>119</sup> The court concluded that using HTF revenues to assist rural gasoline stations would, at most, facilitate motorized vehicle traffic “only tangentially” and would primarily benefit gasoline station owners rather than highway users.<sup>120</sup> As a result, the court held that the underground storage tank assessment was impermissible under art. IX, sec. 3a.

Second, the court reviewed the constitutionality of the emissions fee on passenger cars, finding that the fee was also subject to the funding limitations in art. IX, sec. 3a, and holding that the majority of the uses for the revenue were impermissible. The state argued that the fee was not a tax on the use of a car, but instead a charge for pollutants emitted by a vehicle.<sup>121</sup> The court looked at the character or function of the emissions fee and concluded that because the fee was collected at the time of vehicle registration, which was a necessary prerequisite to the “ownership, operation or use of motor vehicles,” the fee was effectively a tax on vehicle ownership or operation.<sup>122</sup> Additionally, in response to the state’s assertion that the fee was simply a charge for emitting pollutants, the court reasoned that “polluting the airshed is an inescapable incident of the operation or use of motor vehicles,” so a state-imposed emissions fee on the operation of motor vehicles must be a tax or excise because it was a charge for using a car.<sup>123</sup>

Describing the purposes for the emissions fee as “many,” the court concluded that the majority of the uses for the revenue were impermissible and declined to redraft the statute to save the permissible uses.<sup>124</sup> Specifically, the court expressly concluded it was impermissible to use emissions fee revenues to finance public transportation, particularly given that voters had declined on three occasions to amend art. IX, sec. 3a, to include that purpose.<sup>125</sup> The state conceded that developing alternative fuels and purchasing buses were also impermissible uses under the *Rogers* test.<sup>126</sup> The court did not specifically opine on which of the state’s additional proposed uses *were* permissible. It referenced, but did not comment on, the state’s argument that transportation demand management projects, such as projects to reduce congestion, like carpools, park-and-ride options, and vehicle lanes for high occupancy vehicles and buses, may qualify as permissible uses of HTF revenues.<sup>127</sup> Instead, the court invalidated the entire law as unconstitutional rather than separate permissible from impermissible uses.<sup>128</sup>

---

<sup>119</sup> *Id.* at 490–91.

<sup>120</sup> *Id.* at 491.

<sup>121</sup> *Id.* at 493.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 494.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 494–95.

### 3. *Oregon Telecommunications Association v. Oregon Department of Transportation*

In 2006, the court revisited the issue of permissible uses of highway funds under art. IX, sec. 3a in *Oregon Telecommunications Association v. Oregon Department of Transportation*.<sup>129</sup> The question in the case was whether the constitution permitted the Oregon Department of Transportation (ODOT) to use highway funds to pay for administrative expenses the agency incurs when utilities relocate infrastructure within highway rights-of-way.<sup>130</sup> The court held that the relocation project qualified as a highway reconstruction and improvement project, and therefore it was permissible for ODOT to use highway funds to recover its administrative expenses associated with the project.

The facts in the case were relatively unique in comparison to other legal disputes that have arisen under art. IX, sec. 3a. ODOT was conducting a series of highway improvement projects, and through the course of these projects it directed several telecommunications utilities to relocate their infrastructure that was located in the rights-of-way of the affected highways.<sup>131</sup> ODOT conducted planning activities to facilitate the relocation of the utility infrastructure, and the agency incurred expenses from these planning activities.<sup>132</sup> ODOT had historically used highway funds to pay administrative expenses it incurred when overseeing the installation or relocation of utility facilities in highway rights-of-way. In 2001, however, the agency received a letter from the Attorney General (AG) that made it question the constitutionality of its policy.<sup>133</sup> In this letter, the AG expressed concern about the “restrictive construction” of art. IX, sec. 3a that the court had adopted in *Rogers* and *Automobile Club*, which only allowed HTF expenditures for projects that primarily and directly facilitated motorized vehicle travel.<sup>134</sup> Based on these cases, the AG concluded ODOT was most likely prohibited from using highway funds for administrative expenses associated with moving utility infrastructure.<sup>135</sup> In response to the AG’s letter, ODOT began to charge the utilities permit fees to cover its administrative expenses.<sup>136</sup> The utilities challenged the permit fees, arguing ODOT could continue to use HTF funds to cover its expenses as it had done prior to 2001.<sup>137</sup>

After noting that both *Rogers* and *Automobile Club* employed an outdated methodology for interpreting legislatively referred constitutional amendments, the court applied its current methodology for determining voter intent.<sup>138</sup> Under this methodology, a court should determine voter intent from an amendment’s text and the context provided by relevant case law.<sup>139</sup> A court should only look to an amendment’s history if it is unable to determine voter intent from the text

---

<sup>129</sup> *Oregon Telecommunications Ass’n v. Oregon Dept. of Transp.*, 341 Or. 418 (2006).

<sup>130</sup> *Id.* at 421.

<sup>131</sup> *Id.* at 422.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 424.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 425.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 425–26.

<sup>139</sup> *Id.* at 426.

and context, and statements from voter pamphlets should not be overly relied on as evidence of voter intent.<sup>140</sup> Examining the text of art. IX, sec. 3a, the court noted that the amendment requires highway funds to be used for the construction, reconstruction, improvement, etc., of *public highways*.<sup>141</sup> According to the court, the text required that these activities “bear a relation to public highways.”<sup>142</sup> As a result, according to the court, no connection is required between the activity and *the motor vehicles* using the public highway; instead, in order to use highway funds under art. IX, sec. 3a, there must be a connection between the activity and *the public highway* itself.<sup>143</sup>

Thus, the court moved away from the “narrow construction” required by *Rogers* that highway expenditures must “primarily and directly facilitate motorized vehicle travel.”<sup>144</sup> Importantly, the court declined to read into the provision a limitation “that the promotion of vehicular travel is the *only* purpose for which the state may spend highway funds.”<sup>145</sup> According to the court, for example, projects that require narrowing or closing a public highway may be paid for using highway funds.<sup>146</sup> Art. IX, sec. 3(a) requires the state to spend the highway funds exclusively for the construction, reconstruction, improvement, repair, and maintenance of *public highways*, and the relocation of utility facilities within the right-of-way qualifies as a highway reconstruction and improvement project.<sup>147</sup> ODOT’s planning and administrative activities when relocating utility facilities were therefore properly regarded as “component parts” of the reconstruction and improvement of the highway itself.<sup>148</sup>

*Oregon Telecom* shifted the legal analysis of art. IX, sec. 3a in two key ways. First, the court held that HTF-funded projects do not have to directly facilitate motorized vehicle travel; instead, HTF-funded projects must share a direct connection with a public highway itself.<sup>149</sup> Second, the court clarified that the test for determining voter intent in disputes involving legislatively referred constitutional amendments should focus on the text of the amendment itself and any relevant case law interpreting that text.<sup>150</sup> The court described this methodology in greater detail in *AAA Oregon/Idaho Auto Source v. State of Oregon*.

<sup>140</sup> *Id.* at 426, 429. “[I]f the intent is clear based on the text and context of the constitutional provision, the court does not look further.” *Id.* at 432, citing *Roseburg School Dist. v. City of Roseburg*, 316 Or. 374, 378 (1993). The current methodology is described in greater detail in section V.A. of this Guide.

<sup>141</sup> *Id.* at 430.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 428–430. However, the court expressly stated that it did not consider the ultimate holdings in *Rogers* or *Automobile Club* to be wrong. *Id.* at 429, n.8.

<sup>145</sup> *Id.* at 430 (emphasis in original).

<sup>146</sup> *Id.* at 430, n.10.

<sup>147</sup> *Id.* at 431–432.

<sup>148</sup> *Id.* at 431. The court defined “improvement” in this context to mean “the act or process of improving . . . the enhancement or augmentation of value or quality . . . a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.” *Id.*

<sup>149</sup> *Id.* at 430.

<sup>150</sup> *Id.* at 429.

#### 4. AAA Oregon/Idaho Auto Source v. State of Oregon

In 2018, the Oregon Supreme Court held that a privilege tax levied on vehicle dealers was not subject to art. IX, sec. 3a.<sup>151</sup> According to the court, taxes on motor vehicle sales do not constitute taxes on vehicle “ownership, operation, and use” under art. IX, sec. 3a(1)(b).<sup>152</sup> The constitution’s restrictions apply to taxes based on the *status* of motor vehicle ownership, and not to taxes on actions a vehicle dealer or owner may take.

The tax at issue in the dispute, which is still in effect, requires licensed vehicle dealers to pay “for the privilege of engaging in the business of selling taxable motor vehicles at retail in this state.”<sup>153</sup> Vehicle dealers may pass on the cost of the tax to the purchaser of the new motor vehicle.<sup>154</sup> The tax does not apply to sales of used vehicles, to sales to resellers, or to sales made by non-dealers.<sup>155</sup> The legislature directed revenues from the privilege tax into the state’s Zero-Emissions Incentive Fund, which provides rebates for zero-emissions vehicles, and the Connect Oregon Fund, which provides grants for public transit and other non-highway transportation projects.<sup>156</sup>

AAA and the Oregon Trucking Association challenged the constitutionality of the privilege tax, arguing that it was a tax on motor vehicle ownership and revenues from the tax must therefore be directed into the HTF. Petitioners argued that taxes on motor vehicle ownership under art. IX, sec. 3a (1)(b) include all taxes on “the exercise of any of the rights of ownership, including the rights to sell and use” the car.<sup>157</sup>

Applying the methodology from *Oregon Telecom*, the court looked to the text of art. IX, sec. 3a to determine if voters intended for the amendment to apply to taxes on motor vehicle sales. First, the court compared the language used in subsection 1(a) of art. IX, sec. 3a—applying to “taxes levied on *sales*” of fuel—versus subsection 1(b)—applying to taxes “on the *ownership*” of motor vehicles.<sup>158</sup> The clear inclusion of taxes on *sales* of motor vehicle fuel in subsection 1(a), and the clear omission of taxes and excises on vehicle *sales* in subsection (1)(b), indicated to the court that the voters did not intend for the constitutional provision to apply to taxes on the sales of motor vehicles.<sup>159</sup> Second, the court considered the “broad category of taxes” covered by subsection (1)(a), which applies to any tax “*on, with respect to, or measured by*” activities related to motor vehicle fuel, in contrast to subsection 1(b), which addresses only taxes “*on*” the ownership, operation or use of motor vehicles.<sup>160</sup> The court concluded that art. IX, sec. 3a(1)(b)

---

<sup>151</sup> AAA Oregon/Idaho Auto Source v. State of Oregon, 363 Or. 411 (2018).

<sup>152</sup> *Id.* at 419–20.

<sup>153</sup> *Id.* at 414; OR. REV. STAT. § 320.405.

<sup>154</sup> *AAA* at 414.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 415.

<sup>157</sup> *Id.* at 419.

<sup>158</sup> *Id.* (emphasis added).

<sup>159</sup> *Id.* at 419–20.

<sup>160</sup> *Id.* at 421 (emphasis in original).

only applies to taxes and excises relating to the *status* of vehicle ownership, and not to taxes and excises on actions that an owner may take, like a vehicle sale.<sup>161</sup>

The court also reviewed the history of the 1942 adoption of the former art. IX, sec. 3, which was when the relevant provisions of art. IX, sec. 3a were added to the constitution. The court concluded the history supported its interpretation of the intended scope of subsection (1)(b).<sup>162</sup> According to the court, the measure's history indicated that voters only intended for art. IX, sec. 3a to apply to taxes on highway users, including "fuel taxes (such as gasoline and diesel taxes); ownership taxes (such as title and registration fees, which must be paid as prerequisite to public highway use); operation taxes (such as driver's license fees); and use taxes (such as ton mile taxes)."<sup>163</sup> In contrast, voters did not intend for the constitution's restrictions to apply to all taxes levied on any "status or activity involving motor vehicles," such as taxes on vehicle sales, repairs, painting, or disposal.<sup>164</sup>

Finally, the court turned to the question of whether the privilege tax was indeed a tax based on the "status of motor vehicle ownership," and concluded it was not for three reasons.<sup>165</sup> First, the court recognized that, while the label applied to a tax is not dispositive by itself, the legislature labeled the tax as a "privilege tax" on the business of selling motor vehicles at retail, rather than a tax on vehicle ownership.<sup>166</sup> Second, the court determined that the tax was not triggered by the status of motor vehicle ownership; a person could own a vehicle without ever incurring the tax.<sup>167</sup> And third, the court concluded that voters intended for art. IX, sec. 3a to apply to taxes on highway users, and the privilege tax was not such a tax.<sup>168</sup> The court therefore held that the privilege tax was not a tax "on the ownership, operation or use of motor vehicles" under art. IX, sec. 3a, and therefore was not restricted to the uses listed in the constitution.<sup>169</sup>

### **5. *Western States Petroleum Association v. Oregon Environmental Quality Commission***

In 2019, the Oregon Court of Appeals held that payments generated through the voluntary sale of clean fuels credits are not taxes on motor vehicle fuels, and thus not subject to the limitations of art. IX, sec. 3a.<sup>170</sup> According to the court, because payments for clean fuel credits are made through voluntary transactions between private entities, and the government does not collect any revenue from these credit sales, the payments are not taxes on motor vehicle fuels.<sup>171</sup>

---

<sup>161</sup> *Id.* at 419, 421.

<sup>162</sup> *Id.* at 423.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 424.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 424–25.

<sup>169</sup> *Id.* at 425.

<sup>170</sup> *Western States Petroleum Ass'n v. Or. Env'tl. Quality Com'n*, 296 Or. App. 298, 320 (2019).

<sup>171</sup> *Id.* at 318–20.

In 2009, the Oregon legislature authorized the Oregon Environmental Quality Commission (EQC) to adopt low-carbon fuel standards (LCFS) for transportation fuels sold in Oregon.<sup>172</sup> The EQC's rules created a system where fuel producers and importers earn credits for the production or importation of fuels with carbon intensities below the LCFS, and generate deficits when they produce or import fuels with carbon intensities above the LCFS.<sup>173</sup> For example, a fuel importer can earn credits by producing low-carbon biofuels in Oregon, and generate deficits by importing diesel fuel into the state. The average carbon intensity of all regulated fuels may not exceed the LCFS, and fuel suppliers demonstrate compliance by balancing their credits and deficits by the end of each compliance period. Regulated entities may also sell and purchase credits through a voluntary trading market.<sup>174</sup> Notably, the Department of Environmental Quality (DEQ) monitors credit trading, but the agency does not set the price for credits and does not receive any revenue from the credit purchases.<sup>175</sup>

An association of petroleum producers challenged the LCFS, arguing that the credit trading market generated a tax on motor vehicle fuels, and that the revenues from those taxes must be devoted to the permissible uses identified in art. IX, sec. 3a.<sup>176</sup> The EQC disagreed, arguing that sales of low-carbon fuel credits represented voluntary transactions between private entities and did not exact taxes on these private entities or generate revenues that are paid to the government.<sup>177</sup>

The court agreed with the EQC, holding that the voluntary payments between regulated parties for low-carbon fuel credits were not taxes subject to art. IX, sec. 3a.<sup>178</sup> The court reached this conclusion by examining the amendment's text. After reviewing the plain meaning of the terms, the court determined that a levy must be imposed by the government "for the use and service of the state" to constitute a tax.<sup>179</sup> Under the clean fuels program, LCFS credits are purchased through private transactions between regulated parties, and credit payments are neither imposed by nor paid to the government.<sup>180</sup> The government receives no revenue from the voluntary sale of credits, and therefore revenues from these sales cannot be used by the state.<sup>181</sup> The court therefore concluded that because credit payments are generated through private transactions and do not produce any public revenues for the state, they are not taxes on motor vehicle fuels under art. IX, sec. 3(a).<sup>182</sup>

---

<sup>172</sup> *Id.* at 300–301.

<sup>173</sup> *Id.* at 302.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 316–17.

<sup>176</sup> *Id.* at 316.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 316, 320.

<sup>179</sup> *Id.* at 318–19 (quoting *Black's Law Dictionary* (6th ed. 1991)).

<sup>180</sup> *Id.* at 319.

<sup>181</sup> *Id.* at 319–20.

<sup>182</sup> *Id.* at 320.

## **VI. CONCLUSION**

A transition is underway in the transportation sector, and the shift to electric vehicles will put increasing pressure on Oregon to reduce its reliance on gas taxes as a primary source of highway funding. When the former art. IX, sec. 3 was initially adopted in 1942, gas taxes presented a logical source of highway funding because there was a direct connection between collected revenues and roadway use. But there is also a direct connection between gas tax revenues and greenhouse gas emissions, and Oregon's reliance on gas taxes is inconsistent with the state's climate goals. Art. IX, sec. 3a imposes outdated and inequitable restrictions on the collection and use of highway funds that will ultimately force drivers who are unable or unwilling to transition to electric vehicles to contribute a disproportionate share of the state's highway funding. In other words, the current constitutional restrictions are creating a growing disconnect between highway usage and highway costs, while also limiting opportunities to raise revenue to support transportation decarbonization. Oregon should work to modernize its highway funding framework to deter gasoline and diesel consumption, promote transportation electrification, and create a sustainable and equitable system for funding roads and highways.