

This opinion is issued in response to questions presented by The Honorable Ken Baker, State Senator, and The Honorable Joan Dukes, State Senator, concerning special motor vehicle license plate programs.

FIRST QUESTION PRESENTED

Senate Bills 372 and 1099 propose to establish programs for special motor vehicle license plates similar to ORS 805.205 and Oregon Laws 1993, chapter 741, section 113, in order to generate revenue for nonhighway purposes. Each program charges a fee in addition to the usual fee for registering a vehicle or renewing the registration. Are such additional fees a "tax or excise on the ownership, operation or use of motor vehicles" within the meaning of Article IX, section 3a, of the Oregon Constitution?

ANSWER GIVEN

No. The special plate fee is not a tax or excise on the ownership, operation or use of motor vehicles and does not accrue from the licensing of motor vehicles. Accordingly, that fee is not dedicated to the Highway Fund.

SECOND QUESTION PRESENTED

The special license plate programs initially use Highway Funds dedicated under Article IX, section 3a, of the Oregon Constitution to fund start-up and administrative costs. Is such use of Highway Funds constitutional?

ANSWER GIVEN

No. The use of Highway Funds to generate revenue for nonhighway purposes violates Article IX, Section 3a, of the Oregon Constitution.

THIRD QUESTION PRESENTED

If the answer to the second question is "no," how can the proposed bills be modified to eliminate the constitutional problem?

ANSWER GIVEN

The bills must provide that all funding for special license plate programs come from sources other than the Highway Fund.

FOURTH QUESTION PRESENTED

If the answer to the second question is "no," how can the existing programs be brought into constitutional compliance?

ANSWER GIVEN

At a minimum, the Highway Fund must be made whole. This will require repayment to the Highway Fund of all start-up costs and costs of administering and operating the programs, as well as reimbursement to the Highway Fund of income the Fund would have earned from normal investments of such amounts.

DISCUSSION

Two special motor vehicle license plate programs currently are in existence. ORS 805.205 authorizes the issuance of special plates for certain nonprofit groups, institutions of higher education and veterans' organizations and Oregon Laws 1993, chapter 741, section 113, authorizes the issuance of commemorative plates for the 150th anniversary of the Oregon Trail. Under both programs, a fee in addition to the vehicle registration fee under ORS 803.420 and any other applicable fees is collected if the owner of the vehicle requests a set of special plates. The vehicle owner's decision to request the special plate and pay the additional fee is voluntary; the fee is separate from the normal registration fee; and the special plate is issued in lieu of the plate otherwise issued.

We are informed that each of the special plate programs used Highway Funds to pay for start-up costs and ongoing

administrative costs incurred to ensure that the special plates are manufactured and assigned to the correct vehicle and to account for the different funds. We are also informed that ODOT has kept one-half of the surcharges on some of these plates until the initial costs are reimbursed, and that there remains over \$100,000 in costs yet to be paid. Because of lagging sales of certain plates, sufficient revenue might never be generated to totally reimburse the fund.

After payment of Oregon Department of Transportation (ODOT) administrative costs, the fees from the special plates issued under ORS 805.205 are deposited in accounts specified by the applicable nonprofit group, institution of higher education or veterans' organization. Although the purpose for which these moneys will be used is not statutorily specified, we assume it is for nonhighway purposes. The revenue from the Oregon Trail plates, after expenses are deducted, is "transferred to the Oregon Trail Coordinating Council for the purpose of developing interpretative facilities along national historic trails in Oregon." Or Laws 1993, ch 741, § 114.

The two bills mentioned in the opinion request, SB 1099 and SB 372, similarly would create special plates and generate revenue for nonhighway purposes. SB 1099 amends ORS 805.205 and authorizes the issuance of special plates for public institutions of higher education with the moneys generated used for academic enhancement. SB 372 authorizes the issuance of veterans' recognition plates with the moneys generated placed in a trust fund for operation of the Oregon Veterans' Home.

I. Status of Special License Plate Fees

Article IX, section 3a, of the Oregon Constitution dedicates "any tax or excise on the ownership, operation or use of motor vehicles" to highway purposes. The first question asks whether the special license plate fee is a "tax or excise on the ownership, operation or use of a motor vehicle."

In a Letter of Advice dated July 2, 1981, to H.S. Coulter, State Highway Engineer (OP-5151), we addressed whether money collected from the \$25 custom license plate fee, formerly ORS 481.285 and now ORS 805.240, is money accruing from the licensing of motor vehicles and thereby part of the Highway Fund. We concluded that the fee is not a tax or excise on the use of motor vehicles and does not accrue from the licensing of motor vehicles. Because the \$25 fee is collected in addition to the regular vehicle license fee and is for the privilege of having a custom license plate and because the decision to request and pay for a custom plate is totally voluntary, we concluded that the \$25 fee is not dedicated to the Highway Fund.

We adhere to that earlier advice and believe the reasoning is equally applicable to the special plates under consideration at this time. The current opinion request also concerns the initial use of Highway Funds to establish these programs, however, and we did not address that issue in our earlier opinion.

II. Use of Highway Funds

Each of the license plate programs that we have been asked to address has provisions for the payment of ODOT administrative expenses from the revenue generated by the special plate fees. Because no other appropriation is made for the programs, Highway Funds are used to initiate the programs and to pay for start-up costs. The revenue generated by the special plate fees is then used to reimburse the fund for the start-up costs, with the revenue remaining after payment of these costs and after costs of administration going to the nonhighway purposes.

The Highway Fund is dedicated for highway purposes under Article IX, section 3a. Thus, the next question is whether the use of Highway Fund moneys to pay the start-up costs of a nonhighway program is constitutional, even if the funds will be repaid at some future time.

We addressed a similar issue in 39 Op Atty Gen 492 (1979) when we were asked whether the Division of Motor Vehicles (DMV) could constitutionally expend moneys from the Highway Fund to distribute voter registration material and to provide voter assistance as required by Oregon Laws 1977, chapter 163. Because no funds were appropriated for DMV to implement the statutory mandate, DMV proposed to use dedicated highway trust funds in order to do so. We concluded that Highway Funds could not constitutionally be used for such a purpose and that the General Fund must reimburse the Highway Fund for such expenditures.

In *State ex rel Sprague v. Straub*, 240 Or 272, 400 P2d 229, 401 P2d 29 (1965), the Oregon Supreme Court held that the intent of the people when they adopted Article IX, Section 3, was to guarantee that none of the proceeds of the taxes and fees listed in the amendment would be diverted to any other purpose. Although Article IX, Section 3, was repealed and replaced in 1980 by current Section 3a, the Oregon Supreme Court found that the intent of the people continued to be

preventing diversion of the Highway Fund to nonhighway purposes. *Rogers v. Lane County*, 307 Or 534, 771 P2d 254 (1989); *Automobile Club of Oregon v. State of Oregon*, 314 Or 479, 840 P2d 674 (1992).

The use of Highway Funds to pay for a nonhighway program, i.e., a program generating revenue for a nonhighway purpose, is a diversion of funds from the constitutionally allowable uses. SB 372 and SB 1099, as proposed, and ORS 805.205 and Oregon Laws 1993, chapter 741, section 113 may not be implemented through the use of moneys from the Highway Fund. Implementation of the existing programs using such funds was an unconstitutional diversion of dedicated trust funds.

III. SB 372 and SB 1099

Because we find that the two proposed bills as written would likely require an unconstitutional diversion of moneys from the Highway Fund, we address the third question. The proposed legislation must be modified to eliminate Highway Funds as a source of moneys for start-up costs and costs of administration. It is possible that General Fund appropriations could be used to cover such costs.⁽¹⁾ It is also possible to require the various organizations benefitting from the special plate programs to provide up-front money to pay for these costs. If ongoing costs of operation and administration are paid out of the special plate fees, then additional appropriations would not be needed for those costs. However, if the special plate fees are not capable of covering ongoing costs, then other nondedicated funding is required as Highway Funds cannot in any way support such programs.

IV. Existing Special Plate Programs

The fourth question asks about the impact to the existing special plate laws if Highway Funds may not be used for those programs. If the legislature wishes to continue the existing programs, those programs must be funded from nondedicated sources. In addition, since Highway Funds have been used to support these programs, the Highway Fund must be made whole. It is clear from the long line of cases on the diversion of dedicated funds, including *Cross of Malta Bldg. Corp. v. Straub*, 257 Or 376, 476 P2d 921, 479 P2d 505 (1971), *Sprague* and *Automobile Club of America*, that diverted moneys must be returned to the dedicated fund. It is also clear that the dedicated fund is entitled to be repaid interest that the Fund would have been earned from appropriate investments of the diverted moneys. For some of the special plate programs, the amount of the Highway Fund diverted for these programs has already been repaid from revenues generated. In all cases, the Highway Fund must also be repaid the interest that the Fund would have earned.⁽²⁾ Such moneys must come from a nondedicated source.

V. Conclusion

Constitutionally dedicated Highway Funds may not be used to fund, operate or administer a special motor vehicle license plate program the purpose of which is to generate money for nonhighway purposes. We conclude that the special plate programs authorized by ORS 805.205 and Oregon Laws 1993, chapter 741, section 113, as well as those proposed by SB 372 and SB 1099 unconstitutionally use Highway Funds.

In order to have a special plate program that generates revenue for a nonhighway program, the program must be funded from moneys other than the Highway Fund, and all costs must be paid from a nondedicated source. To the extent dedicated funds have been used in a manner inconsistent with the allowable uses of the Highway Fund, the Fund must be repaid the amount of money diverted and all income lost by the diversion.

HARDY MYERS
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1. In order to use General Fund moneys for the special plate programs, the Legislature must find that the programs serve a public purpose. Because several of the organizations receiving funds from the special plate program will be private nonprofit organizations, this public purpose is not apparent on the face of the legislation, and we recommend that specific legislative findings on this issue be included in the bill. If a public purpose cannot be found, then General Funds could not be used to support the programs.

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2. In a Letter of Advice dated June 16, 1989, to Robert N. Bothman, Director, ODOT (OP-6329), we examined whether the cost of the voter registration program could be defrayed with fees obtained from the sale of DMV records produced with Highway Funds and concluded that since DMV used moneys from dedicated Highway Funds to generate the records, income from their sale would also be dedicated and could not be used to support the voter registration program. This Letter of Advice and other opinions raise the question whether revenue generated by the special license plate programs should be returned to the Highway Fund. Because of the limited time available to prepare this opinion, we have not addressed that question.

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