Rob McKenna
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

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The Honorable Pam Roach
Senator, District 31
PO Box 40431
Olympia, WA 98504-0431

Dear Senator Roach:

By letter previously acknowledged, you have requested an opinion on the following question:

> **Can the Transportation Commission raise taxes, fares, fees, or tolls without a vote of the legislature?**

By way of background, you explain that the Transportation Commission is currently considering a proposal to increase fares for the Washington State Ferries. Although your question is framed in broader terms than ferry fares alone, you specifically ask whether the terms of Initiative 1053 (I-1053) would affect this proposal.[1]

BRIEF ANSWER

By enacting I-1053, the voters amended RCW 43.135.055(1) to restate the requirement that fees can only be imposed or increased "if approved with majority legislative approval in both the house of representatives and the senate . . . ." RCW 43.135.055(1) (as amended by I-1053, § 5(1)). Coupled with the statement of voter intent set forth in I-1053, RCW 43.135.055(1) now permits the imposition or increase of a fee only if the legislature so approves at some time after the effective date of I-1053. The initiative accordingly rendered legislative approval granted before the enactment of I-1053 insufficient to authorize the increase or imposition of a fee.[2]

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[1] The text of I-1053 is attached for ease of reference.

[2] The scope of this opinion is limited to the application of RCW 43.135.055(1) to actions that impose new or increased fees taking place after the effective date of I-1053. The conclusion is based upon the language of I-1053 and upon the legislative intent set forth within that measure.

ANALYSIS

I begin by considering, in some detail, the authority of the Transportation Commission to set ferry fares, as well as the authority to set tolls for specific roads and bridges. After doing so, I consider the effect on that authority of RCW 43.135.055(1), as amended by I-1053.[3]

The legislature has delegated authority to the Transportation Commission to "adopt [ferry] fares and pricing policies by rule." RCW 47.60.315(1). "The commission may increase ferry fares included in the schedule of charges adopted under this section by a percentage that exceeds the fiscal growth factor." RCW 47.60.315(3); *see also* RCW 47.56.032 ("The commission shall determine all fares, tolls, and other charges for its facilities and shall directly perform all duties and exercise all powers relating to financing, refinancing, and fiscal management of the system's bonded indebtedness in the manner provided by law."). The current state transportation budget specifically approves increases in ferry fares during the fiscal years it covers:

> Pursuant to RCW 43.135.055, during the 2009–11 fiscal biennium, the transportation commission shall periodically review and, if necessary, modify the schedule of fares for the Washington state ferry system. The transportation commission may increase ferry fares, except no fare schedule modifications may be made prior to September 1, 2009. For purposes of this subsection, "modify" includes increases or decreases to the schedule.

Laws of 2010, ch. 247, § 205(1). The legislature also authorized the Transportation Commission to adopt a "ferry fuel surcharge" effective July 1, 2011. Laws of 2010, ch. 247, § 205(6).

The legislature's general approach regarding the imposition of tolls on state highways and bridges has been for the legislature to designate specific transportation facilities as toll facilities, and then to delegate to the Transportation Commission the actual setting of the tolls. RCW 47.56.031 ("No tolls may be imposed on new or existing highways or bridges without specific legislative authorization or upon a majority vote of the people within the boundaries of the unit of government empowered to impose tolls."); RCW 47.56.820 ("Unless otherwise

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[3] You ask whether the Transportation Commission has the legal authority to raise taxes, fares, fees, or tolls without a vote of the legislature. Those four terms, "tax," "fare," "fee," and "toll," cover a range of revenue sources, but the process for imposing a tax is not at issue with regard to the Transportation Commission. The Transportation Commission's authority includes the authority to impose and increase fares and tolls. These are varieties of fees, assessed for the use of, for example, ferries, bridges, or roads. *See State ex rel. Peninsula Neighborhood Ass'n v. State*, 142 Wn.2d 328, 338, 12 P.3d 134 (2000) (equating tolls and user fees, and stating that "the fixing of tolls is an administrative function"). Accordingly, this opinion considers the authority of the Transportation Commission to impose or increase fares and tolls, but does not consider the imposition of taxes.

delegated, only the legislature may authorize the imposition of tolls on eligible toll facilities."); RCW 47.56.030(1)(b) ("The transportation commission shall determine and establish the tolls and charges thereon."); RCW 47.56.240 ("Except as otherwise provided in RCW 47.56.850, the commission is hereby empowered to fix the rates of tolls and other charges for all toll bridges built under the terms of this chapter. Toll charges so fixed may be changed from time to time as conditions warrant."). The legislature has declared by statute that, "[u]nless these powers are otherwise delegated by the legislature, the transportation commission is the tolling authority for the state." RCW 47.56.850(1).

The legislature has designated a number of roads and bridges as toll facilities. These include the legislature's designation of the Tacoma Narrows Bridge and State Route 167 as toll facilities. RCW 47.56.271 (authorizing tolls at the Tacoma Narrows Bridge); RCW 47.56.403 (authorizing a pilot project of high occupancy toll lanes on State Route 167 in King County). As with the Washington State Ferry fares discussed above, the legislature has specifically approved toll increases during this fiscal biennium through the current state transportation budget:

> Pursuant to RCW 43.135.055, during the 2009–11 fiscal biennium, the transportation commission shall periodically review and, if necessary, modify the schedule of toll charges applicable to the Tacoma Narrows Bridge, taking into consideration the recommendations of the citizen advisory committee created under RCW 47.46.091. For purposes of this subsection, "modify" includes increases or decreases to the schedule.

Laws of 2010, ch. 247, § 205(3). Similarly:

> Pursuant to RCW 43.135.055, during the 2009–11 fiscal biennium, the transportation commission shall periodically review and, if necessary, modify the schedule of toll charges applicable to the state route number 167 high occupancy toll lane pilot project, as required under RCW 47.56.403. For purposes of this subsection, "modify" includes increases or decreases to the schedule.

Laws of 2010, ch. 247, § 205(2).

In 2009, the legislature also designated the "state route number 520 corridor"[4] as a toll facility. RCW 47.56.870(1). By permanent statute, the legislature authorized the Transportation Commission to set, and annually adjust, tolls for the State Route 520 corridor:

[4] "The state route number 520 corridor consists of that portion of state route number 520 between the junctions of Interstate 5 and state route number 202." RCW 47.56.870(2).

> The tolling authority shall initially set the variable schedule of toll rates, which the tolling authority may adjust at least annually to reflect inflation as measured by the consumer price index or as necessary to meet the redemption of bonds and interest payments on the bonds, to generate revenue sufficient to provide for [specified revenue].

RCW 47.56.870(3)(b).

Taken by themselves, these legislative enactments amply demonstrate that the legislature has authorized the Transportation Commission to set and raise ferry fares, as well as tolls on the Tacoma Narrows Bridge, the high occupancy vehicle lane pilot project on State Route 167, and the State Route 520 corridor. Your question is whether, notwithstanding the fact that the legislature has enacted the statutes discussed above, an additional legislative vote is required by RCW 43.135.055.

The voters amended RCW 43.135.055(1) at the 2010 general election by approving I-1053. The answer to your question, therefore, depends on whether I-1053 changed the law to require further legislative approval for the imposition or increase of fees that the legislature had previously authorized. Before the enactment of I-1053, RCW 43.135.055(1) provided: "No fee may be imposed or increased in any fiscal year without prior legislative approval and must be subject to the accountability procedures required by RCW 43.135.031." RCW 43.135.055(1) (as amended by Laws of 2008, ch. 1, § 14 (Initiative Measure 960)). I-1053 amended the statute, as follows:

> ((~~No~~)) A [sic] fee may only be imposed or increased in any fiscal year ((~~without prior legislative approval~~)) if approved with majority legislative approval in both the house of representatives and the senate and must be subject to the accountability procedures required by RCW 43.135.031.

I-1053, § 5(1) (showing additions and deletions of statutory language in bill drafting form, deleted language by striking through, new language by underlining).[5]

Interpretation of any statute begins with an examination of its plain language, giving that language its ordinary meaning. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). I-1053 changed the statutory language in three ways. First, it changed the text from a negatively-phrased prohibition on imposing or increasing fees into a positively-stated limitation. I-1053, § 5(1) (changing "No fee may be imposed or increased . . . without . . ." to "A fee may only be

[5] The word "A" was added to RCW 43.135.055(1) by I-1053, but the initiative did not show the addition by underlining the word.

imposed or increased . . . if . . ."). Second, it deleted the word "prior" as a modification of the phrase "legislative approval." I-1053, § 5(1). Third, it rephrased the term "legislative approval" to read "majority legislative approval in both the house of representatives and the senate."[6] I-1053, § 5(1).

It could be argued that none of these changes affect the meaning of the statute, because they merely substitute equivalent phrases for those set forth in the statute before the amendment. An examination of the plain meaning of I-1053 includes more than merely a narrow reading of the phrases substituted by section 5 of the initiative, however. A statute's plain meaning should be "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). To this end, "an enacted statement of legislative purpose is included in a plain reading of a statute." *G-P Gypsum Corp. v. State*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010).

When the voters enacted I-1053, they also enacted the statement of intent set forth in the first section of the initiative, which declared:

> This initiative should deter the governor and the legislature from sidestepping, suspending or repealing any of Initiative 960's policies in the 2010 legislative session. But regardless of legislative action during the 2010 legislative session concerning Initiative 960's policies, the people intend, by the passage of this initiative, to require either two-thirds legislative approval or voter approval for tax increases and majority legislative approval for fee increases. These important policies ensure that taking more of the people's money will always be an absolute last resort.

I-1053, § 1. This statement of intent indicates that the voters intended I-1053 to require the future approval of the legislature for fee increases. Statutory amendments are generally presumed to operate prospectively, addressing events that occur after the statute takes effect. *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999). It, therefore, follows that the voters

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[6] The reference in RCW 43.135.055(1) to "the accountability procedures required by RCW 43.135.031" does not affect this analysis. RCW 43.135.055(1) contained that language previously, and was not the product of any amendment in I-1053. Moreover, the procedures described in RCW 43.135.031 come into play only if a bill directly imposing or increasing a fee is introduced in the legislature. Nothing in either RCW 43.135.031 or .055 prohibits the legislature from approving a fee in a different manner, and no such principle can be inferred from the fact that one statute cross-references the other. *See Tracfone Wireless, Inc. v. Dep't of Revenue*, 2010 WL 4244674, at *8 (Wash. Oct. 28, 2010) (concluding that a statute requiring a tax to be set out separately on a monthly statement did not excuse the collection of the tax if monthly statements were not sent).

intended I-1053 to provide that fees can be increased only if, after the effective date of I-1053, the legislature so approves.[7] In a manner of speaking, I-1053 hit the "reset" button on legislative approval of the imposition or increase of fees, limiting such actions to those approved anew by the legislature after the effective date of the measure.

The presumption that a statutory amendment is intended to change the law confirms this conclusion. *Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3, 459 P.2d 389 (1969) ("It is a well recognized rule of statutory construction that, where a law is amended and a material change is made in the wording, it is presumed that the legislature intended a change in the law.") (emphasis added); 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22:30 at 352–56 (7th ed. 2009) (same). There would have been little reason to amend RCW 43.135.055 in I-1053 except to change the prior law. The initiative accordingly changed prior law by requiring that fees can only be increased after the effective date of the initiative if the legislature approves that action after the effective date of the initiative.

The intent section of I-1053 suggests a caveat regarding the conclusion that the measure requires new legislative approval for future actions that impose or increase fees. If a statute either specifies the amount of a fee or sets forth a formula for calculating the fee such that the agency implementation is merely ministerial, then I-1053 does not require further legislative approval. In such a circumstance, the legislature has already essentially established the fee by its direct action.

One element remains in order to provide a complete answer to your question. You ask whether the imposition of fares or tolls would require a vote of the legislature. RCW 43.135.055(1) requires that a fee be imposed or increased only "with majority legislative approval in both the house of representatives and the senate." This necessarily requires a vote of the legislature, but the statute does not otherwise constrain the manner in which the legislature proceeds. The legislature could vote on bills that approve the imposition or increase of fees in any number of ways, which need not be fully cataloged here. For example, the legislature could enact a statute directly imposing or increasing a fee in a specified amount. It could alternatively delegate the authority to impose or increase fees to an administrative agency, so long as the legislation set forth sufficient standards or guidelines to govern the delegation of authority. *Peninsula Neighborhood Ass'n*, 142 Wn.2d at 335–36.

As the Washington Supreme Court has explained: "It is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions." *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007); *see also State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004) (same). "Implicit in the plenary power of the legislature is the principle that one legislature cannot enact a statute that prevents a

[7] I-1053 took effect December 2, 2010. Const. art. II, § 1(d).

future legislature from exercising its law-making power." *Farm Bureau*, 162 Wn.2d at 301. The people exercise the same legislative power when enacting an initiative, and accordingly they "cannot, by initiative, prevent future legislatures from exercising their law-making power." *Id.* at 302. The legislature's plenary authority includes the discretion to delegate fee-setting authority to administrative agencies. *Peninsula Neighborhood Ass'n*, 142 Wn.2d at 335–36. RCW 43.135.055 is itself merely a statute, and cannot bind subsequent legislative action. We do not construe RCW 43.135.055(1) as limiting the options available to the legislature as to the manner in which it approves the imposition or increase of a fee. *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) ("Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.").

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,

Jeff T. Even

JEFFREY T. EVEN
Deputy Solicitor General
(360) 586-0728

wros

Initiative Measure No. 1053

SAVE THE 2/3'S VOTE FOR TAX INCREASES

COMPLETE TEXT

AN ACT Relating to tax and fee increases imposed by state government; amending RCW 43.135.035 and 43.135.055; adding a new section to chapter 43.135 RCW; creating new sections; repealing RCW 43.135.035; and providing contingent effective dates.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

INTENT

NEW SECTION. **Sec. 1.** This initiative should deter the governor and the legislature from sidestepping, suspending or repealing any of Initiative 960's policies in the 2010 legislative session. But regardless of legislative action taken during the 2010 legislative session concerning Initiative 960's policies, the people intend, by the passage of this initiative, to require either two-thirds legislative approval or voter approval for tax increases and majority legislative approval for fee increases. These important policies ensure that taking more of the people's money will always be an absolute last resort.

PROTECTING TAXPAYERS BY REQUIRING EITHER TWO-THIRDS LEGISLATIVE APPROVAL OR VOTER APPROVAL FOR STATE GOVERNMENT TO RAISE TAXES

(sections 2 and 3 take effect if the 2010 legislature suspends or repeals the two-thirds legislative vote requirement for tax increases)

NEW SECTION. **Sec. 2.** A new section to chapter 43.135 RCW is added and reads as follows:

(1) After July 1, 1995, any action or combination of actions by the legislature that raises taxes may be taken only if approved by at least two-thirds legislative approval in both the house of

representatives and the senate. Pursuant to the referendum power set forth in Article II, section 1(b) of the state Constitution, tax increases may be referred to the voters for their approval or rejection at an election.

(2)(a) If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election. The state expenditure limit committee shall adjust the state expenditure limit by the amount of additional revenue approved by the voters under this section. This adjustment shall not exceed the amount of revenue generated by the legislative action during the first full fiscal year in which it is in effect. The state expenditure limit shall be adjusted downward upon expiration or repeal of the legislative action.

(b) The ballot title for any vote of the people required under this section shall be substantially as follows:

"Shall taxes be imposed on . . . . . in order to allow a spending increase above last year's authorized spending adjusted for personal income growth?"

(3)(a) The state expenditure limit may be exceeded upon declaration of an emergency for a period not to exceed twenty-four months by a law approved by a two-thirds vote of each house of the legislature and signed by the governor. The law shall set forth the nature of the emergency, which is limited to natural disasters that require immediate government action to alleviate human suffering and provide humanitarian assistance. The state expenditure limit may be exceeded for no more than twenty-four months following the declaration of the emergency and only for the purposes contained in the emergency declaration.

(b) Additional taxes required for an emergency under this section may be imposed only until thirty days following the next general election, unless an extension is approved at that general election. The additional taxes shall expire upon expiration of the declaration

of emergency. The legislature shall not impose additional taxes for emergency purposes under this subsection unless funds in the education construction fund have been exhausted.

(c) The state or any political subdivision of the state shall not impose any tax on intangible property listed in RCW 84.36.070 as that statute exists on January 1, 1993.

(4) If the cost of any state program or function is shifted from the state general fund to another source of funding, or if moneys are transferred from the state general fund to another fund or account, the state expenditure limit committee, acting pursuant to RCW 43.135.025(5), shall lower the state expenditure limit to reflect the shift. For the purposes of this section, a transfer of money from the state general fund to another fund or account includes any state legislative action taken that has the effect of reducing revenues from a particular source, where such revenues would otherwise be deposited into the state general fund, while increasing the revenues from that particular source to another state or local government account. This subsection does not apply to: (a) The dedication or use of lottery revenues under RCW 67.70.240(3), in support of education or education expenditures; or (b) a transfer of moneys to, or an expenditure from, the budget stabilization account.

(5) If the cost of any state program or function and the ongoing revenue necessary to fund the program or function are shifted to the state general fund on or after January 1, 2007, the state expenditure limit committee, acting pursuant to RCW 43.135.025(5), shall increase the state expenditure limit to reflect the shift unless the shifted revenue had previously been shifted from the general fund.

(6) For the purposes of this chapter, "raises taxes" means any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.

NEW SECTION. **Sec. 3.** RCW 43.135.035 (Tax legislation--Referral to voters--Conditions and restrictions--Ballot title--Declarations of

emergency--Taxes on intangible property--Expenditure limit to reflect program cost shifting or fund transfer) and 2009 c 479 s 36 are each repealed.

PROTECTING TAXPAYERS BY REQUIRING EITHER TWO-THIRDS LEGISLATIVE APPROVAL OR VOTER APPROVAL FOR STATE GOVERNMENT TO RAISE TAXES

(section 4 takes effect if the 2010 legislature does not suspend or repea the two-thirds legislative vote requirement for tax increases)

Sec. 4. RCW 43.135.035 and 2009 c 479 s 36 are each amended to read as follows:

(1) After July 1, 1995, any action or combination of actions by the legislature that raises taxes may be taken only if approved by ((a)) at least two-thirds ((~~vote of each house of the legislature~~)) legislative approval in both the house of representatives and the senate, and then only if state expenditures in any fiscal year, including the new revenue, will not exceed the state expenditure limits established under this chapter. Pursuant to the referendum power set forth in Article II, section 1(b) of the state Constitution, tax increases may be referred to the voters for their approval or rejection at an election.

(2)(a) If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election. The state expenditure limit committee shall adjust the state expenditure limit by the amount of additional revenue approved by the voters under this section. This adjustment shall not exceed the amount of revenue generated by the legislative action during the first full fiscal year in which it is in effect. The state expenditure limit shall be adjusted downward upon expiration or repeal of the legislative action.

(b) The ballot title for any vote of the people required under this section shall be substantially as follows:

"Shall taxes be imposed on . . . . . in order to allow a spending increase above last year's authorized spending adjusted for personal income growth?"

(3)(a) The state expenditure limit may be exceeded upon declaration of an emergency for a period not to exceed twenty-four months by a law approved by a two-thirds vote of each house of the legislature and signed by the governor. The law shall set forth the nature of the emergency, which is limited to natural disasters that require immediate government action to alleviate human suffering and provide humanitarian assistance. The state expenditure limit may be exceeded for no more than twenty-four months following the declaration of the emergency and only for the purposes contained in the emergency declaration.

(b) Additional taxes required for an emergency under this section may be imposed only until thirty days following the next general election, unless an extension is approved at that general election. The additional taxes shall expire upon expiration of the declaration of emergency. The legislature shall not impose additional taxes for emergency purposes under this subsection unless funds in the education construction fund have been exhausted.

(c) The state or any political subdivision of the state shall not impose any tax on intangible property listed in RCW 84.36.070 as that statute exists on January 1, 1993.

(4) If the cost of any state program or function is shifted from the state general fund to another source of funding, or if moneys are transferred from the state general fund to another fund or account, the state expenditure limit committee, acting pursuant to RCW 43.135.025(5), shall lower the state expenditure limit to reflect the shift. For the purposes of this section, a transfer of money from the state general fund to another fund or account includes any state legislative action taken that has the effect of reducing revenues from a particular source, where such revenues would otherwise be deposited into the state general fund, while increasing the revenues from that particular source to another state or local government account. This

subsection does not apply to: (a) The dedication or use of lottery revenues under RCW 67.70.240(3), in support of education or education expenditures; or (b) a transfer of moneys to, or an expenditure from, the budget stabilization account.

(5) If the cost of any state program or function and the ongoing revenue necessary to fund the program or function are shifted to the state general fund on or after January 1, 2007, the state expenditure limit committee, acting pursuant to RCW 43.135.025(5), shall increase the state expenditure limit to reflect the shift unless the shifted revenue had previously been shifted from the general fund.

(6) For the purposes of this chapter ((~~1, Laws of 2008~~)), "raises taxes" means any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.

PROTECTING TAXPAYERS BY REQUIRING MAJORITY LEGISLATIVE APPROVAL FOR STATE GOVERNMENT TO INCREASE FEES

Sec. 5. RCW 43.135.055 and 2008 c 1 s 14 are each amended to read as follows:

(1) ((~~No~~)) A fee may only be imposed or increased in any fiscal year ((~~without prior legislative approval~~)) if approved with majority legislative approval in both the house of representatives and the senate and must be subject to the accountability procedures required by RCW 43.135.031.

(2) This section does not apply to an assessment made by an agricultural commodity commission or board created by state statute or created under a marketing agreement or order under chapter 15.65 or 15.66 RCW, or to the forest products commission, if the assessment is approved by referendum in accordance with the provisions of the statutes creating the commission or board or chapter 15.65 or 15.66 RCW for approving such assessments.

CONSTRUCTION CLAUSE

NEW SECTION. **Sec. 6.** The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act.

SEVERABILITY CLAUSE

NEW SECTION. **Sec. 7.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

MISCELLANEOUS

NEW SECTION. **Sec. 8.** This act shall be known and cited as Save The 2/3's Vote For Tax Increases Act of 2010.

NEW SECTION. **Sec. 9.** Sections 2 and 3 of this act take effect if, during the 2010 legislative session, the legislature amends or repeals RCW 43.135.035.

NEW SECTION. **Sec. 10.** Section 4 of this act takes effect if, during the 2010 legislative session, the legislature does not amend or repeal RCW 43.135.035.

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