

FILED
Court Administrator

STATE OF MINNESOTA
COUNTY OF RAMSEY

JUL 12 2011
By UX Deputy SECOND JUDICIAL DISTRICT

DISTRICT COURT

In re Government Shutdown Litigation)

In re Temporary Funding of Core)
Functions of the Executive Branch)
Of the State of Minnesota)

Case Type: Civil

Court File No. 62-cv-11-5203

**GOVERNOR'S OPPOSITION TO PETITION OF
SENATOR GIMSE AND REPRESENTATIVE BEARD**

INTRODUCTION

Governor Mark Dayton opposes the petition of Senator Joe Gimse and Representative Mike Beard (collectively, "the Legislators") whereby they request that the Court declare all ongoing Minnesota Department of Transportation ("MnDOT") highway construction projects¹ to be "a critical core function" of government and order that, as necessary, unappropriated funds be spent for them.

The Legislators invite the Court to exercise sweeping power and order the expenditure of more than \$100 million for state highway projects and perhaps another \$137 million for local highway projects, all without appropriations enacted into law. This extraordinary request collides with the June 29 Order and should be denied.

¹ Although MnDOT funds other modes of transportation, the Legislators' sole focus appears to be on construction for highway travel.

ARGUMENT

I. **THERE IS AN ISSUE REGARDING THE CAPACITY IN WHICH THE LEGISLATORS APPEAR HEREIN.**

By Order dated June 27, 2011, the Hon. Bruce Christopherson denied four state senators' motion to intervene in *Judicial Branch Proceeding*, holding: "In such individual and collective roles as state senators, they lack independent stakes, defenses, and standing to intervene as parties in this action." Similarly, on June 23, 2011, this Court denied the same senators' to intervene in this proceeding.

In this case, the Legislators have submitted their petition on official Senate letterhead, identifying Senator Gimse with his state office address, telephone, and email. The petition is signed by "Senator Joe Gimse, Chairman, Special Transportation Committee," and by "Representative Mike Beard, Chairman, House Transportation Committee." The petition itself was submitted through, and this hearing was scheduled by, Senate staff.

The first two sentences of the petition are oddly inconsistent: "We write to you not in our capacity as the Chairs of the Minnesota Senate and House of Representatives Transportation Committees, but as concerned citizens. Yet, as the Transportation Committee Chairs, we possess an intimate knowledge of transportation"

At the threshold, the Court should decide whether the Legislators seek to appear in their official capacities or as individual citizens. If the former, the Court must determine whether it wishes to apply its and Judge Christopherson's prior rulings.

The Governor notes that the House of Representatives and the Senate are parties in this proceeding. The Court should request that the legislative houses state whether they support the wide-ranging judicial relief sought by two of their members.

II. THE ISSUE OF WHEN HIGHWAY CONSTRUCTION CONSTITUTES A CRITICAL CORE FUNCTION HAS ALREADY BEEN DECIDED.

The Minnesota Constitution, Article XIV, creates a trunk highway system and county and municipal state-aid highway systems. Funds subject to appropriation are created to support them. No doubt constructing and maintaining highways are important government functions.

But this Court has already decided which highway construction and maintenance is a critical core function. In the Court's Order of June 29, the Court acknowledged that the government shutdown would "significantly delay completion of present projects, increase costs and put numbers of employees out of work," due to the legislative and executive branches' failure to agree. The Court allowed MnDOT to protect life and safety by, for example, repairing a bridge in danger of collapsing. Such work would "constitute a critical core function that needs to be funded." But the Court declined to allow funds to be spent in violation of Article XI to replace infrastructure in the absence of a direct threat to life and safety. *See* June 29 Order, p. 13, ¶ 37.

In so holding, the Court cited *County of Beltrami v. Marshall*, 135 N.W.2d 749 (Minn. 1965), and cautioned that a state road construction contract "does not justify the court ordering payment under those contracts without a specific legislative appropriation." *See* June 29 Order, pp. 13-14, ¶ 38.

Having decided the issue, the Court should not retreat from its prior holding on which the Special Master, contractors, and government agencies, including MnDOT, have relied. The line drawn by the Court makes a great deal of sense.

III. THE LEGISLATORS' PETITION WOULD REQUIRE THAT THE COURT ORDER THAT MORE THAN \$100 MILLION OF UNAPPROPRIATED FUNDS BE SPENT.

The Legislators request that the Court order the resumption of highway construction projects, "including staff and operating costs necessary to support these operations."

To aid the Court in understanding the breathtaking nature of the relief the Legislators seek, the Governor submits herewith three affidavits.

A. Affidavit of Tracy Hatch ("Hatch Aff.")

Tracy Hatch (no relation to the attorney who has appeared in this proceeding) is the Chief Financial Officer of MnDOT. Hatch explains that MnDOT road construction projects are not financed with standing or continuing appropriations. Hatch Aff. ¶ 6. Nor is there federal money in state coffers waiting to be spent. The Federal Aid Highway Program is a reimbursement program, not a grant program. To receive federal reimbursement, the state must first appropriate funds, spend the funds on eligible projects, and then seek and obtain reimbursement. Even after federal reimbursement, 60% of the State Roads program is state money. No federal funds go into the Local Roads program. Hatch Aff. ¶ 5.

The State Roads program is financed mainly through the Trunk Highway Fund, and the aids to counties and cities are financed through separate funds. Hatch Aff. ¶ 4. These funds are not standing or continuing appropriations. Hatch Aff. ¶ 6.

Before the government shutdown, MnDOT anticipated that its summer construction program would be financed by both Fiscal Year 2011 and Fiscal Year 2012 appropriations. Hatch Aff. ¶ 7. MnDOT planned to fund the hard construction costs of

the projects awarded by June 30 with FY11 or earlier appropriations, while hard costs for projects awarded after July 1 would be funded with FY12 appropriations. Hatch Aff. ¶ 7.

However, over and above the hard costs, MnDOT anticipated that all of the summer construction projects would require FY12 funds for project support and oversight. These services include financial management, human resources, information technology, permitting, auditing, inventory, right of way, safety, fleet mechanics, construction project personnel, inspectors, traffic control, civil rights, and offices for materials, environmental stewardship, construction, technical support, and bridges. Hatch Aff. ¶ 8.

Because the FY12 appropriation has not been enacted into law, MnDOT has suspended all of these projects. MnDOT estimates that, to resume the State Roads program, about \$75 million of unappropriated FY12 funds would have to be spent for hard construction costs. Hatch Aff. ¶ 9. To resume the Local Roads program (aids to counties and cities), about \$137 million of unappropriated FY12 funds would have to be spent. Hatch Aff. ¶ 11.

Finally, MnDOT estimates that, to resume the summer construction program, MnDOT would have to call back 840 employees to perform oversight and supervision, as part of a monthly cost of at least \$7.7 million. This would have to be paid for with unappropriated FY12 funds. Hatch Aff. ¶¶ 8, 11.

B. Affidavit of Jon Chiglo (“Chiglo Aff.”)

Chiglo was the project manager on the new I-35W Bridge, and is now the Division Director of MnDOT’s Engineering Services Division.

According to Chiglo, MnDOT construction projects could be resumed only by expending large amounts of FY12 funds. Such funds would be required for:

1. MnDOT's activities on the right of way as owner and regulator.
2. MnDOT's bridge office, which deals with design, construction, and traffic control issues.
3. MnDOT's technical support office, which does estimating, utility permitting, and consultant agreements.
4. MnDOT's construction and innovative contracting unit, which processes invoices and contract changes, as well as advising District Offices on claims.
5. MnDOT's environmental services unit, which obtains permits and monitors compliance.
6. MnDOT's land management unit, which obtains, secures, and protects the right of way.
7. MnDOT's civil rights and affirmative action functions.
8. MnDOT's materials and road research office, which provides technical services regarding structural concrete, pavement, and grading activities.
9. MnDOT's Operations Division, within which are eight District Offices and 23 Resident Offices. The District and Residence Offices administer the contracts. One of their important functions is traffic engineering for the safety of the traveling public.
10. MnDOT's State Aid Division, which manages the Local Roads Program.
11. MnDOT's finance and auditing functions, which are important to the financial integrity of these complex projects.

According to Chiglo, effective July 1, MnDOT suspended 98 active projects and all related contracts, and another 56 projects where contracts had not yet been let or awarded. Chiglo states: "MnDOT cannot effectively reactivate, administer, supervise, inspect, and close those projects without funds that have not yet been appropriated." Chiglo Aff. ¶ 14.

C. Affidavit of Britta Reitan ("Reitan Aff.")

Reitan is an Executive Budget Coordinator at the Department of Management and Budget. She states that "the vast majority of expenditures from the THF [Trunk Highway Fund] require direct appropriation by the legislature and are not standing or continuing appropriations." Similarly, all of the expenditures for state aid to counties and cities are direct appropriations, not standing or continuing appropriations. Reitan Aff. ¶ 6.

Direct appropriations for FY12 were in the transportation appropriations bill. More than \$2 billion was in the bill for the State Roads and the Local Roads programs. The bill was vetoed by the Governor on May 24, 2011. Reitan Aff. ¶ 7.

In summary, the Legislators are requesting that the Court inject itself into the legislative and executive budget process, seize the power of the purse, call back many employees, and order that a very large amount of unappropriated FY12 money be spent to reactivate, operate, and administer the MnDOT road construction programs. By no stretch of the imagination could such an order be consistent with Article III (separation of powers), Article IV (appropriations process), Article V (executive power), and Article XI (appropriations required) of the Minnesota Constitution. Most certainly such a sweeping Court order would constitute control, coercion, and restraint of the other two departments

of government. *See State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930).

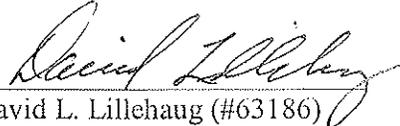
CONCLUSION

At the same time as six of their colleagues petition the Minnesota Supreme Court for a writ declaring that this Court has far exceeded its authority, these two Legislators invite the Court to exercise the broadest authority imaginable, ordering the return of hundreds of employees and the expenditure of more than a hundred million dollars.

As the Court has said repeatedly in recent orders based on Special Master recommendations, state government funds and operates many admirable programs. But some such programs, including much of MnDOT's summer construction program, are not "critical core functions," and must await a lawful appropriation, either with the consent of the Governor or with the support of two-thirds of each legislative house. To order otherwise would be unconstitutional.

Dated: July 11, 2011

Respectfully submitted,



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SPECIAL COUNSEL TO THE
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² On June 10, 2011, the Governor retained Special Counsel solely on the matter of the potential government shutdown. Special Counsel represents only the Office of the Governor, and does not represent the State of Minnesota generally, the Attorney General, or the State's other constitutional officers, departments, entities, or subdivisions, whether executive, regulatory, legislative, or judicial.