

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1983

**OPINION NO. 83-1 The University of Nevada System; Law Enforcement Personnel: Nature and Scope of Powers and Authority of University of Nevada System Police Officers**—Nevada statutory law explicitly limits the powers and authority of university system police as peace officers to a specific territorial area comprised of campuses, grounds or properties of the university system as well as instances where the university police act in hot pursuit of a law violator leaving these specified areas. Nev. Rev. Stat. §§ 169.125(11), 171.172 and 396.325.

Carson City, February 23, 1983

Mr. Donald F. Klasic, General Counsel, Office of the Chancellor, The University of Nevada System, 405 Marsh Avenue, Reno, Nevada 89509

Dear Mr. Klasic:

Your office has presented two questions concerning Nevada law governing the nature and scope of the official powers and authority of law enforcement personnel employed by and on behalf of the University of Nevada System. An evaluation of your inquiries requires consideration of Sections 169.125(11), 171.172 and 396.325 of the Nevada Revised Statutes in light of controlling decisional law on the subject of statutory construction. No summary of the presenting facts is necessary because the inquiries of your agency can be resolved on the exclusive basis of legal construction of the involved statutes.

**QUESTION NUMBER 1**

Whether law enforcement personnel employed by the University of Nevada System may exercise the powers and authority of a Nevada peace officer if the officer is not on duty, is not present on the premises of the University of Nevada System campuses and grounds, or is not acting in hot pursuit of a violator departing those areas.

**ANALYSIS**

The Nevada Constitution provides for the establishment, support and maintenance of the University of Nevada System. In this regard, the state constitution vests responsibility for oversight of the university system in the board of regents. *See* Nev. Const. art. XI, §§ 4-8. Among the powers

which the Nevada Legislature has granted to the university board of regents is the authority, “to create a police department for the University of Nevada System and [to] appoint one or more persons to be members of such department.” Nev. Rev. Stat. § 396.325(1). Section 396.325, further proscribes that:

Persons employed and compensated as members of such police department, when so appointed and duly sworn, are *peace officers*; *but* no such officer may *exercise, his powers or authority except:*

- (a) Upon the *campuses* of the University of Nevada System, including the area to the center line of public streets adjacent to a campus;
- (b) When in *hot pursuit of a violator leaving* such a campus or area; or
- (c) In or about other *grounds or properties* of the University of Nevada System.

Nev. Rev. Stat. § 396.325(2)(a)-(c) (emphasis added). This statute is a legislative grant of authority to the board of regents permitting the university system to create an institutional law enforcement organization within narrow statutory parameters.

In this regard, both the specific provisions of Section 396.325 and the general definitional statutes governing criminal procedure are in agreement that university system law enforcement personnel are Nevada peace officers. *Compare* Nev. Rev. Stat. § 396.325(2) *with* Nev. Rev. Stat. § 169.125(11) (defining peace officer). *Cf.* *People v. Wesley*, 365 N.Y.S.2d 593, 595 (Buffalo City Ct. 1975) (absence of general peace officer designation immaterial where specific limited peace officer status granted to university police).

Section 396.325 is an explicit statute which clearly and unambiguously limits University of Nevada System law enforcement personnel from exercising power or authority except when upon campuses, grounds and property of the university system *or* when in hot pursuit of a violator leaving a campus or other university grounds. Nev. Rev. Stat. § 396.325(2)(a)-(c). Because Section 396.325(2) is explicit and unambiguous any resort to statutory construction would be improper. *See* *Porter v. Sheriff*, [87 Nev. 274](#), 275, 485 P.2d 676 (1971).

Even assuming that Section 396.325(2) is unclear, the considerations employed in construing legislative enactments would not result in a contrary analysis. A harmonious construction of Sections 169.125(11), 171.172, and 396.325, would indicate that the general legislation contained in Section 169.125(11), defining university system police as Nevada peace officers, and the language of Section 171.172, permitting peace officers to exercise their authority while in hot pursuit, is consistent with the specific restrictions contained in Section 396.325(2). *See* *Weston v. County of Lincoln*, [98 Nev. 183](#), 643 P.2d 1227, 98 Nev.App.Op. 57 (1982); *Laird v. State of Nev.Pub.Emp.Ret.Bd.*, [98 Nev. 42](#), 639 P.2d 1177, 98 Nev.Adv.Op. 15 (1982); *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830 (1977).

Accordingly, a university system law enforcement officer is a Nevada peace officer to the extent of that specific jurisdictional area determined by legislative enactment. Nev. Rev. Stat. §§ 169.125(11), 396.325(2)(a) and (c). Similarly, a university system police officer may take appropriate action in hot pursuit of a violator within his specified jurisdiction to the same extent generally permitted peace officers. Nev. Rev. Stat. §§ 171.172 and 396.325(2)(b). As a matter of Nevada law, it appears that university system law enforcement personnel maintain their peace officer status regardless of the fact that they may not be presently on duty, provided the specific officer is acting within the territorial limits of the jurisdiction granted in Section 396.325(2). *Compare* Nev. Rev. Stat. § 169.125(11) *and id.* § 169.125(2) *with* Nev. Rev. Stat. § 169.125(3) *and id.* § 169.125(15).

## CONCLUSION

Section 396.325 is an explicit, clear and unambiguous declaration of legislative policy that the University of Nevada System law enforcement personnel may not exercise their peace officer powers and authority beyond the limits mandated by the statute. In this regard, a university system police officer is a Nevada peace officer, whether presently on duty or during relief hours, provided that the officer is upon the campuses, grounds and property of the University of Nevada System *or* when acting reasonably in hot pursuit of a violator leaving these designated areas. The explicit language of Section 396.325(2) is consistent with the mandates of Section 169.125 defining peace officers and Section 171.172, which latter statute delineates the parameters of the hot pursuit doctrine.

## QUESTION NUMBER 2

Whether a law enforcement officer employed by the University of Nevada System is considered a peace officer or a private citizen should the officer respond while uniformed and operating a marked police vehicle to an incident involving a violation of Nevada law in an area outside the specific jurisdictional area designated for such officers by legislative enactment.

### ANALYSIS

Generally, a peace officer derives his power to act from the grant of authority contained in applicable statutory provisions. *See, e.g., Nevada Credit Rating Bur. v. Williams*, [88 Nev. 601](#), 608, 503 P.2d 9 (1972). Where a particular classification of peace officer, such as a university system police officer, has a narrow statutorily proscribed jurisdiction, that officer is not engaged in the performance of official duties when acting in excess of the stated jurisdiction. Under these circumstances, the university system police officer is not acting as a peace officer. This strict construction of the peace officer status and powers of university system law enforcement personnel is consistent with the manifest legislative intent to restrict the extra-territorial exercise of power by such institutional police. *See, e.g., State ex rel. Hurley*, 501 P.2d 111, 113 (Utah 1972). *But cf. People v. Dickson*, 154 Cal.Rptr. 116, 119 (App.Ct. 1979)

(specific statutory provision permits university police to assist other peace officer as is appropriate under the circumstances).

In light of explicit jurisdictional limitations placed upon the powers and authority of University of Nevada System police personnel under Section 396.325(2), extra-territorial exercise of power by these institutional law enforcement officers is improper. Although these peace officers could respond to incidents occurring outside their territorial jurisdiction under circumstances evidencing an indicia of police authority—that is an uniformed officer operating a designated police vehicle while on duty—this act would be improper under Nevada law. Consequently, should university system police take such extra-territorial actions, the affected officer must be considered to be acting beyond his peace officer powers and authority and, therefore, to be acting as a private citizen. The singular exception to this rule discouraging extra-territorial law enforcement activities by university system police is where the particular officer is in hot pursuit of a law violator leaving the campuses, grounds or property of the University of Nevada System. Nev. Rev. Stat. § 396.325(2)(b).

### CONCLUSION

Although University of Nevada System law enforcement personnel may be generally regarded as peace officers, this designation is granted university system police subject to the narrow statutory jurisdiction proscribed by the Nevada Legislature. This type of statutory scheme indicates a manifest legislative intent to restrict exercise of extra-territorial power by such institutional police. Accordingly, a university system police officer who disregards this narrow grant of authority by responding to incidents beyond his jurisdiction must be deemed to act as a private citizen. This rule is excepted where the university system police officer is acting reasonably in hot pursuit of a law violator leaving the campuses, grounds or property of the University of Nevada System.

Respectfully submitted,

BRIAN McKAY

Attorney General

By Dan R. Reaser  
Deputy Attorney General,  
Criminal Division

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**OPINION NO. 83-2 Driving While License Revoked or Suspended**—At the conclusion of a specified suspension period for a driver’s license, a person cannot be considered to be driving while his license is suspended in violation of [NRS 483.560](#) merely because he has not taken appropriate steps to reinstate the license. But, the driving privileges of a person whose license was revoked based on a conviction or forfeiture of bail remain revoked until evidence of financial responsibility is submitted and a person driving prior to that time is in violation of [NRS 483.560](#).

Carson City, February 23, 1983

The Honorable William A. Maddox, Carson City District Attorney, 208 N. Carson Street, Carson City, Nevada 89701

Attention: Noel S. Waters, Deputy District Attorney

Dear Mr. Maddox:

This office has received your letter dated October 18, 1982, in which you requested an opinion regarding the distinctions between section 483.550 and section 483.560 of the Nevada Revised Statutes. These sections govern the driving of motor vehicles without a valid license or with a revoked or suspended license. You have inquired as to whether a driver may be charged with driving on a revoked or suspended license after the specific period of revocation or suspension has ended but before the driver has taken appropriate steps to reinstate his license. An analysis of the question requires a review of certain facts and related statutes.

### **BACKGROUND**

The situation you described provides a good basis for analysis. First, we assume that a driver was stopped in Nevada by a police officer for a traffic infraction or other legitimate purpose. A subsequent records check indicated that the Nevada driving privileges of that individual were suspended or revoked. It was also determined that the actual period of suspension or revocation had run but that formal steps had not been taken by the driver to reinstate his driving privileges. Under section 483.550 of our statutes, it is unlawful to drive on highways in this state without being a holder of a valid driver’s license. Anyone convicted of violating this section is guilty of a misdemeanor and is also required to obtain a license. Nev.Rev.Stats. §§ 483.550, 483.620 (1981). Similarly, section 483.560 provides that anyone driving on a highway at a time when his or her driving privileges have been canceled, revoked or suspended is guilty of a misdemeanor. *Id.* § 483.560. The difference here is that this statute also states that anyone driving on a license which was suspended or revoked under the drunk driving or implied consent statutes shall be punished with mandatory jail time not less than thirty days and a fine of not less than \$500.

### **QUESTION PRESENTED**

Whether a person who is found to be driving on a public street or highway in Nevada may be charged with driving on a suspended or

revoked license under section 483.560 when the specific period of suspension or revocation of his license as previously ordered has run but when steps for reinstatement of driving privileges have not been taken.

## ANALYSIS

The relevant statutes state that no person may drive “*at a time* when his driver’s license has been canceled, revoked or suspended \* \* \*.” *Id.* § 483.560(1) (emphasis added). Similarly, section 483.570 states that a non-resident whose driving privilege has been canceled, suspended or revoked shall not drive “*while* such privilege is canceled, suspended or revoked.” *Id.* at § 483.570 (emphasis added). *Cf. id.* § 485.330 (cannot drive “during such suspension or revocation.”) The two emphasized phrases appear synonymous and commonly mean “[p]ending or during the time that.” *Black’s Law Dictionary* at 1431 (5th ed. 1979) (defining “while”). At this point, we must look to statutes defining the terms and periods of “suspension” and “revocation.” We have found that the statutory scheme distinguishes a suspension from a revocation.

### A. Suspensions

Nevada statutes define “suspension” as a temporary withdrawal of the privilege. Nev. Rev. Stat. § 483.180 (1981). Some statutes specifically identify the time periods for which a license may be suspended. *See, e.g., id.* §§ 483.465(3), 483.470, 483.490, 483.560(5), 484.379(3), 484.385. Still other statutes in the Safety Responsibility Act in chapter 485 require that certain suspensions continue until a driver submits evidence of his financial responsibility. *Id.* §§ 485.230, 485.302-303, 485.326. Therefore, the period or duration of a suspension will be a specified time defined by statute or can be terminated when the driver submits specific items after a suspension under the Safety Responsibility Act.

Even though the Licensing and Traffic Law sections in chapters 483 and 484 specify how long a suspension will last, we must be cognizant of section 483.525. That statute states that the Department of Motor Vehicles may not restore a license or privilege which has been revoked or suspended unless the person seeking the license has provided evidence that he is financially responsible. *Id.* § 483.525. Although this provision seemingly extends some of the specific periods of suspension defined by statute, it actually only states that the Department may not act to restore a license until it receives evidence of financial responsibility.

If this provision were read as an extension of specified suspension periods, it could possibly make indefinite those suspensions which are otherwise temporary and defined. And, under section 483.560, a driver charged with driving while his license was suspended for driving under the influence or for violating the implied consent law (*see id.* §§ 484.379, 484.3795, 484.385) shall be punished by a jail term of not less than thirty days and a fine of not less than \$500.00. *Id.* § 483.560(1). On the other hand, if a person is only driving *after* a period of suspension, but before he has reinstated his license, he will be guilty of driving without a valid license, *id.* § 483.550, and the mandatory jail term will not apply.

Because the statutes prohibiting driving without a valid license and driving on a suspended license are penal in nature, they must be strictly construed although the legislative intent must govern. *Ex parte Todd*, [46 Nev. 214](#), 218-19, 210 P. 131, 132 (1922). Penal statutes are not to be extended by inference or implication. *State v. Elsbury*, [63 Nev. 463](#), 471, 175 P.2d 430, 434 (1946) (citing cases). *See also In re Laiolo*, [83 Nev. 186](#), 426 P.2d 726 (1967). We do not believe that section 483.525 should be read to extend by implication some of the harsher provisions of section 483.560. Under section 483.180, a suspension is a temporary withdrawal and, under section 483.490, the Department may not suspend a license for more than one year. Moreover,

section 483.550 makes it unlawful to drive without a valid license. Because suspensions, by definition, are temporary, this section appears to cover those points in time when a suspension period has ended, but before a driver reinstates his license. It does not appear that the legislature, through section 483.525 actually intended to lengthen a suspension period but, rather, placed restrictions on reinstating a license. Had the legislature so desired, it could have so specified that the suspension period be extended. *Cf.* Nev. Rev. Stat. § 485.306 (1981) (driving privilege remains revoked).

#### B. Revocations

In contrast to the temporary nature of a suspension is a revocation which is defined as the termination of the driving privilege. *Id.* § 483.150.1 And, although some statutes do tend to limit revocations to specified periods,<sup>2</sup> *see, e.g., id.* § 483.460, other statutes and administrative practices demonstrate the permanency of the revocation as opposed to the temporary or defined suspension period. For instance, after a period of *suspension*, the Department may not restore a license until the driver pays a reinstatement fee and submits to tests. *Id.* §§ 483.410(1), 483.480(2), 483.500. After a *revocation* period, because the driving privilege was terminated, *id.* § 483.150, the Department requires the driver to apply for another license, *id.* § 483.290, and submit to testing, *id.* § 483.330. The driver must also pay a fee for the new license as well as a reinstatement fee. *Id.* § 483.410(1).

Some of the distinctions between revocations and suspensions in these statutes are subtle. Section 483.500 authorizes the return of a *suspended* license at the end of a suspension period. *Id.* § 483.500. Obviously, a *revoked* license cannot be returned because the driving privilege was terminated. Moreover, the practice of the Department of Motor Vehicles is to initiate a new licensing period once a person has reinstated his revoked driving privileges.

Further indicia of the permanency of a revocation is found in statutes requiring that certain steps be taken before a revoked license can be reinstated. Section 483.525 states that the Department may not restore, as with suspended licenses, a license or privilege which has been revoked unless evidence of financial responsibility has been submitted. As indicated in the previous analysis regarding suspensions, this statute alone should not be construed to extend a defined withdrawal period. Nevertheless, section 584.306 of the Safety Responsibility Act specifically states that, after a person's driving privilege has been revoked by reason of a conviction or forfeiture of bail, the driving privilege "*shall remain revoked* unless such person has previously given or immediately gives and thereafter maintains proof of financial responsibility." *Id.* § 485.306 (emphasis added). Unlike section 483.525, this statute purports to extend the actual period of some revocations in chapter 483.<sup>3</sup> And, the Safety Responsibility Act

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<sup>1</sup>*Cf.* Nev.Rev.Stat. § 483.040 (1981) ("canceled" means a license is void or terminated due to error or fraud).

<sup>2</sup> The usage of the phrase "period of revocation" in certain statutes is an unfortunate application of terms. As defined in section 483.150, a revocation is a termination as opposed to a suspension which is temporary and should be for defined periods. In order to make sense of the definition of "revocation" and the other statutes discussed here showing the permanency of a revocation, we believe that those statutes purporting to limit a revocation to a specific term should not be read literally. Rather, we believe it would be more reasonable to read the phrase "period of revocation" to mean "the period during which a revoked driving privilege may not be reinstated." *See Sheriff v. Smith*, 91 Nev. 729, 733-34, 542 P.2d 440, 443 (1975) (a reasonable interpretation is favored over an unreasonable one). Such a reading would render compatible the statute defining "revocation" and those statutes which are *in pari materia*. *See State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830, 836 (1977) (statutes must be construed to render them compatible). This reading would be consistent with the manner in which a period of revocation is defined in the Uniform Vehicle Code. *See Uniform Vehicle Code* § 6-208.

<sup>3</sup>This statute was amended in 1975 and removed provisions which also extended suspensions. 1975 Nev.Stats.ch. 580, at 1091. Because chapter 485 only contains provisions for suspensions, *see, e.g., Nev.Rev.Stat.* §§ 485.190, 485.302, 485.326 (1981), it appears that section 485.306 is intended to apply only to revocations authorized in chapter 483. *See Nevada State Department of Motor Vehicles v. Turner*, 89 Nev. 514, 515 P.2d 1265 (1973).

is to be construed as supplemental to the motor vehicle laws found in chapter 483. *Id.* § 485.390.

The very terms of section 485.306 indicate that the statute does not apply to any *suspensions* including those in chapter 484 for driving under the influence. Nor does it apply to implied consent *revocations* under section 484.385 as those revocations do not depend upon a “conviction or forfeiture of bail.”<sup>4</sup> As such, we need not be concerned with the harsher penalties of section 483.560 being applied to “indefinite revocations” based upon those violations of law. Thus, although a period of *suspension* is not extended until a driver submits evidence of financial responsibility, a *revoked* driving privilege remains revoked for any defined period of time and then indefinitely until a driver takes the proper steps to reinstate and comply with section 485.306.

## CONCLUSION

When a person is found to be driving a vehicle on a highway in Nevada at a time when the specified period of *suspension* has run but before reinstatement steps are taken, that person is not driving at a time when his license is suspended in violation of section 483.560.<sup>5</sup> That person is driving without a valid license in violation of [NRS 483.550](#). On the other hand, if a person is driving after his driving privileges have been *revoked*, due to a conviction or forfeiture of bail, and before he has submitted evidence of his financial responsibility pursuant to section 485.306, that person is driving at a time when his license has been revoked in violation of section 483.560. The revocation in those circumstances remains in effect until the driver complies with section 485.306.

Respectfully submitted,

Brian McKay  
Attorney General

By: Brian Randall Hutchins  
Deputy Attorney General

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**OPINION NO. 83-3 Public Records; Records of Criminal History and Law Enforcement Records**—Arrest reports are records of criminal history. [NRS Chapter 179A](#). Criminal investigation reports or crime reports, including police radio logs, are not public records within the meaning of [NRS 239.010](#).

Carson City, May 2, 1983

The Honorable James E. Wilson, Jr., Elko County District Attorney, Elko County Courthouse,  
Elko, Nevada 89801

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Excluded are revocations in chapter 484 for Implied Consent Law violations since those do not depend upon a “conviction or forfeiture of bail.” *See Nev.Rev.Stat.* § 484.385(1), (2) (1981). Moreover, after the 1981 changes in the DUI laws, the Department can only *suspend* licenses of drunk drivers. *Id.* § 484.379 (as amended in 1981 Nev.Stats.ch. 755, § 5, at 1924-26). Thus, the only revocations which appear affected are those found in chapter 483. *See, e.g., id.* §§ 483.440, 483.460. For all intents and purposes, the *Turner* decision has now been legislatively overruled with regard to point system *suspensions* in section 483.470 being affected by section 485.306.

<sup>4</sup>*See* note 3 *supra*.

Dear Mr. Wilson:

## QUESTION

This letter is in response to a written request from your predecessor for an opinion of this office concerning these questions: Which of the following records relating to the criminal justice system are public records: (1) arrest reports, (2) criminal investigation reports, and (3) radio logs of police dispatchers?

## ANALYSIS

The Nevada Legislature has enacted a general statute concerning access to public records. [NRS 239.010](#) provides, in pertinent part:

All public books and public records \* \* \* the contents of which are

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<sup>5</sup>This conclusion does not hold true, of course, for those persons whose licenses *remain* suspended, according to the terms of certain statutes, *see, e.g.*, Nev. Rev. Stat. §§ 485.230, 485.302-.303, 485.326 (1981), until proof of financial responsibility is given.

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not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person.

The application of [NRS 239.010](#) to the records described above is complicated by the lack of any legislative definition or judicial interpretation by Nevada courts of the term “public books and public records,” despite the provision for a criminal penalty for noncompliance with the statute. However, with respect to characterization of various records prepared or maintained by agencies of criminal justice, the Legislature has provided a more specific statute, [NRS Chapter 179A](#), which appears to furnish some guidance.

### ISSUE NO. 1

Are arrest reports or notations of arrests maintained by agencies of criminal justice records of criminal history?

### DISCUSSION

[NRS 179A.070](#)(1) defines records of criminal history as follows:

*“Record of criminal history” means information contained in records collected and maintained by agencies of criminal justice, the subject of which is a natural person, consisting of descriptions which identify the subject and notations of arrests, detention, indictments, informations or other formal criminal charges and dispositions of charges, including dismissals, acquittals, convictions, sentences, correctional supervision and release, occurring in Nevada. The term includes only information contained in memoranda of formal transactions between a person and an agency of criminal justice in this state. The term is intended to be equivalent to the phrase “criminal history record information” as used in federal regulations. (Emphasis supplied.)*



Based on this definition, an arrest report would be included in the category of records of criminal history.

Nev. Rev. Stat. 179A.100 provides for the dissemination of records of criminal history. Records of criminal history, including arrest reports, *may* be disseminated without restriction, if the person who is the subject of the record is currently within the system of criminal justice. [NRS 170A.100\(2\)](#). Records of criminal history *must* be disseminated to certain persons and governmental entities, including among others, the person who is the subject of the record, reporters for the printed and electronic media and prospective employers. *See* 179A.100(4)(a-j).

The Nevada Legislature has, in [NRS Chapter 179A](#), provided a statutory scheme for the collection and dissemination of records of criminal history. The specific terms of this chapter control the more general public records law in Nevada, [NRS 239.010](#). *See generally*, Laird v. State of Nevada Public Employees Retirement Board, [98 Nev. 42](#), 639 P.2d 1171 (1982), Ronnow v. City of Las Vegas, [57 Nev. 332](#), 65 P.2d 135 (1937).

It appears from consideration of [NRS 179A.100](#) that the Legislature has balanced the conflicting societal interests concerning access to records of criminal history. The arrest of a person marks the formal entry into the criminal justice system, and the arrest report which contains information such as the offense committed, the time and location of the crime, the identity of the person arrested, and the arresting officers, is a memorandum of a formal transaction between a person and an agency of criminal justice. As such, dissemination of the record would be governed by [NRS 179A.100](#).

#### **CONCLUSION TO QUESTION NO. 1**

An arrest report is a record of criminal history as defined by [NRS 179.070\(1\)](#). The provisions of [NRS 179A.100](#) govern the dissemination of arrest reports.

#### **QUESTION NO. 2**

Are criminal investigative reports and recorded data contained in intelligence or investigative files maintained by law enforcement agencies public records?

#### **DISCUSSION**

The definition of “record of criminal history,” contained in [NRS 179A.070\(1\)](#) cited above, explicitly does not include “[i]nvestigative or intelligence information, reports of crime or other information concerning specific persons collected in the course of the enforcement of criminal laws.” [NRS 179A.070\(2\)\(a\)](#). The exemption of these categories of criminal records from the orderly dissemination procedures of [NRS 179A.010](#), *et seq.*, indicates a legislative purpose that these records remain confidential.

Nevada’s statutes governing dissemination of criminal records, [NRS 179.010](#), *et seq.*, were enacted by the Sixtieth Session of the Nevada Legislature in response to a requirement set by the federal government that the state provide in acceptable plan concerning the dissemination of criminal history records, or be subject to certain budgetary sanctions. 1979 Nev. Stat. Ch. 689 at 1850. *See Legislative History 79-7*, AB 524 of the Sixtieth Session, Page 3. *See Privacy and Security Plan, Nevada Commission on Crime, Delinquency and Corrections*, October 19, 1976.

The federal requirement that an acceptable statute be adopted to protect the privacy of individuals and the security of governmental records pertaining to the detection and prosecution of criminal misconduct was imposed pursuant to the authority vested in the Law Enforcement Assistance Administration (LEAA) by Sections 501 and 504 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Crime Control Act of 1973, Pub.L. 93-83, 87 Stat., 197 (42 U.S.C. 3701, *et seq.* [August 6, 1973]). *See* 42 U.S.C. 3789(b), (c) and (d).

The Nevada statute, [NRS 179A.080\(1\)](#), refers to federal regulations which define the phrase “criminal history information record.” A review of the regulation which serves as a guideline for state law indicates that investigative and intelligence reports are not a matter of public record and are not included in the category of “criminal history information records.” *See* Appendix,

Subpart A, to Section 20.3(b), Title 28, CFR Chapter 1, Subpart (b) at 248. See Definition and Annotation “Criminal History Record Information,” *Dictionary of Criminal Justice Data Terminology*, First Ed. 1976, Search Group, Inc., U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service.

The intent of the Legislature to classify data contained in intelligence and investigation files as confidential is further revealed in [NRS 179A.150](#)(1), which provides:

Each state, municipal, county or metropolitan police agency shall permit a person, who is or believes he may be the subject of a record of criminal history maintained by that agency, to appear in person during normal business hours of the agency and inspect any recorded information held by that agency pertaining to him. *This right of access does not extend to data contained in intelligence, investigative or other related files, and does not include any information other than that defined as a record of criminal history.* (Emphasis supplied.)

Additionally, [NRS 179A.120](#) provides that agencies of criminal justice may disclose to victims of crimes the identity of persons suspected of being responsible for the crime, but that no duty to disclose additional information contained in investigation reports exists.

These statutes, and the discussion which follows, indicate a legislative purpose that intelligence, investigative and related files maintained by agencies of criminal justice are confidential, and are not open to public inspection pursuant to [NRS 239.010](#).

In Op. Att’y Gen. No. 234 (June 3, 1965), this office stated its opinion that [NRS 239.010](#), which defines public books and records that are open to public inspection, did not make otherwise confidential crime reports, photographs and criminal records available to the public for the reason that revealing these records would not be in the public welfare:

It is also to be pointed out that if such records are available to the general public, the apprehension of criminals by law enforcement agencies would be hampered. It is not unreasonable to believe, for example, that should material be made available on a “wanted” person, such person could be forewarned. If attorneys desire information of the type described above, they can avail themselves of court orders rather than the statutes.

The strong public policy supporting the confidentiality of crime reports, criminal investigation reports, witness statements, affidavits, and physical evidence, except that released pursuant to a court order, is based upon the necessity of maintaining effective law enforcement. The legitimate public policy interests in maintaining confidentiality of criminal investigation records and criminal reports include the protection of the elements of an investigation of a crime from premature disclosures, the avoidance of prejudice to the later trial of the defendant from harmful pretrial publicity, the protection of the privacy of persons who are not arrested from the stigma of being singled out as a criminal suspect, and the protection of the identity of informants. These interests have generally been recognized by the courts to outweigh the general policy of openness in government, and reflect the common law view that certain records which pertain to criminal investigations are confidential. *People v. Wilkins*, 287 P.2d 555 at 559 (Cal.App. 1955); *Cowles Publishing Company v. Murphy*, 637 P.2d 966 at 968, 969 (Wash. 1981); *In Re Broughton*, 520 F.2d 765 at 767 (9th Cir. 1975), pertaining to search warrants and sealed affidavits. See, e.g., *Matthews v. Pyle*, 251 P.2d 893 (Ariz. 1952); see also *Los Angeles Police Department v. Superior Court*, 135 Cal.Rptr. 575 (Cal.App. 1977); *Losavio v. Meyber*, 496 P.2d 1032 (Colo. 1972); *Bogas v. Chief of Police*, 354 N.E.2d 872 (Mass. 1976); *Sheehan v. Binghamton*, 398 NYS2d 905 (N.Y.App. 1977); *Jensen v. Schiffman*, 544 P.2d 1048 (Ore.App., 1976).

The Legislature has further defined the processes by which a person formally charged with the commission of a crime may, by court order, obtain discovery of certain items of evidence to be used in that person’s defense. Such items include statements of a defendant, [NRS 174.235](#)(1), and reports of physical or mental examinations and of scientific tests or experiments made in

connection with a particular case within the possession, custody or control of the state, [NRS 174.234](#)(2). The court, upon motion, may further permit the defendant to inspect and copy books, papers, documents, tangible objects, buildings or places, which are within the possession, custody or control of the state, upon a showing of materiality to the preparation of the defense. The Nevada Legislature in [NRS 174.245](#), however, sharply limited pretrial discovery in criminal cases with the following language:

Except as provided in subsection 2 of [NRS 174.235](#) and [NRS 174.087](#), this section does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than a defendant) to agents of the state. [NRS 174.145](#).

This statute was reviewed by the Nevada Supreme Court in *Franklin v. District Court*, [85 Nev. 401](#), 455 P.2d 919 (1969), certiorari dismissed on other grounds, wherein the court stated:

The new criminal code does deal with criminal discovery ([NRS 174.235](#)-174.295) and those provisions represent the legislative intent with respect to the scope of allowable pretrial discovery and [they] are not lightly to be disregarded. 85 Nev. at 402-403.

The Legislature's enactment of this statute pertaining to pretrial discovery in criminal cases, with defined rights and remedies of the defendant and of the state, indicates a legislative intent that such matters are not otherwise accessible. See *Wooster Republican Printing Co. v. Wooster*, 383 N.E.2d 124 (Ohio 1978.) *People v. Wilkins*, *supra*.

#### **CONCLUSION TO QUESTION NO. 2**

Criminal investigation reports as defined above are confidential as internal intelligence and investigative records collected in the course of the enforcement of criminal laws and are not public records subject to [NRS 239.010](#).

#### **QUESTION NO. 3**

Are radio logs prepared by police dispatchers public records?

#### **ANALYSIS**

A radio log has been described as a lined sheet of paper with entries concerning the activities of law enforcement personnel, investigation and arrest of suspects, reports and complaints received from all sources, and the identity of officers receiving or responding to calls. The term generally refers to an internal administrative record of police and other law enforcement dispatchers which record the response of law enforcement personnel to reports of crime and other incidents. The log may contain notations of the location of officers and the time spent in responding to calls, and may also contain sensitive information concerning the names of informants, surveillance activities and patrol routes and schedules. The logs contain basic intelligence and investigative information collected in the course of enforcement of criminal laws. [NRS 170A.070](#)(2)(a). [NRS 179A.070](#)(1) defines records of criminal history to include "only information contained in memoranda of formal transactions between a person and an agency of criminal justice." Since radio logs are not records of formal transactions, and since radio logs contain basic investigative or intelligence information, reports of crime and other information collected in the course of the enforcement of criminal laws, the radio logs would not be subject to dissemination as a record of criminal history. [NRS 179A.070](#)(2)(a).

#### **CONCLUSION TO QUESTION NO. 3**

The radio log, maintained by law enforcement agencies to record information including the calls coming in to the agency and the dispatching of law enforcement officers, is not a record of

criminal history. [NRS 179.070](#)(1). A radio log has been characterized as a record containing investigative or intelligence information, [NRS 179A.070](#)(2)(a), and is not a public record. [NRS 239.010](#).

If your office is interested in examining these issues further, the right of public and media access to police records has received extensive attention from courts and legal commentators in other jurisdictions. See *Public Access to Police Records*, 81 ARL3d 19 (1978); *The Press and Criminal Records Privacy*, 20 St. Louis ULJ 509 (1976); *The Rights of the Public and Press to Gather Information*, 87 Herv.L.Rev. 1505 (1974); *Houston Chronicle Co., vs. City of Houston: Public Has Limited Access to Criminal Records*, Vol. 30, Southwestern Law Review (1976) 514.

Sincerely,

Brian McKay, *Attorney General*

By James C. Smith, *Deputy Attorney General*

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**OPINION NO. 83-4 Employment Discrimination—The Equal Rights Commission may include “tips” in calculations of back pay awards where “tips” are normally part of the wages earned and where an adequate evidentiary basis for making calculations of potential tip income exists.**

Carson City, June 6, 1983

Ms. Delia E. Martinez, *Executive Director*, Nevada Equal Rights Commission, 1550 E. Tropicana, Suite 590, Las Vegas, Nevada 89158

Dear Ms. Martinez:

You have asked our opinion with regard to the authority of the Equal Rights Commission to include “tips” in back pay awards.

#### **QUESTION**

May “tips” be included in calculating back pay awards for employment discrimination cases pursuant to [NRS 613.310](#) through 613.430?

#### **ANALYSIS**

The Equal Rights Commission has broad authority to make an employee whole as the result of a discriminatory act. [NRS 233.-170](#)(3)(b)(2) provides that the Commission may:

2. Restore all benefits and rights to which the aggrieved person is entitled, including but not limited to rehiring, back pay for a period not to exceed two years, annual leave time, sick leave time or pay, other fringe benefits and seniority, in cases involving an unlawful employment practice.<sup>1</sup>

Generally, back pay awards are calculated so as to reimburse those individuals who have suffered discrimination for the wages they would have earned but for the unlawful discrimination. It is not for the purpose of punishing the employer. *Claiborne v. Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1979), *cert. den.* 442 U.S. 934 (1979). Historically,

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<sup>1</sup>In the 1983 legislative session, A.B. 95 was passed which will allow interest at 12 percent per

annum on such benefits.

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awards of back pay to employees who have been discriminated against have properly included the following: lost wages, overtime pay, shift differentials, premium pay, interest and fringe benefits, vacation and sick pay and worker's compensation benefits. *Farmer v. United Catering Restaurant, Bar and Hotel Workers Local 1064*, 19 EPD § 9075. Awards have also included medical expenses, *Harmon v. San Diego County*, 21 EPD § 30, 293, 447 F.Supp. 1084 (D.C. Cal. 1979); travel pay and expenses, *Weeks v. Southern Bell Telephone and Telegraph*, 3 EPD § 8202, (D.C. Ga. 1971); pension rights, retirement and disability benefits, and medical insurance payments, *Communication Workers v. American Telegraph and Telephone*, 9 EPD § 10,035, 513 F.2d 1024 (2d Cir. 1975). Generally the courts look to any benefits which are part of the employee's compensation if they are integrally related to the entire wage structure. *Gilbert v. General Electric Company*, 519 F.2d 661 (4th Cir. 1975).

There are a few cases in which the courts have allowed "tips" to be included as part of the back wage payment when such tips can be calculated without being unnecessarily speculative. For example, a waitress who proved employment discrimination on the basis of sex was awarded back pay which was calculated partially on the basis of an obligatory 16 percent gratuity which was to be shared among the waiters and waitresses. *Evans v. Sheraton Park Hotel*, 5 EPD § 8079 (1972), *aff'd* 503 F.2d 177 (D.C. Cir. 1974). In *Evans* the U.S. District Court for the District of Columbia held that preference was given to banquet waiters for reception assignments and waitresses were not allowed to serve receptions with the same regularity as the men. This was a substantial factor in creating a compensation difference between the waiters and the waitresses. *Id.* at Sec. 8079 at p. 6922. Due to a significant and substantial portion of the total compensation coming from the division of an obligatory 16 percent gratuity among those employees serving at receptions, the court held it was just to compensate Ms. Evans, who had been discriminated against unfairly, by calculating a proportionate amount of this gratuity within her back pay award.

In addition, the National Labor Relations Board has awarded back pay for waitresses and car hops at a drive-in restaurant by directing that tips be included. *Home Restaurant Drive-In, N.L.R.B.*, 1960, 46 Labor Relations Reference Manual (LRRM) 1065 BNA. In that case the employer was required to reinstate discriminatorily laid-off employees with back pay equal to the amount they would have earned as wages from the date of their layoffs to the date of the employer's offer of reinstatement. In computing back pay the commission ordered that "tips" be included as part of the wages normally earned.

Although an employer would not have paid "tips" to the employee as an out-of-pocket cost, there is no doubt that certain employees would receive "tips" by virtue of having worked in the gaming, restaurant or hotel industries. In these cases, "tips" would be a benefit which is integrally related to the entire wage structure of certain employees engaged in the gaming, restaurant or hotel industries.

Calculating the amount of "tips" which the employee is due would depend on the facts of each individual case. If the establishment keeps track of "tips" for IRS purposes, then an average "tip" for the time period in question can be calculated with a reasonable degree of certainty. If a "tip" pooling arrangement exists, there would be evidence of an average proportionate "tip" for each employee. Declarations of "tip" income on the employee's IRS tax form may also be used as a basis for calculation. The only advice we would give is that the lost "tips" income not be based on mere speculation, but be based on actual figures obtained through valid and substantial evidence.

#### **CONCLUSION**

In summary it is our opinion that in calculating back pay awards for employment discrimination cases, it is proper for the Equal Rights Commission to include "tips" in calculations of back pay awards where "tips" are normally part of wages earned and where an adequate evidentiary basis

for making calculations of potential “tip” income exists.

Sincerely,

Brian McKay, *Attorney General*

By Pamela M. Bugge, *Deputy Attorney General*

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**OPINION NO. 83-5 State Board of Health; Health Division Authority to Impose Fees on Wholesale Food Warehouse as Food Establishments—Health Division has authority to impose fees on wholesale food warehouses as “food establishments” within the meaning of [NRS 446.020](#) pursuant to regulations adopted by State Board of Health in accordance with [NRS 439.150\(3\)](#).**

Carson City, June 9, 1983

George Reynolds, M.D., *Acting State health Officer*, Health Division, 505 E. King Street, Carson City, Nevada 89710

Dear Dr. Reynolds:

The State Board of Health pursuant to the provisions of [NRS 439.150\(3\)](#) adopted regulations on May 19, 1982, drafted by the Health Division establishing fees for the permitting and inspecting of facilities and establishments regulated by the Health Division. One such facility regulated by the Health Division is “Food and Drink Establishments” in accordance with Chapter 446 of the Nevada Revised Statutes.

A number of objections to the imposition of said fees upon “food establishments” have been tendered by wholesale warehouses which store and sell alcoholic and nonalcoholic beverages in both bottles and aluminum cans. The thrust of the objections raised by the warehouses can be summarized as follows: First, as wholesale warehouse, they sell beverages in glass containers which are waterproof or in pressurized cans. Second, they do not process, bottle or repack any of the products. Third, some of the products are federally inspected (as in the case of alcoholic beverages) at the distillery or brewery and all products are hermetically sealed. Fourth, if any product has a broken seal or defective package, the warehouse destroys the product as it is not salable to retail outlets.

Based upon these objections, these wholesale warehouse facilities believe that the provisions of Chapter 446 regulating “Food and Drink Establishments” do not apply to their operations and they should accordingly not be charged a fee for the issuance of a permit as a “food establishment.”

Your office has requested an opinion concerning the Health Division’s authority to impose permit fees on these wholesale warehouse facilities. The specific question posed is as follows:

**QUESTION**

Do the provisions of Chapter 446 of the Nevada Revised Statutes (Food and Drink Establishments) apply to wholesale warehouse facilities which store beverages for ultimate sale?

**ANALYSIS**

The response to the question posed entails a two-part analysis. First, are alcoholic and nonalcoholic beverages bottled in both glass and aluminum cans “food” as that term is defined in [NRS 446.017](#)? [NRS 446.017](#) defines “food” as follows:

“Food” means any food, *drink*, confection or *beverage*, or any component in the preparation or manufacture thereof, *intended for ultimate human consumption*, stored, being prepared or manufactured, displayed, *offered for sale*, sold, or served in a food establishment. (Emphasis added.)

Any resort to statutory construction tools to interpret this statute is unwarranted based upon the explicit and unambiguous terms contained therein. *See*, Porter v. Sheriff, [87 Nev. 274](#), 275, 485 P.2d 676 (1971).

When the intention of the Legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction.

Sutherland, *Statutory Construction*, 4th Ed. § 46.01. See also § 45.02.

Thus, this office concludes from the plain language of the statute that the Legislature intended to include alcoholic and nonalcoholic beverages within the meaning of “food” as defined in [NRS 446.017](#).

The second inquiry is whether this “food” is being stored, offered for sale or sold in a “food establishment” as that term is defined in [NRS 446.020](#).

[NRS 446.020](#) defines “food establishment as follows:

1. “Food establishment” means any place, *structure*, premises, vehicle or vessel, or any part thereof, in which any food intended for ultimate human consumption is manufactured or prepared by any manner of means whatever, or in which any *food* is sold, *offered or displayed for sale*, or served.
2. The definition does not include:
  - (a) Private homes.
  - (b) Fraternal or social clubhouses attendance at which is limited to club members.
  - (c) Vehicles operating on common carriers engaged in interstate commerce.
  - (d) Premises on which religious, charitable and other nonprofit organizations sell food for the purpose of raising funds or on which charitable organizations receive salvage food in bulk quantities for the purpose of free distribution.
  - (e) Any slaughter establishment which is regulated and inspected by the state department of agriculture.
  - (f) Mild and milk products plants, frozen dessert plants and dairy farms which are regulated by chapter 584 of NRS. (Emphasis added.)

This office concludes, for the same reasons noted above, that a wholesale warehouse which stores “food” in the form of alcoholic and nonalcoholic beverages and offers these products for sale or consummates sales of these products, is a “food establishment” as that term is defined in [NRS 446.020](#). These statutes are broadly construed by this office to effectuate the legislative purpose of this legislation, *i.e.*, the protection of public health. Sutherland in his treatise, *Statutory Construction*, 4th ed. at § 71.02 states:

Since a very early time the courts have been committed to the doctrine of giving statutes which are enacted for the protection and preservation of public health an extremely liberal construction for the accomplishment and maximization of their beneficent [beneficent] objectives. The public and social purposes served by such legislation greatly exceed the inconvenience and hardship imposed upon the individual, and therefore the former is given greater emphasis in the problems of interpretation. Therefore, the courts are inclined to give health statutes a liberal interpretation despite the fact that such statutes may be penal in nature and frequently may impose criminal penalties.

Likewise, § 65.03 states:

Where administrative powers are granted for the purpose of effectuating broad regulatory programs which are deemed to be essential to the public welfare, interpretive attention may concentrate on the remedial character of the legislation to produce a liberal interpretation that enables the full benefits of the program to be realized. This approach has been taken consistently in respect to statutes granting powers to boards of health.

In view of the importance of the interests confided to the care of health officers, the various statutes conferring such powers should, notwithstanding the individual liberty of the citizens in a large measure involved, receive a broad and liberal construction in aid of the beneficial purposes of their enactment.” (Citations omitted.)

Nevada has adopted a similar rule permitting liberal construction of statutes to effectuate the type of legislative intent which prompted enactment of the provisions under consideration. In *Welfare Div. v. Washoe Co. Welfare Dep’t.*, [88 Nev. 635](#), 637, 503 P.2d 457 (1972) the Court held:

“The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense.” *State ex rel O’Meara v. Ross*, [20 Nev. 61](#), 63, 14 P. 827, 828 (1887); *State ex rel Huckley v. District Court*, [53 Nev. 343](#), 352, 1 P.2d 105, 106 (1931); *Western Pacific R.R. v. State*, [69 Nev. 66](#), 69, 241 P.2d 846 (1952). “The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it.”

(See also, *Ex Parte Douglass*, [53 Nev. 188](#), 192, 295 P. 447 (1931); *Ryan v. Manhattan Mining Co.*, [38 Nev. 92](#), 98, 145 P. 907 (1914).

This office has on prior occasions examined the regulation of food establishments pursuant to Chapter 446 of the Nevada Revised Statutes. In *Op. Att’y Gen. No. 399* (July 29, 1958), we stated:

\* \* \* inasmuch as this is a regulatory statute (Chapter 446 of NRS) vitally affecting public interest and health, we are required to give it a liberal construction to effect all the purposes for which it was designed.

The wholesale warehouses involved appear to question the beneficent objectives served by a legislative grant of authority to the Health Authority pursuant to Chapter 446 of the Nevada Revised Statutes to inspect wholesale warehouses containing sealed beverage containers.

The Health Division has advised that a controlled environment for storage of bottled and canned beverages is essential to prevent possible contamination of the food product or, even more likely, the containers which may result in unsanitary conditions when the product is consumed. The example given is the case of rodent or insect infestation of a warehouse where animal wastes may be deposited on cans or bottles without any visible indications of such contamination. This office can take notice of the fact that such contamination of soda pop cans, for example, may result in unsanitary conditions to the unwary consumer who does not sanitize the top of the can prior to consuming the beverage contained therein. Thus, the need for Health Authority inspection of warehouse facilities to ensure the utilization of sanitary practices by the operator in both the storing and handling of this packaged “food” is apparent.

This office is also persuaded to interpret this legislation broadly by the fact that the agency charged with administering the statute at issue has construed its application to include wholesale warehouses such as those in question for at least ten years without objection on the part of the wholesale warehouses. Where the meaning of a statutory provision is in doubt, the construction placed upon the provision by the agency charged with its administration is entitled to weight. *Seaborn v. Wingfield*, [56 Nev. 260](#), 270, 48 P.2d 881 (1935); *Texas Health Fac. Com’n. v. El Paso Med., Etc.*, 573 S.W.2d 291, 295 (1978). In *Makowitz v. State Dept. of Civil Service*, 424 A.2d 1190 (1980) the Court gave an agency’s interpretation great weight as evidence of the



Legislature's intent where such an interpretation had continued over a period of years without legislative interference. Courts have given even greater weight to such agency interpretations where the Legislature has considered the statutory provisions in question and amended them in other particulars but has not modified the agency's construction by amending the provisions to eliminate said construction. *Lumpkin v. Department of Social And Health Services*, 581 P.2d 1060, 1062 (C.A. Wash. 1978). The Nevada Supreme Court in *Summa Corp. v. State Gaming Control Bd.*, 98 Nev. Adv. Opn. 116 (August 27, 1982) stated:

As the district court found, Regulation 6.080 has remained unchallenged for years and the Commission's action has remained unchanged by subsequent legislative action. Where, as here, the legislature has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent. *Sierra Pacific Power Co. v. Department of Taxation*, [96 Nev. 295](#), 607 P.2d 1147 (1980).

The Nevada Legislature has amended [NRS 446.020](#) on numerous occasions expressly excluding certain facilities from the definition of "food establishment." Wholesale warehouses have not been so excluded.

It might appear from an initial reading of [NRS 446.020](#) that the Legislature intended to include only those facilities which sell food directly to the ultimate consumer for immediate consumption as in the case of a restaurant. However, this construction must be rejected in light of the exclusions found in [NRS 446.020\(2\)\(e\)](#) and (f). The Legislature has excluded slaughter establishments regulated and inspected by the State Department of Agriculture as well as milk and milk product plants regulated by Chapter 584 of the Nevada Revised Statutes. Such exclusion would have been unnecessary unless the Legislature had intended the term "food establishments" to include facilities which did not necessarily sell food to the consumer for immediate consumption.

The wholesale warehouses might contend that Chapter 585 of the Nevada Revised Statutes (Nevada Food, Drug and Cosmetic Act) constitutes the exclusive authority of any governmental agency to inspect them as a food warehouse. Such a position cannot be adopted by this office in light of our previous opinion expressed in Op. Att'y Gen. No. 22 (March 16, 1955). In that opinion we were asked whether the Food, Drug and Cosmetic Act was repealed by implication by the enactment of what is now Chapter 446 of the Nevada Revised Statutes. We were told by the respective administrators charged with the administration of those provisions that the functions of the two departments under the respective Acts were technically different and not inconsistent with each other. In concluding that there appeared to be some jurisdictional overlapping between the two departments as a result of the two acts, we did not feel that any duplication of effort was intended or existed. The respective jurisdiction of each department was left to the department heads to resolve.

The facts now before us reflect that the jurisdictional question was resolved between the respective departments. The Health Division, not the Commissioner of Food and Drugs, has licensed and inspected food warehouses for over ten years as food establishments within the meaning of [NRS 446.020](#). This office cannot find any compelling reason to reverse our opinion in Op. Att'y Gen. No. 22 (March 16, 1955) permitting the respective departments to agree upon their jurisdictional limits and now dictate which department should regulate this field pursuant to its respective grant of authority. Therefore, we decline to do so.

This office concludes that it is our duty to favor an interpretation which renders the statutory design effective in terms of the public health policies underlying its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with both the plain language of the statute and the practice of the agency in treating wholesale warehouses as "food establishments" for over ten years without objection. To construe the statute otherwise would run afoul of the broad public health objectives this office believes the Legislature intended to effectuate.

## CONCLUSION

Accordingly, it is the opinion of this office that wholesale warehouses which store and sell alcoholic and nonalcoholic beverages are “food establishments” within the meaning of [NRS 446.020](#). Therefore, the Health Division, pursuant to regulations adopted in accordance with [NRS 439.150\(3\)](#) and the Administrative Procedure Act, has authority to collect fees from these facilities as “food establishments.”

Respectfully submitted,

Brian McKay, *Attorney General*

By Bryan M. Nelson, *Deputy Attorney General*

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**OPINION NO. 83-6 Gaming: Punchboards—Punchboards are lotteries prohibited by the State Constitutions and Statutes. Op. Att’y Gen. No. 72-89 (July 20, 1972) is overruled.**

Carson City, June 29, 1983

Mr. James Avance, *Chairman*, State Gaming Control Board, 4220 South Maryland Parkway, Las Vegas, Nevada 89158

Dear Mr. Avance:

On July 20, 1982, this office issued a significant letter opinion to your agency regarding the legal status of punchboards, concluding that they are lotteries prohibited by the State Constitution and statutes. The opinion also specifically overruled Op. Att’y Gen. No. 72-89 (July 20, 1972). In view of the importance of the question asked and the result reached, we have decided to reissue the opinion at this time as a formal opinion of the Attorney General, so that it may be included in our annual publication of formal AGO’s.

## QUESTION

Is a punchboard a lottery within the prohibition of our State Constitution and Statutes?

## BACKGROUND

In 1972, this office opined that punchboards were not lotteries but were gaming devices or gambling games subject to the Gaming Control Act. Op. Att’y Gen. No. 72-89 (July 20, 1972). That opinion overruled four previous opinions of this office which held that punchboards were lotteries. Op. Att’y Gen. No. 19-8 (January 29, 1919); Op. Att’y Gen. No. 19-90 (August 23, 1919); Op. Att’y Gen. No. 19-97 (October 29, 1919); and Op. Att’y Gen. No. 22-94 (January 28, 1922). Our reevaluation based upon the following analysis leads us to a conclusion opposite to that reached in Op. Att’y Gen. No. 72-89 (July 20, 1972), and therefore that opinion is overruled. Before addressing the 1972 opinion and the question posed by your request an explanation of the punchboard concept will be presented.

There is no definition of a punchboard in Nevada statutes or case law. Generally, a punchboard is a device consisting of a board having numerous holes containing slips of paper bearing unexposed numbers or symbols, some of which represent a prize. Upon payment of consideration a person is entitled to remove from the board (*i.e.*, “punch” out) a slip of paper chosen at random. The person may receive a prize or nothing at all depending upon the number or symbol of the slip of paper so removed. *See* Brewer v. Woodham, 74 So. 763 (Ala. 1917); Parker-Gordon Importing Co. v. Benakis, 238 N.W. 611 (Iowa 1931); Shreveport v. Kahn, 67 So. 35 (La. 1914);

State v. Hudson, 37 S.E.2d 553 (W.Va. 1946). Clearly, a punchboard is a form of gaming. The question is whether it is a form which is legal and subject to the provisions of the Gaming Control Act or illegal because of any prohibition in the State Constitution and statutes.

### ANALYSIS

In concluding that a punchboard was a game or gambling game for purposes of the Gaming Control Act (chapter 463 of NRS), the opinion of this office issued in 1972 Op. Att’y Gen. No. 72-89 (July 20, 1972) reasoned that: (1) a punchboard was played individually by a player; (2) the amount which could be won was not dependent on the amount which had been previously played; and (3) the wagers were not pooled. It was then concluded that a punchboard was a gambling game because it was a banking game.

However, [NRS 463.0152](#) defines “game” or “gambling game” as “any banking or percentage game played with cards, dice, or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or representative of value, . . . .” Under that definition, two elements comprise a “game” or “gambling game.” The first element is that the game must be a “banking or percentage game.” The second element of a “game” or “gambling game” is that it must be “played with cards, dice or any mechanical, electromechanical or electronic device or machine.”

The previous opinion of this office Op. Att’y Gen. No. 72-89 (July 20, 1972) in concluding that a punchboard was a banking game, found the presence of the first element. That opinion, however, did not address whether the second element was present in a punchboard. An analysis of a punchboard in relation to the second element leads to the conclusion that a punchboard in relation to the second element leads to the conclusion that a punchboard is not a “game” or “gambling game” within the meaning of [NRS 463.0152](#).

A punchboard does not contain the second element. The punchboard is played with a board and slips of paper; cards, dice or any mechanical, electromechanical or electronic device or machine are not utilized. Both criteria set forth in the statute must be met, not just one. A punchboard does not meet both criteria and, therefore, is not a “game” or a “gambling game” within the statutory definition.

Likewise, a punchboard is not a “gaming device.” “ ‘Gaming device’ means any mechanical, electromechanical or electronic contrivance, component or machine used in connection with gaming or any game which affects the result of a wager by determining win or loss.” [NRS 463.0155](#). Again, a punchboard is played with a board and slips of paper. Mechanical, electromechanical or electronic contrivances, components or machines are not utilized. Therefore, a punchboard is not a “gaming device” for purposes of the Gaming Control Act.

Since a punchboard does not meet the statutory criteria set forth in the definitions of “game,” “gambling game,” or “gaming device,” it is irrelevant that a punchboard is played individually, that the amount which could be won is not dependent on the amount which had been previously played, or that the wagers were not pooled. Those factors may or may not be present in all games or gambling games but, for the purposes of the Gaming Control Act, those factors are to the criteria set forth in [NRS 463.0152](#) for determining whether a particular scheme is a “game” or “gambling game” or the criteria set forth in [NRS 463.0155](#) for determining whether a particular device is a “gaming device.”

It should be noted that in a few cases outside Nevada, the operation of a punchboard was likened to that of a slot machine. *E.g.*, State v. Leblanc, 191 A.2d 537 (N.H. 1963). Moreover, the previous opinion of this office, Op. Att’y Gen. No. 72-89 (July 20, 1972), took a similar approach in determining that a punchboard was a “game” or “gambling game.” Because a slot machine is a “game” or “gambling game” within the Gaming Control Act, the comparison of a punchboard and a slot machine must be reanalyzed.

The court cases in which the operation of a punchboard was likened to that of a slot machine are not dispositive of the issue since none of them analyzed the question in terms of the Gaming Control Act, particularly the statutory definition of slot machine. In Nevada:

“Slot machine” any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or any thing of value whatsoever, whether the payoff is made automatically from the machine or in any other manner whatsoever.

[NRS 463.0191.](#)

The definitions of “game,” “gambling game,” “gaming device,” and “slot machine” were first enacted into law in the same bill. Sections 18, 20, and 33, 1967 Nev. Stat. ch. 376, at 1039-40. The rules of statutory construction provide that the entire act should be read together. *Midwest Livestock Comm. Co. v. Griswold*, [78 Nev. 358](#), 372 P.2d 689 (1962). In addition, each part of an act should be read to harmonize with each other if possible. *E.g.*, *Seaborn v. First Judicial Dist. Ct.*, [55 Nev. 206](#), 29 P.2d 500 (1934). Based upon the rules of statutory construction, the definitions of “game,” “gambling game,” “gaming device,” and “slot machine” should be read together, and read to harmonize with each other.

As previously indicated, a punchboard is not a “game,” “gambling game,” or “gaming device” because it is not “played with cards, dice or any mechanical, electromechanical or electronic device or machine” or a “mechanical, electromechanical or electronic contrivance, component or machine.” [NRS 463.0152](#), [463.0155](#). Furthermore, a punchboard is not a “mechanical, electrical or other [similar] device, contrivance or machine” within the definition of a slot machine because it is played with a board and slips of paper. Therefore, a punchboard is not a slot machine.

A slot machine is a banking game played with a “mechanical, electromechanical or electronic device.” [NRS 463.0152](#). Therefore, unlike a punchboard, a slot machine meets the criteria for a “game,” “gambling game” and “gaming device.” To conclude that a punchboard is outside the definitions of those terms but within the definition of slot machine would be inconsistent with the rules of statutory construction requiring that the definitions be read together and read to harmonize with each other. A slot machine satisfies the criteria for all those definitions, while a punchboard does not.

Since we have concluded that a punchboard is not a “game,” “gambling game,” “gaming device,” or a “slot machine” subject to the provisions of the Gaming control Act, we must determine whether a punchboard is a lottery.

Article 4, Section 24, of the Constitution of the State of Nevada, provides: “No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed.” The enforcement of this constitutional prohibition is found in chapter 462 of NRS. The statutory definition of a lottery is as follows:

A lottery is any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name the same may be known. [NRS 463.010](#).

Our definition of “lottery” is very similar to those in other jurisdictions. *See, e.g.*, *Lee v. City of Miami*, 163 So. 486 (Fla. 1935), *see also* 38 Am.Jur.2d *Gambling* § 5 (1968).

It should be noted that the word “lottery” has been interpreted by various courts both generally and technically. *Id.* Lotteries are a species of gambling but a distinction is usually drawn between lotteries and other forms of gambling. *See, e.g.*, *Lee v. Miami, supra*; *Sate v. Hudson, supra*; 38 Am.Jur.2d *Gambling* § 5 (1968). In Nevada, our Supreme Court long ago recognized this distinction. “It is true that in common parlance, in a dictionary sense and the statutory definition, the word ‘lottery’ may be a game. But the legislature of this state, since the date of its

organization as a state, has plainly drawn a distinction between lotteries and unlawful gaming.” Ex Parte Pierotti, [43 Nev. 243](#), 248, 184 P. 209 (1919). *Pierotti* recognized that a form of gambling, a slot machine, was not a lottery and could be authorized by legislative enactment.

The Court also stated: “It is for the legislature, and not the courts, to draw the line of demarcation between the varied kinds. It is not the province of courts to confound by construction what the legislature has made clear.” *Id.* at 250. Nowhere in the Gaming Control Act are punchboards mentioned. *See, e.g., NRS 463.0152* which names various gambling games. In Nevada, the legislature has legalized many forms of gambling. It has not legalized punchboards. In the opinion of this office, it could not do so because of the constitutional prohibition against lotteries. Ex Parte Pierotti, *supra*; Lee v. City of Miami, *supra*. State v. Village of Garden City, 265 P.2d 328 (Ida. 1953); State v. Tursich, 267 P.2d 641 (Mont. 1954).

Op. Att’y Gen. No. 72-89 (July 20, 1972), reasoned that the essence of a lottery was a pool of money wagered by players for a chance to win such a pool of money or a portion of it, that a punchboard game did not pool the wagers, and therefore concluded that a punchboard was not a lottery.

However, the definition of a lottery makes no reference to a pool of money as being either the form or the object of the scheme. While money obviously is a type of property, the definition of lottery is not limited to that type of property. In State v. Overton, [16 Nev. 136](#) (1881), the Nevada Supreme Court struck down a legislative act which gave an organization the right to sell tickets for admission to “public entertainments or concerts” and to distribute by chance amongst the ticket holders “personal property, real estate, things in action, demands or other valuables.” *Id.* at 141. The Court held that the scheme was a lottery and the legislative act which authorized it was void as it violated the constitutional prohibition against lotteries. In view of the statutory definition of a lottery and the *Overton* decision, we must conclude that the pool of money concept relied on in Op. Att’y Gen. No. 72-89 (July 20, 1972) was misplaced. The nature and form of the property to be distributed is not germane to the analysis of whether a punchboard is a lottery. As demonstrated below, a punchboard is within the definition of a lottery, regardless of whether money is pooled.

Under the statutory definition of a lottery it is apparent that three basic elements must coexist to create a lottery: (1) a *prize* consisting of some form of property; (2) distributed by *chance*; (3) among individuals who have paid or promised to pay some form of *consideration*. This is in accord with the vast majority of decisions in the United States. *See, e.g.,* Annot., 29 A.L.R.3d 888 (1970); 38 Am.Jur.2d *Gambling* § 6 (1968). These basic elements of a lottery are present in a punchboard. It makes no difference what the scheme is called—a lottery, raffle, or punchboard. The character of the scheme is controlling for analysis. State v. Overton, *supra*, *see also NRS 463.010*. The object of the game is to win a *prize*; individuals select or punch the paper slip at random—by *chance*; they pay *consideration* to play. Other jurisdictions have reached the same conclusion; punchboards are lotteries. *See* Helen Ardelle, Inc. v. F.T.C., 101 F.2d 718 (9th Cir. 1929); Brewer v. Woodham, *supra*; In Re Gray 204 P.1029 (Ariz. 1922); Atkinson Novelty Co. v. Prince & Son, 111 S.E. 699 (Ga. 1922); State v. Village of Garden City, *supra*; City of Shreveport v. Kahn, *supra*; State v. Tursich, *supra*; Stranger v. State, 298 S.W. 906 (Tex. 1927); State v. Hudson, *supra*. Although there is one case holding that punchboards are not lotteries it is distinguishable. People v. Trace, 109 N.Y.S.2d 893 (Ct. of Special Sess. 1951). The New York lottery statute then in effect, unlike Nevada’s, referred only to a distribution based upon the drawing. *Compare* NRS a63.010. The defendant who had been accused of possessing punchboards was found not guilty of violating a statute prohibiting distribution of property dependent on the drawing of a lottery. Although some of the penalty provisions of chapter 462 or NRS appear to be limited to a ticket drawing type of lottery ([NRS 463.020](#)), it must be remembered that all types of lotteries are prohibited by the State Constitution. Nor is our statutory definition of lottery limited to ticket drawing types. [NRS 463.010](#). The provisions of [NRS 463.030](#) support our conclusion that punchboards are lotteries. “Every person who sells . . . or transfers to or for any other person any ticket . . . or any ticket, *chance*, share or interest in . . . any lottery is guilty of a misdemeanor.” [NRS 462.030](#). (Emphasis added.) Even if the penalty

provisions of chapter 462 of NRS applied only to ticket drawing types of lotteries, all lotteries would still be prohibited by the State Constitution.

### CONCLUSION

Based upon the foregoing analysis, it is the opinion of this office that punchboards as generally described herein are lotteries prohibited by the State Constitution and chapter 462 of NRS and are not gambling games or gaming devices subject to the provisions of the Gaming Control Act.

Sincerely,

Brian McKay, *Attorney General*

By Dennis Vincent Gallagher, *Deputy Attorney General,*  
*Gaming Division*

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### **OPINION NO. 83-7 Consumer Affairs: Defective Automobiles—1983 Nev. Stat. ch. 261 (Assembly Bill 59) applies only to automobiles purchased after July 1, 1983.**

Carson City, July 14, 1983

Ms. Shari B. Compton, *Commissioner*, Consumer Affairs Division, 2501 East Sahara, Suite 304, Las Vegas, Nevada 89158

Dear Ms. Compton:

### QUESTION

By memorandum you inquired of this office whether 1983 Nev. Stat. ch. 261 (Assembly Bill 59, the “Lemon Law”) has any application to a new automobile purchased prior to the effective date of the law, July 1, 1983. In particular you have inquired whether the provisions of 1983 Nev. Stat. ch. 261 apply to the purchaser of an automobile who purchased prior to July 1, 1983, but whose express warranty covers a period which extends beyond July 1, 1983.

### ANALYSIS

1983 Nev. Stat. ch. 261 added a number of new provisions to Chapter 598 of the Nevada Revised Statutes requiring a manufacturer of an automobile or its agent or authorized dealer to repair or replace a defective automobile within certain time periods and requiring that the motor vehicle be replaced or the purchase price refunded if the defect is not remedied in four attempts or if the total repair time exceeds 30 days *and* the defect “substantially impairs the use and value of the motor vehicle to the buyer” *and* the defect “is not the result of abuse, neglect or unauthorized modifications or alterations.”

A law that does no more than codify the common law on a subject may be applied to transactions occurring before its effective date without running afoul of constitutional prohibitions. *Sierra Wine and Liquor Company v. Heublein, Inc.*, 626 F.2d 129 (9th Cir. 1980) at 132. While the law of this State has been that the purchaser of a defective automobile that could not be made to conform to the terms of an express warranty had the right to return the automobile to the dealer and receive a refund of the purchase price, *Sellman Auto., Inc. V. McCowan*, [89 Nev. 353](#), 513 P.2d 1228 (1973); *Havas v. Love*, [89 Nev. 458](#), 514 P.2d 1187 (1973), it does not appear that the conclusive presumptions contained in the “Lemon Law” were a part of this State’s common law on this subject. (*Sellman* involved “numerous mechanical difficulties” that the dealer “failed to satisfactorily remedy” while *Havas* involved a vehicle that emitted smoke and fumes from underneath the hood after one three- or four-hour attempt to cure the defect.)

It has always been the law of this State that:

Retrospective laws (are) \* \* \* objectionable and inaccordant with the fundamental principles of the social compact. \* \* \* Our understanding of the law on this subject as now settled is that the primary rule of construction is to give a statute a prospective effect, but that the rule must yield if the retroactive intention is so plainly expressed or manifest as to leave no doubt upon the mind. And this is confined to cases where no constitutional objection interposes \* \* \* as for instance laws impairing the obligation of contracts, which are positively inhibited. *Milliken v. Sloat*, [1 Nev. 573](#) (1865) at 577-578.

Somewhat more recently our Nevada Supreme Court stated that:

As a general rule, a statute will not be construed to operate upon past transactions, but *in futuro* only. It is a maxim, which is said to be as ancient as the law itself, that a law ought to be prospective, not retrospective, in its operation. Retrospective legislation is not favored, and, except when \* \* \* remedial acts do not create new rights or take away vested ones, is apt to result in injustice. \* \* \* Every citizen \* \* \* is supposed to know the law, and to govern his conduct, both as to business affairs and otherwise, in accordance with its provisions. It would be a manifest injustice if, after rights had become vested according to existing laws, they could be taken away, in whole or in part, by subsequent legislation. \* \* \* There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them. *Wildes v. State*, [43 Nev. 388](#) (1920) at 393.

Quite recently our Supreme Court had occasion to reiterate that no retrospective law could be passed impairing the obligations of contracts without running afoul of article I, section 10 of the United States Constitution and art. 1, § 15 of our Nevada Constitution. *Public Employees' Retirement Board v. Washoe County*, [96 Nev. 718](#), 615 P.2d 972 (1980) at 721. This office has likewise previously opined that in the absence of express language appearing on the face of a statute demanding retroactive effect, a statute will be interpreted as having a prospective operation only. Op. Att'y Gen. No. 62 (June 5, 1959).

Applying a presumption that an automobile is defective if it has been in the repair shop for a certain number of days or a certain number of times in our opinion would alter and impair the contractual obligations and rights of a seller of automobiles who entered into a contract to sell and automobile prior to the effective date of such a statute. 1983 Nev. Stat. ch. 261 does not on its face require that it be applied to all motor vehicles sold at any time in the past in this State and cannot fairly be said to be a mere codification of the existing law of this State concerning such a presumption.

#### **CONCLUSION**

It is, therefore, the opinion of this office that the "Lemon Law," 1983 Nev. Stat. ch. 261 (Assembly Bill 59), only applies to sales of automobiles which occurred on or after the effective date of this law, July 1, 1983. A purchaser of an automobile prior to that date must therefore be prepared to prove, without benefit of presumptions, that the automobile purchased cannot be made to conform to the terms of an express warranty covering such automobile in order to avail himself of the same types of remedies as are provided in this new law.

Very truly yours,

Brian McKay, *Attorney General*

By Richard Jost, *Deputy Attorney General*

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**OPINION NO. 83-8 Sheriffs, Police, and Constables—County and Municipal Law Enforcement Personnel: Jurisdictional Limitations Upon the Arrest Powers and Authority of Local Law Enforcement Officers—Nevada statutory law confers upon law enforcement personnel employed by county sheriff’s offices and city police departments extraterritorial warrantless arrest authority, even in the absence of fresh pursuit circumstances, provided the person arrested is a suspect of a public offense committed within the territorial jurisdiction employing the arresting officer. Nev.Rev.Stats. § 171.124, as amended by 1983 Nev.Stat.ch. 560, § 1; Nev.Rev.Stats. §§ 248.090 and 266.530.**

Carson City, August 12, 1983

Honorable Mills Lane, *Washoe County District Attorney*, Washoe County Courthouse, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Lane:

In your correspondence dated the 3rd day of June, 1983, your office requested the opinion of the attorney general concerning the parameters of the arrest powers of county sheriffs and municipal police in their respective jurisdictions. This question has arisen in light of recent legislative amendment of Section 171.124 of the Nevada Revised Statutes. *See* 1983 Nev.Stat.ch. 560, § 1. An analysis of your inquiry necessitates a consideration of the relevant statutory amendment in light of controlling decisional law on the subjects of peace officer powers and statutory construction.

#### **QUESTION PRESENTED**

Whether a county sheriff and his duly qualified acting deputies have power and authority to arrest persons, under the statutory basis contained in Section 171.124 of the Nevada Revised Statutes, anywhere within the territorial jurisdiction of the county although the county may include incorporated municipal areas served by city police departments.

#### **ANALYSIS**

The power of a Nevada peace officer to arrest a person is expressly delineated by statute. Nev. Rev. Stat. §§ 169.125 (peace officer defined) and 171.124 (arrest authority). In this regard, Section 171.124 was amended by the Nevada Legislature on the 26th day of May, 1983. *See* 1983 Nev.Stats.ch. 560, § 1. This recent amendment provides in relevant part that:

A peace officer who is a sheriff or deputy sheriff of any county or a member of the police department of any city or town may only make an arrest \* \* \* for an offense committed within his territorial jurisdiction, but he may make the arrest beyond the boundaries of that jurisdiction.

Nev. Rev. Stat. § 171.124(3), *as amended by* 1983 Nev.Stats.ch.560, § 1.

Generally, Section 171.124 enumerates certain instances in which peace officers may effect an arrest with or without a warrant. *See id.* § 171.124(1)-(2). The portion of this statute relevant to the present question, however, is the language limiting sheriff and police powers of arrest to an offense committed within the officer’s territorial jurisdiction, although he may make the arrest beyond the boundaries of that jurisdiction. *See id.* § 171.124(3), *as amended by* 1983 Nev.Stats.ch. 560, § 1. This jurisdictional provision added by the 1983 Nevada Legislature is explicit, clear and unambiguous and, accordingly, resort to legislative history is not necessary in discerning the meaning of Section 171.124(3), *See, e.g.,* Porter v. Sheriff, [87 Nev. 274](#), 275, 485



P.2d 676 (1971).

A review of Section 171.124 indicates that a peace officer may effect an arrest of a person upon a warrant anywhere within the State of Nevada provided the officer has "reasonable cause to believe that the person arrested is the person \* \* \* named or described [in the warrant]." Nev. Rev. Stat. § 171.124(1)(e). Where no warrant has been issued, the arrest authority of a county sheriff or sheriff's deputy and of members of a city police department is subject to a territorial jurisdiction limitation. Specifically, although sheriff and police offices may effect a warrantless arrest beyond the jurisdiction of their appointing authority, the offense for which the arrest is made must have been committed within the territorial jurisdiction of the officer's appointment. Nev. Rev. Stat. § 171.124(3), *as amended by* 1983 Nev.Stats.ch.560, § 1.

Under Nevada statutory law, the territorial jurisdiction of a sheriff and his deputies is the entire county. Nev. Rev. Stat. § 240.090. By comparison, the jurisdiction of peace officers employed by a city police department is the territorial boundaries of the particular municipal corporation. Nev. Rev. Stat. § 266.530. *See e.g.*, Reno, Nev., City Charter § 1.090-1.100 (1982). *Cf.* Op. Att'y Gen. No. 79-21 at 120 (arrest powers and authority of Washoe County Airport Authority Police Service).

Considering the territorial jurisdiction limitations contained in Section 171.124(3), in conjunction with the jurisdictional powers of sheriffs and police delineated above, two conclusions can be reached. First, the arrest powers and authority of a county sheriff and sheriff deputies, in the absence of a warrant, extend throughout the territorial jurisdiction of the respective county and the State of Nevada *provided* the subject offense was committed within the respective county. As previously noted, a sheriff and his deputies have arrest authority anywhere within the state where a duly issued warrant is being served by the county peace officer.

Second, a city or township policeman has arrest powers and authority in the absence of a warrant throughout the territorial jurisdiction of the respective municipality, the surrounding county and the State of Nevada *provided* the subject offense was committed within the respective municipality. Moreover, the arrest authority of a municipal policeman upon a duly issued warrant is statewide.

The warrantless arrest power conferred upon policemen under Section 171.124(3) is broader than that generally granted to municipal law enforcement officers. A police officer would usually be limited to warrantless arrest authority within the confines of the municipality boundaries absent fresh pursuit. *See, e.g.*, *People v. Wolf*, 635 P.2d 213, 216-217 (Colo. 1981); *State v. Shienle*, 545 P.2d 1129, 1132 (Kan. 1976); *State v. Mangum*, 226 S.E.2d 852, 854(N.C. Ct.App. 1976); *Knowlton v. State*, 574 P.2d 1059, 1061 (Okla.Ct.Crim.App. 1978); *State v. Wallace*, 361 N.E.2d 516, 517-519 (Ohio Ct.App. 1976); *Commonwealth v. England*, 375 A.2d 1292, 1296-1297 (Pa. 1977); *State v. MacDonald*, 260 N.W.2d 626, 627 (S.D. 1977); *Irwin v. State Dep't. of Motor Vehicles*, 517 P.2d 619, 621 (Wash.Ct.App. 1974); *Six Feathers v. State*, 611 P.2d 857, 861 (Wyo. 1980). *See also* Nev. Rev. Stat. §§ 171.154-171.164 and 171.166-171.176.

By comparison, the amended provisions of Section 171.124 grant extraterritorial warrantless arrest powers in those situations where the person arrested is the suspect of a public offense committed within the territorial confines of the municipality employing the police officer who effects the arrest. This arrest authority extends statewide and, therefore, confers warrantless arrest powers on Nevada sheriffs and police officers to a greater extent than by the most generous of statutes in other states. *Compare* Nev. Rev. Stat. § 171.124(3), *as amended by* 1983 Nev.Stats.ch. 560, § 1, *with* Ala.Code § 15-10-1 (1975).

## CONCLUSION

The recent legislative amendment of Section 171.124 confers upon officers employed by county sheriffs departments and municipal police agencies warrantless arrest authority which is more extensive than that generally granted law enforcement personnel. With respect to a county sheriff, Section 171.124 empowers the sheriff and his deputies to effect an authorized arrest anywhere within the respective county. Generally, a municipal police officer may effect an authorized arrest only within the boundaries of the municipality. All of these peace officers may,

however, effect warrantless arrests outside the boundaries of their respective jurisdictions, even in the absence of fresh pursuit circumstances, provided the person arrested is suspect of a public offense committed within the territorial jurisdiction employing the arresting officer.

Respectfully submitted,

Brian McKay, *Attorney General*

By Dan R. Reaser, *Deputy Attorney General,*  
*Criminal Division*

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**OPINION NO. 83-9 Criminal Procedure—County and State Fiscal Obligations: Liability for Expenditures Incident to Post-Conviction Proceedings—The state treasury, through the budget of the state public defender or the statutory contingency fund, is financially obligated for court approved costs and expense incident to litigation seeking relief under post-conviction procedures. Nev. Rev. Stat. § 177.345.**

Carson City, August 16, 1983

Mr. Don Bissett, *Washoe County Comptroller*, Ninth Street and Wells Avenue, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Bissett:

This office is in receipt of your correspondence dated the 22nd day of June, 1983. In that letter, you requested an opinion regarding liability for litigation expenditures incident of post-conviction criminal matters. Your inquiry included a rendition of the circumstances of a particular case.

The relevant facts as related in your letter are that the county paid a claim for compensation submitted by a court reporter in the amount of seven thousand one hundred eighteen dollars and ten cents (\$7,118.10), which claim was dated May 31, 1983. This claim was for the transcription of certain trial testimony in a criminal prosecution. Apparently, the production of this trial transcript was ordered by the district court on November 16, 1982, for use in certain post-conviction relief proceedings initiated by the criminal defendant. Absent from the factual analysis contained in your correspondence is whether the particular litigation was a habeas corpus action or an actual post-conviction proceeding. Moreover, there is no indication of whether the underlying conviction being challenged was for commission of a felony offense or a gross misdemeanor crime.

#### **QUESTION PRESENTED**

Whether the necessary costs and expenses incident to the presentation of a post-conviction claim on behalf of an indigent criminal defendant in the district courts of the State of Nevada is a financial obligation chargeable against the treasury of the respective county or the state treasury.

#### **ANALYSIS**

The rules governing criminal procedure in the district courts provide in relevant part that:

The petition [for post-conviction relief] may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall appoint counsel for him within 10 days of the filing of the petition. \* \* \* *If inability to pay is determined, all necessary costs and expense incident to the proceedings in the trial court and in the reviewing court, including all court costs, stenographic*

services, printing and reasonable compensation for legal services, *shall be paid from funds appropriated to the office of state public defender*, but after the appropriation for such purpose is exhausted, moneys shall be allocated to the office of state public defender *from the reserve for statutory contingency fund* for the payment of such costs, expenses and compensation. Nev. Rev. Stat. § 177.345(1) and (2) (emphasis added).

Under the language of Section 177.345, the legislature has declared that expenditures for the representation of indigent criminal defendants in post-conviction proceedings is not an obligation of the county where the district court considering the post-conviction petition is situated. These expenditures generally include “all court costs, stenographic services, printing and reasonable compensation for legal services.” Nev. Rev. Stat. § 177.345(2). These “necessary costs and expense” are an obligation of the state treasury which is first chargeable to the state public defender and second to the statutory contingency fund. The Nevada legislature has assigned these costs to the state treasury since the inception of the post-conviction relief statutes. *See* 1967 Nev.Stats.Ch. 523, § 320(2)-(3); 1969 Nev.Stats.Ch. 87 § 5(2)-(3); 1973 Nev.Stats.Ch. 102, § 3(2)-(3) and Ch. 349, § 4(2)(3).

Considering other statutory provisions *in pari materia* with Section 177.345, *Weston v. County of Lincoln*, [98 Nev. 183](#), 643 P.2d 1227, 98 Nev.Adv.Op. 57 (1982); *Laird v. State of Nev.Pub.Emp.Ret.Bd.*, [98 Nev. 42](#), 639 P.2d 1177, 98 Nev.Adv.Op. 15 (1982); *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830 (1977), as well as relevant decisional law, there are, however, certain exceptions to the general practice of imposing post-conviction costs upon the state treasury. These exceptions must be considered when reviewing claims for compensation under the provisions of Section 177.345.

Initially, Section 177.345 provides for payment of litigation costs only in post-conviction proceedings under the Nevada Criminal Procedure Law. *See* Nev. Rev. Stat. §§ 169.015, 177.315-177.385. This post-conviction procedure applies only to “cases in which the court finds that there has been a specific denial of the petitioner’s [federal or state] constitutional rights with respect to his conviction or sentence.” Nev. Rev. Stat. § 177.320. Moreover, the petitioner must be either serving under a sentence of death or imprisonment in the state prison and the post-conviction procedures must be commenced in the judicial district in which the conviction occurred. Nev. Rev. Stat. §§ 177.315(1) and 177.325. Accordingly, necessary expenditures accompanying other challenges to a criminal conviction or sentence by way of a writ of habeas corpus or other alternative procedural devices are not obligations imposed upon the Nevada state treasury under the mandates of Section 177.345, *Cf.* Nev. Rev. Stat. § 34.360-34.680 (habeas corpus); *id.* § 176.515 (new trial).

An additional limitation upon the liability of the state treasury pursuant to Section 177.345 relates to whether the particular litigation costs are appropriate. A post-conviction relief indigent petitioner is not entitled to appointed counsel at state expense without initially demonstrating to the district court that the requested review is not frivolous. Additionally, Section 177.345(2) only applies to necessary costs and expense and consequently court records and transcripts need to be furnished to a petitioner at state expense only where the petitioner satisfies the court that the issues presented by the petition have merit which will tend to be supported by a review of the requested documents. *See Peterson v. Warden*, [87 Nev. 134](#), 135-136, 483 P.2d 204 (1971).

Considering the circumstances of the presenting facts and the legal principles discussed, the subject trial transcript preparation costs would probably be an expense which is an obligation of the state treasury. This conclusion is based upon three important factors. First, it is assumed that the post-conviction litigation involved was actually a proceeding initiated pursuant to Chapter 177 of the Nevada Revised Statutes. Second, this conclusion assumes that the petitioning offender presented a claim under circumstances satisfying the criteria delineated in Chapter 177. Finally, the liability of the state treasury is predicated on the fact that the district court order commanding production of the subject transcript was based upon an implied finding that the attendant litigation expenses were necessary and proper under the *Peterson* decision. If the assumptions are correct, the transcript costs would be a financial obligation of the appropriate

accounts within the state treasury.

### CONCLUSION

Generally, the state treasury, through the budget of the state public defender or the statutory contingency fund, is financially obligated for the necessary costs and expense incident to post-conviction relief proceedings. The liability of the state treasury for these expenditures is subject to certain limitations. First, only litigation costs arising from those cases which satisfy the specific statutory prerequisites for post-conviction procedures are payable from the state treasury. Second, the state treasury is not chargeable for any costs of post-conviction relief proceedings which are incurred unless the reviewing district court has first determined the expenses are proper under the criteria announced in the *Peterson* decision.

Based upon the analysis of your question, this office concludes that based upon the assumptions discussed above the subject expenditures for preparation of the trial transcript for use in a post-conviction proceeding were an obligation of the state public defender's budget or the statutory contingency fund. Hopefully, the foregoing analysis of Section 177.345 and related provisions of law will assist your office, with the assistance of your legal counsel, in determining whether particular post-conviction proceeding litigation costs are obligations of the county treasury or chargeable against state funds.

Respectfully submitted,

Brian McKay, *Attorney General*

By Dan R. Reaser, *Deputy Attorney General,*  
*Criminal Division*

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**OPINION 83-10 Motor Vehicles: Administrative Fee—A Separate \$10.00 administrative fee may be assessed for each misdemeanor for which a person is found guilty or enters a guilty plea. A juvenile master may not assess such a fee.**

Carson City, August 30, 1983

Honorable Richard A. Wagner, *District Attorney*, Pershing County Courthouse, Lovelock, Nevada 89419

Dear Mr. Wagner:

### QUESTION

Does Assembly Bill No. 44 require a \$10 administrative assessment for each misdemeanor count or should the fee be collected only once in the case of a multi-count citation?

### ANALYSIS

1983 Nev.Stat. ch. 375, often referred to as Assembly Bill 44, states in pertinent part:

1. When a defendant pleads or is found guilty of a misdemeanor, including the violation of any municipal ordinance, except one regulating metered parking, the justice or judge shall include in the sentence the sum of \$10 as an administrative assessment and render a judgment against the defendant for the assessment.
2. The money collected for an administrative assessment must not be deducted from the fine imposed by the justice or judge but must be taxed against the defendant in addition to the fine. The money collected for an administrative assessment must be stated separately

on the court's docket and must be included in the amount posted for bail. If the defendant is found not guilty or the charges are dropped, the money deposited with the court must be returned to the defendant.

The charging practices of the various jurisdictions within the state are not uniform. Some jurisdictions only allow a single violation to be charged on a citation. Other jurisdictions allow multiple violations to be included on a single citation. The practices of the various jurisdictions likewise are not consistent in the manner of charging the administrative assessment. In some courts, it is required that for each misdemeanor charged and for which a person is found guilty, a separate \$10 fee will be assessed. Other courts provide that only one administrative assessment will be collected, regardless of the number of misdemeanors for which a person is convicted.

The problem you have presented is clearly one of statutory construction. In construing a statute, we must determine the intention of the legislature under the rules established for such interpretation. We "[a]re not permitted to speculate as to whether the legislature had a certain state of facts in view at the time of the enactment of a statute, or as to whether, if it had, the statute would not have been drawn differently; but, where the language is clear, we must suppose that the lawmakers intended just what they have said, in every aspect of the case that they ought to have had in mind." *State v. Commissioners Washoe Co.*, [22 Nev. 203](#) (1894).

If the meaning of a statute is doubtful, it must be determined what the legislature meant. *State v. Mack*, [23 Nev. 359](#) (1897); *In Re Lavendol's Estate*, [46 Nev. 181](#), 209 P.237 (1922). On the other hand, if the language used is clear, the interpreter must suppose that the legislature intended just what has been enacted. *State v. Commissioners Washoe Co.*, *supra*. The language of the statute must be examined, and when plain language is used one cannot go out of the way to impart another meaning to that language. *Eddy v. Board of Embalmers*, [40 Nev. 329](#), 163 P.245 (1917).

The language of 1983 Nev.Stat.ch. 375 is clear and consistent in the use of singular terms. "When a defendant pleads or is found guilty of a *misdemeanor*, \* \* \* the justice or judge should include in *the sentence* the sum of \$10 as an administrative assessment and render *a judgment* against the defendant for *the assessment*." All of the underlined terms are in the singular. Had the legislature chosen to do so, it could have used other language that would have expressed the intention to charge a defendant a single \$10 upon his conviction of one or more misdemeanor offenses. However, the legislature did not choose such language.

This office is aware of some testimony given before legislative committees that a single assessment would be imposed against a person upon conviction, regardless of the number of violations of which he was found guilty. However, "testimony before a committee is of little value in ascertaining legislative intent." *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 497 n. 8 (Alaska 1982) cited in *Robert E. V. Justice Court*, 99 Nev. ...., ..... P.2d ..... (Adv.Opn.No.91, June 9, 1983). Furthermore, in light of *State v. Commissioners Washoe Co.*, *supra*, we must assume the legislature considered all viewpoints, including that just expressed as well as those opposed to it, and then consciously enacted the language it did.

Another rule of statutory construction supports an interpretation in favor of imposing the \$10 assessment on each misdemeanor for which a person is convicted. It has long been a principle of construction that exemptions from revenue-raising statutes are the exception and not the rule. A statute granting an exemption from taxation is to be strictly construed in limiting that exemption. *Op. Att'y Gen. No. 448* (10-12-67). Laws in derogation of the general rule must be construed against the person claiming an exemption. *Op. Att'y Gen. No. B-15* (10-17-40). Likewise, when considering exemptions from taxation statutes, "the words cannot be bent from their ordinary meaning to form the exemption, in absence of a legislative intent, clearly manifest, pointing that way." *Op. Att'y Gen. No. 99* (9-28-17). Citing *Douglas County Agricultural Society v. Douglas County*, 104 Wis. 429, 80 N.W. 740 (1899).

Although 1983 Nev.Stat.ch. 375 is not strictly a taxation statute, it very clearly is a statute intended to provide additional funding for the court system. As such, an interpretation which would have the effect of "exempting a person from taxation" as it were should be avoided. An interpretation of the statute which allowed a single \$10 assessment to be imposed on a person

convicted of three misdemeanors would have the effect of exempting that person from paying \$20 of the statutorily prescribed assessment amount. Such a construction would be contrary to long-accepted axioms of statutory construction, and thus should be avoided.

While this question was being researched, district attorneys in other counties addressed similar inquiries to this office, including one which asked whether juvenile masters may assess a \$10 administrative fee on a juvenile who pleads or is found guilty of a violation of a covered misdemeanor. It is our opinion that juvenile master, being neither a “justice” nor a “judge” as that term is used in 1983 Nev.Stat.ch. 375, may *not* assess such a fee. Had the legislature intended to include juvenile masters, it would have been easy for it to have made such a reference in Chapter 375. Instead, the statute refers only to “assessments in municipal court” and “assessments in justices’ courts.” Such a construction of the statute is also consistent with the rule of statutory construction that the inclusion of one thing in a statute is the exclusion of all others.

We find further support for our opinion as to juvenile masters from the fact that Chapter 375 sets forth a comprehensive scheme not only for the assessment of a \$10 administrative fee but also for the distribution of said fee to various state and local government funds for the support of the courts and related programs. The juvenile courts are mentioned in that portion of Chapter 375 concerned with the distribution of the \$10 administrative fee, and we must assume that that is all the legislature intended to say on that subject with respect to said courts.

### CONCLUSION

By employing long-recognized principles of statutory construction, we conclude that 1983 Nev.Stat.ch. 375 requires that an administrative assessment be imposed on a defendant for *each* misdemeanor to which he is either found guilty or enters a guilty plea, regardless of the number of charging documents used by law enforcement in bringing the matter before the court.

Juvenile masters may not assess this \$10 administrative fee, which is limited to municipal courts and justice’s courts.

Sincerely,

Brian McKay, *Attorney General*

By Steven F. Stucker, *Deputy Attorney General*

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### **OPINION NO. 83-11 Motor Vehicles: Breath Tests—There is no legal requirement in Nevada to preserve breath samples taken in D.U.I. cases.**

Carson City, September 14, 1983

Wayne Teglia, *Director*, Department of Motor Vehicles, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Teglia:

You have requested our opinion concerning your administration of the driving under the influence provisions of the motor vehicle code.

### QUESTION

Must breath samples be preserved as evidence in driving under the influence (hereafter D.U.I.) cases in which a breath test is conducted?

### ANALYSIS

One of the cases which answers this question in the affirmative is *People v. Hitch*, 527 P.2d 361 (Cal. 1974). The California Supreme Court held that it was a denial of due process for the defendant to be denied an opportunity to have a breath sample for his independent analysis as it may well be evidence of his innocence, and due process required that evidence of an exculpatory nature be made available to him. This conclusion has been reached in a number of other states on substantially the same reasoning. See *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976); *State v. Michner*, 550 P.2d 449 (Ore. 1976); *Garcia v. State*, 589 P.2d 924 (Colo. 1979); and *Baca v. Smith*, 604 P.2d 617 (Ariz. 1979). The cases cited are not all inclusive but represent a sample of the cases from jurisdictions in the western United States.

The states which do not require preservation of a “breath sample” for the defendant do so on two general theories. The first is that the state has no duty to anticipate the defense strategy in any particular case and provide evidence for the defendant’s use. The second is that any retesting or delayed testing is of questionable reliability and would not be admissible as evidence. Some of the cases which have so held are *State v. Canaday, et al.*, 585 P.2d 1185 (Wash. 1978); *State v. Young*, 614 P.2d 441 (Kan. 1980); *Edwards v. State*, 544 P.2d 60 (Okla. 1975); *State v. Teare*, 342 A.2d 556 (N.J. 1975); and *People v. Stark*, 251 N.W.2d 574 (Mich. 1977).

Again, the cases cited are not all inclusive. However, they do establish that there is a clear split of authority among the states which have considered your question.

The question presented has not been addressed by the Nevada Supreme Court, nor by the United States Supreme Court. By analyzing Nevada statutes pertaining to discovery in criminal actions and case law interpreting these statutes, some direction can be forecast as to what the decision of our state Supreme Court would be should this issue be presented to that court. This analysis leads us to conclude that Nevada would follow the rule that the breath sample need not be preserved.

The Nevada statutes which relate to discovery in criminal actions and are applicable to the question raised by your opinion request are [NRS 174.235](#) and [174.245](#). Neither of these statutes refers to the question of D.U.I. breath samples, but only to the right of defendants to discovery generally. [NRS 174.235](#) states in pertinent part:

Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph any relevant:

\* \* \*

2. Results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, to the district attorney.

It must be noted that the statute quoted above refers to *results* of tests or examinations. It is our opinion that the requirement that the prosecutor produce results and reports of tests cannot be construed to require production of test samples for the defendant’s use.

[NRS 174.245](#) states, in pertinent part:

Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph books, papers, documents, *tangible objects*, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subsection 2 of [NRS 174.235](#) and [NRS 174.087](#), this section does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) to agents of the state. (Emphasis added.)

The word “tangible” is the key to the question presented. Is the breath of a person which passes

through a breathalyzer or other device *tangible*? Is it ever within the possession of the state? Black's Law Dictionary (4th ed. 1957) defines "tangible" as "capable of being touched; perceptible to the touch; \* \* \* and capable of being possessed or realized. \* \* \*" One would be hard pressed to advance the argument that a wisp of "breath" is "tangible" and therefore subject to discovery under the provisions of this statute.

In addition to the discovery statutes, [NRS 484.389](#) also has a bearing on what is to be allowed any defendant in a D.U.I. case. [NRS 484.389](#), subsection 2, states:

If a person submits to such a test, full information concerning such test shall be made available, upon his request, to him or his attorney.

In addition, there are provisions built into the statutes which offer to each defendant the right to have testing done at his own insistence. [NRS 484.391](#) states in subsections 1 and 3:

A person arrested for driving a vehicle while under the influence of intoxicating liquor or a controlled substance shall be permitted, upon his request and at his expense, reasonable opportunity to have a qualified person of his own choosing administer a chemical test or tests for the purpose of determining the alcoholic content of his blood or the presence of controlled substance in his blood.

\* \* \*

A test obtained under the provision of this section may not be substituted for or stand in lieu of the test required by [NRS 484.383](#).

This test, or sample, however, does not preclude the state's use of its own sample and test results. From a reading of the foregoing it seems clear that the state is only statutorily required to provide any defendant with *reports* and *results* of tests if they are in fact *in the possession* of the state and/or allow inspection of *tangible* evidence. Reasonableness must be established as well as materiality before the court will order discovery, and the article or evidence requested must be "within the possession of the state."

Additionally, the United States Supreme Court held in *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846 (1977):

There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one: \* \* \* "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. \* \* \*"

*Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

It is interesting to note that prior to our present criminal discovery statutes, the Nevada Supreme Court held that absent a statute allowing a defendant to inspect an autopsy report and blood alcohol test reports, it was proper to the state to refuse such inspection in a murder case. See *Pinan v. State*, [76 Nev. 274](#), 352 P.2d 824 (1960).

After our current discovery statutes were enacted in 1967, the Nevada Supreme Court addressed them in the case of *Franklin v. District Court*, [85 Nev. 401](#), 455 P.2d 919 (1969). In that case, a defendant sought to discover, inspect and copy "the statements of all persons to be called by the prosecution as witnesses at trial."

The Court went on to state that the statutes did not authorize this and there was no constitutional right to discover such documents. The court stated a pp. 402-403:

The new criminal code does deal with criminal discovery \* \* \* and those provisions represent the legislative intent with respect to the scope of allowable pretrial discovery and are not lightly to be disregarded.

Though the particular question you asked has not been addressed by our Supreme Court, there



have been cases decided that would appear to bear upon the question if it were to be addressed by the court. The court in these cases addressed the state's duty to gather and preserve evidence. In *Boggs v. State*, [95 Nev. 911](#), 604 P.2d 107 (1979), our Supreme Court addressed the failure of the police to obtain the names and addresses of three people who were in a car driven by the defendant when he was arrested for the grand larceny of the car. The court stated that to obtain a reversal for a due process violation, a defendant must show either bad faith or connivance on the part of the government or that he was prejudiced by the loss of the evidence. They said, at p. 913:

Prejudice must, therefore, be shown and the burden of showing this prejudice rests on the defense. \* \* \* This burden requires some showing that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense. \* \* \* It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense.

See also *Rusling v. State*, [96 Nev. 755](#), 616 P.2d 1108 (1980), where the same standard was applied when the state failed to preserve a screwdriver and hammer used in a burglary, and *Baccari v. State*, [97 Nev. 109](#), 62 P.2d 1008 (1981), where a tape recording of a defendant's initial interview with the police was destroyed.

### CONCLUSION

At this time there is not requirement in our case law or statutes that breath samples taken in D.U.I. cases be preserved. Should the issue be put before the Nevada Supreme Court, it is our opinion, based on past decisions relating to discovery, that the court would not impose such a requirement. In light of this, it is the opinion of the Attorney General that you need to preserve a breath sample for the use by defendants in D.U.I. cases.

As to your remaining questions, they become moot in light of the conclusion reached concerning your first question. Your concern regarding *Garvin v. State*, [96 Nev. 827](#), 619 P.2d 534 (1980) is unfounded because that case does not address the question presented.

Respectfully submitted,

Brian McKay, *Attorney General*

By Scott W. Doyle, *Chief Deputy Attorney General*,  
*Civil Division*

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**OPINION NO. 83-12 Traffic Law, Municipalities, Highways and Road Law—Local authorities may enact their own ordinances without board approval unless expressly barred by statute.**

Carson City, September 13, 1983

Honorable Robert Van Wagoner, *Reno City Attorney*, City Hall, Reno, Nevada 89505

Dear Mr. Van Wagoner:  
Your office has requested an opinion as to the following:

### QUESTION

Can a city enact its own ordinances as to traffic laws on state highways within its city limits without first obtaining approval from the Board of Directors of the Department of

Transportation?

### ANALYSIS

The answer to this question can be found in [NRS 484.777\(2\)](#) which provides in part:

*Unless otherwise provided by specific statutes, any local authority may enact by ordinance traffic regulations which cover the same subject matter as the various sections of this chapter if the provisions of the ordinance are not in conflict with this chapter. \* \* \** (Emphasis added.)

Paragraph 2, *supra*, provides for a city to enact its own ordinances as to traffic laws unless it is expressly barred from doing so by “specific statute” and the ordinance does not conflict with [NRS Chapter 484](#).

[NRS 484.777](#) goes on to provide certain instances in which a local authority may not enact any local ordinances. Paragraph 3 of 484.777 provides:

A local authority shall not enact an ordinance:

- (a) Governing the registration of vehicles and the licensing of drivers;
- (b) Governing the duties and obligations of persons involved in traffic accidents, other than the duties to stop, render aid and provide necessary information; or
- (c) Providing a penalty for an offense for which the penalty prescribed by this chapter is greater than that imposed for a misdemeanor.

Another example of a statute which restricts a local authority from enacting its own ordinances and the one which is most pertinent to this opinion is [NRS 484.779](#). This statute provides:

*Except as provided in subsection 3, a local authority may adopt, by ordinance, regulations with respect to highways under its jurisdiction within the reasonable exercise of police power:*

- (a) Regulating or prohibiting processions or assemblages on the highways.
- (b) Designating particular highways as one-way highways and requiring that all vehicles thereon be moved in one specific direction.
- (c) Designating any highway as a through highway, requiring that all vehicles stop before entering or crossing the highway, or designating any intersection as a stop or a yield intersection and requiring all vehicles to stop or yield at one or more entrances to the intersection.
- (d) Designating truck and bicycle routes.
- (e) Adopting such other traffic regulations related to specific highway as are expressly authorized by this chapter.

2. An ordinance relating to traffic control enacted under this section is not effective until official traffic-control devices giving notice of those local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate.

3. *An ordinance enacted under this section is not effective with respect to:*

- (a) *Highways constructed and maintained by the department of transportation under the authority granted by chapter 408 of NRS; or*
- (b) *Alternative routes for the transport of radioactive, chemical or other hazardous materials which are governed by regulations of the United States Department of Transportation, until the ordinance has been approved by the board of directors of the department of transportation. (Emphasis added.)*

Analysis of [NRS 484.779](#) discloses that the Legislature generally intended to allow local authorities to enact traffic regulation ordinances on all subject areas except for those that affect

the use and the flow of traffic on highways under state control. This legislative motive is indicated in [NRS 484.779](#)(1)(a) through (e). Those subsections deal with (a) parades, (b) one-way roads, (c) the general flow of traffic, (d) truck and bicycle routes and (e) a close reading will show that so long as the local authority drafts its ordinances in such a manner as not to mention a specific highway (*i.e.*, "Virginia Street, U.S. 395"), there is no need to have the ordinance approved by the board. The rationale of requiring the local authority to avoid regulating a specific highway is one of uniformity. The uniformity rationale is readily supported by [NRS 484.777](#)(1) which provides, in part:

The provisions of this chapter are applicable and uniform throughout this state on all highways \* \* \*

A search of [NRS Chapter 484](#) provides the following non-exclusive list of examples in which a local authority is restricted in some manner from acting on its own on state highways:

484.313—Contracted access highways  
484.351—Railroad grade crossing  
484.367—Speed limits in unincorporated towns  
484.369—State speed zones  
484.375—Special speed limitations  
484.403—Parking  
484.6101—Noise emissions  
484.752—Weight limits  
484.753—Width limits  
484.783—Traffic control devices

The Nevada Legislature has the ultimate authority over the highways and streets within the state's borders. Such power may be delegated as the Legislature sees fit. 39 Am.Jur.2d, *Highways, Streets and Bridges*, Section 200. A reading of the previously cited NRS sections and an examination of [NRS Chapter 484](#) as a whole indicates that the Legislature intended to allow the local authorities to enact ordinances affecting state highways unless specifically restricted from doing so. A general statement can be made that the local authorities have the power to enact ordinances as to the conduct of drivers on the highway, *i.e.*, prohibiting D.U.I.s. However, the Legislature has not granted to local authorities the power to enact ordinances affecting the use and flow of traffic on state highways without first getting the approval of the Board of Directors of the Department of Transportation.

The foregoing general statement holds true except for [NRS 484.777](#)(3)(a) which speaks of the conduct of persons involved in traffic accidents. The Legislature could have provided other exceptions, however it did not. And it is a well recognized rule of statutory construction that where the Legislature specifies exemptions to a general rule, further exemptions will not be implied. *Galloway v. Truesdell*, [83 Nev. 13](#) (1967).

As a footnote, Op. Att'y Gen. No. 110 (1-29-73), which discusses local authorities' power to enact ordinances covering vehicle sizes and weights, is still valid. However, the opinion's statement as to the effect of [NRS 484.779](#) should not be read out of context and should be read in light of this opinion. Vehicle size and weight relates to the use and flow of traffic on the highways and therefore requires Department of Transportation approval. See [NRS 484.743](#), [484.752](#) and 484.759.

## CONCLUSION

Pursuant to the foregoing analysis, it is the opinion of this office that pursuant to [NRS 484.777](#)(2) a local authority generally does have the power to enact its own ordinances with respect to traffic laws on state highways within its city limits without approval by the Board of Directors of the Department of Transportation. The only limitation to this power occurs where the local authority

is expressly barred from doing so in statutes such as [NRS 484.777\(3\)](#) and [NRS 484.779\(1\)\(a\)](#) through (e).

Respectfully submitted,

Brian McKay, *Attorney General*

By Del Hardy, *Deputy Attorney General*,  
*Department of Transportation*

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**OPINION NO. 83-13 Honorable Discharge From Probation, Pardons, Sealing Criminal Records—Effect on Civil Rights and Statutory Disabilities—Discussion of effect of these procedures on ex-felon registration, right to vote and hold office, professional licensing and other rights and abilities.**

Carson City, September 14, 1983

Mr. Robert Calderone, *Chief*, Department of Parole and Probation, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Calderone:

You have requested of this office an opinion regarding the distinctions between various state statutes relating to honorable discharges from probation, the sealing of records of criminal proceedings, and the restoration of civil rights to those convicted of criminal offenses. You have asked how these statutes and procedures affect, *inter alia*, convicted felon registration, the right to carry concealed weapons, the right to vote and professional licensing requirements. A brief review of the several different constitutional and statutory provisions which apply to these situations is appropriate prior to an analysis of your specific questions.

**BACKGROUND**

Your main concern appears to be with regard to the statutory provision of section 176.225 of our statutes allowing for an honorable discharge from probation. Basically, any defendant who has fulfilled the term and conditions of his probation may be allowed to withdraw a guilty plea or have his guilty verdict set aside. After that, the court shall “dismiss the indictment of information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he had been convicted.” Nev. Rev. Stat. § 176.225(1) (1979).

You have also inquired about the provisions of sections 179.245 and 213.090. The first section allows a convicted person, after his release from custody, to petition the court in which he was convicted for the sealing of conviction records. *Id.* § 179.245 (as amended by 1983 Nev.Stats.ch. 426, § 32 at 1088). The second section provides for the “restoration of civil rights” to those who receive a pardon. *Id.* § 213.090. Similarly, civil rights may be restored to successful parolees and prisoners who complete their sentence. *Id.* §§ 213.155, 213.157.

All of these provision of law are important when determining who must register as a convicted felon, *see id.* § 207.090, who may not carry or own a concealable weapon, *see id.* § 202.360(2), and who may not be eligible to obtain or retain certain business and professional licenses, *see, e.g., id.* §§ 628.390(1)(e), 641.230(1), 648.110(1)(e). These statutory provisions may also affect a person’s ability to vote, hold office or serve as a juror. An analysis of the rights or opportunities which may be affected by these laws depends upon the statute providing relief.

**QUESTION ONE**

What is the effect of an honorable discharge from probation under section 176.225 of our statutes and what are the “penalties and disabilities” from which a person is released?

### ANALYSIS

As discussed above, a person who successfully completes his probationary period may have the court dismiss the original indictment and information and “be released from all penalties and disabilities *resulting from the offense or crime* of which he has been convicted.” *Id.* § 176.225(1) (emphasis added). Clearly, this language indicates that an individual will no longer be subject to the somewhat disabling restrictions of the term and conditions of probation which usually include supervision by the Department of Parole and Probation. And, because of this, a person who completed probation need no longer be concerned with the penalty of imprisonment simply for failing to abide by the probation conditions. The other effects of a release from penalties and disabilities require a review of the particular rights.

1. *Eligibility for Professional License.* One of the most important areas affected by a felony conviction is the opportunity to obtain or retain a business or professional license. As noted above, many statutes provide that a licensing board may deny or revoke a license on the basis of a felony conviction. The Supreme Court of Nevada addressed the effect of section 176.225 on professional licenses in the case of *Patt v. Nevada State Board of Accountancy*, [93 Nev. 548](#), 571 P.2d 105 (1977). In *Patt*, the court held that “proceedings to suspend or revoke business or professional licenses are not included among the penalties and disabilities that are released by an honorable discharge from probation.” *Id.* at 549, 571 P.2d at 106 (citing cases). The court upheld the revocation of appellant’s certificate as a certified public accountant pursuant to subsections 5 and 6 of section 628.390 of our statutes. As noted in *Patt*, California courts have construed a similar statute in the same way.

2. *Registration as a Felon, Eligibility to Carry Firearm, and Impeachment and Enhancement With Prior Conviction.* Nevada statutes require that a person convicted of a felony or other designated crimes register with a sheriff or chief of police. Nev. Rev. Stat. §§ 207.080, 207.090 (1981). It is also unlawful for a convicted felon to own or possess a firearm capable of being concealed upon his person. *Id.* § 202.360(2). And, of course, a person’s prior convictions may be used in subsequent prosecutions for enhancement purposes. *See, e.g., id.* §§ 207.010, 453.348. In these areas, the fact that a person receives an honorable discharge from probation and is released from all “penalties and disabilities resulting from the offense . . .,” *id.* § 176.225(1), does not necessarily exempt such a person from the effect of these laws.

With regard to the requirement that a “convicted person” register with the appropriate local official, we note that subsection 2 of section 207.080 provides that any person “whose conviction is or has been set aside in the manner provided by law shall not be deemed a convicted person.” *Id.* § 207.080(2). Of course, this applies only with regard to the registration requirements under sections 207.080 to 207.150. *Id.* § 207.080(1). The only reference in Nevada statutes to a *conviction* being set aside appears to be that of section 176.225 which actually states that the court may set aside a *verdict* of guilty. We find these terms to be synonymous as the effect is the same. Thus, an honorably discharged probationer is exempt from the registration requirements. This does not apply to those who receive only a general or dishonorable discharge. *See id.* §§ 176.235, 176.245.

We also recognize that, in Nevada, a person cannot be certified as a peace officer if he has been convicted of a crime for which registration is required. Peace Officers Standards and Training Committee, Regulations Establishing Minimum Standards for Recruitment, Selection and Training for Peace Officers § IV(5) (Eff. May 7, 1982). Because registration is not required for persons who have received an honorable discharge from probation, the mere fact of conviction will not bar certification. AS a point of interest, in the State of Texas, a person convicted of a felony may not be certified as a peace officer. Thus, in 1980, the Texas Attorney General opined that, under a statute similar to section 176.225, a person convicted of a felony could not prevent the revocation of his certification as a peace officer even after being granted an honorable discharge from probation. Ops. Att’y Gen. Texas MW-148 (Mar. 17, 1980). Citing the California

cases referred to by the Nevada Supreme Court in *Patt*, The Texas opinion stated that such revocation proceedings are not for the punishment of the licensee but for the protection of the public. *See Meyer v. Board of Medical Examiners*, 206 P.2d 1085 (Cal. 1949); *In re Phillips*, 109 P.2d 344 (Cal. 1941). In Nevada, though, due to the specific language of section 207.080(2), an honorable discharged probationer is exempt from the general registration requirements.

The rationale of *Patt* and the Texas and California decisions does apply, however, to one's ability to own or possess a concealable firearm and with regard to the use of a prior conviction in subsequent prosecutions. Section 202.360 prohibits anyone convicted of a felony from owning or possessing a firearm capable of being concealed upon the person. Nev. Rev. Stat. § 202.360(2) (1981). Those persons ultimately discharged honorably from probation under section 176.225(1) have previously been convicted. This is unlike the procedure followed under section 453.336 prior to 1981 in which a court, after a plea or finding of guilty for a first-time drug possession charge, could defer further proceedings "without entering a judgment of guilt." *Id.* § 453.336(6) (amended in 1981 Nev.Stats.ch. 567, § 1, at 1211-12.<sup>1</sup> Because an honorably discharged probationer is still a person who has been convicted, he may not own or possess a concealable weapon only as a result of that honorable discharge. *Cf. Ops. Att'y Gen. Nev. No. 180* (Jan. 22, 1975) (person on probation under former section 453.336(6) not a "convicted person" and need not so register).

The very terms of section 176.225(3) also support the above conclusions. That statute provides that a "prior conviction may be pleaded and proved" in any subsequent prosecution "for any other offense." Nev. Rev. Stat. § 176.225(3) (1981). Thus, when a prior conviction must be proved under section 202.360(2) for carrying a concealed weapon, or under section 207.010 for being an habitual criminal, the prior felony, conviction of an honorably discharged probationer may be used.<sup>2</sup> Because there are no specific statutory exemptions within sections 202.360 and 207.010 for honorably discharged probationers as is found in section 207.080(2), such individuals are still convicted persons for these purposes.

3. *Voting, Holding Office, and Serving as a Juror.* The Nevada Constitution specifically describes those persons eligible to vote and hold office. All citizens of the United States eighteen years of age and above, who are state residents, may vote if they have not been convicted of a felony. If convicted, they may vote if they have had their civil rights restored. Nev. [Const. art. 2, § 1](#). And, no person may hold office if he is

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<sup>1</sup>A person who now pleads guilty or is found guilty of possession of a controlled substance under section 453.336(6) is a "convicted" person. *See Dickerson v. New Banner Institute, Inc., .....* U.S. ...., 103 S.Ct. 986 (1983). It should be noted, however, that the court may seal the record and place the individual on probation. Because a record of a conviction would then be unavailable for any subsequent prosecution, the "convicted" person status essentially dissolves. To the extent that any previous opinion of this office conflicts with the conclusion, it is hereby overruled. *See Letter Op. Atty. Gen. Nev. to Dept. of Parole and Probation* (Sept. 14, 1981).

<sup>2</sup>Under section 50.095, a felony conviction may be used to impeach a witness. The specific exceptions include convictions older than ten years and convictions which have been "the subject of a pardon." *Id.* § 50.095(2)(b), (3).

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not a qualified voter. *Id.* art. 15, § 3. This reference to a restoration of civil rights obviously refers to sections 213.090, 213.155 and 213.157 which provide for the restoration of civil rights to a person receiving a pardon, to a paroled prisoner, or to a prisoner who has served his sentence. These sections also state that the individual will be released from all penalties and disabilities. The restoration of civil rights may not occur until five years after the grant of a pardon without restoration of civil rights or until after the ending of a parole or sentence. Had the Nevada

Legislature intended that a person honorably discharged from probation be restored to his civil rights, it could have so specified. Thus, a convicted felon who has been honorably discharged under section 176.225(3) is not eligible to vote or hold office until he has had his civil rights restored under section 213.090. *See also* Letter Op. Att’y. Gen. Nev. to Dept. of Parole and Probation (Nov. 8, 1974). Of course, a person convicted of a felony while in office may be precluded from ever holding office again. Nev. Rev. Stat. §197.230 (1981); Ops. Att’y Gen. Nev. No. 274 (Oct. 29, 1965).

Every qualified elector “who has not been convicted of treason, felony, or other infamous crime” may serve as juror. Nev. Rev. Stat. § 6.010 (1981). Unlike the constitutional provision regulating those eligible to hold office, this statute specifically states that a convicted felon may not be a juror and there is no clause exempting those who have received an honorable discharge from probation. Thus, the reasoning of *Patt* would apply to serving as a juror and an honorably discharged probationer is not relieved of this restriction.

### **CONCLUSION—QUESTION ONE**

The fact that a person is released from the penalties and disabilities of his crime does not, in most instances, remove a previously convicted felon from his status as a “convicted person.” An honorable discharge means that a person will no longer be subject to the term and conditions of probation. It does not mean a person is released from all consequences of his conviction or that he automatically reacquires the civil rights he lost. *See* *People v. Sharman*, 95 Ca. Rptr. 134, 135-36 (Cal.App. 1971). *See also* *State v. Hayes*, [94 Nev. 366](#), 580 P.2d 122 (1978).<sup>3</sup> Such a person may not vote, hold office or serve as a juror. The record of conviction may be used to prove habitual criminal status and to deny or revoke professional licenses. It will also prevent such person from carrying or owning a concealable firearm. But due to a specific statutory provision, such a person need not register as a convicted person.

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<sup>3</sup>In *State v. Hayes*, [94 Nev. 366](#), 580 P.2d 122 (1978), the Nevada Supreme Court noted that a convicted person may only have his criminal records sealed pursuant to section 179.245(1) of our statutes. A person arrested but not convicted may apply for a sealing of his records under section 179.255(1). The court, citing the *Patt* decision, concluded that the fact that a person had been given an honorable discharge from probation did not alter the conclusion that the person had been “convicted” for the purposes of determining whether he fit within the provisions of section 179.245(1) as opposed to section 179.255(1). We believe that this rationale applies to similar statutes which refer to the obligations of a “convicted” felon.

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### **QUESTION TWO**

What is the effect of a pardon or restoration of civil rights, or both, under sections 213.090, 213.155 and 213.157 of our statutes?

### **ANALYSIS**

Our constitution vests the power to grant pardons, after convictions, in a body consisting of the governor, the supreme court justices, and the attorney general. Nev. [Const. art. 5, § 14](#). Pardons may be granted “subject to such regulations as may be provided by law relative to the manner of applying for pardons.” *Id.* Our legislature has provided by statute for the procedure in applying for a pardon. Nev. Rev. Stat. § 213.020 (1981). Moreover, the legislature has indicated that a pardon may or may not include restoration of civil rights and may be granted upon conditions. *Id.* § 213.090(1).

Under section 213.155, the Board of Parole Commissioners may restore civil rights to a person following expiration of his parole. If this is not done immediately, that person may apply to the

Board of Parole Commissioners after five years for a return of his civil rights assuming he has not been convicted during that time of any offense greater than a traffic violation. *Id.* § 213.155. This also holds true for anyone who has served his sentence and has been released. *Id.* § 213.157. Unfortunately, our constitution and statutes are silent as to what effect a pardon has by itself or what all is included in the terms “civil rights” and “penalties and disabilities.” *See id.* § 213.090(2). Other constitutional and statutory provisions do specifically mention some effects of a return of civil rights. For example, such restoration allows the convicted person to vote and hold office. Nev. [Const. art. 2, § 1](#); art. 15, § 3. *See* Op. Att’y Gen. Nev. No. 7 (Mar. 4, 1921). *But cf.* Op. Att’y Gen. Nev. No. 274 (Oct. 29, 1965) (public employee convicted as described under section 197.230 is forever barred from holding public office). A convicted person also need not register as a felon if his civil rights have been restored and either the district court, parole board or pardons board so orders. Nev. Rev. Stat. § 207.090(5) (1981). The exception here is that a person defined by statute as a “sex offender” may only be relieved of registration requirements upon application to and hearing by the district court. *Id.* § 207.156. Based upon the *Patt* decision discussed above, we believe that proceedings to deny or revoke professional licenses are not “penalties or disabilities” from which a person may be released under chapter 213. *See* *Patt v. Nevada State Board of Accountancy*, [93 Nev. 548](#), 571 P.2d 105 (1977). The question here is what effect a pardon or “restoration of civil rights” has on licensing proceedings and on the use of a conviction in subsequent proceedings when not otherwise proscribed by statute.<sup>4</sup> An early Nevada case indicated that “a full and unconditional pardon of an offense removes all disabilities resulting from conviction thereof.” State of

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<sup>4</sup>Pursuant to statute, a conviction which is the subject of a pardon may not be used to impeach a witness. *Id.* § 50.095(3).

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*Nevada v. Foley*, [15 Nev. 64](#), 67 (1880). Moreover, the court stated that a full pardon makes “the offender a new man” and works “to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former [*sic*], as to give him a new *credit and capacity*.” *Id.* at 69 (quoting cases)<sup>5</sup> (emphasis in original). In *Foley*, the court found that a pardon restored a person’s competency as a witness. We presume that “full pardon” includes a restoration of civil rights, as well as just a release from any attendant punishment.

Even in light of such language concerning the effect of a pardon, more recently, many courts have held that a pardon does not obliterate the conviction or restore a person’s good character. *See* Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vanderbilt L.Rev. 929, 1145 (1970) [hereinafter cited as *Project*]. And some authorities indicated that the effect of a pardon is to forgive and not to forget. *See* 67A C.J.S. *Pardon & Parole* § 18 at 24 (1978) (citing cases). This appears to be the state of the law in Nevada in light of the *Patt* and *Hayes* cases cited above. Because the conviction is not obliterated, it may be utilized in a new prosecution to prove an element. In such a case, a convicted felon who has received a pardon may not own or possess a concealable weapon under section 202.360(2) of our statutes. *See* *People v. Norton*, 146 Cal.Rptr. 343, 346 (Super.Ct.App.Div. 1978).<sup>6</sup>

We also believe that a conviction which has been the subject of a pardon with a restoration of civil rights may be used to enhance the punishment for a new conviction under sections 207.010 and 453.348 of our statutes. Under the theory stated above, the record of conviction may still be used in this instance. *Accord*, *Project*, *supra* at 1146. *See* Annot., *Pardon as Affecting Consideration of Earlier Conviction in Applying Habitual Criminal Statute*, 31 A.L.R.2d 1186 (1953). *Contra*, *Guastello v. Department of Liquor Control*, 536 S.W.2d 21, 25 (Mo. 1976). Another theory is that a sentencing body, in determining the punishment for a new offense,



should be able to consider the prior actions of a person who received a pardon. *Carlesi v. New York*, 233 U.S. 51, 57-59 (1914); *People v. Biggs*, 9 Cal.2d 508, 511-14, 71 P.2d 214, 216-18 (1937). Similarly, for the purposes of many professional licensing requirements, a pardon should not preclude consideration of the underlying offense. *See Project, supra* at 1146. *Cf. Grossgold v. Supreme Court of Illinois*, 557 F.2d 122, 125 (7th Cir. 1977) (federal pardon does not “wipe out the moral turpitude” of a conviction).

If the above analysis holds true for a full pardon which would include a

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<sup>5</sup>*See* II W. Blackstone, Commentaries 1524-28 (ed. T. Cooley 1899); 2 S. Greenleaf, Law of Evidence 470 & N.2 (14th ed. 1883).

<sup>6</sup>We decline to answer in this opinion whether or not a convicted felon may own or possess a concealable weapon after receiving a pardon which specifically states that the individual may do so or which is based upon a determination that the conviction was in error. *See generally, Dickerson v. New Banner Institute, Inc.* ..... U.S. ...., 103 S.Ct. 986 (1983); *United States v. Allen*, 699 F.2d 453 (9th Cir. 1982).

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restoration of civil rights, it should also apply to the simple restoration of civil rights to those who successfully complete their parole or sentence. *See Nev. Rev. Stat. §§ 213.155, 213.157* (1981). The Nevada Legislature has provided the opportunity for these individuals to obtain a restoration of general, unenumerated civil rights. There is no indication that such a general grant releases these individuals from the strictures of more specific statutes.

### **CONCLUSION—QUESTION TWO**

A pardon relieves a person from any further punishments for a crime while a restoration of civil rights allows a convicted person to vote, hold office<sup>7</sup> and avoid certain requirements to register as a convicted person. Such restoration does not allow a convicted person to carry a concealed firearm, enable the individual to avoid professional licensing restrictions, or relieve the individual of statutory enhancements based upon the underlying conviction.

### **QUESTION THREE**

How are the rights of a convicted person affected when his record of conviction is sealed under section 179.245?

### **ANALYSIS**

The most effective way in which an individual may be relieved of all of the burdens of a prior conviction in Nevada is to have the records of that conviction sealed. There are two statutes in Nevada providing for the sealing of records. Section 179.245 allows for such action fifteen years after a felony conviction or sentence of imprisonment. The time period is ten years for gross misdemeanors and five years for misdemeanors. Nev. Rev. Stat. § 179.245(1). Such sealing is allowed if a person has not been arrested during those time periods. The second provision is found in subsections 5 and 6 of section 453.336. Persons under twenty-one years of age who are convicted of possession of less than one ounce of marijuana may have their conviction records sealed after three years. And any person not previously convicted of drug offense who is found guilty of possession of a controlled substance may have his record sealed and then expunged once the terms and conditions of probation are fulfilled. *Id.* § 453.336(5), (6).

When a record of conviction is sealed, “all proceedings recounted in the record are deemed never to have occurred . . .” *Id.* § 179.285. A prosecutor is without a means of proving the conviction when necessary in new prosecution. *See id.* § 207.010(8). *See also id.* §§ 51.295, 52.125, 52.265. Thus, it cannot be proved that a person who is in possession of a concealable weapon or who has

failed to register is a convicted person. It also

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<sup>7</sup>It should be remembered that a public employee convicted of a felony or malfeasance in office is forever disqualified from holding any public office. Nev. Rev. Stat. § 197.230 (1981).

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cannot be shown that a new sentence for such person should be enhanced because of prior convictions. Moreover, there is no record available to show that a person is “convicted” for the purposes of many licensing provisions. *But cf.* Grossgold v. Supreme Court of Illinois, 557 F.2d at 125 (a *pardon* does not “wipe out the moral turpitude” of a conviction). We also note that, because the underlying proceedings are deemed never to have occurred and a person may answer accordingly, Nev. Rev. Stat. § 179.285 (1981), the sealing of records means that a person may vote, hold office and serve as a juror. This is because the legal fiction is created that they have never been convicted of a felony.<sup>8</sup>

### **CONCLUSION—QUESTION THREE**

When a record of conviction is sealed, such conviction may not be utilized to prove an element in a new crime or as an enhancement for a new conviction. A sealed conviction also may not be used as the basis for a denial or revocation of a professional license. A person whose records have been sealed may also vote, hold office and serve as a juror.

### **SUMMARY**

Based upon our constitutional and statutory provisions, there is a progression of rights, opportunities and abilities which may be restored to a convicted person in Nevada. An honorable discharge from probation indicates that a person will not be required to serve a prison sentence as a penalty for his offense and, due to a specific statutory provision, an honorable discharge relieves a person from the requirements of registering as a felon. Similarly, a pardon, in and of itself, releases a person from any remaining prison term. A restoration of civil rights to those who receive a pardon or have successfully completed their parole or sentence allows the individual to vote and hold office. Registration as a felon is also no longer required. It is only after the record of conviction is sealed that a convicted person may own or possess a concealable firearm, is released from statutory enhancements based upon the conviction and, perhaps, can avoid professional licensing restrictions.<sup>9</sup>

Respectfully submitted,

Brian McKay, *Attorney General*

By Brian Randall Hutchins, *Deputy Attorney General,*  
*Criminal Division*

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<sup>8</sup>We do not believe that the general statute governing the sealing of records controls the more specific statute prohibiting a convicted public employee from ever again holding public office. *Compare* Nev. Rev. Stat. § 179.285 (1981) *with* Nev. Rev. Stat. § 197.230 (1981).

<sup>9</sup>Whether or not the actual facts which led to the conviction may be used to prove “moral turpitude” is a question we do not address here.

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**OPINION NO. 83-14 Workers' Compensation—Contested Claims—Practice of Law. In matters before the appeals officer concerning contested workers' compensation claims, the appearance before the appeals officer on behalf of an absent party, the binding of an absent party on procedural and substantive matters or the informal disposition of a matter pending appeal by stipulation or agreed settlement constitutes the practice of law and must be performed by a licensed attorney.**

Carson City, October 27, 1983

Ms. Connie Westadt, *Appeals Officer*, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Ms. Westadt:

You have asked this office for an opinion as to the extent to which nonattorney representatives may participate in hearings before the appeals officer in matters relating to industrial insurance claims under the provisions of Chapter 616 of NRS. Specifically, you ask the three questions which follow:

#### **QUESTIONS**

In matters before the appeals officer of the Department of Administration, may a nonattorney representative:

1. Appear on behalf of an absent party at an appeals officer hearing;
2. Bind the absent party on procedural and substantive matters; or
3. Informally dispose of a matter pending appeal by stipulation or agreed settlement on behalf of an absent party?

After a thorough review of the issues involved and the pertinent authorities, it is the opinion of this office that each of your questions must be answered in the negative. We submit the following analysis.

#### **ANALYSIS**

The appeals officer hears contested claims for compensation in the form of appeals from the decision of the hearings officer. [NRS 616.542](#)(1). The appeals officer has statutory authority to issue subpoenas [subpoenas] for the attendance of witnesses or production of various documents or records, to administer oaths to witnesses, to rule on evidentiary or procedural matters which arise during the course of the hearing, to initiate and preside over settlement conferences and to govern the scope of discovery. [NRS 616.226](#). The functions which the appeals officer performs and the nature of the hearing over which he presides are clearly quasi-judicial in nature. *Nevada Industrial Commission v. Reese*, [93 Nev. 115](#), 560 P.2d 1352 (1977). The actual conduct of the hearing includes the presentation by the parties of opening statements and closing arguments, the examination and cross-examination of witnesses, the introduction of and objecting to evidence, and the application of [NRS Chapter 616](#) and other statutes to the facts of the case. The outcome of the hearing certainly can affect substantial property rights of the parties. *i.e.* the amount of compensation deemed proper by the appeals officer.

The scope of the hearing and the functions of the appeals officer having been considered, we now must ascertain whether or not the Nevada legislature has evinced an intent as to the central issue herein, *i.e.* whether a nonattorney may represent, advise or bind an absent party in the proceedings before the appeals officer. We begin by noting that [NRS 7.285](#) prohibits the practice of law by any person not an active member of the State Bar of Nevada.

Next we observe that [NRS 616.5422](#) provides in pertinent part:

2. The appeals officer shall, within 10 days after receiving a notice of appeal, schedule a hearing for a date and time within 60 days after his receipt of the notice and give notice by mail or by personal service to *all parties to the appeal and their attorneys* at least 30 days after the date and time scheduled. (Emphasis supplied.)

While the term “attorney” could arguably be stretched to include any representative appointed by the party, we do not believe that the legislature intended such a result. In *Eagle Indemnity Co. v. Industrial Accident Commission*, 217 Cal. 244, 18 P.2d 341 (1933), the Court considered the following excerpt from Section 19(a) of California’s Workmen’s Compensation and Safety Act:

Either party shall have the right to be present at any hearing, in person or by attorney *or by any other agent*, and to present such testimony as shall be pertinent under the pleadings. (Emphasis supplied.)

After discussion as to the limits of legislative and judicial power, the court held that such an express statement by the legislature granting authority to a nonattorney to represent a party before the Industrial Accident Commission was an exception to the general rule that a layman may not lawfully represent another in such legal matters. As such, the practice was analogous to the long-approved and statutorily provided for practice of allowing laymen to represent a part in justice court in California. *Eagle Indemnity co. v. Industrial Accident Commission*, *supra*, at 342-343. We find no similar provision in Chapter 616 of NRS which provides the express authority allowing a layman to represent a party in a contested claim for workers’ compensation. [NRS 616.5422](#)(2) is the best expression of legislative intent as to who the legislature intended may participate at the hearing, and such participation is apparently limited to “parties \* \* \* and their attorneys.” Had the legislature intended participation by laymen representatives, it could have included in [NRS 616.5422](#)(2) an “or by their agents” option similar to the one found in the California statute. See [NRS 612.705](#)(2) which allows claimants for unemployment compensation to be “represented by counsel or other duly authorized agent.”

Other evidence that the Nevada legislature did not intend participation by laymen representatives in the subject hearings is found in the provisions relating to the state industrial attorney. The state industrial attorney may be appointed by the appeals officer to represent claimants when requested by a claimant. [NRS 616.2535](#) and [616.2537](#). [NRS 616.2539](#) provides in pertinent part:

1. The provisions of [NRS 616.253](#) to [616.2539](#), inclusive, [relating to the state industrial attorney] do not prevent any claimant from engaging *private counsel* at any time. \* \* \* (Emphasis supplied.)

The legislature has therefore expressly mentioned only two claimant representatives as proper participants in hearings before the appeals officer, the state industrial attorney and “private counsel.” Again, as with the term “attorney,” the common meaning of “counsel” as used in NRS is one who is licensed to practice law in Nevada and who gives advice on legal matters. The inclusion in the statute of those two proper representatives implies the exclusion of any other kind of representative not so mentioned. *State ex rel. Boardman v. Lake*, [8 Nev. 276](#) (1873). It is our opinion that the Nevada legislature did not intend lay representation of claimants before the appeals officer.

Whether or not a corporation, as contrasted with a natural person, may properly appear in legal proceedings through representation of a nonattorney representative, on the theory that such a representation would be an appearance by the corporation *in propria persona*. The South Carolina court cited with approval a Missouri case, stating:

The law recognizes the right of natural persons to act for themselves in their own affairs. \* \* \* A natural person may present his own case in a court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person \* \* \* it cannot appear or act in

person. \* \* \* In legal matters, it must act, if at all, through licensed attorney.

State v. Wells, *supra*, at 186.

Similarly, the Pennsylvania court held:

In the case of a corporate party \* \* \* there can be no legal representation at all except by counsel, because a corporation cannot appear *in propria persona*.

Shortz v. Farrell, *supra*, at 24. See also, West Virginia State Bar, et al. v. Earley, 109 S.E.2d 420, 435 (W.Va. 1959).

A survey of the case law of other jurisdictions provides ample authority for the conclusion that a party, whether a corporation or a natural person, may not be represented by a nonattorney in hearings before the appeals officer. Each of the cases cited herein concerns representation of parties by nonattorneys in workers' compensation claims or appeals.

Perhaps the premier case in the area is *People ex rel. Chicago Bar Ass'n v. Goodman*, 8 N.E.2d 941 (Ill. 1937), cert. den. 302 U.S. 728, 82 L.Ed. 562, 585 Ct. 49, reh. den. 302 U.S. 777, 82 L.Ed. 601, 58 S.Ct. 138. In that case Goodman, not an attorney, represented claimants in negotiations with insurers and employers, filed claims with the Illinois Industrial Commission, and appeared on behalf of claimants before an arbitrator of the commission at hearings wherein he presented evidence. The court reasoned that an appearance before an arbitrator to contest the denial of or amount of compensation awarded by the commission was an *adversary proceeding* at which representation of a party constitutes the practice of law. The court focused on the fact that workers' compensation law is highly complicated and that:

\* \* \* one who practices in that sphere must understand its legal ramifications \* \* \* [and]  
\* \* \* be able understandingly to weigh evidence and coordinate the testimony and its application to the statute.

*People ex rel. Chicago Bar Ass'n v. Goodman*, *supra*, at 946. The court stated that it was the "character" of Goodman's acts which determined whether or not he was engaging in the practice of law, holding that Goodman's institution of proceedings before the commission and his trial of those causes before the arbitrator in an adversary proceeding constituted the practice of law. *People ex rel. Chicago Bar Ass'n v. Goodman*, *supra*, at 947.

An earlier case decided by Ohio's highest court went further, holding that in a rehearing by the Industrial Commission of the disallowance of a claim the importance of producing an accurate record is so great that representation of the parties should be entrusted only to a licensed attorney. The court held that the defendants, members of the Industrial Commission, were:

\* \* \* prohibited from recognizing or entertaining representation \* \* \*

by nonattorney representatives. *Goodman v. Beall*, 200 N.E. 470 (Ohio 1936).

That reasoning applies equally to a hearing before the appeals officer, since that hearing is the final administrative step before judicial review and since any review by the district court is confined solely to an examination of the record made at the hearing before the appeals officer. [NRS 616.543](#); [NRS 233B.140\(4\)](#).

A West Virginia case sets forth a broad definition of the practice of law, stating that there are three types of professional activity which constitute that practice:

1. *Legal advice* and instruction to clients to inform them of their rights and obligations;
2. *Preparation* for clients of *documents* requiring knowledge of legal principles not possessed by an ordinary layman; and
3. *Appearance* for clients *before public tribunals* which have the power to determine rights of life, liberty and property. *West Virginia State Bar v. Earley*, *supra*, at 431.

The nonattorney defendant in the action was a union employee whose duties included

representation of union members before the state compensation commissioner in worker's compensation matters. The defendant was paid for the service only by the union and no fee was charged to the party he represented. The court considered whether the defendant's activity was the practice of law and held:

\* \* \* defendant, in appearing as agent in behalf of claimants for compensation at hearings before the state compensation commissioner, an administrative agency or tribunal, and his duly appointed trial examiners \* \* \* engaged in the practice of law \* \* \* such conduct on his part constituted the unauthorized practice of law which may be prevented by injunction.

West Virginia State Bar v. Earley, *supra*, at 432.

More recent cases have held that the rendering of services in the preparation and presentation of workers' compensation claims would constitute the practice of law even if the presentation was made at the original hearing of the matter, prior to the adversary stage discussed in *People ex rel. Chicago Bar Ass'n v. Goodman, supra*. See *In re Unauthorized Practice of Law in Cuyahoga County*, 192 N.E.2d 54 (Ohio 1963), cert. den. 376 U.S. 970, 12 L.Ed.2d 85, 84 S.Ct. 1136, reh. den. 377 U.S. 940, 12 L.Ed.2d 304, 34 S.Ct. 1332. The most recent case on this issue flatly holds that:

Appearances and practice before the Industrial Commission constitute the practice of law.

State ex rel. Nicodemus v. Industrial Commission, 448 N.E.2d 1360, 1362 (Ohio 1983).

This issue has also been addressed comprehensively in the following annotation of the American Law Review: *Handling, Preparing, Presenting or Trying Workmen's compensation Claims or Cases As Practice of Law*, 2 ALR3d 724.

### CONCLUSION

It is the opinion of this office that all three acts described in the three questions you pose would constitute the practice of law under the authorities cited above. Finding no express statutory exception in Nevada relative to workers' compensation claims to the almost universal rule that only licensed attorneys may practice law, it is further the opinion of this office that only a licensed attorney may perform the services described for an absent party.

Very truly yours,

Brian McKay, *Attorney General*

By James T. Spencer, *Deputy Attorney General*

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**OPINION 83-15 Water—Applications submitted by federal agencies for rights to appropriate the public waters may be approved by the State Engineer for limited proprietary purposes but not for governmental purposes where the grant to the United States would displace state jurisdiction by an exercise of federal jurisdiction.**

Carson City, October 28, 1983

Mr. Thomas W. Ballow, *Executive Director*, Department of Agriculture, 350 Capitol Hill Avenue, Reno, Nevada 89502

Dear Mr. Ballow:

The Nevada State Board of Agriculture has requested a formal review of a recent Nevada State Engineer's ruling dated July 26, 1983, by this office and an opinion as to whether the ruling accurately reflects the law of the State of Nevada and whether, if acted upon, it will impair the sovereignty of the State of Nevada.

The threshold question which we must first address is whether this office is authorized by law to review the July 26, 1983, Ruling of the State Engineer (hereinafter, Ruling) and to render the opinion requested. The Nevada Constitution, art. 5 § 22 provides in pertinent part that:

The secretary of state, state treasurer, state controller, attorney general, and superintendent of public instruction shall perform such other duties as may be prescribed by law.

[NRS 228.150](#) provides in pertinent part:

When requested, the attorney general shall give his opinion, in writing, upon any question of law, \* \* \* to the head of any state department, agency, board or commission \* \* \* upon any question of law relating to their respective offices, departments, agencies, boards or commissions.

You have represented that:

The Nevada Department of Agriculture had previously protested the granting of water rights for livestock water and wildlife to the Federal Government. The ruling indicates the intent of the State Engineer to grant these waters to the Federal Government.

The critical inquiry, then, is whether the Board has standing pursuant to the limitations in [NRS 228.150](#) to request an opinion from this office as to the question presented.

The powers and duties of the State Board of Agriculture are contained in [NRS 561.105](#), which provides in pertinent part:

1. The board shall have only such powers and duties as are authorized by law.
2. The board shall have the following powers and duties:
  - (a) To be informed on and interested in the entire field of legislation and administration charged to the department.

In [NRS 561.194](#) the composition of the Nevada Department of Agriculture is set forth and the duties of four divisions of the Department are stated. Of particular interest for our purposes, the duties of the divisions of animal industry and plant industry are set forth in subsections 3 and 5 respectively.

3. The division of animal industry shall manage activities of the department pertaining to the protection and promotion of the livestock industry of the State of Nevada.
5. The division of plant industry shall manage activities of the department pertaining to the protection and promotion of the agriculture industry of the State of Nevada.

The granting of permits by the State Engineer to agencies of the federal government to appropriate the public waters of the State of Nevada must necessarily deplete the limited quantities of water available for agricultural purposes. The United States Supreme Court aptly noted in *United States v. New Mexico*, 438 U.S. 696 (1978) that water rights held by the federal government "will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." 438 U.S. at 705. Additionally, the Court agreed with the New Mexico Supreme Court "that any stockwatering rights must be allocated under state law to individual stockwaterers." 438 U.S. at 716. The Court noted in the latter regard that:

There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited. 438 U.S. at 717.

The reduction of available water for appropriation for livestock purposes and the interests of the livestock industry to maintain access to water for watering stock are interests within the purview of the Division of Animal Industry. We are of the opinion that the oversight responsibility that the Division of Animal Industry is charged with by state law gives the board standing to request an opinion of this office relative to the legality of the Ruling, and this office has the authority to issue such an opinion.

We also note that the Board of Agriculture was instrumental in bringing a lawsuit which reopened the public lands of the State of Nevada to agriculture entries made possible pursuant to the Desert Land Act of 1877, Ch. 107, 19 Stat. 377. *See State of Nevada ex rel. Nevada State Board of Agriculture v. United States, et al.*, 699 F.2d 486 (9th Cir. 1983). The Division of Plant Industry, in our opinion, has an interest in the allocation of the public waters which would deplete the quantities of water which are available for Desert Land Act agricultural entries. Thus, the Board also has standing to request an opinion on this basis.

#### **REVIEW OF RULING AND ANALYSIS**

We begin our review by noting that the Ruling is captioned:

#### **IN THE MATTER OF APPLICATIONS TO APPROPRIATE THE PUBLIC WATER BY AGENCIES OF THE FEDERAL GOVERNMENT.**

We further note, however, that the Ruling is neither an approval or denial of any of the several hundred applications which have been submitted to the State Engineer by the Bureau of Land Management and the Forest Service to appropriate the public waters. The Ruling does not set forth a request by either applicants or protestants for a preliminary ruling on any issues in advance of approval or disapproval of the applications. In short, the Ruling appears to be merely a gratuitous comment on the hypothetical question of whether or not the United States should be granted permits to appropriate the public waters for the recited purposes of “stockwatering, wildlife, recreation and domestic use.”

The concluding paragraph of the Ruling goes no further than to state the following proposition established by Nevada statutes:

Federal agencies are legal applicants under Nevada Water Law and each application to appropriate pending before the State Engineer will be considered for approval or denial based on its own merits consistent with protection of existing rights, statutory compliance, the public interest and consideration of any protests filed in compliance with the Statute.

Since 1913 the United States has been defined as a “person” in [NRS Chapter 533](#). *See NRS 533.010*. United States governmental agencies have been defined as persons in Chapter 534 relating to underground water and wells since 1939. *See NRS 534.010(1)(e)*. The standards for consideration of applications to appropriate the public waters are contained in [NRS 533.370](#) which are consistent with the factors set forth above. On its face the concluding paragraph of the Ruling itself is not inconsistent with Nevada water law.

It appears, however, that certain significant pronouncements are not contained in the concluding paragraph identified as the Ruling, but are contained in the Findings of Fact and Conclusions which precede it. These pronouncements warrant review because of the far-reaching consequences attending perpetual grants to the United States of the State’s scarce water resources.



We approach this review mindful of the fact that opinions of the Attorney General should not address matters of policy. *See e.g.*, Attorney General’s Opinion 299 dated May 1, 1946. In this regard, however, we are aware that the water policies recognized by the present and preceding administrations of Nevada State Engineers are stated exclusively in Title 48 of the Nevada Revised Statutes, particularly Chapters 533 and 534. Therefore, this union of water law and policy assures us that our review of the Ruling will not address matters which are solely questions of policy committed to the discretion of the State Engineer.

We note at the outset that the Findings of Fact and Conclusions are not referenced to testimony taken at the six public hearings. Rather, they simply represent the State Engineer’s views on a number of complex legal issues surrounding a controversy of substantial public importance. It is unusual for a state adjudicatory agency to publish, *sua sponte*, an advisory legal opinion anticipating the outcome of a contested case in advance of deciding the case. We are advised from long association with, and representation of, the State Engineer’s office that the State Engineer has uniformly declined to anticipate in any manner how he may rule on a water rights application in advance of his decision to either approve or deny the application. Adherence to this procedure is unassailable for numerous reasons, not the least of which are the ambiguities created relative to the appeal rights of an aggrieved party pursuant to [NRS 533.450](#) when piecemeal rulings are entered. The State Engineer’s ruling appears to be a break with this established procedure.

If indeed the Ruling represents an advisory legal opinion emanating from the State Engineer’s office, the Attorney General as the state’s chief legal officer and advisor to the State Engineer ([NRS 532.160](#)), should have been advised in advance. *See also*, [NRS 533.450](#)(10). No involvement was requested from this office by the State Engineer nor was any notice provided that the State Engineer intended to publish the Ruling.

We note that the powers of the State Engineer, like other state administrative agencies, are limited to those set forth in the statutes. *See e.g.*, *Andrews v. Nev. St. Bd. of Cosmetology*, [86 Nev. 207](#), 208, 467 P.2d 96 (1970). The State Engineer has not general or common law powers, but only such powers as have been conferred by law expressly or by implication. *Id.* The State Engineer has the authority to approve applications to appropriate the public waters if the conditions of [NRS 533.370](#)(3), are satisfied and to reject applications if they are not. No power is conferred to create new conditions or extinguish existing conditions by way of an advisory ruling. The condition of primary concern in [NRS 533.370](#)(3), for purposes of our review, requires the State Engineer to reject an application if it “threatens to prove detrimental to the public interest.” This condition contemplates an objective approach based upon pertinent cases, the laws and legislatively stated policy and not upon, *inter alia*, perceived fears of federal power.

Whatever legal force or effect the ruling may have must await judicial review of the State Engineer’s decision to either grant or deny particular applications filed by the federal agencies. *See* [NRS 533.450](#); *see also*, [NRS 233B.130](#)(1). To the extent that the Ruling correctly states applicable law, of course, the statements are material, not because of any immediate force or effect of the Ruling, but because of the applicability of the underlying legal principles.

We turn now to a review of the Ruling insofar as it relates to a correct statement of the law. Although seven numbered paragraphs are set forth as Findings of Fact, with a few minor exceptions, no facts are set forth either as referenced to the public hearings or as matters of which the State Engineer may take administrative notice. We must necessarily treat the entire Ruling as stating conclusions of law. We will review the issues under the same Roman numerals as used in the Ruling.

## I

*Do federal agencies qualify under Nevada Statutes as applicants to appropriate the public waters?*

As stated previously, there is no question that the United States and its agencies are proper applicants to appropriate the public waters as they are defined as “persons” in [NRS Chapters 533](#)

and 534. Furthermore, unmentioned by the State Engineer, [NRS 328.065](#) provides:

An officer of an agency or instrumentality of the United States:

\* \* \*

2. Shall apply to the state engineer pursuant to Title 48 of NRS to appropriate water on the public lands or other federal lands of this state. The state engineer has continuing jurisdiction over any acquisition by the United States of the waters of the State of Nevada, whether by purchase, gift, condemnation, appropriation pursuant to the state's water laws or otherwise, and whether appurtenant to lands acquired by or retained by the United States.

Of particular note, an issue which we will discuss further herein, is the requirement in [NRS 328.065](#) and [NRS 328.085](#) that the State Engineer must exercise continuing jurisdiction over the use of the waters which may be approved in applications filed by the United States or its agencies. As we will point out, we are of the opinion that assurance of continuing jurisdiction is in *sine qua non* of the application and approval process.

## II

*Would the granting of applications to appropriate the public waters to federal agencies be legally in conflict with [NRS 321.596](#) thru 321.599 (Sagebrush Rebellion Legislation)?*

What has become known as the Sagebrush Rebellion statutes, [NRS 321.596](#) through [NRS 321.599](#), state on behalf of the State of Nevada a moral and legal claim to the public lands as defined in [NRS 321.5963](#). These lands comprise the unappropriated and unreserved lands managed by the Bureau of Land Management. Thus, these provisions of Nevada law are relevant, if at all, only with respect to applications filed by the Bureau.

It is not unusual for a state to claim ownership to various aspects of its natural resources. Thus, the state claims ownership to the wildlife within the state ([NRS 501.100](#)) even though the United States Supreme Court has held that a state does not "own" the wild creatures within its borders. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The state claims ownership of the water on behalf of its public. See [NRS 533.025](#).

Although the Ruling offers the conclusion that the granting of applications to appropriate the public waters to Federal agencies would not conflict with the provisions of [NRS Chapter 321](#), it is evident that the Ruling misconceives the nature of the problem. In support of the conclusion the Ruling suggests:

Should the State of Nevada be successful in asserting its ownership of the public lands, then it would follow that water rights and improvements appurtenant thereto would pass into state ownership as appurtenances to the land.

We do not take issue with the general proposition that the appropriative right is appurtenant to land at least when utilized for agricultural purposes, except to note that the concept is subject to exceptions. *See e.g.*, *Smith v. Logan*, [18 Nev. 149](#), 154, 1 P. 678 (1883) (the use of water on land by a trespasser did not make the water appurtenant to the land, and therefore did not inure to the benefit of the subsequently determined valid titleholder); *Reno Power, light and Water Co. v. Public Service Commission*, 300 F. 645, 647-648, 650 (D. Nev., 1921) (nonappurtenance of water in the case of water distributed for compensation); see also provisions in the water law for changes in place and manner of use, [NRS 533.040](#) and [NRS 533.325](#), *et seq.*

The relevant inquiries as to this issue are twofold. First, whether the state's statutory claim to the public lands prevents an appropriative right granted to the United States from becoming appurtenant to the public lands, and second, whether the approval of such applications would jeopardize the successful resolution of Nevada's claim to the public lands.

As to the first, the Nevada Supreme Court held in *Prosole v. Steamboat Canal Co.*, [37 Nev. 154](#),

161, 164, 140 P. 720, 144 P., 744 (1914) that water for agricultural purposes and the land to which it is applied become so interrelated and dependent on each other that the water becomes an integral part of the freehold. Therefore, unless there is an express severance in the manner provided in [NRS Chapter 433](#), the water right remains appurtenant to the land and upon conveyance, the water is transferred with the conveyance of the land as an appurtenance. See [NRS 533.040](#).

Nevada's claim to the public lands is based upon three theories, succinctly state they are: (1) the "equal footing" doctrine, (2) the trust doctrine and (3) the Tenth Amendment. Nevada seeks to displace the ownership of the Federal government, in short, because the present federal control of more than 88 percent of Nevada land deprives the state of the equal footing guaranteed upon admission to statehood. The United States Supreme Court has recognized a federal trust obligation to effectually and beneficially dispose of the public lands to state or private entities and the trust theory suggests that a failure to pursue a timely and effective program of disposal constitutes a breach of the trust which justifies a displacement of the trustee. Finally, the extensive federal presence and regulatory control deprives the state of governmental choices and prerogatives which have been traditionally exercised by other states pursuant to powers reserved by the Tenth Amendment. These issues have not been resolved. But *see*, Nevada ex rel. Board of Agriculture v. United States, *supra*.

It is our opinion that despite Nevada's claim to the public lands, the well recognized coexisting claim of the United States to the public lands is a sufficient basis for standing to support an application to appropriate the public waters pursuant to [NRS Chapters 533](#) and 534. Compare United States v. Humboldt Lovelock Irrigation Light & Power Co., 97 F.2d 38, 45 (9th Cir. 1938).

The second inquiry is the more difficult one and the one with greater implications. This inquiry starts with the proposition that the state owns the water within its borders and may administer and allocate such waters according to its own laws and its best interests. *See* [NRS 533.025](#); *see also* California v. United States, 438 U.S. 645, 654 n. 9 (1978) (absolute ownership over the waters asserted by various states, the Supreme Court not taking exception to such claims). The state's ownership of its water must be predicated, of course, upon more than the claim in [NRS 533.025](#) and, in fact, it is.

Prior to statehood in 1864, the United States owned both the public lands and the waters, having acquired its ownership by the Treaty of Guadalupe Hidalgo in 1848. In 1845, the United States Supreme Court had construed the landholding function of the United States in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) as a temporary one, until disposition of the public lands was complete, at which time the "power of the United States over these lands as property, was to cease" and "the municipal sovereignty of the new states will be complete throughout their respective borders, and they, and the original states, will be on an equal footing, in all respects whatever." 44 U.S. at 224. The land disposition programs in place at that time left little doubt that complete disposition would be accomplished. It would unduly lengthen this opinion to develop the history and legal implications associated with congressional encouragement directed toward settlement of the West, but at least it must be recognized that Congress had embarked on an aggressive land disposal program which has affected the water resources of the state in a substantial way. The United States Supreme Court in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935) reviewed in retrospect what Congress had done as follows:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, 89 Fed. 556, 558. The fair construction of the provision [the Desert Land Act of 1877] now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not

navigable “shall remain and be held free for the appropriation and use of the public” are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced.

As noted by the Supreme Court, Congress had the option of disposing of the land and water together or separately. It clearly chose the latter. See also *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937). In *Federal Power Commission v. State of Oregon*, 349 U.S. 435, 443-444, 448 (1955), the Supreme Court again observed what had happened:

“Public lands” are lands subject to private appropriation and disposal under public laws. \*  
\* \*

The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location.

In *Andrus v. Charlestone Products Co., Inc.* 436 U.S. 604, 614 (1978), the Supreme Court again observed:

\* \* \* Congress three times (in 1866, 1870 and 1877) affirmed the view that private water rights on federal lands were to be governed by state and local law and custom. It defies common sense to assume that Congress, when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights,  
\* \* \*

That the State may create private property rights to the use of water, even in the United States, is ample evidence that title to such waters has passed. See *e.g.*, *United States v. New Mexico*, *supra*, 438 U.S. 645, 654 (1978); see also *United States v. New Mexico*, *supra*, at 693, wherein admission into the Union on an equal footing is listed along with Congressional Acts as a source of whatever powers the states acquired over their waters. In a footnote, the court in *California v. United States*, noted that state claims to ownership have been upheld by the state courts “on the ground that the States gained absolute dominion over their nonnavigable waters upon their admission to the Union.” 438 U.S. at 654 n. 9, citing *Stockman v. Leddy*, 55 Colo. 24, 27-29, 129 P. 220, 221-222 (1912); *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900). Whether the state’s dominion over its water resources is a result of Congressional Acts of disposal or the consequence of admission into the Union, we are convinced that the state’s sovereignty and absolute dominion over its water resources is an accomplished fact. On the other hand, the United States is the owner of the public lands and has the power to dispose of and to allocate public and private rights to use such lands. See *e.g.*, *Light v. United States*, 220 U.S. 523, 536 (1911). We are of the further opinion that approval of applications to appropriate the public waters of the state by the United States and its agencies for management purposes in connection with federal retention of the public lands will result in a monopolization of governmental control over both resources in federal hands. Having reunited the land and water for federal purposes, it is doubtful that the state will continue to enjoy a federal deference to state water law and water administration. We believe that reuniting the public lands and waters will prove detrimental to the state’s efforts to eventually reach some semblance of parity in public lands matters. To suggest that the water rights granted to the United States would pass to the state with a disposal of the public lands to the state, therefore, is misleading, even if true, because it is the act of reuniting the land and water for management purposes which will fulfill the prophecy that for the future the federal government will exercise dominion and sovereignty over both. We will discuss further impacts on the state’s sovereignty in V, *infra*.

*Will the granting of water rights to the federal agencies weaken the legal hold the ranchers and farmers have on the public range as relates to grazing rights?*

The grant of water rights to the Bureau of Land Management and the Forest Service may cause adverse impacts upon existing grazing privileges which may be unavoidable as a matter of federal law. As a congressional declaration of policy, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.*, provides in pertinent part:

The Congress declares that it is the policy of the United States that—  
\* \* \*

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute; \* \* \* § 1701a(9).

It may be anticipated that a federally held water right for stockwatering may be interpreted as part of the resources of the public lands for which fair market value must be charged. The Ruling states that:

Conditions attached to the issuance of permits under the pending applications would preclude the utilization of water rights to the detriment and impairment of the range user where that detriment and impairment can be established.

The foregoing statement misconceives the extent to which conditions may be imposed by the State Engineer on federal permits to appropriate available water. This misconception appears again at page 4 of the Ruling where the State Engineer opines:

The U. S. Supreme Court has ruled that state-imposed conditions can be placed on water rights issued to Federal agencies [citing *California v. United States*, 438 U.S. 645 (1978)], which is a more desirable alternative to the possible event and success of Federal agencies obtaining rights for the same uses independent of state law and of the conditions of state the state can lawfully attach to permits.

Reliance upon the State Engineer's power to condition the federal use of water is to lean upon a slender reed. *California v. United States*, *supra*, 438 U.S. at 668 n. 21 observed:

In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary. *See Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. See n. 25, *infra*.

In n. 25, p. 672, the Court continued:

As discussed earlier in n. 21, it is at least arguable that Congress did not intend to override state water law when it was inconsistent with congressional directives such as the 160-acre limitation, but intended instead to enforce those objectives simply by the Secretary's refusal to approve a project which could not be built or operated in accordance with them. This intent, however, is not clear, and Congress may have specifically amended § 8 to provide that state law could not override congressional directives with respect to a reclamation project. See n. 19, *supra*. *Ivanhoe* and *City of Fresno* read the legislative history of the 1902 Act as evidencing Congress' intent that specific congressional directive which were contrary to state law regulating distribution of water would override that law. Even were this aspect of *Ivanhoe res nova*, we believe

it to be the preferable reading of the Act.

Section 8 of the Reclamation Act of 1902, an embodiment of “cooperative federalism,” was construed in *California v. United States*, *supra*, and even though the FLPMA voices a similar deference to state water law (43 U.S.C. § 701g(2)), the State Engineer’s power to establish conditions on the federal use of water undoubtedly would be conditioned by other congressional directives to the Secretary.

As an example of overriding congressional directives to the Secretary, a federal District Court in *Carson-Truckee Water Conservancy Dist., et al. v. Watt, et al.*, 549 F.Supp. 704 (1982) determined that the Endangered Species Act of 1973, 16 U.S.C. §§ 1531(b,c), 1532 (2), 1536, required the Secretary of Interior to give the endangered and threatened species of fish in Pyramid Lake priority over all other purposes for which the Stampede Dam and Reservoir were authorized for construction by the Washoe Project Act, 43 U.S.C. § 614. Other examples may arise under the Wild Free-Roaming Horses And Burros Act, 16 U.S.C. § 1331, the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.*, the Wildlife Resources Act, 16 U.S.C. § 661 *et seq.*, the Wilderness Act, 16 U.S.C. § 1131 *et seq.*, the Wild And Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*, the Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, the Flood Control Act of 1962, 43 U.S.C. § 383, the Federal Power Act, 16 U.S.C. § 791A-825R, the American Antiquities Preservation Act, 16 U.S.C. § 431, and FLPMA, itself, to name just a few.

In *United States v. California, etc.*, 694 F.2d 1171 (9th Cir. 1982), the Ninth Circuit Court of Appeals considered further the conditions which were in issue on remand of *California v. United States*, *supra*, and refined the “congressional directive” standard of the Supreme Court as follows:

Cases deciding whether state regulation is preempted under the Supremacy Clause by congressional action aid us in interpreting the Supreme Court’s command that only state law “inconsistent” with “congressional directives” is overridden by the relevant portion of 87-874. A state statute or regulation is preempted by a federal rule “to the extent it conflicts with a federal statute,” *Maryland v. Louisiana*, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981), or where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); see also *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981).

In the case before us, therefore, a state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme. 694 F.2d at 1176-1177.

The test advanced by the Ninth Circuit Court of Appeals has not been applied to circumstances other than the New Melones Dam division of the Central Valley Project, but the purported breadth of its possible application creates much uncertainty as to the authority of the State Engineer to condition, in a meaningful way, water usage by the federal agencies in permits granted to those agencies. *See also*, *Kleepe v. New Mexico*, 426 U.S. 529 (1976).

In addition to limitations on the State Engineer’s power to impose conditions, certain statutory conditions such as forfeiture and abandonment are not likely to be enforceable against the United States, either from practical or legal bases. See [NRS 533.060](#) and [534.090](#); *see also*, *United States v. City and County of Denver, et al.*, 656 P.2d 1, 34-35, ..... Colo. .... (1982).

#### IV

*Will the granting of water rights to the federal agencies threaten the availability of water*

*for other uses?*

Commentary aside, the pertinent portion of the Ruling as to this issue states:

It is conceivable that a junior appropriator could have his application denied or his right curtailed to protect a senior right held by a Federal agency. That, of course, is the essence of prior appropriation and protection of existing rights.

Nevada water law provides:

Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for. [NRS 533.370](#), subsection 3.

In the aggressive effort by federal agencies to appropriate the remaining unappropriated waters on the public lands which has been contemplated (see Nevada BLM News Release dated April 12, 1979, in which it was estimated that 6,000 to 9,000 applications for water permits would be filed with the State Engineer), it is likely rather than merely conceivable, that the subsequent applications of private appropriators will be denied. As to this scenario the suggestion by the United States Supreme Court in *United States v. New Mexico*, *supra*, at 705 is particularly apropos:

When in the case of Rio Members, a river is fully appropriated, federal reserved rights will frequently require a gallon-for-gallon reduction in the amount of water available for water needy state and private appropriators.

In terms of the preclusive effect federal water rights may have upon subsequent appropriators, there is little difference in federal reserved rights or rights obtained pursuant to the state's appropriation system; in either case the underlying considerations are the quantity of water and the priority. In *Cappaert v. United States*, 426 U.S. 128 (1976) a federal reserved right with a priority of 1952 was asserted against a private appropriator's state well permits with a priority of 1970. The result was that pumping was ordered limited on the 12,000 acre ranch which employed more than 80 people with an annual payroll of \$340,000. 426 U.S. at 133. Pumping may have to be limited in similar fashion anywhere in the entire 4,500 square mile groundwater basin where the government can show that the hydrological connection to the Devil's Hole Monument will affect the level of water in the limestone cavern. 426 U.S. at 143 n. 7. Had the United States acquired a state appropriative water right for the purpose for which Devil's Hole was reserved with the same priority, a similar outcome could be anticipated. Furthermore, it is doubtful that any attempts to condition the water right by the State Engineer would be effective against the overriding considerations associated with the endangered species of pupfish present in Devil's Hole.

The conclusion of the Ruling: "The granting of applications to appropriate the public waters by Federal agencies would be subject to existing rights in the source," while correct is not responsive to the issue as presented. The availability of water for other uses will be commensurately reduced, and in some cases, as in *Cappaert*, the exercise of junior rights may be substantially limited over an extensive area.

In [NRS 540.011](#), the Nevada Legislature determined "that it is the policy of the State of Nevada to continue to recognize the critical nature of the state's limited water resources." The Legislature further recognized "the relationship between the critical nature of the state's limited water resources and the increasing demands placed on these resources as the population of the state continues to grow." We find it difficult to reconcile the Legislature's stated policy with a large-scale grant of water rights to federal agencies for management of the public lands, particularly in

light of the fact that the government has breached its trust obligation to pursue an orderly program of public land disposal. Rather it has retained the lands, managed them, extracted revenue from them and, as a result, now asserts jurisdiction and power over the state's political and sovereign life that it does not have in other states. Needless grants to the federal government of the state's remaining supply of water would not only be inconsistent with state policy to conserve water for needful purposes, it would undoubtedly aggravate the division of powers problems between the state and federal authorities.

V

*Will the granting of water rights to the federal agencies threaten the state's sovereignty?*

The Ruling states with respect to this issue that:

The legal arguments both pro and con on the issue of state sovereignty are so voluminous as to be beyond the scope of this ruling.

Nevertheless, despite this disclaimer, the conclusion associated with the issue states:

There is no evidence that the granting of applications to appropriate the public waters by Federal agencies would threaten or otherwise adversely effect [sic] the state's sovereignty. On the contrary, it is concluded that recognition and compliance with state water law will strengthen state sovereignty.

No evidence was cited from the public hearings on this, or for that matter any of the issues. The conclusion set forth in the Ruling rests almost entirely upon the following notion:

To preclude the Federal agencies from the opportunity of acquiring state issued water rights in support of congressionally mandated responsibilities on the basis of impugning state sovereignty would only serve an unimpeachable and compelling reason for judicial or congressional creation of non-reserved rights.

Our review indicates that this assertion has little support in reason or in experience.

In an opinion authored by the Solicitor for the Department of Interior, M-36914 (Supp. D), 88 I.D. 1055, dated September 11, 1981, the Solicitor concluded that because there was "insufficient legal basis for the creation of what has been called federal 'non-reserved' water rights, \* \* \* there is no federal 'non-reserved' water right." 88 I.D. at 1064. In a comprehensive Memorandum For Assistant Attorney General, Land and Natural Resources Division, dated June 17, 1982, the Assistant Attorney General for the Office of Legal Counsel, concluded that:

To the extent the federal non-reserved water rights theory would suggest that federal water rights are created merely by the assignment of land management functions to a federal agency or authorization of a federal project, we believe that it does not have a sound legal or constitutional basis and does not provide an appropriate legal basis for assertion of water rights by federal agencies.

The Office of Legal Counsel opinion is binding on all of the federal agencies.

We agree with the Ruling that the federal agencies should be allowed to acquire needed water pursuant to state appropriation statutes for certain limited purposes and we recognize the power of the United States to acquire water rights by condemnation (*Dugan v. Rank*, 372 U.S. 609 (1963)), or by the exercise of Congress of Property and Commerce Clause powers (*Cappaert v. United States*, *supra*, at 138), but the notion that unless the state capitulates to extensive federal requests for water a non-reserved water rights theory will reemerge is simply not supportable.

The Ruling, by its own admission, fails to address the relevant considerations concerning



impairment of state sovereignty by grants of water rights to federal agencies. As noted previously, the impact upon state sovereignty in the acquisition by the federal government of land or water has not gone unnoticed by the Nevada Legislature. In [NRS 328.065](#), the Legislature provided that “the state engineer has continuing jurisdiction over any acquisition by the United States of the water of the State of Nevada” however acquired. Chapter 328 deals broadly with state legislative consent to cessions of jurisdiction when the United States acquires property within the state. In this regard [NRS 328.085](#) provides in pertinent part:

It is the policy of this state, \* \* \* to reserve:

4. Its jurisdiction over the appropriation of water, including the full power to control and regulate its acquisition, distribution, diversion, control and use.

In the context of [NRS 328.085](#), we believe that reservation of jurisdiction and the powers stated is equivalent to a reservation of sovereignty over the water. Thus, unless the State Engineer can be assured that the jurisdiction and powers set forth in [NRS 328.085](#) can be retained, it would be against the policy of the State of Nevada to approve the application and thus “should prove detrimental to the public interest.” See [NRS 533.370\(3\)](#). Approval of applications under these circumstances would be in violation of state law.

An exception to the foregoing rule may be carved out where the United States through one of its agencies seeks a water right for proprietary purposes only. This may occur when the United States seeks domestic water rights for use in connection with administrative sites, stockwatering water rights to water stock which it actually owns, irrigation rights for pastures to raise forage for its stock, and for similar purposes. As to these, if the responsible federal official gives assurance that full power to control and regulate the acquisition, distribution, diversion, control and use of the water will be retained by the State Engineer and that he will have continuing jurisdiction, there does not appear to be any prohibition in granting the application. On the other hand, where the federal agency applies for a water right for governmental purposes such as for wildlife purposes, for stockwatering in relation to grazing by permittees, for recreation purposes, or for similar purposes which are governmental in nature, no assurance can be given based upon the applicable case law which has been discussed previously which would guarantee that the requirements of [NRS Chapter 328](#) may be satisfied.

The proprietary/governmental purposes distinction derives from a line of United States Supreme Court cases dealing with state consent to cessions of jurisdiction to the United States over property acquired by the United States. Thus, in *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525 (1885), the Supreme Court noted that when lands and their appurtenances are acquired for uses of the general government “[t]heir exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their [federal instrumentalities] delegated powers” *Id.* at 539. The Court further noted that where the property was not used for governmental purposes, “the possession of the United States was only that of an individual proprietor.” *Id.* at 527. The Court explained:

The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals. *Id.* at 531.

We note also in this regard that the United States is recognized as “person” not as a “government” for purposes of [NRS Chapters 533](#) and 534. [NRS Chapter 328](#) aside, it should be apparent, even upon casual consideration, that where property is granted to the United States in furthering governmental purposes, purposes which have been traditionally committed to state authority and control such as wildlife, water, agriculture and recreation, to name a few, a substantial displacement of state authority and therefore sovereignty may result. We do not find it necessary to explore this topic in detail because the Legislature has spoken in such unequivocal terms in [NRS Chapter 328](#). Suffice it to

say, however, that a substantial body of case law is developing which strongly suggests that pursuant to a Property Clause authority to protect property owned by the United States, federal power extends to conduct on or off the federal property which would threaten designated federal purposes. *See e.g.*, *Camfield v. United States*, 167 U.S. 518, 525-526 (1897); *McKelvey v. United States*, 260 U.S. 353, 359 (1922); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.* 452 U.S. 264 (1981); *United States v. Brown*, 552 F.2d 817, 822 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977). In *Minnesota v. Block*, 660 F.2d 1240 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982) the Eighth Circuit Court of Appeals ruled that the federal government could regulate conduct on 281,000 acres of state lands in the Boundary Waters Canoe Area Wilderness to protect the purposes of the BWCAW. The Court stated at 1252:

Appellants argue that the state “ownership” of the waters distinguishes this case from the typical one. The state, however, does not “own” the water within its borders in the same manner as it owns the land under those waters. Rather, as an aspect of sovereignty, the state has the power to control the use of those waters for the benefit of the public. This authority, like any other state police power, however, must yield to any valid exercise of federal power.

We are of the opinion that the creation of federal property interests in the state’s water resources will invite federal regulation of conduct both on and off federal lands which will undoubtedly have serious and lasting impacts upon Nevada ‘sovereignty’. In this regard, compare the BLM’s closure of public access roads to Blue Lakes upheld in *Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982) with the BLM’s Application NO. 36479 filed with the State Engineer for water rights for fishing, recreation, stockwatering and wildlife for Blue Lakes.

## VI

*Can the federal agencies demonstrate the ability to place the public waters to beneficial use through privately-owned stock and wildlife controlled and under the jurisdiction of the State of Nevada?*

The Ruling seems to suggest that there is no requirement under Nevada water law that the applicant for a water permit be the person who applies the water to a beneficial use. Based upon our review of applicable law, we do not quarrel with this conclusion. In 1 Hutchins, *Water Rights Law In The Nineteen Western States*, 550 (1971) there appears the statement:

Whether explicitly or implicitly, all western water appropriation statutes authorize individuals, groups, formal organizations, and public agencies and entities to make such appropriations either for their own uses, or for disposition to consumers, that is, those who put the water to beneficial use. And long prior to enactment of the general water statutes in the several Western States and Territories, such practices were followed pursuant to local custom and judicial recognition.

Even though principles of agency permit one other than he who makes the diversion of water from the source to apply the water to beneficial use, and thereby to perfect the appropriative water right, Nevada case law holds that it is the one who actually places the water to beneficial use who ultimately holds the water right itself. Thus, in *Prosole v Steamboat Canal Co.*, *supra*, [37 Nev. 154](#), 140 P. 720, 144 P. 744 (1914), the Nevada Supreme Court held that the Steamboat Canal Co. which diverted water from the Truckee River for delivery to lands under the canal for a valuable consideration, did not own the water rights. Rather, it was the consumers of the water from the canal who had applied the water to beneficial use who were entitled to the water rights. As stated by the Court at 161-162.

It required more than the mere diversion of the water to complete the appropriation under

the doctrine as heretofore referred to. Hence, the diversion of the water from the canal of the appellant company and its application to a beneficial use by the owners or possessors of irrigable lands constituted the culminating act in perfecting the appropriation. This latter step, namely, the application of the water itself to the lands for the purpose of reclamation and irrigation, fulfilled the primal and essential object to all legislation and judicial expression upon this subject, *i.e.* the cultivation of the soil.

\* \* \*

Hence, it follows, as it has been reasoned out by many courts of last resort in able and well-considered opinions, that he who applies the water to the soil, for a beneficial purpose, is in fact the actual appropriator, although the application may be made through the agency of another, who by and through his own means and instrumentalities diverts the water, in the first instance, from its natural course.

We note that the Legislature has created an exception to the foregoing rule in [NRS 533.040](#) “in cases of ditch and canal companies which have appropriated water for diversion and transmission to the lands of private persons at an annual charge.” This provision was construed by the United States District Court for Nevada in *Reno Power, Light & Water Co. v. Public Service Commission*, 300 Fed. 645, 647-648, 650 (D. Nev. 1921). The Court construed the proviso relating to nonappurtenance of water in the case of water distributed for compensation, as a legislative recognition of the right to appropriate water for the purpose of distribution and sale. It was considered by the court that the theory that the water rights vests exclusively in the consumer is illogical under the statute. None of the considerations discussed by the Court apply to the case of stockwatering on the public lands. See also Hutchins, *The Nevada Law of Water Rights*, 20 (1955).

The statutory proviso contained in [NRS 533.040](#) may be the source of the State Engineer’s confusion as to this issue. We note again, in this regard, that the United States is defined as a “person” and not as a ditch or canal company in [NRS Chapters 533](#) and 534.

It is clear that neither the Bureau of Land Management nor the Forest Service would come within the terms of the proviso unless, perhaps, they could be deemed “companies which have appropriated water for diversion and transmission to the lands of private persons at an annual charge.” See the discussion of this problem in III above. The better reasoning, which we believe is required by *Prosole v. Steamboat Canal Co.*, *supra*, and *Smith v. Logan*, *supra*, would recognize ownership of the stockwatering right in the livestock operators who put the water to beneficial use by watering their stock, even though the Bureau of Land Management or the Forest Service had made application for the right. This approach is consistent with the United States Supreme Court’s pronouncement in *United States v. New Mexico*, *supra*, that stockwatering rights would be adjudicated to the stockwaterers. It is also in line with the recent offer by the Bureau of Land Management to assign their stockwatering applications to the livestock operators running livestock on the allotments where the points of diversion of the water rights applications are located.

The private ownership of the stockwatering rights is consistent with important policy considerations underlying the appropriative right to use water. A grant of these rights to the United States, which does not own the stock which are watered may, as discussed previously, tie up the water rights in perpetuity for stockwatering at the option of the government. On the other hand, the private use of the water will continue only so long as it can be beneficially used for the purpose for which it was granted. See [NRS 533.045](#). Thus, as new uses are made of the public lands, at least some water may be available to satisfy these uses.

In any event, neither the State Engineer nor this office has the authority to countermand the decision of the highest Court of our state. We note as an aside that the Nevada Supreme Court’s decision in *Prosole v. Steamboat Canal Co.*, was authored by Pat A. McCarran when he was a justice of the Nevada Supreme Court. Later as United States Senator, Pat McCarran became identified with perhaps the most significant federal water legislation in the history of this country, the McCarran Amendment, 43 U.S.C. § 666, which has been largely responsible for

preserving the states' jurisdiction and control over their water resources. See *e.g.*, *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976).

The analysis provided herein that the private water user gains the water right is bolstered by federal law as well. In *United States v. Alpine Land and Reservoir Co.*, 503 F.Supp. 877, 879 (1980), the United States District Court for Nevada in a general adjudication of the waters of the Carson River, citing a substantial body of federal case law, determined that the Newlands Reclamation Project landowners owned the water rights which were appurtenant to their lands even though the Bureau of Reclamation had constructed the works of diversion and canals and had made the actual diversion. See also *Ickes v. Fox*, *supra*, 300 U.S. 82, 95 (1937); *Nebraska v. Wyoming*, 325 U.S. 589, 614-616 (1945). Thus, by analogy, where the Bureau of Land Management constructs as well and applies for the water right, it undoubtedly retains ownership over the works of diversion as the Bureau of Reclamation did with the works of diversion of the Newlands Project, but it is the one who proves beneficial use who is entitled to the water right. We believe that the federal agencies who apply for water under Nevada's appropriation scheme, as well as the State Engineer, should be aware of these consequences in advance of proceedings before the State Engineer wherein approval of the applications may be granted.

## VII

*Will the approval of applications to federal agencies allow water to be removed from the area of the sources, thereby adversely affecting the access of stock and wildlife to water?*

Certain statutory procedures and criteria relative to processing of applications to appropriate the public waters are alluded to or set forth verbatim in this portion of the Ruling which guide the State Engineer in his determination of whether to approve an application.

These matters are committed to the expertise and jurisdiction of the State Engineer subject to judicial review of his decisions. See [NRS 533.450](#). As stated, they do not suggest any deviation from established practices of the State Engineer's office and do not warrant further comment.

## CONCLUSION

Having reviewed the Ruling, it is the opinion of this office that the Ruling accurately reflects the law of the State of Nevada in some respects, but not others. The United States and its agencies are unquestionably proper applicants for an appropriative water right and the United States' interest in the public lands give it and its agencies standing to seek water rights from the state.

The grant of substantial water rights to the United States will result in reuniting the land and water, heretofore severed for purposes of private acquisition, for the purpose of perpetual management by the federal government. As to lands and waters thus joined, efforts by the State of Nevada pursuant to [NRS 321.596](#) to [NRS 321.599](#) to secure favorable dispositions into state control will be seriously jeopardized, if not foreclosed.

A grant of water rights to federal land managers, according to FLPMA, may require the users of the public lands to pay increased fees for the use of the public lands based on an enhancement of fair market value represented by the federal ownership of the water rights acquired.

The State Engineer's power to condition state appropriative water rights granted to the United States is limited by court created standards and tests. The inability of the State Engineer to establish conditions which assure his continuing jurisdiction and control over the waters granted and the inability of the federal land managers in certain cases to provide such assurances cause the granting of such applications to be contrary to the policy of the State of Nevada as stated in [NRS Chapter 328](#) and, therefore, prohibited by [NRS 533.370\(3\)](#).

The granting of water rights to the federal agencies will necessarily diminish water available for state and private appropriators contrary to state policy contained in [NRS 540.011](#). To the extent that the State Engineer may grant water rights to federal agencies for certain governmental purposes which overlap with traditional governmental authority of the state, a displacement of state sovereignty is to be anticipated. As it is the opinion of this office that such applications may not be granted consistent with [NRS Chapter 328](#), any impairment of state sovereignty is

avoidable.

Where the federal agencies apply for water permits and where the water right represented by the permit may be perfected only by the application of the water to beneficial use by private parties, we are of the opinion that the records of the State Engineer's office should reflect that actual and/or beneficial ownership of the water right is in the party who proves beneficial use.

In other respects the Ruling restates interpretations of applicable state law and practices of the State Engineer's office which are entitled to deference and with respect to which this office expresses no opinion.

If we may be of further assistance in this matter, please do not hesitate to contact us.

Very truly yours,

Brian McKay, *Attorney General*

By Harry W. Swainston, *Deputy Attorney General*

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**OPINION NO. 83-16 Sheriff, Police and Constables: Arrest Powers and Authority of Local Law Enforcement Officers—Nevada peace officers should act cautiously in enforcing federal laws. Accordingly, peace officers should not detain or arrest a person solely on the basis that this individual might be a deportable alien. Where an individual arrested for a nonimmigration criminal violation is suspected of being an illegal alien, the United States Immigration and Naturalization Service should be notified immediately. Nev. Const., art. 1, § 2 and art. 15, § 2; Nev. Rev. Stats. §§ 171.124 and 292.020.**

Carson City, November 23, 1983

Honorable John Madraso, Jr., *Mineral County Sheriff*, Post Office Box 778, Hawthorne, Nevada 89415

Dear Sheriff Madraso:

This office is in receipt of your correspondence which requested the opinion of the attorney general concerning certain matters related to the authority of a county sheriff in the State of Nevada to enforce federal statutory laws related to illegal aliens. There are no facts which require summary prior to analyzing the law applicable to your question.

#### **QUESTION PRESENTED**

Whether a Nevada peace officer has the power and authority to arrest persons suspected of violating the statutory provisions of the federal immigration and nationality acts.

#### **ANALYSIS**

The Constitution of the State of Nevada mandates that "the Paramount Allegiance of every citizen is due the Federal Government in the exercise of all its constitutional powers as the same have been or may be defined by the Supreme Court of the United States; \* \* \*" Nev. [Const. art. 1, § 2](#). Furthermore, the Nevada Constitution require all executive, judicial and ministerial officers to take and subscribe to an oath before entering their respective offices, which oath provides in part that the public officer "will support, protect and defend the constitution and government of the United States. \* \* \*" Nev. Const., art. 15, § 2. *See* Nev. Rev. Stat. § 282.020. A Nevada peace officer is a person who must subscribe to the oath delineated by the state constitution and statutes. *See* Nev. Rev. Stat. §§ 169.125 and 281.005; *see, e.g.*, 1953 Nev.Op.Att'y.Gen. No. 249, at 111 (Nevada Highway Patrolmen required to take oath of office).

Considering the constitutional and statutory law of Nevada there is ample support for the proposition that state and local peace officers are generally obligated to facilitate the enforcement of federal law. In this regard, absent an express federal statutory prohibition, a state law enforcement official may effect an arrest for a violation of federal law to the extent that officer may validly act under state law. *United States v. Bowdach*, 461 F.2d 1160, 1168 (5th Cir. 1977); *see, e.g., United States v. De Re*, 332 U.S. 581, 587-590 (1948).

An analysis of the language of and the legislative history surrounding the general penalty provisions of the immigration and nationality acts has convinced one state appellate court that the Congress contemplated the participation of local peace officers in the enforcement of these federal statutes. *See* 8 U.S.C. § 1321-1330 (1976 and Supp. 1981); *People v. Barajas*, 147 Cal.Rptr. 195, 198-199 (Ct.App. 1978). In the *Barajas* decision, the court held that state and local law enforcement officers may arrest persons for violations of the federal immigration laws. *Id.* at 199. The *Barajas* court concluded that this rule was proper because the statutory law of the United States is incorporated into the statutory law of the several states by reason of the supremacy clause of the federal constitution. U.S. Const., art. VI. *See People v. Barajas*, 147 Cal.Rptr. 195, 199 (Ct.App.1978). Additionally, two federal courts have reviewed and validated the enforcement of immigration laws by state law enforcement officials. *See United States v. Hernandez*, 486 F.2d 614, 616-618 (7th Cir. 1973); *Gonzales v. City of Peoria*, 537 F.Supp. 793, 797 (D.Ariz. 1982).

By contrast, other courts and commentators have expressed the opinion that enforcement of federal immigration laws by state and local authorities is a questionable practice which may result in civil rights or tort liability of peace officers for illegal arrest. *See, e.g., United States v. Perez-Castro*, 606 F.2d 251, 252-253 (9th Cir. 1979); *United States v. Cruz*, 559 F.2d 300, 302-304 (5th Cir. 1977); *see also Mashi v. INS*, 585 F.2d 1309, 1315 (9th Cir. 1978); *Chairez v. County of Van Buren*, 542 F.Supp. 706, 711-716 (S.D.Mich. 1982); *Gordon & Rosenfeld, Immigration Law and Procedure* § 5.2b(1) at 5-18; *id.* § 5.4a at 5-57 to 5-58 (1981) and Supp. 1983); *Article, Illegal Aliens And Enforcement: Present Practices And Proposed Legislation*, 8 U.C.D. L. Rev.. 127, 145-146 and 148-150 (1975). Similarly, the Attorney General of the United States has explained that state and local law enforcement personnel have authority to enforce the federal immigration laws where state law specifically authorizes such enforcement activities. Consistent with this opinion, certain guidelines for state and local peace officers are suggested, namely:

- (1) do not stop and question, detain, arrest, or place an immigration hold on any person not suspected of crime, solely on the ground that they might be deportable aliens:
- (2) upon arresting an individual for a nonimmigration criminal violation, notify the Service immediately if it is suspected that the person may be an undocumented alien, so that the Service may respond appropriately.

Dep't of Justice, Press Release (June 23, 1978), *cited* *Gordon & Rosenfeld, Immigration Law and Procedure* § 5.4a at 5-58 (Supp. 1983). *See* Dep't of Justice, Policy Statement (Feb. 10, 1983).

In light of the differing views expressed by the courts, as well as the legal counsel for the involved federal agency, this office concludes that Nevada peace officers should act with extreme caution in enforcing immigration laws. Consequently, while Nevada law enforcement officials may have certain inherent powers to arrest persons suspected of violating federal laws, this arrest authority should only be exercised within the parameters suggested by the Attorney General of the United States. When exercising arrest authority, Nevada peace officers must be certain that they act within the powers expressly described by statute. *See Nev. Rev. Stat.* § 171.124. By following the guidelines discussed above and strictly adhering to the parameters of statutory arrest authority, Nevada peace officers should avoid any difficulties with respect to illegal arrest or improper enforcement of federal immigration laws.

## CONCLUSION

Generally, Nevada peace officers are empowered to arrest persons suspected of violating federal criminal laws. This arrest authority is derived from the supremacy clause of the federal constitution and by reason of the fact that the Nevada Constitution requires law enforcement officers to enforce federal law. The power of Nevada peace officers to arrest for violations of immigration law should be cautiously exercised because there is no dispositive federal position or applicable Nevada decisional law concerning this subject.

Specifically, a state or local law enforcement officer should not detain or arrest a person absent probable cause to suspect state criminal activity solely on the basis that this individual might be a deportable alien. Moreover, where local or state law enforcement personnel effect an arrest of an individual for a nonimmigration criminal violation, the Nevada peace officer should immediately notify the United States Immigration and Naturalization Service if it is suspected that the person may be an illegal alien, so that the Service may take appropriate action. Hopefully, the foregoing opinion of the attorney general will assist your office, working with your local legal counsel, in effectively performing the law enforcement duties of sheriff in Mineral County.

Respectfully submitted,

Brian McKay, *Attorney General*

By Dan R. Reaser, *Deputy Attorney General*,

*Criminal Division*

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