

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1991

OPINION NO. 91-1 JURISDICTION; JUSTICE COURTS: The justice court retains jurisdiction in cases of injury to persons or property if the claim does not exceed the amount of \$2,500, but [NRS 38.215](#) requires that the justice court require mandatory arbitration if the cause is contested in any manner.

Carson City, January 23, 1991

To Honorable Michael McCormick, District Attorney, Humboldt County Courthouse, Post Office Box 909, Winnemucca, Nevada 89445

Dear Mr. McCormick:

This letter is in response to an inquiry from your office regarding the effect of the 1989 amendment to [NRS 38.215](#) on the jurisdiction of justice courts in cases of minor traffic accidents involving claims for monetary damages.

QUESTION

Does the 1989 amendment to [NRS 38.215](#) remove the vehicle accident cases from justice court or small claims court jurisdiction by requiring arbitration of these claims?

ANALYSIS

In the 1989 session of the Nevada Legislature, [NRS 38.215](#) was amended to read as follows:

1. Except as otherwise provided in subsection 2, all civil actions for damages for personal injury, death or property damage arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the State of Nevada and the amount in issue does not exceed \$15,000, must be submitted to arbitration, in accordance with the provisions of [NRS 38.015](#) to [38.205](#), inclusive, and
2. Subsection 1 does not apply to civil actions within the jurisdiction of the district court of a judicial district in which a program of mandatory arbitration is in effect.

Prior to that, [NRS 38.215](#) read:

1. Except as provided in subsections 2 and 3, all civil actions for damages for personal injury, death or property damage arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the State of Nevada and the amount in issue does not exceed \$3,000, shall be submitted to arbitration, in accordance with the provisions of [NRS 38.015](#) to [38.205](#), inclusive.
2. Any such action over which a justice court has jurisdiction shall be submitted to such arbitration only upon the mutual consent of the parties.

3. Subsection 1 does not apply to civil actions within the jurisdiction of the district court of a judicial district in which a program of mandatory arbitration is in effect.

Article 6, § 8, of the Nevada Constitution authorizes the Legislature to fix by law the limits of the civil and criminal jurisdiction according to the amount in controversy, the nature of the case, the penalty provided, or any combination of these for justice courts. Justice courts have special and limited jurisdiction. *Paul v. Armstrong*, [1 Nev. 82](#) (1865). Subsection 1(b) of [NRS 4.370](#) grants justice courts jurisdiction in actions for injury to persons or property, where the amount claimed does not exceed \$2,500. In addition, the justice courts have small claims jurisdiction for the recovery of money only if the claim does not exceed \$2,500. [NRS 73.010](#).

The amendment to [NRS 38.215](#) eliminated the provision requiring arbitration in justice court actions only upon stipulation by the parties. The amendment requires mandatory arbitration in all cases in which the amount in controversy does not exceed \$15,000. This amendment did not change the jurisdiction of the justice courts. The Legislative Counsel Bureau reached a similar result in an opinion addressed to Senator William J. Raggio issued October 25, 1989.

Additionally, it appears that the justice courts are courts of competent jurisdiction under [NRS 38.025](#) and have authority to order arbitration. [NRS 38.045](#).

Justice courts having jurisdiction over cases that do not exceed the \$2,500 statutory maximum must require mandatory arbitration by the litigants but may not refuse to accept such a civil action for filing. The mandatory requirement for arbitration would only arise once a case comes before the justice court under either chapters 4 or 73 of NRS and if a defendant appears and denies the allegations of the complaint as to either liability or damages. The court must stay further proceedings until completion of mandatory arbitration prior to further proceedings consistent with the provisions of chapter 38 of NRS, including trial and judgment.

CONCLUSION

The justice court retains jurisdiction in cases arising from injury to persons or property arising out of the ownership, maintenance or use of a motor vehicle, where the cause of action arises in the state of Nevada, and the claim for damages does not exceed the amount of \$2,500. However, [NRS 38.215](#) requires that the justice court require mandatory arbitration if the cause is contested in any manner. Arbitration is not required in such cases if a settlement is stipulated to by the parties or if the defendant or defendants are defaulted.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Don Aimar
Deputy Attorney General

OPINION NO. 91-2 UNIONS; COLLECTIVE BARGAINING; PRINTING: The Superintendent of the State Printing Division has no statutory authority to enter into collective bargaining agreements with unions representing employees of that division. The Division may be lawfully excused from complying with [NRS 344.060](#).

Carson City, April 3, 1991

Mr. Terry Sullivan, Director, Department of General Services, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Sullivan:

You have requested an opinion from this office concerning the State Printing Division's ("Division") use of the International Typographical Union label and the Division's ability to negotiate with unions representing its employees. This office has been informed that the Communication Workers of America ("CWA") requested that Don Bailey, Superintendent of the Division, sign an agreement setting forth the rates of pay, hours of work and other terms and conditions of employment within the Division.

QUESTION ONE

Does the CWA agreement in essence constitute a collective bargaining agreement?

ANALYSIS

The proposed, unsigned agreement was drafted in 1990. Paragraph 2.01 of that agreement refers to "collective bargaining." Paragraph 2.01 reads:

The Employer hereby recognizes the Union as the exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and all other conditions of employment for all full-time and regular part-time employees covered by this Agreement.

The California courts have discussed what the term "collective bargaining" means:

Collective bargaining by its recognized definition and application in the field of labor relations presupposes something more than mere presentation and discussion. The essence of collective bargaining is the right to negotiate and agree on the terms and conditions of employment.

International Ass'n of Firefighters v. City of Palo Alto, 29 Cal. Rptr. 219, 232 (Cal. Dist. Ct. App. 1963). See also *Nutter v. City of Santa Monica*, 168 P.2d 741, 748 (Cal. Dist. Ct. App. 1946).

CONCLUSION TO QUESTION ONE

This office finds that the proposed agreement is a collective bargaining agreement because the CWA agreement seeks to set the terms and conditions of employment within the Division.

QUESTION TWO

May the State Printing Division enter into collective bargaining agreements with unions representing employees of that division and if so, to what extent?

ANALYSIS

The Attorney General's Office has addressed this issue on numerous occasions regarding other state agencies, boards and political subdivisions. Historically, this office has been of the opinion that political subdivisions of the state cannot enter into collective bargaining agreements affecting public employees.

This is because a public officer or employee, as a condition of the terms of public service, voluntarily gives up such part of his rights as may be essential to the public welfare.

While there is nothing improper in the organization of municipal employees with labor unions, collective bargaining by public employees is another matter.

. . . Under our form of government public office or employment has never been, and cannot become, a matter of bargaining and contract.

This is true because the whole matter of qualifications, tenure, compensation, and working conditions for any public service involves the exercise of legislative powers. The Legislature cannot delegate such powers and such powers cannot, therefore, be bargained or contracted away; and certainly not by any administrative or executive officer who cannot have any legislative powers.

Op. Nev. Att'y Gen. No. 233 (June 1, 1965) (citations omitted). Such agreements were opined to be invalid unless specific statutory authority was granted to enter into such contracts. *See* Op. Nev. Att'y Gen. No. 494 (March 4, 1968); Op. Nev. Att'y Gen. No. 539 (Sept. 17, 1968).

In 1969, the Nevada State Legislature enacted the Local Government Employee-Management Relations Act granting local governments the authority to recognize and negotiate with employee organizations. *See* [NRS ch. 288](#). The Act does not apply to state boards, agencies or employees. *See* Op. Nev. Att'y Gen. No. 640 (Jan. 19, 1970).

These opinions follow what appears to be the general rule in most jurisdictions, that public employees have no authority to enter into collective bargaining agreements without specific statutory authority. A brief recitation of applicable case law will illustrate this point.

Absent express constitutional or statutory authorization, a public agency cannot bargain with nor enter into a collective bargaining agreement with labor organizations concerning wages, hours and conditions of employment of its employees. *International Union or Operating Eng'r, Local 321 v. Water Works Bd.*, 163 So. 2d 619 (Ala. 1964). *See also* *University Police Officers Union v. University of Neb.*, 277 N.W.2d 529, 536 (Neb. 1979); *International Brotherhood of Elec. Workers v. City of Hastings*, 138 N.W.2d 822, 824 (Neb. 1965); *State Bd. of Regents v. United Packing House Food & Allied Workers*, 175 N.W.2d 110, 116 (Iowa 1970). It is generally recognized that, absent express statutory authority, public officials have no authority to enter into exclusive collective bargaining agreements with public employees. *American Fed'n of State, County & Mun. Employ-*

ees v. Olson, 338 N.W.2d 97 (N.D. 1983). A public employee has no right either to bargain collectively or to strike, absent an authorizing statute. *Almond v. County of Sacramento*, 80 Cal. Rptr. 518 (Cal. Ct. App. 1969).

At common law there is no right to collectively bargain. "At common law, public employees are not entitled to collective bargaining and public employees are without power to enter collective bargaining agreements." *State v. Delaware State Educ. Ass'n.*, 326 A.2d 868, 874 (Del. Ch. 1974). "Without common law collective bargaining rights, public employees enjoy only those rights specifically granted by statute." *City of Hayward v. United Pub. Employees, Local 390*, 126 Cal. Rptr. 710, 713 (Cal. Ct. App. 1976).

Many cases indicate that the terms and conditions of public employment may not be altered by collective bargaining agreements.

All the cited cases either expressly or implicitly acknowledge that to the extent that the terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract, and concerted labor activity instigated for the purpose of affecting such terms and conditions is not sanctioned by the law.

Newmarker v. Regents of the Univ. of Cal., 325 P.2d 558, 562 (Cal. Dist. Ct. App. 1958) *reh'g denied*, citing *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 210 P.2d 305, 312 (Cal. Dist. Ct. App. 1949).

There is also the fact that the elaborate system of laws which constitute the policy of the state in the domain of public employment would be largely nullified if the legislation should be construed as applicable to public employment, to the full extent that is applicable to private employment. Government by law would then have to give way to government by contract, and this without action by the Legislature which expressed an intention to establish an entirely new system in the field of public employment.

Nutter, 168 P.2d at 747.

The National Labor Relations Act left regulation of labor relations of state and local governments to the states. *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 207, 223 (1977), *reh'g denied*, 433 U.S. 915. See 29 U.S.C. § 152(2). It is widely held that state laws which in general terms allow collective bargaining agreements do not apply to public employees. *Wichita Pub. Schools Employees Union v. Smith*, 397 P.2d 357, 360 (Kan. 1964). "It is well settled that statutes which in general terms divest pre-existing rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected." *State v. Brotherhood of R.R. Trainmen*, 232 P.2d 857, 860 (Cal. 1951).

In the state of Nevada, there is no express statutory provision granting state entities the ability to enter into collective bargaining agreements. This office previously opined, however, that the superintendent of the Division could enter into union agreements or recognize or be bound by the same but only as to wage scales for union members employed in that Division. Op. Nev. Att'y Gen. No. 358 (March 12, 1958). No other provisions or union agreements could be recognized or adopted. The opinion based its reasoning on the wording of [NRS 344.080\(2\)](#) which provided:

At no time shall the state superintendent pay such compositors, machine operators, pressmen and assistants a higher rate of wages than is recognized by the employing printers of the State of Nevada, or than the nature of the employment may require.

[NRS 344.080\(2\)](#) has been amended and presently states:

The compensation of the compositors, machine operators, pressmen and assistants *must be fixed by the department of personnel*, but no such employees are entitled to receive a higher rate of wages than is recognized by the employing printers of the state of Nevada or than the nature of the employment may require. [Emphasis added.]

The Nevada State Legislature has empowered the Department of Personnel with exclusive authority to fix compensation of printing personnel. The Director of the Department of Personnel must certify the payroll

pursuant to [NRS 284.185](#). As a result of the statutory change, it is the opinion of this office that portions of Op. Nev. Att’y Gen. No. 358 referring to the State Printer’s ability to enter into wage scale agreements are no longer applicable. Therefore, the superintendent of the Division may not set wage scales for union members employed in his office.

Division employees who are compositors, machine operators, pressmen and assistants are state employees in the unclassified service of the state but are not exempted from the provisions of chapter 284 of the Nevada Revised Statutes and the Nevada Administrative Code. See [NRS 344.080](#)(1), (3); [NRS 284.013](#). As of the date of this opinion, neither the superintendent of the Division, nor any other state entity has express statutory authority to enter into collective bargaining agreements.

CONCLUSION TO QUESTION TWO

The superintendent of the Division has no statutory authority to enter into collective bargaining agreements with unions representing employees of that division.

QUESTION THREE

May the Division continue to use the union label pursuant to [NRS 344.060](#) if permission to use the label is revoked?

BACKGROUND

[NRS 344.060](#) states:

The superintendent shall cause to be affixed to all public printing, except work reproduced in the reproduction division, the union label recognized by the International Typographical Union. He is authorized to purchase such cuts for that purpose as in his discretion are necessary.

It is our understanding that there is no existing organization known as the International Typographical Union. The CWA, Local 9413, claims sole ownership of the International Typographical Union label (“label”). For the purposes of this opinion request, we will assume that CWA is entitled to the

sole use of this label. This label was registered with the U.S. Patent Office on September 26, 1939, as a trademark for use on certain goods. See *Baker v. Master Printers Union of N.J.*, 34 F. Supp. 808 (D. N.J. 1940).

In a letter to Governor Miller dated July 26, 1990, CWA indicated it would revoke the state of Nevada’s license to place the label on any matter printed by the Division unless certain alleged violations were corrected. One of those cited alleged violations was the non-existence of a current contract. As previously shown, the state of Nevada has no authority to enter into a collective bargaining agreement with CWA nor with any other union.

ANALYSIS

A trade union is entitled to the sole use of its name, insignia, union labels and other

identification devices that it uses. *Fitzgerald v. Block*, 87 F. Supp. 305 (D. Pa. 1949). Where the union label is registered as a trademark, the union is entitled to protest its unlawful use and even to enjoin a threatened unlawful use. *NLRB v. Washington-Oregon Shingle Weaver's Dist. Council*, 211 F.2d 149, 151 (9th Cir. 1954). A labor union having a label may withhold the label from those who do not comply with the conditions it attaches to its use, but it may not employ its label for an unlawful purpose or as an unlawful means. *Connors v. Connolly*, 86 A. 600, 606 (Conn. 1913). Protection of the label may not be used to justify illegal action by the union. *Dallas Stage Employees Local Union 127 v. NLRB*, 633 F.2d 1195 (5th Cir. 1981); *see also Washington-Oregon Shingle Weavers Dist. Council*, 211 F.2d at 151.

These cases indicate that CWA may withhold the label from the state of Nevada if the state does not comply with the conditions CWA attaches to its use. CWA may not, however, threaten to withhold the label for an unlawful purpose such as to compel an illegal action.

If CWA lawfully withholds its label, the state of Nevada should not print the label without permission. Although [NRS 344.060](#) is mandatory, Nevada case law indicates that the Legislature does not intend to require the performance of an impossible act, especially where a lawful excuse exists for noncompliance. *Tarsey v. Dunes Hotel*, [75 Nev. 364](#), 367-68, 343 P.2d 910 (1959); *Sisson v. Georgetta*, [78 Nev. 176](#), 180, 370 P.2d 672 (1962);

Smith v. State, [38 Nev. 477](#), 483, 151 P. 512 (1915). If good faith attempts fail to secure use of the label, the Division would have a lawful excuse for its noncompliance with that statute.

CONCLUSION TO QUESTION THREE

The Nevada State Printing Division should strive to retain use of the label to be in full compliance with [NRS 344.060](#) but it may be excused from these requirements if CWA refuses to grant its permission to use the label.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Debra Winne Jeppson
Deputy Attorney General

OPINION NO. 91-3 INDIANS; GAMING; LIQUOR: State and local jurisdiction over non-Indian crimes committed on reservations includes right of police to enter the reservation in support of its jurisdiction; county may, pursuant to tribal-state intergovernmental agreement, require reservation gaming establishments to obtain a county license, and require casino employees to obtain county work cards; county may require on-reservation liquor establishments to obtain county liquor licenses.

Carson City, April 9, 1991

The Honorable Rex Bell, District Attorney of Clark County, 225 East Bridger Avenue, Eighth Floor, Las Vegas, Nevada 89155

Dear Mr. Bell:

You have asked this office for an opinion concerning jurisdiction in the Clark County portion of the Fort Mojave Indian Reservation (“Reservation”). You have indicated that you anticipate construction of a large housing and casino development on the Reservation which will attract non-Indian residents, employees, and tourists, and that you are considering entering into cooperative agreements with the Fort Mojave Indian Tribe (“Tribe”) to provide services to the development. In particular, you have asked the following:

1. What are the rights and duties of the Las Vegas Metropolitan Police Department (“Metro”) over non-Indians on the Reservation?
 - a. Can Metro enter the Reservation without permission by the Tribe to enforce state and/or local criminal laws?
 - b. Must an officer of Metro leave the Reservation if instructed to do so by tribal police or a tribal official?
 - c. Is Metro legally obligated to provide law enforcement services to the Reservation?
2. Can Clark County require gaming establishments to obtain a county license?
3. Can Clark County require non-Indian casino employees to obtain work cards through the Sheriff’s Office?
4. Can Clark County require county liquor licenses for non-Indian establishments located on the Reservation?

BACKGROUND

In 1953, the United States Congress authorized the states to assume criminal and civil jurisdiction over Indian country. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 28 U.S.C. § 1360 and 18 U.S.C. § 1162 (“PL 280”). In the Act of March 23, 1955, ch. 198, 1955 Nev. Stat. 297, the state of Nevada assumed jurisdiction over all Indian country in the State except for that which was excluded by proclamation of the Governor.

By proclamation dated August 18, 1955, the Governor of Nevada excepted Indian country in Clark County from the assumption of PL 280 jurisdiction. The State’s jurisdiction over the Clark County portion of the Reservation is therefore determined without reference to PL 280.

QUESTION ONE

What are the rights and duties of Metro over non-Indians on the Reservation?

This question exposes a tension which exists in the law between the well-established right of a state to exert its criminal jurisdiction over non-Indians on a reservation and an equally well-established right of Indians to exclude others from their land.

ANALYSIS

Indian Power to Exclude

In *New Mexico v. Mescalero Apache Tribe*, 103 S. Ct. 2378, 462 U.S. 324, 333 (1983), the court said that an Indian “tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established.”

[This power of the Indian tribe does] not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its

autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905).

Though well recognized, the Indian right to exclude others is not immutable. Indian sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Since a tribe’s right to exclude others is an inherent aspect of Indian sovereignty, it is itself subject to extinguishment or modification by Congress. *United States v. White Mountain Apache Tribe*, 604 F. Supp. 464, 466 (D. Ariz. 1985) (“the federal government’s duties to manage and protect reservation lands and resources necessarily override the Tribe’s sovereign power to exclude non-members”).

State Jurisdiction Over Non-Indian Crime

The right of a state to exert its jurisdiction over non-Indians who commit crimes in Indian country is equally well recognized. In *United States v. McBratney*, 104 U.S. 621 (1881), a non-Indian criminal defendant found guilty in federal court of murder committed on the Ute Indian Reservation in Colorado moved the Supreme Court to arrest judgment on the theory that the State of Colorado had jurisdiction, and that the federal conviction was therefore in excess of the federal court’s jurisdiction. The Supreme Court agreed.

Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the

treaty with the Ute Indians and the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.

Id. at 623-24 (citations omitted). To the same effect, *see United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946) (“in the absence of a limiting treaty obligation or Congressional enactment, each state [has] a right to exercise jurisdiction over Indian reservations within its boundaries”); *Draper v. United States*, 164 U.S. 240, 242-43 (1896).

The vigor of *McBratney* is undiminished and was noted in *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (state criminal jurisdiction on reservation limited to non-Indians). Many state court decisions rely on the *McBratney* line of cases. *See, e.g., State v. Burrola*, 669 P.2d 614, 615 (Ariz. 1983) (state court has jurisdiction to deal with offense of possession of a deadly weapon by non-Indian on reservation); *State v. Herber*, 598 P.2d 1033, 1035 (Ariz. App. 1979); *Ryder v. State*, 648 P.2d 774, 776 (N.M. 1982) (state court has jurisdiction to deal with offense of distribution of marijuana by non-Indians on reservation); *State v. Shoemaker*, 39 N.W.2d 524, 525 (S.D. 1949) (state court has jurisdiction to deal with offense of murder of a non-Indian by a non-Indian on a reservation).

Nevada law likewise reflects the right of the State to exercise jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. *See Jones v. State*, [94 Nev. 679](#),

680, 585 P.2d 1340 (1978) (state may punish non-Indian defendant for offense of possessing a controlled substance on reservation); *Ex Parte Crosby*, 38 Nev. 389, 149 P. 989 (1915). See also Op. Nev. Att’y Gen. No. 80-42 (Dec. 11, 1980); Op. Nev. Att’y Gen. No. 166 (May 2, 1974).

Though the State’s criminal jurisdiction over non-Indians on reservations is well established, challenges to it are normally brought by non-Indians. The courts have not addressed the question of whether this jurisdiction will support a state right to maintain a physical presence on the reservation against the objections of the Indians. “There is very little authority regarding the powers of the federal, state and tribal police in Indian country.” Canby, *American Indian Law in a Nutshell* 129 (1981). “The Supreme Court also has not spoken on this question.” *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 729 n.10 (9th Cir. 1980). Canby concludes, however, that “powers of policing and arrest follow the criminal jurisdiction of the three governments in the absence of special arrangements or agreements.” Canby, at 129.

One court reached the same conclusion.

Our view is that if the subject matter of the litigation is one that the state court has jurisdiction to try and determine and the federal government has not reserved sole and exclusive jurisdiction over the territory involved, the state officers may enter such territory under the state’s sovereign authority and serve the necessary process to enable it to exercise its legitimate jurisdiction. Any other rule would lead to ridiculous results. For illustration, if defendants’ reasoning be sound, a white man could murder another white man on or off an Indian reservation and would be secure from Arizona prosecution so long as he could remain within the boundaries of a reservation In other words the state would have territorial jurisdiction without power to exercise it. Such is not and cannot be the law.

Williams v. Lee, 319 P.2d 998, 1000-01 (Ariz. 1958), *rev’d on other grounds*, 358 U.S. 217. In its decision reversing the opinion of the Arizona Supreme Court, the U.S. Supreme Court did not impugn the idea that a state has a right to have a physical presence on a reservation in aid of its jurisdiction over non-Indians. The reversal instead was based on the absence of subject matter jurisdiction in the first place, since the defendants in the litigation were Indians.

The conclusion drawn by Canby and the Arizona court is consonant with the pronouncements of the United States Supreme Court. It is clear, first of all, that the Indians’ right to exclude others is subject to extinguishment or modification by Congress. *White Mountain Apache Tribe*, 604 F. Supp. at 466. Second, the cases make clear that the U.S. Congress granted criminal jurisdiction to the states over non-Indians in Indian country as a consequence of the Equal Footing Doctrine and through the various Enabling Acts. A reasonable conclusion is therefore that the U.S. Congress, in granting the states such jurisdiction, also extinguished so much of the Indians’ power to exclude others as was necessary to enable the states to exercise their jurisdiction. To deny the states the right to enter Indian country to enforce their laws against non-Indians would render the grant of jurisdiction to the states a virtual nullity.

Local Criminal Law

In order to answer your inquiry fully, it is necessary to determine whether the above analysis applies equally to enforcement of local criminal law.

The power to create and punish crimes is an aspect of sovereignty which is controlled by the Legislature. “It is for the legislative branch of a state or the federal government to determine, within state or federal constitutional limits, the kind of conduct which shall constitute a crime and the nature and extent of punishment which may be imposed therefor.” 1 *Wharton’s Criminal Law* § 10 (14th ed. 1978).

There is little question that local governments may also criminally enforce their own laws or ordinances. “The clear weight of authority allows municipal corporations with express grants of power from the Legislature to create crimes.” Antieu, 1 *Antieu’s Local Government Law: Municipal Corporation Law* § 5.03 (1989). “Wisconsin stands veritably alone in ruling that the state cannot delegate to its lesser political entities power to punish ordinances as crimes.” Antieu, 4 *Antieu’s Local Government Law: County Law* § 31.06 (1989).

Local authority to criminally punish offenses, however, is derivative of the power of the state legislature. Delegation of this power can be express or implied. *Dunn v. Mayor of Wilmington*, 219 A.2d 153 (Del. 1966). This is consistent with the rule that the rights and powers of a political subdivision are in general derived from the Legislature. *Pershing County v. Humboldt County*, [45 Nev. 78](#), 84-85, 181 P. 960 (1919).

The U.S. Supreme Court has recognized the derivative nature of local criminal law. In *Waller v. Florida*, 397 U.S. 387 (1970), the Court held

that a municipality is a part of the state and is not a separate sovereignty, and hence the double jeopardy provision of the Fifth Amendment prohibits retrial of a criminal defendant by a state after conviction of the same defendant in a municipal court for the same acts.

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.

397 U.S. at 392 (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)).

Since any exercise of criminal jurisdiction by local governments is an exercise of the state’s sovereignty, it follows that the reach of local power to punish crime extends throughout the county and into Indian country in the same manner as the state’s own power, unless otherwise limited by the Legislature.

CONCLUSION TO QUESTION ONE

Based upon the foregoing, this office concludes that: (1) Metro may enter the Reservation without permission from the Tribe to enforce state or local criminal laws against non-Indians; (2) an officer of Metro need not leave the Reservation if instructed to do so by tribal police or a tribal official, so long as the officer is engaged in the enforcement of state laws against non-Indians; and (3) Metro has the same obligation to provide law enforcement services on the Reservation as it has generally within Clark County, to the extent such on-reservation services involve enforcement against non-Indian persons committing victimless crimes or crimes against non-Indians.

Some uncertainty necessarily attends these conclusions since the U.S. Supreme Court has not directly addressed the issues. In particular, the Court has not measured the severity of the impacts to tribal sovereignty which would result from keeping a state presence in Indian country, nor indicated how those impacts might limit the otherwise clear right of a state to exercise its jurisdiction. Tribal sovereignty itself is an evolving concept

in the Court which oscillates between competing theories of tribal power. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989). An expansive view of this power focuses on the territorial aspect of tribal authority;¹ a more circumscribed

¹ For an example of this view, see Justice Blackmun’s dissenting opinion in *Brendale*, 109 S. Ct. at 3017-27.

view would limit exercise of tribal sovereign power to a tribe's own members.² The extent of the allowable state presence may vary with the prevailing theory of tribal power as well as the particular circumstances giving rise to the issue.

Metro may wish to consider entering into a cooperative agreement with the Tribe. Through such an agreement the parties could clearly identify the rights and obligations of the state and tribal law enforcement personnel, and thereby avoid many of the uncertainties which inhere in this area of the law.

QUESTION TWO

Can Clark County require gaming establishments to obtain a county license?

ANALYSIS

Regulation of tribal gaming activities is now controlled by the federal Indian Gaming Regulation Act, 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168 ("IGRA"). The IGRA and accompanying case law provide that Indian gaming, where permitted, can only be regulated through a tribal-state compact. The Senate Report accompanying the bill which was enacted as the IGRA states that:

[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities The

mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-state compact S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

S. Rep. No. 446, 100th Cong., 2d Sess. 5-6, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3075-76 (quoted in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990)).

This language intends that all regulation must be expressly authorized by a tribal-state compact. In this case, a tribal-state agreement exists, but it does not expressly authorize regulation by Clark County.

The state of Nevada and the Tribe entered into a tribal-state intergovernmental agreement on January 15, 1987. Although the agreement predates the enactment of IGRA, it contains express provisions delineating civil and criminal jurisdiction over gaming. Paragraph 4 of the agreement provides that:

[T]he TRIBE hereby grants, assigns, transfers, and sets over all of its civil and criminal jurisdiction, except for taxing authority, pertaining to the licensing and regulation of Gaming within the Fort Mojave Property to NEVADA, together with the present and continuing right with full power and authority to enforce

² For an example of this view, see Justice White's opinion in *Brendale*, 109 S. Ct. at 2996-3009.

all the gaming laws and regulations of Nevada within the Fort Mojave Property and to do any and all things which NEVADA is or may become entitled to do under its gaming laws and regulations, including . . . the present and continuing right . . . to investigate, license, and regulate all individuals and entities seeking to or conducting gaming or gambling within the Fort Mojave Property

The Tribe's grant of power to license gaming establishments was to the State.

In addition, in paragraph 8 of the agreement, the Tribe has assented to the application of Nevada law to matters covered by the agreement:

To the extent necessary to carry out and effectuate the purposes of this Inter-governmental Agreement, the TRIBE shall enact such resolutions, ordinances, statutes, and/or regulations as may be necessary to adopt and/or incorporate the provisions of Nevada law and regulations relating to gaming and make the same applicable to the Fort Mojave Property.

Again the only reference is to the State's law, and no reference is made to county law. However, gaming licensees are specifically required under state law to obtain "all federal, state, county and municipal gaming licenses." [NRS 463.160](#)(1). See *Stokes v. State*, [76 Nev. 474](#), 357 P.2d 851 (1960). Thus the agreement of the Tribe to submit to state gaming jurisdiction, necessarily requires the submission to county jurisdiction.

CONCLUSION TO QUESTION TWO

The regulatory framework of the IGRA requires that any license requirement must be included in the tribal-state agreement controlling gaming on the Reservation. Although there is no reference in the agreement to any authority given to the county, the county has authority to license gaming establishments on the Reservation in accordance with [NRS 463.160](#)(1). The Tribe has agreed to the enforcement of state civil and criminal gaming laws. It is a requirement of state law that gaming licensees obtain all licenses, including county licenses. *Id.*

QUESTION THREE

Can Clark County require non-Indian casino employees to obtain work cards through the sheriff's office?

CONCLUSION TO QUESTION THREE

For the reasons given in answer to Question Two, this office concludes that Clark County can require non-Indian casino employees to obtain work cards. It is a specific requirement of state law that all persons employed in gaming have "[a] valid work permit issued in accordance with the applicable ordinances or regulations of the county or city in which his duties are performed." [NRS 463.335](#)(2)(a). Thus under state law, a gaming employee must obtain a county work permit. The Tribe has specifically consented to all state gaming laws in the inter-governmental agreement executed with the state.

QUESTION FOUR

Can Clark County require county liquor licenses for non-Indian establishments located on the

Reservation?

ANALYSIS

State regulation of liquor transactions in Indian country is controlled by 18 U.S.C. § 1161, which reads:

The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title [18 U.S.C. §§ 1154, 1156, 3113, 3488, and 3669, prohibiting sale of liquor in Indian country], shall not apply to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register.

The U.S. Supreme Court in *Rice v. Rehner*, 463 U.S. 713, 722 (1982), addressed the question of whether this statute permits the states to regulate liquor sales in Indian country. The Court answered in the affirmative, observing that “tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.” The states, on

the other hand, have “an unquestionable interest in the liquor traffic that occurs within its borders.” *Id.* at 724. The Court concluded:

Application of the state licensing scheme does not “impair a right granted or reserved by federal law.” *Kake Village*, 369 U.S., at 75. On the contrary, such application of state law is “specifically authorized by . . . Congress . . . and [does] not interfere with federal policies concerning the reservations.” *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685, 687 n.3 (1965).

Id. at 734-35.

It might be argued that only state, not county, regulation of liquor businesses in Indian country was countenanced by the federal statute. But the “state licensing scheme” in Nevada includes the express delegation of licensing authority to the county commissions. [NRS 369.200](#). State licenses issued by the commissions include those required for importers and wholesalers. [NRS 369.180](#). Elsewhere the state has delegated to the counties, acting through county liquor boards, the authority to license retailers. [NRS 244.350](#). Thus to the extent the county requires a license under authority of these statutes, it is acting within its authority under the federal law.

CONCLUSION TO QUESTION FOUR

Clark County may require a liquor license for non-Indian establishments, so long as the license is a requirement which derives from the State’s delegated power and authority.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: C. Wayne Howle
Deputy Attorney General

OPINION NO. 91-4 ADOPTION: It is a violation of [NRS 127.310](#) to send video tapes, audio tapes, resumes, letters or other information describing prospective adoptive parents to a birth mother in Nevada without holding a valid unrevoked license as a child placing agency.

Carson City, April 16, 1991

Mr. Thom Reilly, Chief, Social Services, Welfare Division, 2527 North Carson Street, Carson City, Nevada 89710

Dear Mr. Reilly:

You have asked the opinion of this office on the following:

QUESTION

Does the act of attorneys in sending video tapes, audio tapes, resumes, letters or other information describing prospective adoptive parents to the birth mother of a child which the mother desires to have adopted, violate [NRS 127.310](#)?

ANALYSIS

[NRS 127.310](#) provides in relevant part:

[A]ny person or organization other than the welfare division of the department of human resources who, without holding a valid unrevoked license to place children for adoption issued by the welfare division:

1. Places, arranges the placement of, or *assists in placing or in arranging the placement of any child for adoption* or permanent free care

is guilty of a misdemeanor. [Emphasis added.]

You have informed this office that the various attorneys who send information concerning adoptive parents to a mother in Nevada desiring to have her baby adopted have stated that this is the extent of their involvement. The attorneys are not licensed by the Welfare Division as a child

placing agency as required by [NRS 127.240](#). Your question is whether the providing of such information constitutes assisting “in placing or in arranging the placement of any child for adoption or permanent free care,” in violation of [NRS 127.310](#).

The actions described above appear to this office to constitute assisting “in placing or in arranging the placement of any child for adoption.” [NRS 127.220](#)(1) defines “[a]rrange the placement of a child” as “to make preparations for or to bring about any agreement or understanding concerning the adoption of a child.” A rule of statutory construction is that if the language of the statute is plain and unambiguous, there is no room for construction of the statute by the court. *Atlantic Commercial Dev. Corp. v. Boyles*, [103 Nev. 35](#), 38, 732 P.2d 1360 (1987). When a statute is clear on its face, the court cannot go beyond it to determine legislative intent. *Daniels v. National Home Life Assurance Co.*, [103 Nev. 674](#), 678, 747 P.2d 897 (1987). Either

directly or indirectly, the attorneys, by sending video tapes, audio tapes, or resumes, do aid the birth mother in selecting adoptive parents and bringing the parties together. Therefore, they are assisting in arranging the placement of a child for adoption.

While the legislative history itself does not provide much information regarding the intent in enacting Nevada's adoption laws, a June 1961 report by the Office of the Attorney General entitled "A Survey of Adoption Practices in Nevada," which identified the existence of a black market in adoptions in Nevada, provided the impetus for strengthening Nevada's adoption laws. In March 1963, the Nevada Legislative Counsel Bureau released Bulletin No. 58, entitled "Child Welfare and Adoption in Nevada—A New Law and a New Approach." This report provided a basis upon which improved legislation strengthening Nevada's adoption law was drafted and enacted.

Although there is no Nevada case law regarding this issue, an examination of cases from other jurisdictions leads to the same conclusion. *Montana Dep't of Social & Rehabilitation Serv. vs. Angel*, 577 P.2d 1223 (Mont. 1978), was a suit for declaratory judgment and injunctive relief which sought to enjoin a doctor and an attorney from placing children for adoption. The actual placement for adoption was made by the doctor, who recommended the attorney to the adoptive parents to represent them in the adoption proceedings. The attorney knew that the doctor placed the child

for adoption, and he represented the adoptive parents in adoption proceedings. The court found that the doctor placed a child for adoption without a license and enjoined both defendants from placing children for adoption. The practice by the physician and the attorney had been ongoing.

The court said, at pages 1224-25:

Where the intent of the legislature can be determined from the plain meaning of the words used, the courts may not go further and apply other means of interpretation because the legislative intent is expressed in the language employed. In this case the legislative intent is obvious from the plain meaning of the words used in sections 10-70 et seq., R.C.M.1947, viz. to give licensed adoption agencies the exclusive function of placing children for adoption

Montana's law is essentially the same as Nevada's; see [NRS 127.310](#).

The court then said, at page 1225:

Since these sections come from the Uniform Adoption Act, we believe that resort to the comments of the National Conference of Commissioners on Uniform State Laws, who promulgated the act, is appropriate to determine the intent of the act. The comments state:

Several sections attempt to deal with so-called black market operations in children. While the act does not prohibit private placement of children, it attempts to discourage black market adoptions and private placements.

There is a line of cases from the District of Columbia dealing with essentially the same issue, or what the cases term a violation of the "Baby Broker Act." The first is *Goodman v. District of Columbia*, 50 A.2d 812 (D.C. App. 1947), where the defendant, Goodman, an attorney, was persistently requested by the birth mother to find an adoptive couple for her baby. Finally, the attorney did find a couple to adopt the child and acted as intermediary without charge for his services. One of the things the attorney did was to go to the hospital to receive the baby and deliver it to the

prospective adoptive parents. Code 1940, § 32-785, the applicable District of Columbia law, provided:

No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child placing agency, may place or arrange or *assist in the placement of a child* under 16 years of age in a family home or *for adoption*.

Goodman, 50 A.2d at 813 (emphasis added). This statute is substantially the same in wording as [NRS 127.310](#), as set forth above.

In *Goodman*, the court gave guidance as to what activity on the part of an attorney would *not* violate the statute.

We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from acting as intermediary, go between, or placing agent; so long as he leaves or refers the placement of children and the arrangement for their placements to agencies duly licensed, he is within his rights under the statute. If that were all this appellant had done his conviction could not stand. It is plain that he had done much more. Blameless though he is by ordinary standards of professional ethics, he has run afoul of a statute which declares his acts *malum prohibitum*.

Id. at 815. The court affirmed the judgment of conviction against the lawyer for violating the so-called “Baby Broker Act.”

In *Anderson v. District of Columbia*, 154 A.2d 717 (D.C. App. 1959), appellant, a practicing attorney, and a Mrs. Petro were found guilty of violating the “Baby Broker Act.” Mrs. Petro acted as an intermediary between the natural mother and the adopting parents, who were willing to adopt the child provided it passed a satisfactory physical examination. The adopting mother requested the attorney to handle the matter. The attorney then arranged with the doctor for the physical examination of the child,

presented the natural mother with a paper identified as a consent to adoption, and gave her \$50 obtained from the adopting mother, stating that it was a loan. The court affirmed the attorney’s conviction for violating the “Baby Broker Act,” stating, at page 718, that the attorney’s conduct clearly fell within the scope of the statute which provides:

Any person, firm, corporation, association, or public agency that receives or accepts a child under sixteen years of age and places or offers to place such child for temporary or permanent care in a family home other than that of a relative within the third degree shall be deemed to be maintaining a child placing agency. . . .

.....
No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, *may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home for adoption*.

Code 1951, §§ 32-782, 32-785 (Supp. VII) (emphasis added).

Finally, *Dobkin v. District of Columbia*, 194 A.2d 657 (D.C. Ct. App. 1963), was also a criminal proceeding wherein the defendant, a practicing lawyer, was charged with violating the

“Baby Broker Act.” The court held that the “Baby Broker Act” is not unconstitutional as vague and indefinite, and that the evidence sustained defendant’s conviction for violation of the act. The court stated, at page 658:

The evidence against appellant was that a woman expecting a child contacted him and asked for help in placing the child for adoption; that appellant later called the expectant mother informing her that a couple from New York, who were interested in adopting her baby, would be in town and he arranged a meeting between them; that the New York couple gave him money to be used in supporting the expectant mother; that when the baby was born the mother contacted appellant who went to the hospital and had her sign adoption papers he had prepared; that appellant and the [adopting] couple escorted the

mother and the baby from the hospital, and the couple took the child with them and the mother went home.

Each of these District of Columbia cases involved situations where the attorney was more deeply involved in placing, arranging, or assisting in arranging or placing the child for adoption than the actions which you have described. In the Montana case, the lawyer was enjoined from assisting in placing or arranging the placement of children for adoption where he simply acted as an attorney but knew that the referring doctor had placed, arranged, or assisted in placing or arranging the placement of the child for adoption. Thus, he did much less than what is being done by the various attorneys in the fact situation described herein.

The activities which you have described, whereby attorneys send video tapes, audio tapes, resumes, letters or other information describing prospective adoptive parents to a birth mother in Nevada, go well beyond giving legal advice. These acts constitute assisting in placing or in arranging the placement of a child for adoption, and when performed by anyone other than a licensed child placing agency, violate [NRS 127.310](#).

It is clear that the situation which resulted in your request for an opinion is one where the attorney has acted as an intermediary to bring the natural mother and the adopting parents together. Therefore, his actions are made unlawful under the provisions of [NRS 127.310](#).

CONCLUSION

Under the facts as presented, an attorney who sends video tapes, audio tapes, resumes, letters or other information describing prospective adoptive parents to a birth mother in Nevada, without holding a valid unrevoked license as a child placing agency, is assisting in “placing or arranging the

placement of a child for adoption,” and may be violating the terms of [NRS 127.310](#).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Tammy L. Tovey
Deputy Attorney General

OPINION NO. 91-5 PUBLIC EMPLOYEES; LOBBYING; WILDLIFE: The Nevada Department of Wildlife has statutory authority to hire or contract for the services of a lobbyist who may attempt to influence the Nevada Legislature for increased funding for the Department.

Carson City, May 7, 1991

Mr. B. Mahlon Brown, Chairman, Board of Wildlife Commissioners, Post Office Box 10678, Reno, Nevada 89520-0022

Dear Mr. Brown:

You have requested an opinion of this office on the issue of whether the Wildlife Commission may legally hire or contract for the services of a lobbyist who would lobby the Nevada Legislature for funding for the Nevada Department of Wildlife (“Department”).

QUESTION

May the Wildlife Commission legally hire or contract for the services of a lobbyist who would lobby the Nevada Legislature for funding for the Nevada Department of Wildlife?

ANALYSIS

Lobbying by administrative agencies is widely practiced, so much so that a distinct agency lobbying style has emerged. *See* Glenn Abney, *Lobbying by the Insiders: Parallels of State Agencies and Interest Groups*, 48 Pub. Admin. Rev. 911 (Sept./Oct. 1988). However, while the practice has become widely accepted, it is unclear from what source the authority to engage in it derives. It is also difficult to precisely identify the legal limits of agency lobbying. *See generally* Note, *The Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 37 Vand. L. Rev. 433 (1984). The following discusses the limited authority on these subjects.

There is no express prohibition in the Nevada Revised Statutes preventing a state officer or employee from lobbying the Legislature. The Nevada Lobbying Disclosure Act, [NRS 218.900](#) through 218.944, appears in fact to contemplate it. In describing unlawful acts, the statute says that:

[A] member of the legislative or executive branch of the state government and an elected officer or employee of a political subdivision *shall not receive compensation or reimbursement other than from the state or the political subdivision* for personally engaging in lobbying.

[NRS 218.942](#)(6) (emphasis added). The reference in this section to compensation of state employees for lobbying cannot be limited to payment for appearances before the Legislature merely to explain the meaning or import of a bill. A “lobbyist” is defined to mean someone who “appears in person in the legislative building and communicates directly with a member of the legislative branch on behalf of someone other than himself to influence legislative action.” [NRS 218.912](#)(1). The definition expressly excludes an employee of a department of the state government “who appears before legislative committees only to explain the effect of legislation related to their department” [NRS 218.912](#)(2)(c). The provision allowing payment for

lobbying with state funds thus necessarily must refer to attempts to influence a legislator.

The mere fact that there is no prohibition on agency spending for lobbying does not justify a conclusion that such spending is lawful. It is necessary also to find authorization for such spending. “[E]xpenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment.” *Stanson v. Mott*, 551 P.2d 1, 6 (Cal. 1976).

The statutes of some jurisdictions are very clear in authorizing the agencies to engage in legislative lobbying. The Washington statutes, for instance, provide:

Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency.

Wash. Rev. Code Ann. § 42.17.190(3) (Supp. 1990).

The Nevada statute does not so clearly provide authority for lobbying. However, an oblique statutory reference similar to the one at [NRS 218.942\(6\)](#) was cited as adequate authority in *North Carolina ex rel. Horne v. Chafin*, 302 S.E.2d 281 (N.C. Ct. App. 1983). There the statute generally required lobbyist registration, but excepted agency officials from the requirement. The exemption was taken by the court as authority for agency personnel to lobby. “Defendants contend, and we agree, that lobbying is authorized by general law, by implication, in G.S. 120-47.8(3), which exempts [government personnel] from the registration requirements imposed on lobbyists.” *Id.* at 284.

It is therefore possible that the Nevada Lobbying Disclosure Act provides not only permission but authority for agency lobbying in the same manner.

Even if the Nevada Lobbying Disclosure Act does not furnish authority for agency lobbying, it would seem to indicate recognition of an already extant implied authority arising from an agency’s general statutory authorization.

The clearest statement on the implied authority to lobby occurs in *Peacock v. Georgia Mun. Ass’n, Inc.*, 279 S.E.2d 434 (Ga. 1981), where the court approved expenses incurred by a county for legislative activities. Among the government activities of which the plaintiffs complained were:

[E]mployment of a lobbyist, the sponsoring of meals, seminars, and meetings for legislators in an attempt to influence legislation; the mailing of literature and other materials to legislators; personal consultation with individual legislators or groups of legislators, or entertainment of various legislators or groups of legislators.

Id. at 436. The court approved such expenses on the basis of authorization implied by more specific powers and duties. “We find that in today’s complex world the activities carried on by defendant organizations constitute necessary activities for the administration of county government.” *Id.* at

437.¹ The *Peacock* opinion is one among “several recent cases addressing the issue [which]

¹ Even though *Peacock* involved a county government, not an administrative agency of the state, the same principles govern in both cases. Both types of entities are bodies with limited powers, empowered to act only as authorized. Op. Nev. Att’y Gen. No. 285 (June 18, 1957) (“agencies performing state functions have only such powers as are specifically given them by legislative acts or those which are reasonably or necessarily implied therefrom”); Op.

almost unanimously permit governmental entities to engage in legislative lobbying.” Note, *The Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 43 Vand. L. Rev. 433, 471 (1984).

Lobbying for funding to support the Department can likewise be described as “necessary activity” implied in the Department’s statement of general powers: the Department cannot perform the duties it is charged with if there is no funding to pay expenses. Since funding is essential to performance of the statutory duties of the agency, an implied authority to lobby for funding can be reasonably found, just as in *Peacock*. “An administrative agency has, and should be accorded, every power which is indispensable to the powers expressly granted.” 1 Am. Jur. 2d *Administrative Law* § 44 (1962).

The actual statutory mechanisms for procuring lobbyist services are the Department’s hiring and contracting authority. These authorities make no express provision for lobbyist services. On their face, however, they provide no reasonable basis for distinguishing between permissible and impermissible purposes, so long as the purposes fall within the legitimate agency function.

The independent contract authority of state agencies is broad and unqualified: “Elective officers and heads of departments, boards, commissions or institutions may contract for the services of persons as independent

contractors.” [NRS 284.173\(1\)](#). The court in Illinois found that such a statute, Ill. Rev. Stat. ch. 127, ¶ 132.6-3 (1987), served only a procedural, non-substantive function. The court reasoned that the statute “does not determine whether [the agency] has the power to contract for . . . services, but sets forth the procedure to be followed if that power exists.” *Illinois State Employees Ass’n v. Department of Children & Family Serv.’s*, 533 N.E.2d 566, 569 (Ill. App. Ct. 1989). This office concludes that the Nevada Independent Contractors statute similarly provides no authorization for nor limitation upon agency contracting purposes, but merely establishes the procedure for contracting when the authority to do so otherwise exists. The scope of the independent contract authority is coextensive with the legitimate functions of the agency, which include lobbying.

The Department’s hiring authority is similarly broad. The Director may “[a]ppoint or remove such technical, clerical and operational staff as the execution of his duties and the operation of the department may require” [NRS 501.337\(4\)](#). The statute provides no limitation on purpose. Again, this office concludes that the scope of the appointment authority is coextensive with the legitimate functions of the agency. Thus the Director may appoint a person to perform lobbying services if he reasonably determines that the services are required by the Director’s duties or the operation of the Department.

CONCLUSION

Legislative lobbying by the Department is a legitimate agency function. The authority to lobby the Legislature can reasonably be found in both the

express and implied provisions of the Nevada statutes, although there are no Nevada opinions on this subject.²

Sincerely,

Nev. Att’y Gen. No. 750 (May 9, 1949) (counties and municipalities have only such powers as are granted them by the state). The articles and opinions dealing with the powers of state agencies generally refer without qualification to opinions concerning the authority of municipal and county governments, and vice versa.

² This opinion reverses Op. Nev. Att’y Gen. No. 90-17 (Nov. 1, 1990).

FRANKIE SUE DEL PAPA
Attorney General

By: C. Wayne Howle
Deputy Attorney General

OPINION NO. 91-6 OPEN MEETING LAW: Scheduled agenda items must be described with clear and complete detail so that the public will receive notice of what is to be discussed or acted upon at a public meeting.

Carson City, May 23, 1991

The Honorable Virgil Bucchianeri, Storey County District Attorney, Post Office Box 496,
Virginia City, Nevada, 89440

Dear Mr. Bucchianeri:

In your letter of March 18, 1991, you posed a question regarding Nevada's Open Meeting Law. Specifically, you have asked the following:

QUESTION

What degree of detail is required for a meeting agenda concerning the topic of issuance of a business license by a county licensing board?

ANALYSIS

Chapter 5.04 of the Storey County Code sets forth the procedures whereby the County issues a business license to persons, partnerships and corporations. In order to issue a permanent business license, the County's licensing board must conduct two readings of a licensing regulation regarding the entity in question. The license may be acted upon by the licensing board after the regulation is read twice. *See* Storey County Code Section 5.04.050.

You state that, in the past, the agenda topic concerning the issuance of all business licenses has simply read: "licensing board." The agenda topic further has stated that action would be taken under this generic topic listing. The identities of the business license applicants have not appeared on the Board's meeting agendas.

Under Nevada's Open Meeting Law, as amended in 1989, the agenda for a meeting of a public body must describe all scheduled items to be considered and voted upon with detail so that, in fact, the public will know

what is to be discussed or acted upon at the meeting. The type of generic listing for agenda topics which you have described has long been discouraged by our office. With the 1989 legislative amendments to [NRS 241.020](#) this practice is now clearly improper.

Prior to 1989, Nevada's Open Meeting Law simply required that a public body post a meeting agenda. The law provided no guidance on what was to be set forth within a meeting agenda and did not state how specific the information should be on each agenda topic. In 1979, based upon the lack of statutory guidelines, our office concluded that a standard of reasonableness governed

those persons who prepared the wording for meeting agendas. Even under this standard our office cautioned that the use of general or vague language as a mere subterfuge to avoid the Open Meeting Law requirements would be improper. *See Op. Nev. Att’y Gen. No. 79-8 (March 26, 1979).*

Our office further noted in that opinion that agendas must be written in a manner that actually gives notice to the public of the items anticipated to be brought up at a meeting. We noted that this practice encourages citizen participation in the process of government. The opinion specifically addresses the manner in which a business license item should be agendized, in part, as follows:

As an example, an agenda item which merely listed consideration of business permits or building permits without identifying who has applied for such permits effectively denies those members of the public with an interest in or information about a particular permit application any opportunity of observing the proceedings or perhaps even participating therein. Listing the name, and where appropriate, the addresses of such applicants, seems a reasonable thing to do in terms of the spirit and purpose of the Open Meeting Law.

See Id. at p. 2.

In 1989, the Legislature enacted SB 140 which amended the agenda requirements of the law. *See* 1989 Nev. Stat. ch. 271. The title of SB 140 set forth, in part: “An Act relating to meetings of public bodies; requiring notices of public meetings to include detailed agendas” The title of

this bill provides some guidance on the Legislature’s intent on this subject. *See Roberts v. State, Univ. of Nev. Sys., Nev. 33, 37, 752 P.2d 221 (1988).*

Another indication of legislative intent is found in the committee hearings. Much of the testimony presented in the legislative committees on this subject focused on past problems with the meeting agendas of public bodies. The bulk of the testimony on this subject centered on the notion that public bodies were putting out confusing meeting agendas which resulted in the public’s lack of knowledge of when issues were going to be heard by the public body and when action would be taken by the public body.

As a result of the passage of SB 140, [NRS 241.020\(2\)\(c\)](#) now requires:

- (c) An agenda consisting of:
 - (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
 - (2) A list and description of the items to be voted on during the meeting which must be clearly denoted as items on which action will be taken.

By this language, the Legislature has provided the guidelines for meeting agendas which were previously absent. The statute now requires each scheduled board topic to be described with detail.¹ The description must be clear and complete. Additionally, there must be a specific

¹ Legislative history of this 1989 amendment illustrates that the words “topics scheduled” were purposefully inserted into NRS 241.020(2)(c). Comments in the legislative committee hearings reflect that the lawmaker did not wish to preclude members of the public from bringing unagendized topics to the attention of the public body for discussion purposes only. This practice frequently occurs and many public bodies accommodate the practice by placing an item on the agenda called “public comment.” The lawmakers contemplated that once a citizen brought an item to the public body’s attention it would be properly noticed, agendized and brought back at a subsequent meeting. Thus the Legislature confined the detail required for agenda items to schedule topics.

designation called “action” for any item the public body wishes to vote on.

CONCLUSION

Pursuant to [NRS 241.020\(2\)\(c\)](#) the items of a public body’s meeting agenda must be described with clear and complete detail so that, in fact, the public will receive notice of what is to be discussed or acted upon. Action items must be clearly denoted as such. The practice you have described concerning generic labeling for the issuance of business licenses is improper.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Robert L. Auer
Deputy Attorney General

OPINION NO. 91-7 CASA; WASHOE COUNTY; EMPLOYEES: The CASA Board of Trustees and individual CASAs in Washoe County, as employees of the county, are entitled to legal representation by the Washoe County District Attorney for acts performed in their capacity as “employees” of the county.

Carson City, October 2, 1991

Mr. Dennis Metrick, Court Administrator, c/o Edward Dannan, Esq., Assistant District Attorney, Washoe County Courthouse, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Metrick:

You have requested this office’s opinion with regard to the following:

BACKGROUND

Court Appointed Special Advocates (“CASAs”) are individuals from within the community who volunteer their time to serve as advocates for children who are involved in proceedings before the Second Judicial District Court of the state of Nevada in and for the County of Washoe. The proceedings in which CASAs are involved are primarily child custody or child abuse and neglect matters. “A CASA is a volunteer, appointed by a judge to seek out information about a child and his family and to recommend the best solution for the child. The CASA then evaluates the options for the child, and presents to the judge, in court, the best choice for the child, and writes a report.” *Reno Gazette-Journal*, Jan. 9, 1991.

The structure of the CASA organization is composed of a court-appointed Board of Trustees, the CASA director, and the individual CASA volunteers. The individual CASA volunteers report to the CASA Board of Trustees. Further, CASAs are appointed to a specific case by order of the court. The CASA director’s salary, as well as that of three full-time staffers, is paid by Washoe County. For routine legal matters, the CASA organization has retained counsel, whose salary is paid either directly from Washoe County funds or by grants received by Washoe County.

QUESTION ONE

Are the CASA Board of Trustees and the individual CASAs entitled to legal representation by either the State Attorney General or by the Washoe County District Attorney?

ANALYSIS

Initially, a determination must be made as to whether individual CASAs, as well as the CASA Board of Trustees as volunteers, may be considered employees of either the state or a political subdivision so as to fall within the purview of [NRS 41.0337](#) through 41.0339.

[NRS 41.0337](#) provides:

No tort action arising out of an act or omission within the scope of his public duties or employment may be brought against any present or former:

1. Officer or employee of the state or of any political subdivision;
2. Immune contractor; or
3. State legislator,

unless the state or appropriate political subdivision is named a party defendant under [NRS 41.031](#).

[NRS 41.0338](#) defines “official attorney” as follows:

1. The attorney general, in an action which involves a present or former legislator, officer or employee of this state, immune contractor or member of a state board or commission.
2. The chief legal officer or other authorized legal representative of a political subdivision, in an action which involves a present or former officer or employee of that political subdivision or a present or former member of a local board or commission.

[NRS 41.0339](#) provides:

The official attorney shall provide for the defense, including the defense of cross-claims and counter-claims, of any present or former officer or employee of the state or a political subdivision, immune contractor or state legislator in any civil action brought against that person based on any alleged act or omission relating to his public duties or employment if:

1. Within 15 days after service of a copy of the summons and complaint or other legal document commencing the action, he submits a written request for defense:
 - (a) To the official attorney; or
 - (b) If the officer, employee or immune contractor has an administrative superior, to the administrator of his agency and the official attorney.
2. The official attorney has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith.

A volunteer does not perform services to the state or a political subdivision pursuant to a state position created by statute. Therefore, a volunteer may not be deemed an officer of the state or a

political subdivision, in this case, Washoe County. Thus, if a volunteer is entitled to a defense, he must be deemed a state or county “employee,” as that word is used in [NRS 41.0339](#). Previous opinions of this office have discussed under what circumstances a volunteer would be deemed an “employee.” See Op. Nev. Att’y Gen. No. 80-39 (Oct. 17, 1980). This office previously concluded that where a county or city had sufficient supervision and control over volunteer workers, an employer/employee relationship could be established so as to impose liability on the part of the county or city for the tortious actions of the volunteers. See Op. Nev. Att’y Gen. No. 80-15 (May 5, 1980). While you have not asked for an opinion of this office as to the liability of the CASA Board of Trustees and individual CASA volunteers for tortious acts committed while performing their various functions, and this office chooses not to venture an opinion on this subject at this time, in order to answer the question herein posed a determination must be made, as was previously stated, if an employer/employee relationship exists between either the state or the Second Judicial District Court and the CASA Board of Trustees and individual CASA volunteers.

The word “employee,” if read narrowly, means “one who works for wages or salary in the service of an employer.” *Alliance Co. v. State Hospital at Butner*, 885 F.2d 386, 389 (N.C. 1955).

A volunteer is a person who gives his services without any express or implied promise of remuneration. See *Black’s Law Dictionary* (Rev. 4th ed. 1968). Under the doctrine of *respondent-superior*—let the master answer for the wrongful acts of his servants—an employer may be held liable for the negligence of its “employees.” An essential element of the employer/employee relationship is the right of control over the manner or method of doing the work. *National Convenience Stores, Inc. v. Fantanzzì*, [94 Nev. 655](#), 659, 584 P.2d 689 (1978). See also *Martarano v. United States*, 231 F. Supp. 805 (D. Nev. 1964). One way of establishing the employment relationship is to determine when the “employee” is under the control of the “employer.”

You have informed this office that the individual members of the CASA Board of Trustees are appointed to serve on the board by the court. The individual CASAs are appointed to a specific case by order of the court. It is our understanding that the court will further direct the CASA to perform certain functions, such as interviewing persons. When a CASA is no longer needed on a case, they are typically “relieved with the thanks of the court.” The very name of the CASA organization *Court Appointed Special Advocates* connotes control by the court of when CASAs are used. Even though the CASA acts as an independent advocate for the best interests of the child, it is the opinion of this office that there is a sufficient amount of control exercised by the court to establish what is essentially an employer/employee relationship between the court and the CASA Board of Trustees and the individual CASAs. The essential characteristic of the employment relationship is the right to control and direct the activities of the person rendering service or the manner and method in which the work is performed. *County of Sonoma v. Workers’ Compensation Appeals Bd.*, 272 Cal. Rptr. 297, 298 (Cal. App. 1990).

An analysis of the factor of control provides a sufficient basis upon which to conclude that an employer/employee relationship does indeed exist between the Second Judicial District Court and the CASA Board of Trustees and CASA volunteers to allow representation by the “official attorney” pursuant to [NRS 41.0339](#).

CONCLUSION TO QUESTION ONE

An employer/employee relationship exists between the Second Judicial District Court and the CASA Board of Trustees and individual volunteers so as to allow for representation by the “official attorney” pursuant to [NRS 41.0339](#).

QUESTION TWO

Who should represent the CASA Board of Trustees and individual CASA volunteers, the state of Nevada Attorney General or the Washoe County District Attorney?

ANALYSIS

In order to determine who should represent the CASA Board of Trustees and individual CASA volunteers, a determination must be made as to who their “employer” is. Since it appears that the Second Judicial District Court may be considered the “employer” for the reasons discussed above, any analysis must begin with a discussion of the district court judges.

State statutes indicate to us that district court judges are state officers. District judges serve as *ex officio* circuit judges and may sit in other district courts by assignment to expedite judicial business. See [NRS 3.040](#). District judges receive their commissions from the governor when appointed to fill a vacancy. See [NRS 3.080](#). State officers receive their commissions from the governor. See [NRS 281.020](#). The district courts are declared to be part of the state judicial department. See [NRS 1.010\(3\)](#). District judges are listed with other state officers in the statutory classification of officers rather than among the county officers. Cf. [NRS 281.010\(1\)\(g\)](#) with [NRS 281.010\(1\)\(n\)\(1\)](#) to (10).

Other statutes also support the conclusion that district judges are state officers in the judicial department of state government. District judges’ travel expenses or claims and subsistence allowances are paid in the same manner and by the same procedure as other state employees. See [NRS 281.160](#), [281.165](#) and 2.285. District judges’ costs for courses of instruction at the National Judicial College in Reno, Nevada, are payable from the fund for continuing education of district judges which is a special revenue

fund created by the Legislature and is supported by appropriations from the State General Fund. See [NRS 3.027](#). The financial treatment of district judges outlined in this paragraph is one more indication that the district judges are state officers in the judicial department of state government.

Provisions contained in our state constitution also indicate to us that district judges are state officers. See Nev. Const. art. VII § 3, which provides for impeachment and removal of district judges, is similar to the other sections in that article which govern impeachment of other state officers. See Nev. Const. art. XVII § 22 specifies how vacancies in certain state offices are filled. The constitutional provision provides that state offices that become vacant before the expiration of the term of that office are filled by appointment by the governor.

Since 1976, this constitutional provision has excepted judicial officers. This exception was necessitated by the creation of the Commission on Judicial Selection. Nev. Const. art. VI § 20. The effect of the 1976 amendments to the state constitution do nothing more than narrow the governor’s discretion to make appointments of state judicial officers based on a plan of merit selection. These amendments do not detract from the fact that district judges are state officers in the judicial department of state government. We believe that the applicable constitutional and statutory provisions present in Nevada law indicate that district judges are state officers.

This conclusion is in accord with the general rule that judges of courts of general jurisdiction are usually held to be state officers. *Pruitt v. Kimbrough*, 536 F. Supp. 764, 766-67 (D.C.N.D. Ind. 1982), *aff’d*, 705 F.2d 462 (6th Cir. 1983); *Olson v. Cory*, 609 P.2d 991, 997 (Cal. 1980); *Garrotto v. McManus*, 117 N.W.2d 570, 576 (Neb. 1970). This list of cases is not intended to be all inclusive but merely illustrative of the rule that judges in the position of our state’s district judges are usually found to be state officers.

The fact that a court is a part of a state judicial system does not make that court an agency of state government in the sense that an employee of that court is also a state employee. *Villanazul*

v. City of Los Angeles, 235 P.2d 16, 19 (Cal. 1951); *Hamilton v. Workers' Compensation Appeals Bd.*, 242 Cal. Rptr. 67 (Cal. App. 1987); *County of Sonoma v. Workers' Compensation Appeals Bd.*, 272 Cal. Rptr. 297, 298 (Cal. App. 1990).

Villanazul involved the question of whether the city, county or state was liable for the alleged negligence of a deputy marshal of the municipal court of the City of Los Angeles. It was held that while it is the state which controls municipal courts through its constitutional and statutory provision authorizing such courts, it does not follow, however, that municipal courts are state agencies or that municipal court officials are state employees.

As was stated above, district court judges are state officers. The judges are defended by the state attorney general in litigation arising from their actions while sitting as a judge of the state. However, it does not necessarily follow that court employees are also employees of the state. *See Villanazul*, 235 P.2d 16, 19. District court employees, including employees of juvenile probation and employees of the clerk's office, are not state employees but rather county employees. In any action arising against either a juvenile probation officer or a deputy clerk, the Washoe County District Attorney's office would act as the "official attorney" (*see* [NRS 41.0228\(2\)](#)) and provide legal representation. It is the opinion of this office that the same may be said of the CASA Board of Trustees and the individual CASA volunteers. The district court, as stated above, orders CASAs appointed to a specific case, on which the CASA then reports to the court. When a CASA's work is done they are relieved "with thanks of the court." The CASA Board of Trustees is appointed by the court. Salaries of various CASA employees are paid by Washoe County. For these reasons, the CASA organization may be considered essentially an arm of the court. Like other court employees, the CASAs may be considered county employees and as such should be represented by the Washoe County District Attorney, the "official attorney" of the political subdivision of Washoe County.

CONCLUSION QUESTION TWO

The CASA Board of Trustees and the individual CASA volunteers, as "employees" of Washoe County should be represented in any litigation

resulting from their actions as CASAs by the Washoe County District Attorney.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Tammy L. Tovey
Deputy Attorney General

OPINION NO. 91-8 TAXATION; ACCEPTANCE OF PARTIAL PAYMENT OF PROPERTY TAXES BY THE COUNTY TREASURER: County treasurers, such as the Clark County Treasurer, have the authority to accept partial payment of property taxes tendered by a taxpayer.

Carson City, October 2, 1991

Zev E. Kaplan, Esq., Deputy District Attorney, Office of the Clark County District Attorney, 225 East Bridger Avenue, Eighth Floor, Las Vegas, Nevada 89155

Dear Mr. Kaplan:

You have requested an opinion from this office with regard to the following question:

QUESTION

Does a county treasurer, such as the Clark County Treasurer, have the authority to accept partial payment of property taxes tendered by a taxpayer?

BACKGROUND

During a recent audit of the Clark County Treasurer's office ("Treasurer"), the external auditors recommended that the Treasurer accept partial payment of property taxes tendered by a taxpayer. This recommendation is based upon the desire to implement a new and more efficient accounting system for recording and apportioning property tax receipts. However, in light of a 1903 Attorney General's Opinion, the district attorney's office has concluded that the Treasurer cannot accept partial payment of property taxes. *See Op. Nev. Att'y Gen. (Nov. 6, 1903).*

ANALYSIS

The opinion in question was in response to an inquiry by the White Pine County District Attorney. The opinion analyzed whether a town tax may be paid in installments like the state and county taxes, and whether the

Treasurer may accept partial payment of these taxes. The opinion concluded that taxes could be paid in installments, but the Treasurer was not authorized to accept partial payment of taxes due. *See Op. Nev. Att'y Gen. (Nov. 6, 1903).*

The opinion does not set forth an abundance of facts and is therefore difficult to analyze with the situation at hand. Nevertheless, it refers to Section 2175 of the Compiled Laws of 1900, entitled "Levy of Taxes-How Collected, etc.," which states in relevant part as follows:

Annually, at the time of assessing or fixing the amount of taxes for county purposes, said Board of County Commissioners shall (subject to restrictions of subdivision third, of section one of this Act), assess, fix, and designate *the amount of taxes that should be levied and collected for city or town purposes on all real and personal property* (including the proceeds of mines) *assessable for state or county purposes within any town or city in their county, which said taxes shall be collected at the same time, in the same manner, and by the same officers as provided in the revenue laws of this state* for the levying and collecting of state and county taxes, and said revenue laws shall, in every respect not inconsistent with the provisions of this Act

1900 Nev. Stat. 2175 (emphasis added). Section 2175 specifically states "taxes shall be collected at the same time." This provision appears to be the center of the 1903 opinion and its conclusion.

Today the laws that govern property taxes are codified in chapter 361 of the Nevada Revised Statutes. Specifically, [NRS 361.483](#), entitled "Payment of taxes, quarterly installments, penalties" is substantially different from the 1900 law. Unlike the law in 1900, there is no provision in [NRS 361.483](#) which states that property taxes must be collected at the same time

and it provides for the quarterly payment of taxes and the corresponding penalties for failure to pay.

Certainly, under [NRS 361.483](#) the Treasurer could, and should, accept the partial payment of quarterly taxes until the due date for the quarterly installment or payment in whole has passed. See [NRS 361.483\(5\)](#). See

also Op. Nev. Att’y Gen. No. 79-17 (Aug. 9, 1979). Partial payments after the respective due dates should be accepted, but the delinquent taxes are subject to penalties and interest. *Id.*

In addition, there appears to be nothing in our statutes or in the Nevada Administrative Code which would prohibit the Treasurer from accepting partial payment of taxes, penalties and interest after the respective due dates. Obviously, such payments will be applied to the penalties and interest first. See Op. Nev. Att’y Gen. No. 73 (Feb. 24, 1932).

It is important to note that in situations concerning delinquent property taxes in which a “trustee certificate” has been issued to the Treasurer to hold property for two years, a taxpayer must pay all amounts accrued against the property in order to effect redemption. See Op. Nev. Att’y Gen. No. 24 (May 28, 1971); Op. Nev. Att’y Gen. No. 404 (May 5, 1967); [NRS 361.565](#), and [NRS 361.570](#). See *also* Op. Nev. Att’y Gen. No. 79-17. However, these statutes do not require the Treasurer to accept only full payment of delinquent taxes, penalties and interest. They merely require that all amounts accrued against the property be satisfied prior to redemption. See *also* [NRS 361.585\(3\)](#). Certainly, partial payments may be accepted until the two-year period for redemption has expired. [NRS 361.570\(3\)\(a\)](#). Nevertheless, the property will continue to be assessed annually during the redemption period. [NRS 361.575](#). The only effect of making partial payments which do not extinguish the tax liability is to reduce the amount of delinquent taxes, penalties and interest which must ultimately be satisfied from a sale of the property. See [NRS 361.610](#).

Certainly the county treasurers have the burden of guarding against taxpayer abuse or fraud. For instance, the situation may arise where a taxpayer tenders partial payment of property taxes and writes on the check “payment in full,” or “acceptance of this check signifies payment in full,” etc. As a measure of prevention, the various county treasurers should verify all property tax balances before accepting any check. Obviously, the county treasurers will have to implement their own policies and procedures for verification of taxes owing and acceptance of payments.

A brief review of the legislation in our sister states confirms the practice of accepting partial payments of property taxes. Nothing in the applicable California and Colorado statutes prohibits the partial payment of

property taxes. See Cal. Rev. & Tax. Code §§ 2605, 2606, 2607 (West Ann. 1987); Colo. Rev. Stat. § 39-10-104 (1990). Idaho and Washington have enacted prepayment statutes. See Idaho Code § 63-1601 (1990); Wash. Rev. Code § 35.21.650 (1990). Oregon’s partial payment statute states “[p]artial payments of taxes . . . may be made at any time.” Or. Rev. Stat. § 311.515 (1989). Arizona’s statute permits partial payment of not less than 10 percent of the installment, before the amount becomes delinquent. Ariz. Rev. Stat. Ann. § 42-345 (1991).

Further, the rules of statutory construction provide that an act should be reasonably construed to avoid absurd results. *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Ct.*, [104 Nev. 508](#), 509, 761 P.2d 1151 (1988); *Breen v. Caesars Palace*, [102 Nev. 79](#), 82, 715 P.2d 1070 (1986). If [NRS 361.483](#) or any statute previously mentioned were construed to prohibit the Treasurer from accepting partial payment of property taxes, the end result would be a chilling effect. Clearly, to construe the statutes in a manner that would chill rather than encourage the payment of taxes is absurd and should be avoided. Additionally, if the language of the statutes is plain and unambiguous, courts cannot go beyond the language in an attempt to determine legislative intent. *Atlantic Commercial Dev. Corp. v. Boyles*, [103 Nev. 35](#), 38, 732 P.2d 1360 (1987). The language and intent of [NRS 361.483](#) is clear and unambiguous, and its plain meaning should be followed.

Therefore, [NRS 361.483](#) is wholly consistent with [NRS 361.565](#) through 361.620 concerning “Delinquencies, Trustee’s Certificates, Redemption and Sale.”

CONCLUSION

County treasurers, such as the Clark County Treasurer, have the authority to accept partial payment of property taxes tendered by a taxpayer.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Jeffrey R. Rodefer
Deputy Attorney General

OPINION NO. 91-9 SMOKING; LOCAL GOVERNMENT; TOURISM: Smoking is prohibited in a public building, except in designated areas, when the public building is leased to a private entity if the lease serves a public purpose.

Carson City, October 2, 1991

The Honorable Richard C. Maurer, Esq., City Attorney, City of North Las Vegas, Post Office Box 4086, North Las Vegas, Nevada 89036

Dear Mr. Maurer:

You have posed the following question:

QUESTION

Does [NRS 202.2491](#) prohibit smoking in a public building except in presently designated areas when the public building is leased to private entities?

ANALYSIS

[NRS 202.2491](#) provides, in pertinent part:

1. Except as otherwise provided in subsections 5 and 6, the smoking of tobacco in any form is prohibited if done in any:

.....

(b)Public building.

.....

3. The person in control of a public building:

(a) Shall post in the area signs prohibiting smoking in any place not designated for that purpose as provided in paragraph (b).

(b) Shall, except as otherwise provided in this subsection, designate a separate area which may be used for smoking.

....
8. As used in this section:
....

- (c) "Public building" means any building or office space owned or occupied by:
- (1) Any component of the University of Nevada System and used for any university purpose.
 - (2) The State of Nevada and used for any public purpose, other than that used by the department of prisons to house or provide other services to offenders.
 - (3) Any county, city, school district or other political subdivision of the state and used for any public purpose.
- If only part of a building is owned or occupied by an entity described in this paragraph, the term means only that portion of the building which is so owned or occupied.

Whether [NRS 202.2491](#) prohibits smoking in a public building, as described in your question, depends on whether the publicly-owned or occupied building is leased for a public purpose. You have provided, as your analysis, a letter of September 16, 1991, from Christine L. Bailey, Deputy Legislative Counsel, to Assemblyman Bob Price addressing a similar question in regard to the occupancy of the Las Vegas Convention Center by private lessees. This office concurs in that analysis, which concluded that the leasing of the Convention Center by the Las Vegas Convention and Visitors Authority to private parties serves a public purpose by promoting the efficient use of the facility, by generating income for its operation and maintenance and by attracting visitors to Clark County. The Deputy Legislative Counsel's conclusion rested on the fact that the Convention Center is leased to a variety of organizations for brief periods and the Las Vegas Convention and Visitors Authority does not relinquish control of the building while the lessee uses the facilities. *See City of Cleveland v. Carney*, 174 N.E.2d 254 (Ohio 1961).

In the *Carney* decision, the Supreme Court of Ohio examined the uses of the Cleveland Auditorium and Exhibition Hall to determine whether it was public property used exclusively for a public purpose. The parties admitted that the property was public and it remained for the court to determine if it was used "exclusively for a public purpose." The court noted that the use of the Auditorium and Exhibit Hall by trade shows and conventions, although not open to the public generally, nevertheless provided a benefit to the city as a whole. Similarly, sports events, dances, musical entertainments, and meetings of various private groups benefitted the public generally. *Id.* at 258. It was significant to establishing the public purpose that the Auditorium and Exhibit Hall was not leased to a single tenant and it was under the direct supervision of the city employees. City employees acted as security guards, electricians, stagehands, plumbers, carpenters and laborers during any uses of the premises. *Id.* at 255-56, 258. While we concur in the conclusion that the Las Vegas Convention Center is used for a public purpose, we note that it is a factual determination in each specific instance as to whether a public purpose is served by the occupancy of a public building by a private entity.

CONCLUSION

[NRS 202.2491](#) prohibits smoking in a public building, except in designated areas, when the public building is leased to private entities if the lease serves a public purpose. Whether a public purpose is served will have to be determined by an analysis of specific factors.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Melanie Meehan Crossley
Deputy Attorney General

OPINION NO. 91-10 CIGARETTES; TAXATION: [NRS 370.371](#)(1) does not prohibit the payment of patronage dividends by a nonprofit cooperative corporation selling cigarettes to its members at wholesale so long as the payment of the patronage dividend does not result in a sale of cigarettes below actual cost. The exclusion of “cash discounts” from the definition of “basic cost of cigarettes” in [NRS 370.005](#) is not enforceable for purposes of determining the actual cost of cigarettes.

Carson City, December 26, 1991

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation, 1340 South Curry Street, Carson City, Nevada 89710

Dear Mr. Comeaux:

In 1989, the Legislature enacted a set of statutes designed to place restraints on the minimum price for which cigarettes may be sold at wholesale in Nevada. Since then the Nevada Department of Taxation (“Department”) has been approached by a wholesaler of cigarettes, Associated Food Stores, Inc., (“Associated”) for a ruling on how the minimum price statutes are to be applied to its operation. You have presented this office with the following facts.

Associated is a nonprofit cooperative corporation organized under Utah law, based in Salt Lake City, which has been doing business for over 50 years. The purpose of the corporation is to permit its shareholders, who are all retail grocery merchants, to purchase grocery items (including cigarettes) at the lowest possible cost. This is done by channeling the inventory demands of the shareholders through Associated to achieve a greater efficiency and lower cost in acquiring and distributing these products to the individual retailers. Associated has a number of shareholders that are Nevada retailers of grocery items and cigarettes.

Since Associated is organized as a nonprofit cooperative corporation, its bylaws provide for the payment of patronage dividends or rebates to its shareholders based upon the volume of purchases made by each shareholder from Associated. Currently, the calculation of these patronage dividends includes consideration of the volume of cigarette purchases made by each shareholder. Furthermore, Associated receives from cigarette manufacturers a cash discount for timely payment of its cigarette inventory. These cash discounts lower its effective cost of doing business.

In view of the foregoing facts, you have requested an opinion from this office on the following questions.

QUESTION ONE

Does [NRS 370.371](#)(1) prohibit Associated from calculating and paying patronage dividends to its Nevada shareholders based, in part, on the shareholders’ volume of cigarette purchases from Associated?

ANALYSIS

Patronage dividends are basically rebates of part of the purchase of grocery items purchased by Associated's member shareholders. For federal income tax purposes, patronage dividends are considered exclusions from gross receipts for the sale of goods required to be reported to the IRS. 26 U.S.C § 1385(b). The member shareholders receiving the patronage dividends are required to report them as income. *Id.* § 1385(a).

[NRS 370.371](#)(1) states:

A wholesale dealer shall not, with intent to injure competitors or destroy or lessen competition substantially:

(a) Advertise, offer to sell or sell at wholesale, cigarettes at less than the cost to the wholesale dealer; or

(b) Offer any rebate or concession price or give any rebate or concession price in connection with the sale of cigarettes.

Since patronage dividends are essentially price rebates, they appear to run afoul of [NRS 370.371](#)(1)(b), if they are offered with the intent to injure competition or destroy or lessen competition substantially.

The patronage dividends paid by Associated are a common characteristic of cooperative corporations. Indeed, in order to remain a cooperative corporation for federal income tax purposes, patronage dividends representing the corporation's net profit must be paid out to the members. 26

U.S.C. § 1362. Cooperative corporations are authorized by statute in both Nevada ([NRS 81.010-.160](#)) and Utah (Utah Code Ann. § 16-6-108). Patronage dividends are explicitly authorized under Utah law, and impliedly under Nevada law. *See* [NRS 81.120](#). Thus, while [NRS 370.371](#) prohibits both sales below cost and the giving of rebates by a cigarette wholesaler, the issue becomes whether the Legislature in so enacting [NRS 370.371](#) intended to impact a cooperative corporation's otherwise legal, statutory right to pay patronage dividends to its members. To put it another way, by enacting [NRS 370.371](#), did the Legislature intend to prohibit or restrict patronage dividends paid by a cooperative corporation to its members to the extent they were based on the volume of cigarettes purchased by the member from the wholesaler?

There is no evidence in the legislative history of [NRS 370.371](#) to suggest that the Legislature considered whether patronage dividends constituted an improper form of rebate for purposes of this statute.

In *Certified Grocers v. State Bd. of Equalization*, 100 Cal. App. 2d 289, 223 P.2d 291 (1950), a California appeals court considered a very similar issue. In that case the nonprofit cooperative corporation distributed alcoholic beverages as a wholesaler to its members, retail outlets. The state argued that patronage dividends paid by the cooperative corporation to its members violated provisions of California's Alcoholic Beverage Control Act ("Act") relating to the requirement to the wholesaler to strictly adhere to posted prices at which the wholesaler was to sell alcoholic beverages to its retail members. *Id.* at 290. The state further relied on an attorney general's opinion that payment of patronage dividends violated the Act's requirement for wholesalers to sell at the posted price. *Id.*

The court concluded that since the Legislature had authorized by statute a cooperative corporation to pay patronage dividends to its members as a valid business practice, it was unwilling to construe the Act as repealing by implication that part of the Corporations Code permitting the payment of patronage dividends by cooperative corporations. *Id.* at 291. Therefore, the court held that the payment of patronage dividends did not constitute the sort of price rebate intended to be prohibited under the Act. *Id.*

So it would seem under Nevada law. It is a principle of statutory construction to construe statutes so that they are compatible with each other.

Weston v. County of Lincoln, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982). Where there are no express terms of repeal, repeal by implication is not favored if there is a reasonable way to harmonize the construction of the two statutes. *State v. Thompson*, [89 Nev. 320](#), 322-23, 511 P.2d 1043 (1973).

If we construed [NRS 370.371\(1\)\(b\)](#) to prohibit patronage dividends by nonprofit cooperative corporations, then we would in effect be eliminating cooperative corporations as a form of doing business otherwise authorized by statute, at least insofar as the selling of cigarettes. It is unlikely that in enacting this statute the Legislature intended to so penalize an otherwise valid statutorily-authorized method of doing business. Therefore, it is our opinion that patronage dividends are not the sort of price rebate intended by the Legislature to be prohibited by [NRS 370.371\(1\)\(b\)](#). Such a conclusion harmonizes the provisions of [NRS 81.010-.160](#) with those in [NRS 370.371\(1\)\(b\)](#), but does not significantly impair the purpose behind [NRS 370.371\(1\)\(b\)](#) to prohibit the use of price rebates as a means of unfair competition between cigarette wholesalers.

CONCLUSION TO QUESTION ONE

[NRS 370.371\(1\)\(b\)](#) does not prohibit a nonprofit cooperative corporation such as Associated from calculating and remitting patronage dividends to its Nevada shareholders even if the patronage dividend is based, in part, on the volume of cigarettes purchased from Associated by the Nevada shareholders.

QUESTION TWO

Is Associated prohibited from passing on its cost savings from receiving cash discounts on its purchases of cigarettes to its Nevada shareholders either in a reduced cost of product or in a patronage dividend?

ANALYSIS

[NRS 370.371\(1\)\(a\)](#) prohibits cigarette sales below the cost to the wholesale dealer. The cost to the wholesale dealer is defined in [NRS 370.027](#) as the basic cost of cigarettes to the wholesale dealer plus the cost of doing business by the wholesale dealer. The “basic cost of cigarettes” is

defined in [NRS 370.005](#) as:

[T]he invoice or replacement cost of cigarettes to the wholesale dealer in the quantity last purchased, whichever is lower, plus the full value of any cigarette revenue stamps that are affixed to the packages, packets or containers of cigarettes, if not included in the invoice cost, less all trade discounts, *except cash discounts*.
[Emphasis added.]

Associated undoubtedly passes on any cash discounts it receives from the manufacturers in this patronage dividends to members. Clearly, cash discounts lower the wholesaler’s cost of doing business and increase any net earnings. Therefore, if Associated is to be truly a cooperative association, it must pass these savings on to its members. However, by doing so Associated appears to be effectively selling its cigarettes below the statutorily-defined basic cost of cigarettes.

The issue becomes whether imposing the statutorily-defined “basic cost of cigarettes” on

Associated would result in an unreasonable and arbitrary result. No cases have been found involving nonprofit cooperative associations and minimum price statutes. However, case law involving similar issues is instructive.

In *Cohen v. Grey & Sons, Inc.*, 80 A.2d 267 (Md. 1951), the court was faced with the issue of whether Maryland's Unfair Sales Act was constitutional as applied to defendant's cash and carry and full service businesses, in particular those portions of the Maryland Act establishing a presumed 2 percent markup as the cost of doing business and the statutorily-prescribed exception of cash discounts from being considered in the calculation of the cost of doing business. The court found that since a competing business could legally use the 2 percent markup as its cost of doing business, regardless of what its actual cost was, the statute was arbitrary and unreasonable in that it resulted in a business with substantially higher costs than defendant's cash and carry business being able to sell its products at about the same price. *Id.* at 272. The statutory 2 percent markup approximated the cash and carry business' actual costs. The prohibition on deducting cash discounts simply contributed to the disparity, since the defendant could not use them to establish a cost of doing business of less than the statutory 2 percent. *Id.* at 278.

In *Rabren v. City Wholesale Grocery Co., Inc.*, 266 So. 2d 822 (Ala. 1972), the Alabama Supreme Court considered the issue of whether the wholesaler's cost of doing business must include the full face value of cigarette tax stamps issued by the state, even though the state sold them at a discount to the wholesaler. The applicable statute defining "basic cost of cigarettes" in Alabama's Unfair Cigarette Sales Act required the wholesaler to include the full face value of the stamps in the cost calculation. *Id.* at 885. The defendant wholesaler claimed this requirement was unconstitutional as being arbitrary and unreasonable. The court agreed, concluding that since the purpose of the statute is to preclude the sale of cigarettes below the wholesaler's actual cost, requiring a wholesaler to include in its costs an expense which it hadn't incurred would be unreasonable and arbitrary particularly where the wholesaler is otherwise not selling cigarettes below its actual cost. *Id.* at 886-87. In so holding, the court cited similar language from *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70, 79 (D.C. Minn. 1938) and *Serrer v. Cigarette Serv. Co.*, 76 N.E.2d 91 (Ohio 1947).

The exclusion of cash discounts from the calculation of the wholesaler's cost of doing business would not, in the absence of a statutorily prescribed minimum cost markup in chapter 370 of NRS, appear to impact a for-profit wholesaler, whether a cash and carry or full service wholesaler. However, it definitely impacts a nonprofit cooperative association competing with a for-profit wholesaler in that the cash discounts cannot be passed on to the association's members without violating [NRS 370.005](#) and [370.371\(1\)\(a\)](#). As noted above, this creates an accounting and tax problem for such businesses. Application of the exclusion to Associated could be successfully challenged as arbitrary and unreasonable.

Cash discounts are simply discounts that a wholesaler may deduct from its bill from the manufacturer for prompt payment of the bill. See *E & H Wholesale, Inc. v. Glaser Bros.*, 204 Cal. Rptr. 838, 843 (Cal. App. 1984). There is no compelling reason for the exclusion of cash discounts from the calculation of costs of doing business. Elimination of this requirement would not result in sales occurring below actual cost, the evil sought to be avoided by [NRS 370.371](#). It would not result in a disparity of treatment, rather, it would permit both nonprofit cooperative associations and for-profit wholesalers to compete on the same terms in accordance with the level and kinds of services provided. Apparently, this is permitted in other states

even with the same statutory exclusion for cash discounts as Nevada has. See *Red Owl Stores, Inc. v. Commissioner of Agric.*, 310 N.W.2d 99, 103 (Minn. 1981).

CONCLUSION TO QUESTION TWO

Since application of the exclusion of cash discounts from the definition of “basic cost of cigarettes” results in an artificial increase in the costs of doing business which is not necessary to protect the public and other wholesalers from the evils of sales below actual costs of cigarettes in Nevada, it is our opinion that the Department should allow cash discounts to be considered in a business’ calculation of its costs of doing business for purposes of [NRS 370.371](#).

To prohibit Associated from deducting the cash discounts it receives from its “basic cost of cigarettes” would hamper or defeat its nonprofit status, and so would render [NRS 370.371](#) arbitrary and unreasonable as applied to Associated.

Therefore, the exclusion of “cash discount” from the definition of the basic cost of cigarettes in [NRS 370.005](#) should not be enforced.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: John S. Bartlett
Deputy Attorney General

OPINION NO. 91-11 DRIVER’S LICENSE; REVOCATION; REINSTATEMENT:

Revoked driver’s license remains revoked and driver is subject to fines and penalties pursuant to [NRS 483.560](#) where specific period of revocation has expired but driver has failed to take necessary steps to reinstate.

Carson City, December 26, 1991

The Honorable Patricia A. Lynch, Reno City Attorney, Post Office Box 1900, Reno, Nevada
89505

Dear Ms. Lynch:

This office has received your letter of November 6, 1991, requesting an interpretation of [NRS 483.560](#). You indicate such statute has been amended several times since 1981 and, accordingly, suggest changes should be made in the conclusions reached in a previous opinion of this office. *See Op. Nev. Att’y Gen. 83-2 (Feb. 23, 1983)*. We have reviewed that opinion, the language of [NRS 483.560](#) and relevant case law. The following represents our current views:

QUESTION ONE

Is a driver who is charged with driving while his license has been revoked after the specific period of revocation has ended, but before the necessary steps have been taken to reinstate the license, subject to the mandatory fines and imprisonment referenced in [NRS 483.560](#)?

ANALYSIS

Since July 7, 1983, the Department of Motor Vehicles and Public Safety (“DMV”) must revoke the driver’s license, permit or privilege to drive of any driver upon receiving a record of his conviction for driving under the influence, where the driver submits to an evidentiary sobriety

test the results of which are 10 percent or more, or where the driver fails to submit to an evidentiary test. See [NRS 483.460](#), [484.383](#), and [484.384](#). The major thrust of the above-referenced opinion is that a drunk driver's license is revoked by DMV and remains revoked until the driver takes steps to reinstate under Nevada Revised Statutes. Conversely, a driver's license

which is suspended is only suspended for a specific period of time and subsequent to the expiration of the suspension period, lapses to the status of no valid license. Based upon the following analysis, we believe this is still the law.

The term "revocation" means "that the licensee's privilege to drive a vehicle is terminated. A new license may be obtained only as permitted in [NRS 483.010](#) to [483.630](#) inclusive." [NRS 483.150](#). In *State v. Jost*, 361 N.W.2d 526, 530 (Neb. 1985), the court stated that "[i]n the case of a suspension, there is a deprivation [of driving privileges] for a definite time, while in the case of a revocation the deprivation endures for an undefined time [R]evocation contemplates the necessity of a new license at the expiration of revocation."

In *People v. Lessar*, 629 P.2d 577, 580 (Colo. 1981), the court stated the "the right to licensing does not automatically spring to life at the end of the period of ineligibility Rather, the completion of the term of revocation . . . merely makes the driver *eligible* to apply for a new license." [Emphasis added.]

Unlike a suspension, wherein the driver's license is merely suspended for a specific period of time, the revocation of a driver's license is permanent and remains so until the driver takes the necessary steps to reinstate his driver's license. Accordingly, upon expiration of a specifically referenced period of revocation, the driver is merely *eligible* to take the necessary steps for reinstatement. If the driver does not reinstate, the license remains revoked. Various well-reasoned authorities consistently reach these conclusions. See *People v. Purvis*, 735 P.2d 492 (Colo. 1987); *People v. Morrison*, 500 N.E.2d 442 (Ill. App. 1986); *State v. Jost*, 361 N.W.2d 526 (Neb. 1985); *State v. Smith*, 152 N.W.2d 16 (Neb. 1967); *State v. Zalta*, 525 A.2d 328 (N.J. App. 1987); *State v. Brude*, 222 N.W.2d 296 (N.D. 1974); *State v. Foster*, 635 P.2d 11 (Ore. App. 1981).

CONCLUSION TO QUESTION ONE

Where a specific period of revocation of a driver's license has expired and the driver has not taken proper steps to reinstate, the driver's license remains revoked forever. A contrary conclusion would vitiate the public

safety purposes of the traffic laws by permitting a person to drive upon the public streets and highways after an order of revocation and nevertheless escape prosecution merely because the act of driving occurred after the period of ineligibility for licensing had expired. Such a conclusion must be rejected as unreasonable. See *Lessar*, 629 P.2d at 580. Unless and until the proper conditions for reinstatement are satisfied, a revoked driver's license remains revoked and the driver is subject to prosecution under [NRS 483.560](#).

QUESTION TWO

Did the Nevada Legislature intend that a person convicted of driving on a license which has been revoked after the specific period of revocation has ended but before the necessary steps have been taken to reinstate or obtain a new license be subject to the mandatory fines and imprisonment referenced in [NRS 483.560](#)?

ANALYSIS

The substantive fines and imprisonment provisions of [NRS 483.560](#) were added to the Nevada Revised Statutes by the 1981 Legislature. A review of subsequent legislative material fails to disclose a *specific* intent to subject a person whose driver's license was revoked to the fines and penalties of [NRS 483.560](#) after the period of revocation has expired and when the driver has failed to take appropriate steps to reinstate his driving privileges. On April 15, 1981, however, in the Assembly Committee on Judiciary and Transportation hearing, the following conversation took place:

Chairman Price then asked Ms. Alcamo to explain the difference between revocation and suspension and requirements for reinstatement of the license. She stated that a suspension is a temporary action, taken for less severe crimes and offenses. A revocation is considered a permanent action and is usually levied against more severe violations.

Assembly Committee on Judiciary and Transportation, Minutes at p. 3 (Apr. 15, 1981).
In 1981, Ms. Alcamo was Chief of the Driver's License Division,

DMV. Ms. Alcamo indicated that a revocation is considered a permanent action. It is generally presumed that the Legislature fully investigated facts concerning legislative enactment. *See Reed v. Woofter*, [88 Nev. 378](#), 498 P.2d 361 (1972). As a representative of DMV, Ms. Alcamo specifically referenced her agency's interpretation of the meaning of revocation versus suspension. Thus, the Legislature had ample opportunity to amend the law or change DMV's interpretation or both, but declined to do so. Where the Legislature could easily have inserted exceptional language into the statute but chose not to, the court may not judicially create an exception. *See State, Dep't of Motor Vehicles v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882 (1988). Accordingly, DMV's interpretation of the meaning of revocation was adopted by the Legislature.

CONCLUSION TO QUESTION TWO

The legislative history indicates that the Assembly Committee on Judiciary and Transportation was fully aware of and investigated the distinction between a suspension and a revocation of a driver's license. The Legislature had an opportunity to change the language of [NRS 483.560](#) but declined to do so. Based upon the foregoing, it appears the Legislature intended a revocation to continue indefinitely until the driver takes steps to reinstate his license under Nevada Revised Statutes. Therefore, a driver is subject to fines and imprisonment under [NRS 483.460](#) when he is driving after the period of revocation has expired but has failed to properly reinstate his driver's license.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: Mark A. Beguelin
Deputy Attorney General

OPINION NO. 91-12 INDIANS; TAXATION: The burden of collecting and remitting motor vehicle fuel taxes under chapters 365 and 373 of NRS falls on the dealer. The legal

incidence of the tax falls on the consumer of the fuel. The state may require a tribal dealer who imports fuel into Nevada to collect and remit state and local fuel taxes. The state may also require a nontribal dealer to collect and remit fuel taxes of fuel sold to a tribal vendor in view of regulation permitting the tribe to recover refunds of fuel taxes on fuel sold to and consumed by tribal members.

Carson City, December 31, 1991

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation, 1340 South Curry Street, Carson City, Nevada 89710

Dear Mr. Comeaux:

In recent discussions with representatives of certain Indian tribes in Nevada, the Nevada Department of Taxation ("Department") has learned that several tribes are currently constructing or contemplating the construction of gas stations or truck stops on tribal lands adjacent to state or federal highways in Nevada. Naturally, the issue of state and local taxation of the gasoline to be sold at these locations has arisen in these discussions. In this regard, you have requested the opinion of this office on the following questions:

QUESTION ONE

On what party does the legal incidence of the motor vehicle fuel taxes imposed by chapters 365 and 373 of NRS fall?

ANALYSIS

In analyzing a particular taxing scheme to determine where the legal incidence of the tax lies, the key element is to divine the legislative intent either by reference to the statutory provisions themselves, or if necessary, to judicial or administrative interpretations. *Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1353 (E.D. Wash. 1978). Therefore, in order to determine where the legal incidence of the

state and county motor vehicle fuel taxes lie, an analysis of the applicable statutory scheme is necessary.

The basic motor vehicle fuel tax is found in [NRS 365.170](#)(1), which states:

Every dealer shall, not later than the 25th day of each calendar month:

(a) Render to the department a statement of all motor vehicle fuel and fuel for jet or turbine-powered aircraft sold, distributed or used by him in the State of Nevada, as well as all such fuel sold, distributed or used in this state by a purchaser thereof upon which sale, distribution or use the dealer has assumed liability for the tax thereon under [NRS 365.020](#), during the preceding calendar month; and

(b) Pay an excise tax on:

(1) All fuel for jet or turbine-powered aircraft in the amount of 1 cent per gallon; and

(2) All other motor vehicle fuel in the amount of 15.15 cents per gallon, so sold, distributed or used, in the manner and within the time prescribed in this chapter.

Next, [NRS 365.180](#), [365.190](#) and 365.192 impose additional excise taxes of 3.6 cents, 1.75

cents, and 1 cent per gallon, respectively, on motor vehicle fuel which, according to those statutes, is to be collected and remitted by the dealer. Finally, [NRS 373.030](#) allows a county to impose a tax on motor vehicle fuel sold in the county in an amount up to 9 cents per gallon. This tax is to be collected in the same manner as the taxes imposed by chapter 365. [NRS 373.070-.080](#).

A “dealer” is defined in [NRS 365.020](#) as:

1. “Dealer” means every person who:

(a) Refines, manufactures, compounds or otherwise produces motor vehicle fuel or fuel for jet or turbine-powered aircraft and sells or distributes the same in this state.

(b) Refines, manufactures, compounds or otherwise produces ethyl alcohol for use in a petroleum-ethanol mixture and sells or distributes the same in this state.

(c) Imports motor vehicle fuel or fuel for jet or turbine-powered aircraft into this state and sells or distributes it therein, whether in the original package or container in which it is imported or otherwise, or who uses the motor vehicle fuel or fuel for jet or turbine-powered aircraft in this state after having imported the fuel.

(d) Having acquired motor vehicle fuel or fuel for jet or turbine-powered aircraft in this state in the original package or container, distributes or sells it in the original package or container or otherwise, or in any manner uses the fuel.

(e) Otherwise acquires in this state for sale, use or distribution in this state motor vehicle fuel or fuel for jet or turbine-powered aircraft with respect to which there has been no prior taxable sale, use or distribution.

2. “Dealer” does not include any person who imports into this state motor vehicle fuel, fuel for jet or turbine-powered aircraft, or ethyl alcohol in quantities of 500 gallons or less purchased from a supplier who is licensed.

It is evident from the foregoing statutory provisions that the burden of collecting and remitting the state and county motor vehicle fuel taxes imposed under chapters 365 and 373 of NRS falls on the “dealer” as defined in [NRS 365.020](#)(1). However, it is equally evident that in [NRS 365.020](#)(1) the Legislature has broadly defined the term “dealer” so as to potentially include every step in the chain of distribution from refiner to the ultimate consumer. The Legislature also intended the “dealer” (other than the ultimate consumer of the fuel) to add the tax to the cost of the fuel sold, and so pass it on to the consumer. This intent is expressed in the general refund statute, [NRS 365.370](#), which states in pertinent part:

Any person who exports any motor vehicle fuel or fuel for jet or turbine-powered aircraft from this state, or who sells any such fuel to the United States Government for official use of the United States Armed Forces, or who buys and uses any such fuel for purposes other than for the propulsion of motor vehicles or jet or turbine-powered aircraft, *and who has paid any tax on such fuel levied or directed to be paid as provided by this chapter, either directly by the collection of the tax by the vendor from the customer or indirectly by the addition of*

the amount of the tax to the price of the fuel, must be reimbursed and repaid the amount of the tax so paid by him. [Emphasis added.]

The United States Supreme Court has held that, even absent an express pass-through provision in the statutory tax scheme (such as [NRS 372.110](#) for sales tax), if the Legislature intended an excise tax to be paid by the ultimate consumer, then the legal incidence of the tax can

be said to fall upon the consumer. *See California Bd. of Equalization v. Chemehuevi Tribe of Indians*, 474 U.S. 8, 11-12 (1985). Thus, even if the vendor is an exempt entity, the statutory scheme in chapter 365 for the collection of motor vehicle fuel taxes imposes the legal incidence of the tax on the ultimate purchaser that will consume the fuel. [NRS 365.020\(1\)\(e\)](#).

CONCLUSION TO QUESTION ONE

The burden of collecting and remitting the motor vehicle fuel taxes imposed under chapters 365 and 373 of NRS falls on the dealer as defined in [NRS 365.020\(1\)](#). Ultimately, since the Legislature has designed the statutory scheme to pass the tax on to the consumer of the fuel, the legal incidence of the tax rests on the consumer.

QUESTION TWO

Under what circumstances may state and county motor vehicle fuel taxes be imposed on motor vehicle fuel imported by a tribal government or tribal member into Nevada for sale on the reservation or tribal trust lands?

ANALYSIS

An entity that imports motor vehicle fuel into Nevada for sale, distribution or use in Nevada falls within the definition of the term “dealer” as defined in [NRS 365.020\(1\)](#). *See* [NRS 365.020\(1\)\(c\)](#). Therefore, normally such an entity must report and pay the state and county motor vehicle fuel taxes imposed by chapters 365 and 373 on each gallon of motor vehicle fuel that entity sells, distributes or uses in Nevada. *See, e.g.,* [NRS 365.170](#).

However, it is well settled that a state or local government cannot impose a tax on a tribal government or tribal member for activities occurring on the reservation or tribal trust lands absent the express consent of Congress. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). We are unaware of any federal statute expressly authorizing a state or local government to impose its fuel tax on a tribal government. Consequently, if a tribal government or tribal member engages in the business of importing motor vehicle fuel into Nevada for sale on the tribal lands, the tribal government or tribal member is probably exempt from liability for the motor vehicle fuel taxes imposed by chapters 365 and 373 of NRS.

The fact that the tribal government or tribal member may be exempt from state and county motor vehicle fuel tax liability does not necessarily relieve the tribal seller from the burden of collecting and remitting the tax on its sales to non-members of the tribe. If, upon a fair interpretation of the taxing statute as written and applied the “legal incidence” of the tax can be said to fall on the non-member purchaser or consumer, the state can still require the tribal seller to collect and remit the tax to the state. *See Chemehuevi Tribe*, 474 U.S. at 11. In analyzing the statutory taxing scheme, it is not necessary that the taxing statutes provide expressly stated pass-through or collection requirements to conclude that the legal incidence of a tax falls on the purchaser or consumer. *Id.*

We have already concluded that the legal incidence of the state and county fuel taxes imposed by chapters 365 and 373 falls on the person that consumes the fuel if acquired in Nevada. Thus any person who purchases motor vehicle fuel from an exempt tribal “dealer” becomes liable for the motor vehicle fuel taxes (unless the person is a member of the tribe). *See* [NRS 365.020\(1\)\(e\)](#).

The statutory scheme envisions that the “dealer” collect from its customers and remit state and county motor vehicle fuel taxes. For example, [NRS 365.170\(1\)\(a\)](#) requires dealers to file a monthly report of sales with the Department. [NRS 365.170\(1\)\(b\)](#) requires the dealer to remit the motor vehicle fuel taxes imposed under that subsection with the return. [NRS 365.330\(2\)](#) provides

dealers with a 2 percent collection allowance to cover the dealer's costs of collecting and remitting the tax. Those provisions in chapter 365 imposing additional components of the total motor vehicle fuel tax all contain provisions specifying that the tax must be accounted for by

the dealer and collected in the manner provided in the chapter. *See, e.g.,* [NRS 365.180\(2\)](#), 365.185(3), 365.190(2), and 365.192(2).

On several occasions the United States Supreme Court has ruled that a state can impose the burden of collecting and remitting the state's tax on a tribe's sale of cigarettes to persons who are not members of the tribe where the legal incidence of the tax does not fall on the tribal vendor. Since the burden of collecting the tax is not the same as imposing a tax on the tribe, the express consent of Congress is not required to impose the collection burden. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976). Thus the Court has held that a state's requirement that the tribal vendor collect and remit a valid tax imposed on non-Indians is a minimal burden designed to prevent avoidance of the tax by the non-tribal purchaser, and so is permissible. *Id.* *See also* *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159 (1980); *Chemehuevi Indian Tribe*, 474 U.S. at 12; *Oklahoma Tax Comm'n v. Citizen's Band of Potawatomi Indians*, ___ U.S. ___, 111 S. Ct. 905 (1991).

As we have concluded that the legal incidence of the state and county motor vehicle fuel taxes does not fall on the tribal vendor, there is no impediment under federal law preventing the Department from requiring the tribal vendor to collect and remit the fuel taxes on its sales to non-members of the tribe. The Department may also require the tribal vendor to keep records detailing its purchases and sales of motor vehicle fuel to assist in the Department's administration and enforcement of the tax. *See Confederated Tribes*, 447 U.S. at 159-60.

CONCLUSION TO QUESTION TWO

The Department may require a tribal vendor of motor vehicle fuel that has imported fuel into Nevada for sale on the reservation or tribal trust lands to collect and remit state and local motor vehicle fuel taxes on the tribal vendor's sales to purchasers who are not members of the tribe. The Department may also require the tribal vendor to maintain appropriate records to document their taxable and exempt sales.

QUESTION THREE

Is the on-reservation sale of motor vehicle fuel by a non-tribal motor vehicle fuel dealer to a tribal retailer subject to state and county motor vehicle fuel taxes?

ANALYSIS

In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), and *Central Mach. Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the United States Supreme Court held that the federal Indian Trader Act (25 U.S.C. §§ 261-264) preempted the state's authority to tax on reservation sales of goods to a tribe or tribal member. However, in both of these cases, the tribal purchaser was the consumer of the goods. *See* [NRS 365.370](#).

On the other hand, in *Moe* the United States Supreme Court validated a statutory "pre-collection" scheme for collecting state cigarette excise taxes which was essentially identical to Nevada's fuel tax collection scheme. In that case, the tribal cigarette retailer purchased his cigarettes from a Montana wholesaler who charged and collected the cigarette excise tax from the tribal retailer. *Moe*, 425 U.S. at 468, n.6. The tribal retailer was required to pass the tax on to its non-tribal customers. *Id.* at 483.

As we have previously noted, the statutory scheme in chapter 365 for the collection of state and county motor vehicle fuel taxes is to require the first “dealer” who makes a sale, use or distribution of the fuel in Nevada to collect and remit the tax. The Legislature intended for the tax thereafter to be passed on down through the chain of distribution until ultimately it is paid by the consumer of the fuel in the cost of the product. To require the tribal retailer to purchase tax-paid fuel from a non-exempt Nevada licensed dealer is not the same as imposing a tax on the tribal retailer. It is simply a statutory scheme for pre-collection of the motor vehicle fuel taxes which ultimately are paid by the customer of the tribal retailer. Thus, under the authority of *Moe*, this scheme is valid.

The Nevada Tax Commission has provided a procedure whereby a tribal member purchasing motor vehicle fuel for consumption from a tribal retailer on the reservation may recover a refund or motor vehicle fuel taxes

paid. See [NAC 365.050](#). Thus under the current system of administering state and county motor vehicle fuel taxes, the Department is properly exempting motor vehicle fuel sold to and consumed by the tribe and tribal members from the taxes. This refund procedure comports with the statutory refund procedure in [NRS 365.370](#).

CONCLUSION TO QUESTION THREE

Since the tribal retailers do not bear the legal incidence of the tax, the Department may require the pre-collection of the state and county motor vehicle fuel taxes by licensed Nevada dealers by charging and collecting these taxes on their sales of fuel to tribal vendors.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: John S. Bartlett
Deputy Attorney General

OPINION NO. 91-13 PROPERTY; TAXATION; LYON COUNTY: The Department may rebill centrally assessed property taxes which were underbilled in prior years due to the Department’s error in applying an incorrect rate of tax at the time the original bills were prepared and sent out, under the authority of [NRS 361.330](#) and [360.300](#).

Carson City, December 31, 1991

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation, 1340 South Curry Street, Carson City, Nevada 89410

Dear Mr. Comeaux:

It has recently been brought to the attention of the Nevada Department of Taxation (“Department”) that an error was made by the Department when it prepared property tax bills for centrally-assessed utilities having property in Lyon County. The Department applied an incorrect tax rate for District 500 by inadvertently omitting from the overall tax rate the overlapping rate

associated with the South Lyon Hospital District. This error occurred in billings sent out by the Department for the fiscal tax years 1989-90 and 1990-91. As a result, the Department underbilled the utilities for those tax years.

In this regard, you have requested an opinion from this office on the following question:

QUESTION

Are there any statutory provisions which would allow the Department to rebill all the affected utility companies in Lyon County for the fiscal tax years 1989-90 and 1990-91 using the correct rate?

ANALYSIS

The Department is given the responsibility of establishing a value of property of an interstate and intercounty nature for purposes of assessing property taxes. [NRS 361.320](#). The Department also maintains a central assessment roll and, on or before January 1 of the fiscal year for which the assessment is made, is responsible for mailing a tax bill to each taxpayer on that roll together with a notice of assessment. [NRS 361.3205](#)(1) and (2). Upon receiving the tax, the Department then apportions it among the counties entitled to a share. [NRS 361.3205](#)(3).

In this case, the Department misinterpreted the publication setting forth the property tax rates approved by the Nevada Tax Commission for Lyon County in preparing the bills to those utilities centrally assessed by the Department having a portion of their property in Lyon County. The question becomes whether the Department has the statutory authority to correct its mistake and rebill the affected utilities to collect the amount of tax that should have been billed and collected in the prior years.

[NRS 361.330](#) states:

No assessment of property is invalid, and no collection of taxes may be enjoined, restrained or ordered to be refunded, on account of any failure:

1. To do any act required by [NRS 361.315](#) to [361.325](#), inclusive; or
2. To do any act required by this chapter within the time so required, if notice and an opportunity to be heard were afforded generally to the class of taxpayers affected by the act required to be done.

[NRS 361.330](#)(1) refers to those statutes directing the Department to centrally assess utilities and to bill them. Thus a failure to bill a taxpayer on the central assessment roll due to the Department's error may clearly be rectified under this subsection. It seems implicit, as well, that the directive in [NRS 361.3205](#)(2) that the Department bill each taxpayer on the central assessment roll means that the Department must send a bill reflecting the correct rate of tax applied to the assessed valuation. Such a construction would avoid the apparent absurdity of construing [NRS 361.330](#)(1) to allow the Department to bill taxpayers on the central assessment roll for property taxes due in prior tax years for which no previous bill was sent due to an error by the Department, but not allowing the Department to send corrected billings for prior tax years due to an error in preparing the bills by the Department.

[NRS 361.330](#) does not, in itself, authorize any particular method of collecting property taxes which were underbilled. However, [NRS 360.300](#) does provide this authority. That statute states, in part:

If the department is not satisfied with the return or returns of any tax or amount of tax required to be paid to the state by any person, in accordance with the

applicable provisions of this Title as administered by the department, it may compute and determine the amount required to be paid upon the basis of any facts contained in the return or upon the basis of any information within its possession or that may come into its possession. [Emphasis added.]

Chapter 360 of NRS contains general provisions which are applicable to any tax imposed within Title 32 of NRS, including property taxes imposed under chapter 361. Utilizing the provisions in [NRS 360.300](#) to [360.410](#) provides the affected taxpayer with notice and an opportunity to be heard on the rebilling. [NRS 360.355](#)(2) also provides an 8-year statute of limitations for the Department to serve a notice of deficiency determination. Thus, based on the foregoing statutory authority, the Department may rebill those taxpayers on the centrally assessed roll who were underbilled for the 1989-90 and 1990-91 fiscal tax years.

CONCLUSION

The Department may rebill those centrally assessed taxpayers having property in Lyon County who were underbilled for the 1989-90 and 1990-91 fiscal tax years due to an error in preparing those bills by the Department.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: John S. Bartlett
Deputy Attorney General

OPINION NO. 91-14 DIVORCE; JURISDICTION; JUDGMENTS: Where Reno/Sparks Indian Colony has no contact with parties to divorce who consent to *in personam* jurisdiction of tribal court, tribal court lacks subject matter jurisdiction over divorce; divorce decreed under such circumstances is not entitled to recognition by county when party to divorce subsequently applies for marriage license.

Carson City, December 31, 1991

The Honorable Dorothy Nash Holmes, Washoe County District Attorney, Post Office Box 11130, Reno, Nevada 89520

Dear Ms. Holmes:

By your letter dated November 18, 1991, you have asked this office for its opinion on the legal effect which Washoe County must accord a divorce decreed by the Reno/Sparks Indian Colony Tribal Court.

FACTS

The facts as you have represented them are these: in two separate instances, previously married individuals have applied for marriage licenses in Washoe County, presenting as evidence

of their divorces decrees of divorce which were issued by the Reno/Sparks Tribal Court. In both cases, the individuals were not Native Americans, were not residents of the Reno/Sparks Indian Colony, and had traveled to this area from out of state for the specific purpose of obtaining a divorce.

Moreover, the petitions for divorce contain no allegation or proof of residency or any other contact with the tribal forum, nor do the decrees of divorce make any findings of such. As you point out, the tribe has no domiciliary or residency requirement for jurisdiction. The Tribal Code simply says that:

(a) The Tribal Court shall have jurisdiction over all civil causes of action.

(b) Personal jurisdiction shall exist over all defendants, Indians or non-Indians, served within the territorial jurisdiction of the court or consenting to such jurisdiction. The act

of entry upon territory within the jurisdiction of the court shall be considered consent to the jurisdiction of the court with respect to any civil action arising out of such entry.

Reno/Sparks Tribal Code § 1-20-020.

QUESTION ONE

Does the Reno/Sparks Indian Colony have jurisdiction to enter decrees of divorce for non-Indian petitioners who do not reside on the reservation and have no other legal connection to the Tribal Court?

ANALYSIS

The Tribal Court's jurisdiction over the subject matter in a divorce action "must be conferred upon Indian courts by their constitutions or tribal codes." *Leon v. Numkena*, 689 P.2d 566, 568 (Ariz. Ct. App. 1984). The very broad language of the Reno/Sparks Tribal Code section cited above could be read to confer such jurisdiction.

There is no doubt that Indians generally have jurisdiction to order the domestic relations of tribal members. In *Red Fox & Red Fox*, 542 P.2d 918, 921 n.7 (Or. Ct. App. 1975), the court observed: "that an Indian tribe has the authority to regulate the domestic relations of its members—including the power to grant a divorce—has been well established." *See also Begay v. Miller*, 222 P.2d 624, 626-27 (Ariz. 1950). This is consistent with the general rule that Indians have the right to "make their own laws and be ruled by them." *Martinez v. Superior Ct., La Paz County*, 731 P.2d 1244, 1246 (Ariz. Ct. App. 1987).

Yet there are limits on the subject matter jurisdiction which any forum may acquire even though the law-making body otherwise provides for it. It is almost uniformly held that in order for a court to have jurisdiction over a divorce action, the forum must have some significant contact with one of the parties to the divorce. Most frequently such contact is found in the domicile of one of the parties in the forum jurisdiction. "It is a well-established principle of American law that, whether it be in a sister state or a foreign nation, domicile is the only basis for divorce jurisdiction." Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. Fam. L. 9, 22-23 (1982).

Although this is probably an overstatement by its reference to domicile as the *only* basis for divorce jurisdiction, it finds support in the pronouncements of the United States Supreme Court:

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted.

Williams v. North Carolina, 325 U.S. 226, 229 (1945) (*Williams II*).

In a concurring opinion, Justice Murphy clarified that domicile as a prerequisite for jurisdiction exists apart from any statute. “This requirement of domicil is not merely a matter of state law. It was stated specifically [in *Andrews v. Andrews*, 188 U.S. 14 (1903)] that ‘without reference to the statute of South Dakota and in any event’ domicil in South Dakota was necessary.” *Williams II* at 240.

The domiciliary requirement has been the subject of some academic criticism. *See Swisher* at 25-37. Yet most of its critics would still require some significant contact with the forum, such as an extended period of residency. *Id.* at 29. Thus the Restatement (Second) says:

A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage.

Restatement (Second) of Conflict of Laws § 72 (1971). Comment (a) to § 72 says “[a] state should not dissolve the marriage of a spouse in whom it

has little or no interest.” A nexus requirement for jurisdiction is required in Nevada. *See* [NRS 125.020\(2\)](#).¹

The legal basis for the contacts requirement is nowhere precisely defined. One court has identified due process as the source of the requirement:

An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. . . . [W]e believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.

Alton v. Alton, 207 F.2d 667, 677 (3d Cir. 1953), *vacated as moot* 347 U.S. 610 (1954).

Another court has agreed that the requirement is a constitutional one, *Perito v. Perito*, 756 P.2d 895, 897 n.4 (Alaska 1988), and additionally finds the requirement in the common law. *Id.*, 756 P.2d at 897.

Because the domicile requirement is so pervasively recognized, the courts have had little

¹ NRS 125.020(2) reads:

Unless the cause of action accrued within the county while the plaintiff and defendant were actually domiciled therein, no court has jurisdiction to grant a divorce unless either the plaintiff or defendant has been resident of the state for a period of not less than 6 weeks preceding the commencement of the action.

Nevada case law provides that “residence” is synonymous with domicile for purposes of this statute. *Aldabe v. Aldabe*, 84 Nev. 392, 396, 441 P.2d 691 (1968).

opportunity to directly address statutes purporting to confer divorce jurisdiction on courts based simply on *in personam* jurisdiction. See 1 *Family Law & Practice* § 3.01(2)(a) (A. Rutkin ed. 1991). In

one instance in which a state legislature attempted to give its state's courts divorce jurisdiction based simply on the appearance of the parties, the court said the legislature lacked the power to do so: "[T]he legislature of a state cannot confer on the courts of that state a power which is not within the power of the state to confer on the legislature." *Jennings v. Jennings*, 36 So. 2d 236 (Ala. 1948). See also *Brandt v. Brandt*, 261 P.2d 978, 980 (Ariz. 1953) ("there is no jurisdiction of the subject matter of a divorce action [in the absence of a sufficient nexus such as domicile], and the state itself lacking such jurisdiction, it cannot be conferred upon its courts").

Since the contacts requirement is jurisdictional, it follows that the parties to a divorce cannot confer upon a court jurisdiction over the subject matter of the divorce when such jurisdiction otherwise is lacking. "Where the requisite of bona fide domicile of at least one of the parties is wanting, the court is without jurisdiction, even if the parties consent." *Ainscow v. Alexander*, 39 A.2d 54, 56 (Del. Super. Ct. 1944). "Jurisdiction over divorce proceedings of residents of California by the courts of a sister state cannot be conferred by agreement of the litigants." *Roberts v. Roberts*, 185 P.2d 381, 385 (Cal. Dist. Ct. App. 1947), *overruled on other grounds in Spellens v. Spellens*, 317 P.2d 613 (Cal. 1957). See generally 27C C.J.S. *Divorce* § 781 (1986). Thus the courts have uniformly refused to recognize divorces granted on a "tourist basis." See *Uniform Divorce Recognition Act* § 1, comment (c), 9 U.L.A. 358 (1988).

In this instance, even though the plaintiffs and defendants have all consented to the jurisdiction, their lack of any significant contact with the forum precludes subject matter jurisdiction in the Tribal Court.

CONCLUSION TO QUESTION ONE

Not only have the parties to the divorces not established a domicile in the forum Indian colony, they have had not the slightest contact with it apart from the instant actions. Thus the forum can have no interest whatever in the status of the parties, and the Tribal Court is without jurisdiction to decree a divorce for the parties under the circumstances. This is true whether the jurisdictional basis for divorce is domicile or some lesser quantum of contact with the forum.

QUESTION TWO

Should Washoe County recognize a divorce decree issued by the Reno/Sparks Indian Colony Tribal Court in the manner described above?

ANALYSIS

A large body of case law has developed over the years regarding the extra-territorial effect of divorce decrees. The analysis divides along two paths, depending upon whether the decree was issued by a foreign state or by a foreign nation. In the first instance, a decree must be duly honored under the Full Faith and Credit Clause of the U.S. Const. art. IV, § 1; in the latter instance, only the principle of comity will compel recognition under the proper circumstances. In neither instance, however, is there an unqualified requirement for recognition.

Tribal divorce decrees are uniformly given recognition by the states when the parties are Indians. For instance in *Begay*, 222 P.2d at 626-27, the state court recognized a tribal decree, holding that "Indian tribal custom marriage and divorce have long been recognized by both the federal and state governments." See also *Martinez*, 731 P.2d at 1246.

The legal basis for state recognition of tribal decrees is unclear. The difficulty arises because of the unsettled question concerning whether the Full Faith and Credit Clause (and the United States statute implementing it, 28 U.S.C. § 1738 (1988)) covers tribal decrees. Although a number of state cases have answered this in the affirmative, *see Jim v. CIT Fin. Serv. Corp.*, 533 P.2d 751 (N.M. 1975), and *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982), the more cogent commentary on the issue would indicate the contrary. *See Red Fox*, 542 P.2d at 920; *Begay*, 222 P.2d at 628 (“recognition obviously is not made under the ‘Full Faith and Credit’ clause of the United States, for clearly this clause applies only between states of the Union”). *See also* Vetter, *Of Tribal Courts and “Territories” Is Full Faith and Credit Required?*, 23 Cal. W.L. Rev. 219 (1987); Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 Or. L. Rev. 589 (1990).

It is unnecessary for present purposes to resolve this dispute. Regardless of whether tribal decrees are entitled to full faith and credit in the same manner as sister state judgments, or only to the lesser deference accorded under the principle of comity, the specific tribal decrees about which you have inquired are not entitled to recognition because the Tribal Court so clearly lacked contacts with the parties necessary to establish subject matter jurisdiction.²

COMITY

The deference given to foreign judgments under the principle of comity is the effect given to judicial decisions of another jurisdiction out of deference and mutual respect. *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz. Ct. App. 1977).

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Red Fox, 542 P.2d at 921, n.6, (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

However, “many of the American states are likely to refuse recognition [to deny comity] to a divorce decree of a foreign country not founded

on’ a sufficient jurisdictional basis.” *Mayer v. Mayer*, 311 S.E.2d 659, 663-64 (N.C. Ct. App. 1984). *See also Warrender v. Warrender*, 190 A.2d 684 (N.J. Super. App. Div. 1963).

In addition, in the context of foreign country judgments:

[T]he tests of jurisdiction applied are ordinarily those of the United States rather than the divorcing country, and a divorce obtained in a foreign country will normally not be recognized as valid if neither spouse has a domicile in that country, even though domicile is not required for jurisdiction by its laws.

Annotation, *Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked*

² It is also unnecessary to resolve the question whether a tribal court lacks subject matter jurisdiction over a civil action in which no Indians or Indian interests are at stake. *See* Cohen, *Handbook of Federal Indian Law*, 342 (1982 ed.) (“[t]ribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property”); Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 519 n.232 (1979).

for Lack of Domicil, or Jurisdiction of Parties, 13 A.L.R.3d 1419, 1424 (1967). Failure of a decreeing court to make a finding of jurisdiction based on domicile, residence, or some other nexus with the forum renders the divorce decree “absolutely void on its face.” *Warrender*, 190 A.2d at 686 (addressing a Mexican divorce).

If the tribal decrees are treated as those of a foreign nation subject to recognition only as a matter of comity, Washoe County would be justified under established law in refusing them recognition. Not only do the parties to the actions lack sufficient contact with the tribal forum upon which to find jurisdiction, even the forum itself made no finding of contact with the parties, and the decrees—like the one in *Warrender*—are assailable as absolutely void on their face.

FULL FAITH AND CREDIT

Supposing, without deciding, that the tribal decrees are entitled to respect under the Full Faith and Credit Clause in the same manner as the judgment of another state, they are still not necessarily entitled to recognition. “[T]he mandate of full faith and credit, even as to judgments, is not absolute; it requires weighing the interests of the situs in refusing to recognize the decree of a sister state . . . against the very strong national interest in according full faith and credit to judgments.” Weintraub, *Commentary on the Conflict of Laws* at 408 (2d ed. 1980).

It is well established that full faith and credit need not be accorded a sister state judgment where the sister state did not have jurisdiction over the subject matter of the action leading to the judgment. *Williams II*, 325 U.S. at 228. Furthermore, simply because the decreeing court finds that it has power to award a divorce decree does not foreclose reexamination by another state. *Id.* at 230 and 234.

Collateral attack on a sister state judgment based on lack of subject matter jurisdiction is usually foreclosed, however, where the issue of the court’s jurisdiction has been fully litigated. “[T]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.” *American Sur. Co. v. Baldwin*, 287 U.S. 156, 166 (1932), cited in *Underwriters Nat’l Assur. v. North Carolina Life & Accident, Etc.*, 455 U.S. 691, 707 (1982).

By your recounting of the circumstances, there was no contesting of the Tribal Court’s jurisdiction in the subject actions, so there is no bar in this respect against examination into the Tribal Court’s authority. Washoe County may plainly conclude that jurisdiction was lacking and that full faith and credit need not be afforded the tribal decrees. However, even had the matter been litigated there are reasons why inquiry still could be made into the court’s jurisdiction.

The preclusiveness of an original court’s examination into its own jurisdiction is not without exception. This rule applies only so long as the questions of jurisdiction have been “fully and fairly litigated” in the original court. *Durfee v. Duke*, 375 U.S. 106, 111 (1963). The parameters of this implied limitation have not been defined. Wright, Miller & Cooper, 18 *Federal Practice & Procedure* § 4428, n.16 (1981 and supp. 1991). One authority suggests that the degree to which an original jurisdictional determination is entitled to *res judicata* effect turns on a number of factors.

The clarity of the error may be the most important. If a close and subtle question of jurisdiction has been overlooked or resolved erroneously, there is little threat to the general allocation of power between courts. As the lack of jurisdiction becomes increasingly clear, nullification may seem more important as a means of restraining deliberate or reckless usurpation.

Id. at 275 (1981). See *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1059 (9th Cir. 1991).

The courts have also referred to the Restatement (Second) of Judgments § 12 (1982), to

determine which jurisdictional determinations may be attacked. *Hodge v. Hodge*, 621 F.2d 590, 593 (3rd Cir. 1980). The Restatement section reads in part:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government.

Because of the settled and uncompromised basis for divorce jurisdiction in the United States, the first of these exceptions would likely apply in this instance even had the actions been contested. The second exception would likely also apply given that the tribal forum has virtually no interest in the status of the individuals to whom it has issued a divorce decree, while the domiciliary jurisdictions of the parties clearly do have such an interest.

Finally, the inquiry which you have made raises the question of the recognition which Washoe County, a non-party to the original actions, must accord the tribal decrees. The Court in *Williams II* acknowledged that the interests of the states are distinct from those of the individual parties to a divorce:

After a contest these [jurisdictional questions] cannot be relitigated as between the parties. But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy.

Williams II, 325 U.S. at 230. This statement cannot be taken as direct authority for states to question the existence of subject matter jurisdiction when the question was fully contested in the original forum; the *Williams II* Court notes in a footnote that such a contest was not had in that instance. *Id.*, n.6. But the statement makes a clear differentiation between the interests of the parties and the state which would further justify reexamination into the original court's jurisdiction in certain cases.

Applying these rules to the divorce decrees addressed in your inquiry, it is clear that full faith and credit is not required. The Reno/Sparks Indian Colony has no interest in the status of the parties; a jurisdiction "can have no legitimate concern with the matrimonial status of two persons, neither of whom lives within its boundaries." *Ainscow*, 39 A.2d at 56.

The State of Nevada, on the other hand, has a direct interest in the validity of the divorce decrees, even though the individuals, party to the divorces, may not be Nevada citizens. The individuals have attempted, after their purported divorces, to employ the power and authority of the State of Nevada in order to remarry. Marriage is an object of great public concern in the state, *Galloway v. Truesdell*, [83 Nev. 13](#), 23, 422 P.2d 237 (1967), and this is signified by the solemnization which the Legislature has required for legal union. [NRS 122.080](#) to [122.170](#). Furthermore, the state has indicated its clear opposition to bigamous relationships by making bigamy a felony, [NRS 201.160](#)(2). Excluded from statutory punishment for bigamy is "any person who is, at the time of such second marriage, divorced *by lawful authority* from the bonds of such former marriage, or to any person where the former marriage has been by lawful authority declared void." [NRS 201.160](#)(4)(b) (emphasis added). Inquiry into the validity of the tribal divorces is therefore fully justified when the parties to the actions make application for marriage licenses in the state.

CONCLUSION TO QUESTION TWO

The Tribal Court lacks subject matter jurisdiction over the subject divorce actions. The divorce decrees issued by the Tribal Court therefore

are not entitled to recognition under either the Full Faith and Credit Clause or under the principle of comity.³

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: C. Wayne Howle
Deputy Attorney General

OPINION NO. 91-15 JURISDICTION; PARKS: Regulatory municipal licensing provisions cannot be applied to persons who are lessees or concessionaires of the State on state parks because the State has by general laws preempted the field of state park regulation.

Carson City, December 31, 1991

Mr. Wayne Perock, Chief of Field Operations, Division of State Parks, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Perock:

You have requested the opinion of this office regarding the authority of cities to regulate activities such as businesses and concessions on State property. Our analysis is set forth below:

QUESTION

Whether a city has jurisdiction over the business/concession activities on State property situated within a city's limits, specifically, whether the City of Las Vegas ("City") can require a lessee who operates a gun club as a business for profit at the Floyd Lamb State Park ("Park"), which is located entirely within the corporate limits of Las Vegas, albeit some 10 miles from the City's downtown area, to obtain a municipal business license and a municipal license for the sale of alcoholic beverages.

FACTUAL BACKGROUND

You indicated that the Division of State Parks ("Division") has received conflicting statements from the City regarding its authority to regulate activities occurring at the Park, which

³ The conclusions of this opinion are made with the belief and assumption that there are no intergovernmental agreements entered into between Washoe County and the Reno/Sparks Indian Colony which would contractually alter what otherwise appears to be the law.

is situated wholly within the city limits of Las Vegas. In one instance, a carriage ride concessionaire, operating its business only within the boundaries of the Park and under contract with the Division, was not required by the City to purchase a business license nor was the concessionaire required to comply with the City's ordinance relating to horse-drawn vehicles although the opening section of the ordinance provided: "No person shall operate an animal-drawn vehicle for hire within the City without a business license therefor issued pursuant to this Chapter." In contrast, the Las Vegas Gun Club ("Gun Club"),

which also operates only within the boundaries of the Park and under a lease/concession agreement, has been required to obtain a business license from the City and to seek a license from it for the sale of alcoholic beverages to patrons of the Gun Club. The Gun Club concession contract indicates that the Gun Club provide recreational trapshooting for the general public on a fee basis although the general public may be excluded during up to four major shooting events each year, lasting up to seven consecutive days. The Gun Club lessee/concessionaire is a private individual who operates the concession as a business for profit. The lease/concession fee is \$6,000.00 per year or 3 percent of gross receipts, whichever is the greater amount. The contract calls for the lessee to submit to the regulation of the Clark County Liquor Board.

According to the Floyd Lamb State Park Master Plan, the City purchased 680 acres in 1964, developed playground and picnic areas, and named the area Tule Springs Park. Between 1964 and 1977, the Sahara-Nevada Corporation, through the Mint Sahara Casino, leased a portion of the Park and built a gun club designed for trap shooting. During the 1970s, the City sought to give the area to the State for use as a state park. As negotiations on the transfer progressed, the Las Vegas City Council changed the name of the Park from Tule Springs Park to Floyd Lamb Park. With the passage of S.B. 314 in 1977, the Legislature accepted 680 acres from Las Vegas to be known as Floyd S. Lamb State Park. In addition, the Legislature authorized the Division to lease adjacent BLM lands. The total acreage of the Park is 2,040 acres, 68 acres of which are leased by the Gun Club. The Park is situated approximately 10 miles north of the center of Las Vegas.

Work began on a master plan for the Park in 1977. Originally, alternative plans for the Park's development did not provide for continuing the Gun Club lease, held at that time by the Sahara-Nevada Corporation because the Division considered a gun club incompatible with a passive park experience. Public opposition to the proposed plans resulted in the Gun Club being re-included in the proposed plans submitted to the Legislative Counsel Bureau's Interim Finance Committee on July 25, 1978. The Committee, chaired by then Senator Lamb, recommended the Division adopt the plan that included the Gun Club.

ANALYSIS

1. Legislative Intent re State Parks and Powers of Administrator

[NRS 407.013](#) sets forth the legislative intent concerning a system of state parks in Nevada and provides:

It is the intention of the legislature that the division shall acquire, protect, develop and interpret a well-balanced system of areas of outstanding scenic, recreational, scientific and historical importance for the inspiration, use and enjoyment of the people of the State of Nevada and that such areas shall be held in trust as irreplaceable portions of Nevada's natural and historical heritage.

[NRS 407.065](#) delineates the powers of the Administrator of the Division of State Parks. This

section provides, in part, as follows:

The administrator, subject to the approval of the director, may:

1. Designate, establish, name, plan, operate, control, protect, develop and maintain state parks, monuments and recreation areas for the use of the general public.

2. Protect state parks and property controlled or administered by it from misuse or damage and preserve the peace within those areas. At the discretion of the administrator, rangers and employees of the division have the same power to make arrests as any other peace officer for violations of law committed inside the boundaries of state parks or real property controlled or administered by the division.

...
3. Allow multiple use of state parks and real property controlled or administered by it for any lawful purpose, including but not limited to, grazing, mining, development of natural resources, hunting and fishing, and subject to such regulations as may be adopted in furtherance of the purposes of the division.

4. Conduct and operate such special services as may be necessary for the comfort and convenience of the general public, and collect reasonable fees for them. . . .

5. Rent or lease concessions located within the boundaries of state parks or of real property controlled or administered by the division to public or private corporations, to groups of natural persons, or to natural persons for a valuable consideration upon such terms and conditions as the division deems fit and proper, but no concessionaire may dominate any state park operation. . . .

The Legislature's expression of intent and its broad grant of powers to the Administrator of the Division of State Parks demonstrates that the Legislature viewed the establishment, protection, development, and interpretation of the state park system as a matter of statewide, rather than local, concern.

2. Municipality's Licensing Power

The power of a state to license occupations and privileges is derived both from its police power and its power to tax. Subject to constitutional prohibition or restriction, its power in either respect may be delegated by legislative act to its political subdivisions. The extent of the power so delegated is, however, wholly dependent upon and limited by the delegating statute. Whether the delegation be of regulatory power under the police power of the state or be of the sovereign power of taxation is, of course, a question of statutory construction. If the grant be of regulatory power only, it does not include the power to license for purposes of revenue. Such power is granted only where the grant plainly appears from the delegating statute.

Clark County v. Los Angeles City, [70 Nev. 219](#), 221, 265 P.2d 216 (1954) [Citations omitted.]; see 9 McQuillin, *Municipal Corporations* § 26.22.05 (rev. 3rd ed. 1986).

As to the City the delegation of the power to license is found in its charter, the legislative enactment conferring the governmental powers of the State upon its local agency (2 McQuillin, *Municipal Corporations* § 9.02 (rev. 3rd ed. 1988), and in statute. The Las Vegas City Charter was approved by the Nevada Legislature on May 26, 1983. Section 2.150 of the Charter provides in part:

1. The city council may:
 - (a) Except as otherwise provided in subsection 2, license and regulate all lawful businesses, trades and professions.
 - (b) Fix, impose and collect a license tax for regulation or for revenue, or both, upon all businesses, trades and professions and provide an equitable standard for fixing those license taxes

A municipality's general power to require business licenses was delegated by [NRS 268.095](#) which provides in part:

1. The city council or other governing body of each incorporated city in the State of Nevada, whether organized under general law or special charter, may:
 - (a) Fix, impose and collect for revenues or for regulation, or both, a license tax on all character of lawful trades, callings, industries, occupations, professions and businesses conducted within its corporate limits

[NRS 268.090](#), pertaining to the licensing of the sale of alcoholic beverages provides:

1. In addition to any authority or power now provided by the charter of any incorporated city in this state, whether incorporated by general or special act, or otherwise, there is hereby granted to each of the cities incorporated under any law of this state the power and authority to fix, impose and collect a license tax on, and regulate the sale of, beer, wines or other beverages now or hereafter authorized to be sold by act of Congress.

These provisions expressly authorize the City and other municipalities to fix, impose, and collect for revenue or for regulation a license tax on all lawful trades, including businesses engaged in the sale of alcoholic beverages.

The Las Vegas Municipal Code ("LVMC") provisions pertaining to business licensing, including liquor control, are found at Title 6 of the

Code. These provisions are the City's legislative expressions of the licensing authority granted it by the Legislature. LVMC § 6.02.060 requires businesses to obtain licenses. LVMC § 6.50.010 makes the sale of alcohol without a license unlawful.¹

¹ LVMC § 6.02.060 provides:

It is unlawful for any person to:

(A) Commence, carry on, engage in or continue in the City any business without a valid unexpired license issued pursuant to this Code; or

(B) Conduct, manage or carry on, either permanently or temporarily, any business of any other person if the person who conducts, manages or carries on such business knows or should know that such other person is not licensed under this Title to conduct, manage or carry on such business.

Each day or portion thereof in which a violation of any provision of this Section is committed, continued or permitted constitutes a separate offense.

LVMC § 6.50.010 provides in part:

Privileged Business—LVMC 6.06 conformance. The City Council declares that this Liquor Control Chapter is an exercise of the regulatory powers delegated to the City Council, by the State pursuant to Chapter 515, Statutes of Nevada 1971, as amended, and NRS 268.090, inter alia. The regulations contained in this Chapter involve, to the highest degree, the economic, social, physical and moral well-being of the

3. Construction of Statutes in Derogation of Sovereignty

Given the language of the delegation of power to Las Vegas, the initial question is whether the City's licensing power extends to the State and its agencies. Generally, statutes written in such broad language that they are reasonably susceptible to being construed as applying to both the government and private parties are subject to a rule of construction which exempts the government from their application although the rule has less force where the governmental body is exercising nongovernmental functions. 3 Sutherland, *Statutory Construction* § 62.01, pp. 111-12 (4th ed. 1986). "An ordinance does not apply to a state with reference to its own property unless the charter expressly gives the city authority to bind the state or the state waives its right to regulate its property." *Paulus v. City of St. Louis*, 446 S.W.2d 144, 150 (Mo. Ct. App. 1969); accord 5 McQuillin, *Municipal Corporations* § 15.31.10 (rev. 3rd ed. 1989); 2 Antieau, *Municipal Corporations Law* § 19A.12 (rev. ed. 1989).² A related principle was expressed in *State v. Rhoades*, [6 Nev. 352](#), 375 (1871), which held that the State cannot be included in a law allowing a local government to impose a tax solely for revenue unless the State has been expressly named in the statute:

In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to that applies with very different and often contrary force to the government itself. It seems to me, therefore, to be a safe rule, founded in the principles of common law, that the general words of the statute are not to include the government or affect its rights, unless that construction be clear and indispensable upon the text of the act.

In *Hall v. City of Taft*, 302 P.2d 574, 578 (Cal. 1956), the California Supreme Court, in concluding that a municipal corporation's building

regulations were not applicable to the construction of a public school building by a school district within the municipality, held in part that "[w]hen [the state] engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation."

Because the State has not waived its right to regulate its own properties, there being no Nevada statute which specifically authorizes a municipality to require the State or its agencies to comply with either business license regulations or alcoholic beverage license regulations, the State and its agencies generally are not subject to such local regulations when they are engaged in sovereign activities.

Even if we were to conclude that as a general rule the municipal licensing power was applicable to the State and its agencies, the provisions of LVMC requiring licensing would not apply to the State and its agencies because only "persons" may not engage in a business without a license under the Code (LVMC § 6.02.060), and the State is not a "person." *State v. Reno Traction Co.*, [41 Nev. 405](#), 418, 430, 171 P. 375 (1918); cf. Op. Nev. Att'y Gen. No. 234 (July 21, 1961). LVMC § 6.02.010(K) defines "person" to include "any association, corporation, firm,

residents and taxpayers of said City. The sale or other disposition of alcoholic beverages is not a matter of right but of privilege, which would otherwise be unlawful if it were not exercised pursuant to a license

² For example, Nevada has waived its immunity from local zoning regulations in NRS 278.580(5) which provides, "[n]otwithstanding any other provision of law, the state and its political subdivisions must comply with all zoning regulations adopted pursuant to this chapter, except for the expansion of any activity existing on April 23, 1971."

partnership, trust or other form of business or social association or organization, as well as a natural person and the estate of a natural person.” “Business,” as defined by LVMC § 6.02.010(B) means “any business, commercial enterprise, trade, occupation, calling, profession, vocation or activity engaged in, conducted or carried on by *any person, his agent or employee* for the purpose of gain, benefit or advantage, either direct or indirect.” (Emphasis added.) In *Op. Nev. Att’y Gen. No. 140* (Aug. 23, 1973), which concluded that the State Public Works Board need not comply with local building codes, the Attorney General concluded that a state cannot be considered a person, firm, association or corporation unless a statute particularly stated that those terms included the state. Here, there is no statute indicating that the State is a “person” for purposes of municipal licensing regulations.

Based on the foregoing analysis, we conclude that neither the Las Vegas City Charter nor the LVMC ordinance pertaining to the taxation, licensing, and regulation of businesses are applicable to the State and its agencies because the State has not waived the right to regulate its own

properties and, even if the State had made such a waiver, the City’s regulations are applicable only to persons, the definition of whom does not encompass the State and its agencies.

4. Preemption

We next consider whether the State has preempted the field of state park regulation. The standards for making this determination were set forth in *Lamb v. Mirin*, [90 Nev. 334](#), 332-33, 526 P.2d 80 (1974), as follows:

Whenever a legislature sees fit to adopt a general scheme for the regulation of a particular subject, local control over the same subject, through legislation, ceases. In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, the Court may look to the whole purpose and scope of the legislative scheme. That which is allowed by the general laws of a state cannot be prohibited by local ordinance, without an express grant on the part of the legislature. In no event may a county enforce regulations which are in conflict with the clear mandate of the legislature. . . .

. . . .
In some instances, a municipal directive can supersede and render a prior conflicting state law inapplicable, but only where the subject matter is purely or strictly of local concern, and the power to regulate the particular subject matter is expressly conferred. [Citations omitted.]

We begin this part of the analysis with another general proposition, that being the creation of a state agency by the Legislature carries with it a presumption that the Legislature intended to preempt local control:

As creatures of the state, local governments are generally subject to the control of the state. There is a corresponding presumption that state legislation creating a state agency preempts local government control. The theory is that, in the absence of contrary statutory language, the state legislature intended the state agency to be absolutely immune from local restrictions, zoning, for example, merely because the state

agency is an arm of the state and as such it occupies a superior position within the governmental hierarchy.

1 McQuillin, *Municipal Corporations* § 3A.19 (rev. 3rd ed. 1987).

The Legislature, in [NRS 407.013](#), expressed the intention that the Division acquire, protect, develop and interpret a well-balanced system of parks for the people of the State of Nevada and that such areas be held in trust as irreplaceable portions of Nevada's natural and historical heritage. Beyond this general statement, [NRS 407.065](#) gave the Administrator of the Division specific authority to “[d]esignate, establish, name, plan, operate, control, protect, develop and maintain state parks, monuments and recreation areas for the use of the general public;” protect state parks and property from misuse or damage and preserve the peace within the parks; allow multiple use of state parks for any lawful purpose; conduct and operate such special services as may be necessary for the comfort and convenience of the general public; and “[r]ent or lease concessions located within the boundaries of state parks . . . to public or private corporations, to groups of natural persons, or to natural persons for a valuable consideration upon such terms and conditions as the division deems fit and proper.” The powers granted the Administrator are broad and comprehensive.

LVMC ' 6.02.090 lists 9 grounds for denying a license to an applicant and 8 grounds for refusing to renew a license.³ Such a licensing provision

is clearly regulatory in that the grounds for denial of a license are not limited to the payment of a fee. The City ordinance is an exercise of its

police power, and the license is issued upon a demonstration that the licensee has met the qualifications fixed by the ordinance for those engaged in a particular business as opposed to a

³ LVMC § 6.02.090 provides as follows:

Other than an application for a license which requires prior approval by an agency of the state or a license that is subject to the provisions of Chapter 6.06 of this Code, the Director, not more than thirty calendar days after receipt of an application for a license, shall approve, deny or take such other action with respect to such application as he considers appropriate. In the event that any department to which the Director is required to refer the application for additional approval is unable to complete its review thereof in time for the Director to comply with such thirty-calendar-day requirement, the Director shall issue a temporary license as provided in Section 6.02.070. The Director may:

- (A) Deny an applicant a license if:
- (1) The application is incomplete or contains false, misleading or fraudulent statements with respect to any information that is required in the application;
 - (2) The applicant or any of its principals fails to satisfy any qualification or requirement that is imposed by this Code, or other local, state or federal law or regulation that pertains to the particular license or approval for suitability which is sought;
 - (3) The applicant or any of its principals resides in the United States illegally;
 - (4) The applicant or any of its principals is or has engaged in a business, trade or profession without having obtained a valid license, an approval for suitability, a permit or a work card when such applicant or principal knew that one was required or under such circumstances that he reasonably knew that one was required or under such circumstances that he reasonably should have known one was required;
 - (5) The applicant or any of its principals has been subject, in any jurisdiction, to disciplinary action of any kind with respect to a license, an approval for suitability, a permit or a work card to the extent that such disciplinary action reflects upon the qualification, acceptability or fitness of the applicant or principal;
 - (6) The applicant or any of its principals has been convicted of an act that constitutes a crime which involves moral turpitude or involves any local, state or federal law or regulation which relates to the same or a similar business;
 - (7) The applicant or any of its principals has been convicted of having perpetrated deceptive practices upon the public;
 - (8) The actual business activity constitutes a public or private nuisance or has been or is being conducted in an unlawful, illegal or impermissible manner.

license tax pursuant to the taxing power for revenue purposes without any attempt to regulate or to establish qualifications. See *Southern Nev. Life v. City of Las Vegas*, [74 Nev. 163](#), 325 P.2d 757 (1958).

Given the language of the grant of authority to the Administrator over the state parks expressed in [NRS 407.065](#), the application of a municipal regulatory ordinance to the activities conducted on a state park which are attendant to its operation would unduly interfere with its operation. If the State must obtain the approval of a municipality before it can engage in an activity deemed by the Administrator to be “necessary for the comfort and convenience of the general public” (see [NRS 407.065\(4\)](#)) or which would contribute to the development of a well-balanced recreational area for the “inspiration, use and enjoyment” of the public (see [NRS 407.013](#)), such as a gun club or a horse-drawn carriage concession, then the legislative grant of authority to the Administrator is limited by a municipality’s willingness to permit activities within its corporate limits. The Legislature could not have intended that the control of the state parks rest ultimately in the cities within which they happen to be situated. The application of a regulatory ordinance to a state park substitutes State control over park activities with that of the City, substitutes statewide policy in an area of statewide concern with local policy, and substitutes the judgment of the Administrator with that of the City, the administrative offices of which, in this case, lie approximately 10 miles to the south.

In *Hall*, 302 P.2d at 579, an additional ground underlying the court’s decision was that the State had completely occupied the field by general laws, and a city may not enact ordinances which conflict with general laws on statewide matters. The court reasoned in part:

There is no necessity for comparing in detail Taft’s building code and the numerous comprehensive building regulations contained in the Education Code and the rules and regulations of the Division of Architecture, for as we have seen the state has occupied the field. As said *In re Means, supra*, 14 Cal.2d 254, 258, 260, 93 P.2d 105, 107, 123 A.L.R. 1378, in speaking of the effect of a city ordinance, establishing stan-

dards for plumbers, on a state employee in a city, the state civil service system provides a comprehensive plan for the selection of state employees and although the city ordinance does not purport to prescribe the conditions for state employment, “If one who has been employed by the state may not work on state property within a municipality obtained after examination, the city has, in effect, added to the requirements for employment by the state, and restricted the rights of sovereignty. . . .

Although the Legislature has enacted no statute regulating plumbing, if the city’s ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service, may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the requirement of its governmental subsidiary. Upon fundamental principles, the conflict must be resolved in favor of the state.

Hall, 302 P.2d at 582.

The next question is whether the regulatory municipal licensing provisions generally can be applied to persons who are lessees or concessionaires of the State on state parks. We think not, the principal reason being that, as discussed above, the State has by general laws completely occupied the field, conferring broad powers upon the Administrator of the Division to control and operate the state parks and to “rent or lease concessions upon such terms and conditions as

the division deems fit and proper.” The legislative enactments concerning state parks control over the attempted regulation by local governments. The State has completely occupied the field by a general law and the LVMC’s licensing regulations conflict with that general law. If the Division enters into a lease or concession agreement on terms satisfactory to the Division, but the lessee or concessionaire may not engage in the contracted-for activity without the consent of the municipality, then the lessee or concessionaire is like the plumber in *Hall*, and “the city has, in effect, added to the requirements of employment by the state and restricted the rights of sovereignty.” *Cf.* 31 Cal. Op. Att’y Gen. No. 46 (1958).

5. Exception: Activities Inconsistent With the Legislative Purpose

By concluding that the State has preempted the field of state park regulation and that municipal licensing regulations may not be applied to lessees and concessionaires of the Division of State Parks, we do not mean to say that a city would be precluded from requiring a lessee or concessionaire to submit to local regulation in every case. The authority of the Administrator of the Division to enter into lease and concession agreements should be viewed in connection with the stated legislative intent which, as we have noted above, involves the acquisition, protection, development, and interpretation of “a well-balanced system of areas of outstanding scenic, recreational, scientific and historical importance for the inspiration, use and enjoyment of the people of the state of Nevada.” While lease and concession agreements which provide “special services as may be necessary for the comfort and convenience of the general public” may be said to further the public purposes of the Division, lease and concession agreements which are inconsistent with the legislative intent, for example, leases of property within a state park to a private enterprise for purposes unrelated to the operation of the park, probably would be subject to local regulation.

6. The Las Vegas Gun Club

In our view, the operation of the Gun Club is consistent with the legislative intent expressed in [NRS 407.013](#). The Gun Club has been a part of the Park for many years, including that period of time during which the City owned the Park. The Gun Club was discussed in public hearings in the planning process for the Park after the State acquired the Park. The Park is open to the general public on a fee basis for all but four weeks of the year. The sale of alcohol is incidental to the operation of the Gun Club and, although the Division has not adopted regulations encompassing the sale of alcohol on state parks, the lease agreement provides that the lessee must submit to the regulations of the County Liquor Board, which we assume is a term that the Division deemed fit and proper.

CONCLUSION

Because the State has preempted the field of state park regulation and because the operation of the Gun Club is consistent with the legislative

intent expressed in [NRS 407.013](#), the Gun Club is not subject to the licensing regulations of the City of Las Vegas.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: P. Mark Ghan
Deputy Attorney General
